The Coconspirator Exception to the Hearsay Rule: The Limits of Its Logic

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THE LIMITS OF ITS LOGIC

"Conspiracy" evokes images of political intrigue and financial manipulation, but far more often enters the courtroom in trials of ordinary crimes allegedly committed by more than one. While doctrinal and judicial attention generally focuses upon the substantive law of conspiracy, its procedural "adjuncts" have come to be of greater practical importance. The pre-eminence of procedure over substance is due to their severance; rules designed to offset the problems peculiar to prosecution of conspiracies have been allowed to invade the general criminal law. This comment will examine perhaps the most notorious of these misbegotten devices, the coconspirator exception to the hearsay rule.

Origins

The general common law coconspirator exception provides that acts and declarations of a conspirator made in furtherance, and during the
pendency, of the conspiracy are admissible against all other conspirators, provided there is independent evidence of the conspiracy. The origins of the exception are nearly as ancient as those of the hearsay rule itself. Not until the early 1500’s did technical rules of evidence begin to develop, as oral testimony in open court became the predominant mode of proof. Until then juries had gathered “evidence” independently, requiring only that the witnesses have personally observed the facts related. While the hearsay rule is not the same as this requirement of firsthand knowledge (as the witness who testifies to hearsay did observe the declarant’s statement), it is a logical extension. For once it is accepted that the absent declarant is the person upon whose observation the jury must rely, it becomes clear that the hearsay witness in no meaningful sense possesses firsthand knowledge. Hearsay was thus for nearly two centuries received with increasing suspicion crystallizing into a general rule of exclusion in the last quarter of the seventeenth century.

That the crimes of one conspirator in furtherance of the conspiracy are imputable to all was established in the common law as early as 1600. It was apparently upon this premise that the coconspirator rule originally developed. In order to prove the scope of the entire conspiracy, and thus determine the seriousness of the crime, it was necessary to admit evidence of the acts and declarations of other conspirators in the trial of each of them. Some hearsay may have been admitted under this theory, but

Rev. 920, 988 (1959) [hereinafter cited as Developments in the Law]. Louisiana courts, like most, refer to the exception only when admitting evidence of the acts. E.g., State v. Chavers, 294 So. 2d 489 (La. 1974); State v. Smith, 193 La. 706, 192 So. 2d 106 (1939).

4. See 9 W. Holdsworth, A History of English Law 214 (1926); 5 J. Wigmore, Evidence § 1364 at 12-28 (Chadbourn rev. 1974) [hereinafter cited as 5 Wigmore].

5. McCormick, supra note 2, § 244 at 579-80; 5 Wigmore, supra note 4, § 1364 at 15.


7. 5 Wigmore, supra note 4, § 1364 at 18.

8. Trial of Sir Christopher Blunt, 1 How. St. Tr. 1410, 1412 (1600).

9. Most of these trials were for high treason (endangering the life of the king), with conspiracy fulfilling the overt act requirement, and thus it was necessary to show that the object of the conspiracy was to overthrow the king. See R. v. Stone, 101 Eng. Rep. 684 (1796).

10. E.g., Trial of Lord George Gordon, 21 How. St. Tr. 485, 535 (1781) (cries of “No Popery” to show mob’s intent); Trial of Daniel Dammaree, 15 How. St. Tr. 521, 552-53 (1710) (discussion of plan among unknown persons in mob); Trial of Lord Viscount Stafford, 7 How. St. Tr. 1217, 1309 (1678) (evidence of acts of the principal Papists, unconnected to defendant).

11. E.g., Trial of William Lord Russell, 9 How. St. Tr. 578, 607 (1683). See the
no hearsay exception was discussed by the courts because the coconspirators' extrajudicial acts and declarations were admitted solely to establish the nature and scope of the conspiracy—a non-assertive use.12

Not until the 1790's, in a series of English treason trials, was the coconspirator rule articulated as an exception to the exclusionary rule against hearsay.13 Setting out the elements of the exception as they exist even today,14 the court made reference to the agency relationship among the coconspirators,15 but relied upon the theory of res gestae, thus characterizing the declarations as acts, or as declarations accompanying acts, in furtherance of the conspiracy.16 The exception was recognized by the United States Supreme Court in 1827 without further clarification of its basis.17 Determination of the rule's actual theoretical underpinning is of more than historical interest. Its basis in law will decide which elements need be stressed most, whether the exception should be narrowly or expansively interpreted, and indeed, whether it should exist at all.

Foundation

The coconspirator rule has thus far been discussed as an exception to the hearsay rule, suggesting subjection to the same scrutiny applied to all other exceptions. But before discussing the exception's relation to the hearsay rule it is necessary to contend with the argument that there is no relation. The Federal Rules of Evidence maintain the effect of the excep-
tion under the traditional theory of vicarious admissions but classify it as non-hearsay. 18 The doctrine that coconspirators' declarations are vicarious admissions is based on the agency theory of conspiracy. Upon entering into the scheme, each conspirator is deemed to authorize the others to act for him in furtherance of the common plan. The Advisory Committee's comments recognize this agency as "at best a fiction" but bow to the weight of tradition. 19 For the reasons that follow, this reclassification does not remove the ills of hearsay, but ignores them. 20

Hearsay is generally excluded because of three deficiencies: it is not given under oath, the trier of fact cannot view the declarant's demeanor, and there is no opportunity to cross-examine the declarant. The first two considerations, oath and demeanor, are dispensable, since neither their absence nor presence is sufficient to determine admissibility. 21 Cross-examination is the essential element because it allows the trier of fact to ascertain the declarant's sincerity and memory, the accuracy of his perception, and whether he adequately conveyed his intended meaning. 22 Admissions are subject to these shortcomings of hearsay to the same extent as the out-of-court statements of non-parties; therefore their exception from the operation of the rule must be supported by policy considerations of overriding dimensions.

The reasoning underlying reception of admissions despite their hearsay character is unsatisfactory due, perhaps, to their having become accepted before crystallization of the rule against hearsay. 23 Early writers relied on the then-existing testimonial incompetency of parties to justify admissibility. 24 It has since been suggested that all admissions be received

18. FED. R. EVID. 801(d)(2)(E): "A statement is not hearsay if . . . offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."
20. Res gestae is also often invoked by the courts, e.g., State v. Nix, 327 So. 2d 301, 330-33 (La. 1975), though its broad use had been discredited by the commentators. E.g., Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 YALE L.J. 229, 231 (1922). Clearly res gestae is not applicable to coconspirators' statements as a class, because they are admissible only against, and not in favor of, the defendant and are used to prove the truth of the matter asserted, not to explain an ambiguous material act. 4 J. WIGMORE, EVIDENCE § 1078 at 170 (Chadbourn rev. 1972) [hereinafter cited as 4 WIGMORE].
21. 5 WIGMORE, supra note 4, §§ 1362 at 3, 1395 at 150-54.
24. PHILLIPPS, supra note 16, at 71; 2 J. WIGMORE, EVIDENCE §§ 575-77 at 674-
as the relevant conduct of the party.\footnote{25} To the extent that they are non-assertive, and thus not hearsay, this is undoubtedly correct. Beyond this point, it is in direct contravention of the policies that exclude hearsay.\footnote{26} Wigmore also considers admissions non-hearsay when offered against the declarant party, finding the hearsay rule "satisfied" because "he himself is in that case the only one to invoke the hearsay rule and because he \textit{does not need to cross-examine himself}."\footnote{27} The declarant has the opportunity to take the stand and explain the assertion.\footnote{28} In view of the release of admissions from the operation of all other circumstantial guarantees of trustworthiness\footnote{29} and in light of the fifth amendment privilege not to take the stand, this argument should be of little weight in criminal cases. Clearly it cannot apply when the "admission" is that of a coconspirator, whose right to claim the fifth amendment privilege is beyond the defendant's control.

The dominant approach, apparently based on notions of estoppel,\footnote{30} is the adversary theory of litigation:\footnote{31} "A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath."\footnote{32} Whatever its merits in civil cases,\footnote{33} injection of the adversary theory into evidentiary rules is
of doubtful propriety in criminal cases. This view that a party, having made a statement, is best able to explain or refute it becomes attenuated when statements of an agent are deemed admissions but retains some of its logic when limited to statements concerning those acts which the agent is expressly authorized to do, especially when it will merely impose civil liability upon the principal. When vicarious admissions are extended to a criminal conspiracy prosecution the logic evaporates. State interests against conspiracy should not be advanced by treating alleged conspirators unfairly. Conspiracies are so broadly defined that even actual conspirators need not know of each other, and the degree of control over coconspirators does not approximate that inherent in a true agency.

Despite disagreement on the proper basis for reception of admissions, commentators are uniform in implicit recognition that none of the traditional bases for accepting admissions provides a foundation for vicarious admissions. Instead, early writers claimed that the liability for the acts of another established under the substantive law provides “equal reason” for receiving admissions that would be evidence against the other. That this merely restates the question as a conclusion has been demonstrated elsewhere. In cases like the early English treason trials where, a conspiracy

35. “It is one thing to say that because we hate all conspirators, we will treat conspirators especially harshly. But it is quite another to say that because we hate conspirators, we will treat harshly everyone accused of conspiracy.” Davenport, supra note 22, at 1390-91.
36. The defendant need not know the other conspirators, the scope of the conspiracy, nor what acts have or will be done in furtherance thereof by others. All conspirators are criminally liable for the substantive offenses of any other conspirator that are committed in furtherance of, or could be “reasonably foreseen as a necessary or natural consequence of, the unlawful agreement.” Pinkerton v. United States, 328 U.S. 640, 647 (1946). See Park v. Huff, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824 (1975); Klein, Conspiracy—The Prosecutor’s Darling, 24 BROOKLYN L. REV. 1 (1957).
37. The two are always accorded separate treatment. E.g., McCormick, supra note 2, § 267 at 639-647; 4 WIGMORE, supra note 20, § 1069 at 100.
38. 4 WIGMORE, supra note 20, § 1077 at 158. See Trial of Thomas Hardy, 24 HOW. ST. TR. 200, 474 (1794) (Eyre, L.C.J.); Van Riper v. United States, 13 F.2d 961 (2d Cir. 1926) (L. Hand, J.).

Ironically, while Wigmore attributed the coconspirator exception to the vicarious liability among conspirators for substantive offenses, the Supreme Court has since drawn upon the coconspirator exception to support the vicarious liability. Pinkerton v. United States, 328 U.S. 640, 647 (1946).
40. See the text at note 9, supra.
having been proven, evidence of the acts of the other conspirators is necessary to determine the degree of the offense, the stated justification holds. But where the offense has been completed, and especially where no conspiracy is charged, the substantive law of complicity should have no evidential consequence. In support of the stated theory, Wigmore points out that the admissions of one with identical interests have the same probative value as the admissions of the party himself.\textsuperscript{41} However, it is nowhere even asserted that the party's admissions have any inherent probative value.\textsuperscript{42}

To its credit, Wigmore's rationale is equally applicable to coconspirators' declarations and vicarious admissions in general. This is where the current basis for vicarious admissions, or representative admissions as they are now called, falls short. While agency has replaced the discredited vicarious liability rationale,\textsuperscript{43} the agency relationship which places an agent's statements in the principal's mouth is but a fiction in the substantive law of conspiracy. Coconspirators' declarations have been unquestioningly treated as representative admissions merely because they were historically viewed as vicarious admissions.

So much energy is expended seeking to place admissions beyond the scope of hearsay because the indicia of reliability characteristic of exceptions to the hearsay rule do not inhere in admissions as a class.\textsuperscript{44} Nonetheless, they are generally considered to be hearsay exceptions\textsuperscript{45} and as such constitute the only exception not based on trustworthiness and necessity.\textsuperscript{46} Vicarious admissions, to the extent that they are within the scope of an express agency,\textsuperscript{47} fit within the "adversary theory of litigation," whatever its merits, for they are in effect adopted by the principal. Reception of a coconspirator's declarations cannot logically be founded upon this, or any other, theory of admissions or vicarious admissions.

There is little ground for attributing any trustworthiness to statements of conspirators, particularly when they implicate another.\textsuperscript{48} Such state-

\begin{itemize}
  \item \textsuperscript{41} Wigmore, \textit{supra} note 20, § 1077 at 160.
  \item \textsuperscript{42} See Morgan, \textit{The Rationale of Vicarious Admissions}, 42 \textit{Harv. L. Rev.} 461, 469-70 (1929).
  \item \textsuperscript{43} E.g., McCormick, \textit{supra} note 2, § 267 at 640.
  \item \textsuperscript{44} Morgan, \textit{Admissions}, 12 \textit{Wash. L. Rev.} 181 (1937). That admissions are evidence against, but not for, the declarant is proof of this.
  \item \textsuperscript{45} McCormick, \textit{supra} note 2, § 262 at 629 n.7.
  \item \textsuperscript{46} Fed. R. Evid. 803(24) and 804(5) require that future exceptions possess trustworthiness and necessity "equivalent" to that of existing ones.
  \item \textsuperscript{47} Not just a "speaking agent," but anyone expressly authorized to do the act discussed.
  \item \textsuperscript{48} Leve, \textit{supra} note 13, at 1165. The writer draws a distinction between
ments may often be motivated by a desire to shift the blame, or to create a particular impression on the listener by claiming another's support or authority. While the requirement that the declaration be in furtherance of the conspiracy perhaps prevents complete repudiation of the hearsay rule, any statement in furtherance of a criminal scheme is inherently unreliable, absent traditional guarantees of trustworthiness, due to the obvious danger of insincerity. Moreover, the claim that the statements are necessary is based on the difficulty of proving a secretive inchoate crime. Trials of completed crimes fall outside the scope of this argument, and in conspiracy trials the coconspirator's declarations cannot be used until after the conspiracy has been established, rendering them superfluous.

The substantive law of conspiracy imposes harsh penalties on conspirators no matter how slight their involvement. State interests behind conspiracy laws—deterrence of group efforts at crime, and punishment of inchoate offenses falling short of attempt—are amply served thereby. The risk of wrongful conviction incidental to the slight measure of proof required should not be heightened by evidentiary rules not founded upon trustworthiness. Nor should the necessity for such evidence supplant the requirement of reliability. Necessity is required in addition to trustworthiness because hearsay is repugnant to our system of justice. Indeed, the fact of necessity demonstrates that the evidence will be heavily relied upon, thus increasing the dangers inherent in its use.

The coconspirator exception should be abandoned and such declarations admitted only if they fall within another recognized exception to the hearsay rule. The exception for declarations against penal interest, recently recognized in Louisiana, and those for spontaneous or excited utterings, would admit only the former.

49. It has been suggested that this evidence is easily fabricated by the prosecution (Hearsay Exception, supra note 24, at 541), but good faith prosecutions run the same risk if an alleged conspirator has turned state's witness and wants to bolster his testimony in the hope of receiving greater leniency.

50. Leve, supra note 13.
51. See note 36, supra.
52. See note 46, supra.
53. Hearsay Exception, supra note 24, at 541.
54. State v. Gillmore, 332 So. 2d 789 (La. 1976). See Fed. R. Evid. 804(b)(3); 5 Wigmore, supra note 4, § 1477 at 360 n.7 (trend toward acceptance in other states). The unavailability requirement of this exception often will be satisfied by the declarant's claim of the fifth amendment privilege. California v. Green, 399 U.S. 149, 168 n.17 (1970); Douglas v. Alabama, 380 U.S. 415, 420 (1965); State v. Herman, 304 So. 2d 322, 323 (La. 1974). Professor Morgan suggests that unavaila-
ances may often be properly applicable. However, in Louisiana, as in most states, the coconspirators' exception is imposed by statute. Until legislative repeal it remains the duty of the courts to exact strict compliance with the statutory limitations of the exception—unless, of course, the Constitution requires more.

Constitutionality

The relationship between the hearsay rule and the confrontation clause is the subject of ongoing debate among courts and commentators. The origin of the hearsay rule is well established, but the intent of the framers of the sixth amendment is unknown. Some claim that the confrontation clause was merely "intended to regulate trial procedure," requiring only that such testimony as is admissible under rules of evidence be given subject to cross-examination and in the presence of the accused. Abuses of evidentiary law, including the hearsay rule, would thus be subject to constitutional restraint only under the due process clause.

Several United States Supreme Court decisions in the 1960's created the impression that, in the absence of a traditional exception to the hearsay rule, the confrontation clause demands cross-examination of the declarant at trial. Perhaps in reaction to scholarly criticism and recognition that...
“constitutionalization” of one of the most unsatisfactory areas in evidence law could be the end result, the jurisprudence shifted radically in 1970. In Dutton v. Evans, a plurality of the Court found the evidentiary rule and the constitutional clause to be overlapping rather than coextensive and introduced a new test for determining the constitutionality of hearsay exceptions. They held that the confrontation clause was satisfied, though the declarant had never been cross-examined, by hearsay possessed of sufficient “indicia of reliability” if the evidence was not crucial to the state’s case or devastating to defendant’s. Later cases indicate that this approach has acquired the support of a majority of the Court.

Dutton is particularly significant because it dealt with evidence admitted under a state coconspirator exception. Georgia’s statutory exception is extremely broad, covering any statement by a conspirator during the pendency of the conspiracy, and has been interpreted to include a concealment phase. The Court was careful, however, to limit its holding to the given application of the exception: the coconspirator’s alleged declaration was spontaneous, against his penal interest, and founded upon personal knowledge. Despite these indicia of reliability, the Court stressed the minor role of the hearsay in the state’s case, and two of the four-member plurality concurred, finding the hearsay “harmless error if it was error at all.” This phrase contains the apparent meaning of the “crucial or devastating” element of the plurality’s analysis; so much does

65. GA. CODE ANN. § 38-306 (1954) (quoted in Dutton v. Evans, 400 U.S. 74, 78 (1970)). Furtherance is omitted and pendency is interpreted to include concealment (all conspirators were in jail at the time of the declaration in Dutton). The foundation is required.
66. A “concealment phase” is an open-ended extension of the pendency of the conspiracy for as long as the parties are obstructing discovery of the crime.
67. “The Georgia statute can obviously have many applications consistent with the Confrontation Clause, and we conclude that its application in the circumstances of this case did not violate the Constitution.” 400 U.S. at 87-88.
68. Defendant’s coconspirator allegedly told a fellow prisoner, “If it hadn’t been for that dirty . . . Alex Evans [defendant], we wouldn’t be in this now.” Id. at 77. The statement does not fall within either of the mentioned exceptions because it was not made during the excitement of the relevant event (the crime) and the declarant was not unavailable.
69. There were 19 other witnesses, including an eye witness, and the witness relating the hearsay was thoroughly impeached. Id. at 87.
70. Id. at 90 (Blackmun, J., & Burger, C.J., concurring). Justice Harlan concurred on the theory contained at note 59, supra. There were four dissenters.
the Court wish to avoid grappling with this tar-baby that it will not decide whether error was committed, only that it would have been harmless. 71

However little validation Dutton provides for Georgia's statute, the Court seemingly approved the federal hearsay exception, 72 the functional equivalent of Louisiana's. 73 Inculpatory statements admitted without strict adherence to the elements of the exception run the risk of violating the defendant's right of confrontation. That such error cannot be cured by limiting instructions was established in Bruton v. United States. 74 The coconspirator exception must not be applied in talismanic fashion; the court should be constantly mindful of its limitations.

Elements

The coconspirator exception in the common law and federal law has three central elements: pendency, furtherance, and a foundation of independent evidence. 75 Louisiana's exception, Revised Statutes Title 15, Section 455, is stated differently but arrives at the same result:

Each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with his codefendant. But to have this effect a prima facie case of conspiracy must have been established. 76

That the declaration must be made during the pendency of the conspiracy results from the implied agency theory of conspiracy. Section

71. See id. at 109 (Marshall, J., dissenting). The alternative reading is to vary the defendant's confrontation rights with the importance of the evidence, even though that can only be determined after the fact and is a question for the trier of fact. Whether it was "crucial" should not be confused with whether it was in- criminating, a question of law.

72. Id. at 80: "[W]e do not question the validity of the coconspirator exception applied in the federal courts."

73. See the text at note 76, infra.

74. 391 U.S. 123, 128 n.3 (1968). Such evidence is by definition "inadmissible under traditional rules of evidence" and by no means does it "creep in . . . inadvertently." Id. at 135.


LOUISIANA LAW REVIEW

455 adopts this agency rationale as evidenced by "assent to or commend." The absence of any express reference to pendency is of no consequence because "furtherance" is in all cases a stricter requirement. A statement cannot be in furtherance of a non-existent or defunct conspiracy. The essence of conspiracy being agreement and the overt acts mere proof thereof, a meeting of the minds should suffice to commence the conspiracy. As a practical matter this must usually be inferred from the overt acts.

Establishing the end of the conspiracy necessitates definition of the common object. At the very least, the parties intend to commit the crime and elude all hot pursuers. At most, they intend to gain acquittal as well. The latter extreme, a "concealment phase," has been rejected by Louisiana and the federal courts, though held not unconstitutional. Early Louisiana cases set the outer limit at "accomplishment or abandonment" but the conspiracy is now held to continue until escape and division of the proceeds of the crime, if any. While an individual conspirator may abandon the combination by affirmative act, rendering subsequent declarations inadmissible as to him, one who joins the conspiracy in progress does not escape the effect of any declarations made prior to his joining.

The requirement that the declaration be in furtherance of the common enterprise is essential to the implied agency rationale. It performs the same function as "course and scope of employment" in civil agencies, but should not be interpreted as expansively since there is no express agency involved. Since the goal is to admit only those declarations which the

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84. Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926) (L. Hand, J.). This strict application of agency principles is criticized in Developments in the Law, supra note 3, at 923.
The defendant can be deemed to have authorized, not only must the intended effect have been to further the common plan, but the content of the statement should be sufficiently related to the conspiracy to render the statement foreseeable. The content will generally be the only evidence of declarant’s purpose and thus should be examined in light of the common object and the circumstances as they were known to declarant at the time. There is a tendency in the courts to overlook the requirement of furtherance or to substitute res gestae for the analysis of the statement’s purpose and content that section 455 demands. So long as the coconspirator exception exists and is based upon an implied agency, albeit fictitious, it is essential to the integrity of evidence law and fairness to the defendant that the requirement of “furtherance” be observed.

The final element—a foundation of independent evidence—has created the greatest confusion. The foundation is necessary because the declarations have only conditional relevance; the state must establish that there was indeed a conspiracy and that both the defendant and the declarant were members of it. The very nature of a foundation and the conditional relevancy of the hearsay require that the evidence be independent, i.e., evidence other than the hearsay offered under the exception. Of Evid. rule 508(b) and Uniform Rule of Evid. 63(9)(b) which require only that the declaration be relevant to the conspiracy and made during its pendency; 4 J. Weinstein & M. Berger, Commentary on Rules of Evidence for the United States Courts and Magistrates § 801(d)(2) (E)(01) at 801-143 (1976).

86. The furtherance requirement has in effect been crippled by the oft-cited misinterpretation: "Anything said or done by co-conspirators in a felonious undertaking," until disposition or division of the proceeds is admissible against all. State v. McKee, 193 La. 39, 190 So. 325, 329 (1939) (emphasis added). See, e.g., State v. Hodgeson, 305 So. 2d 421 (La. 1974); State v. Chavers, 294 So. 2d 489 (La. 1974).

87. E.g., State v. Shepherd, 332 So. 2d 228 (La. 1976); State v. Brumfield, 329 So. 2d 181 (La. 1976); State v. Witherspoon, 292 So. 2d 499 (La. 1974). In State v. Nix, 327 So. 2d 301 (La. 1975), the state offered statements made by a coconspirator to the driver of the getaway car (witness) describing the break-in and shooting. The Court found that section 455 was applicable (despite total lack of furtherance) but relied upon res gestae. As narrations, these statements are expressly excluded from res gestae by R.S. 15:447 regardless of their spontaneity. See note 20, supra. The exception for excited utterances might apply, but requires further analysis.

This use of res gestae is “little more than a test of relevancy.” Developments in the Law, supra note 3, at 986.

88. Levee, supra note 13, at 1167.

89. 4 Wigmore, supra note 20, § 1079 at 186-87.

90. E.g., State v. Courtney, 170 La. 314, 127 So. 735 (1930); State v. Smith, 30 La Ann. 457, 460 (1878).

91. E.g., 2 Marr. supra note 76, § 552 at 848: “A foundation, however, must first be laid, aliunde. . . ."
Were it otherwise, "hearsay would lift itself by its own bootstraps to the level of competent evidence." 92

A logical corollary is that the coconspirator's declarations should not be admitted until the foundation has been established. Otherwise the jury would be in the position of having to ignore the hearsay when deciding the guilt or innocence of the accused if no foundation were subsequently established. It is generally agreed that the judge should decide questions of fact precedent to the admissibility of evidence even though the jury must ultimately determine the existence of conspiracy and, thus, the effect of the hearsay. 93

In a series of recent cases, the Louisiana Supreme Court expressly adopted the traditional view that the judge must find a prima facie case before the existence of the conspiracy becomes a question for the jury. 94 However, these cases dealt with the propriety of argument and jury instructions on the law of conspiracy and therefore did not decide whether evidence could be admitted before the judge's finding of a prima facie case. 95

Early Louisiana decisions were unanimous in requiring that the foundation precede admission of the hearsay. 96 In 1903, the supreme court recognized the general rule 97 but went on to create the exception which swallowed the rule: "[W]hen the conspiracy is to be established by numerous isolated facts" the declarations may be conditionally received by the jury. 98 Even were this exception valid, it has been applied uncritically, without regard to the complexity of the facts. In 1928, however, section 455 was enacted requiring that a foundation be laid. The courts then held that section 455 "does not purport to regulate the order of

95. But see State v. Carter, 326 So. 2d 848, 854 (La. 1975) (plurality dictum): "[t]he rule requiring a prima facie showing of conspiracy prerequisite to admitting evidence . . . ."
97. "[I]t is true the general rule of law is the declaration of a coconspirator is to be received only after the conspiracy is established . . . ." State v. Bolden, 109 La. 484, 33 So. 571 (1903).
98. Id., 33 So. at 572.
proof," which is within the trial judge's discretion. While this interpretation of section 455 is technically correct, the courts never considered the statute which does purport to regulate the order of proof, article 773 of the Code of Criminal Procedure: "when the evidence requires a foundation for its admission, the foundation must be laid before the evidence is admissible." It is of no consequence that section 455 requires a foundation for the "effect" of the evidence, rather than for its "admission," because without such effect it is inadmissible hearsay. Even beyond the foregoing statutory analysis, considerations of judicial efficiency militate against the philosophy of the "order of proof" cases. These decisions were based on the efficacy of the instruction to disregard, which is more easily accomplished than a hearing in the jury's absence to determine the sufficiency of the foundation. In the wake of Bruton this reasoning is no longer sound. Inculpatory hearsay that does not fall within an exception to the hearsay rule may violate the defendant's right to confrontation, requiring mistrial or reversal. In light of the doubt expressed in Dutton as to the constitutionality of a comparatively minor deviation from the traditional coconspirator exception, it is unlikely that admission of such hearsay without the necessary foundation could survive constitutional scrutiny.

Judicial determination of the existence of a prima facie case of conspiracy could be obtained at any point in the state's case before the invocation of section 455, by removing the jury. It could, perhaps, be more efficiently accomplished in advance of trial. If it is decided that


100. LA. CODE CRIM. P. art. 773. It was originally enacted, in slightly different form, as article 368 of the 1928 Code and carried over as R.S. 15:368 until 1966.


102. See the text at note 74, supra.

103. See State v. Kaufman, 331 So. 2d 16, 27 (La. 1976) (Tate, J., concurring). The court has excluded inculpatory statements of codefendants. State v. Herman, 304 So. 2d 322 (La. 1974). There is no reason to treat differently statements of persons not on trial which are wrongfully admitted under section 455 (no foundation established).

104. See notes 67-70, supra.

105. This is especially true in Louisiana since the supreme court has rejected the harmless error doctrine (apparently relied upon in Dutton, see notes 70 & 71, supra) for Bruton violations, State v. Herman, 304 So. 2d 322 (La. 1975); State v. Michelli, 301 So. 2d 577 (La. 1974).

coconspirators' statements should be discoverable,\(^{107}\) a device similar to the motion to suppress could be adopted. It has been suggested that "the state has as much interest as the defendant in knowing in advance of trial whether a co-conspirator's statement will be admitted."\(^{108}\) Nonetheless, if the state is concerned about exposing its case in advance of trial, the hearing could be held immediately prior to the voir dire or at some other convenient time.\(^{109}\) By delaying the hearing, however, the state would have to forego any mention of conspiracy during voir dire and in its opening statement.\(^{110}\)

Nor can it be objected that this imposes too great a burden on the criminal justice system. The legislature foreclosed that argument in 1928, and *Bruton* found that even a new trial was not excessive cure. Moreover, it must be remembered that the state is initially required to prove only a prima facie case. Logically the standard should be much higher,\(^{111}\) for it is inherent in the traditional exception that the defendant has no remedy when the judge finds a prima facie case but the hearsay is decisive in the jury's ultimate finding that a conspiracy exists. Nonetheless, the legislature is clear on this point and there is no indication that the constitution requires more.

*State v. Carter*\(^{112}\) held that a showing that two or more persons committed the crime charged does not establish a prima facie case of conspiracy. Some evidence of an agreement must be found, though it is well established that it can be inferred from circumstantial evidence.\(^{113}\) The most appropriate standard of proof is that amount necessary to sustain a verdict of guilt on a charge of conspiracy, *i.e.*, to dismiss defendant's motion for a directed verdict.\(^{114}\) The existence of the conspiracy would

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109. This might also eliminate the need to call the witnesses on two different days. *But see* note 117, *infra* (for defendant's ability to obtain an earlier hearing via motion to suppress).

110. See the text at note 118, *infra*.

111. Davenport, *supra* note 22, at 1389 (perhaps even "beyond a reasonable doubt").

112. 326 So. 2d 848, 854 (La. 1975).


then truly be a question for the jury and the judge would never be required
to overturn this finding.

In addition to establishment of the statutory foundation, the state
should be required to give defendant notice, before its opening statement,
of any inculpatory statements of coconspirators that it intends to offer.115
If the declarations of coconspirators are to be imputed to each of them
because of an implied agency, then certainly the defendant should receive
the notice to which his "agent" would be entitled. Notice of inculpatory
statements is required under article 768 of the Code of Criminal Procedure
to lessen the arbitrary impact of surprise upon one's ability to defend
himself.116 The alleged conspirator's need for such protection is even
greater because he may be completely unaware of his "agent's" state-
ments. If the defendant does know of these statements, he should be able
to require a hearing before trial by use of the motion to suppress.117 By the
same token, the state should not be allowed to "advert in any way"
(including discussion of section 455) to the existence of these declarations
in its opening statement, unless a prima facie case of conspiracy has
already been established.118

This Comment has concentrated on the admissibility of evidence, but
recently the courts have become embroiled in a dispute over the propriety
of arguing the law of conspiracy to the jury when the state intends to
invoke section 455 in a trial for the completed offense. The danger to the
defendant is twofold: increased likelihood of guilt by association, and the
possibility that a confused jury will convict for the basic offense if they
believe defendant guilty of conspiracy. In 1967, the supreme court re-
versed itself on rehearing and held that a charge on all aspects of the law of

La. 1083, 1105-06, 47 So. 32, 40 (1908), which should be the meaning of the oft-cited
"to the satisfaction of the jury." E.g., State v. Courtney, 170 La. 314, 127 So. 735
(1930); State v. Brasseaux, 163 La. 686, 112 So. 650 (1927). Therefore, to establish a
prima facie case the judge need only find that a reasonable man could find conspira-
cy beyond a reasonable doubt.

115. It is also arguable that defendant is entitled to the notice outlined in State v.
Prieur, 277 So. 2d 126, 130 (La. 1973) (see Comment, Other Crimes Evidence in
Louisiana, 33 LA. L. REV. 614, 628 n.76 (1973)), because conspiracy is separate and
distinct from the completed offense (see LA. CODE CRIM. P. art 814 (not a respon-
sive verdict) and LA. R.S. 14:26 (1950) (not bar to prosecution for basic offense)).

116. LA. CODE CRIM. P. art. 769, comment (c)(2).

117. Id. art. 703B (inculpatory statements).

118. Id. art. 767. The policy underlying the article is that no mention of the
inculpatory statement should be made because the defendant may succeed in
excluding it at trial. After the foundation is established there is no chance of
exclusion of the statement.
conspiracy was not only not prejudicial, it was mandatory when section 455 was invoked in a trial for the completed offense. This was extended the next year to allow the state to question prospective jurors about conspiracy law on voir dire. The theory was that the trial would involve these issues because of section 455 and such questioning could reveal the "juror's ability to act intelligently in the case." In 1974, the state was allowed to explain the law of conspiracy in its opening statement even though "it might have been irrelevant." The court was careful to note that the prejudicial effect had not been compounded by a jury charge on conspiracy.

The prosecution pushed the problem to the limit in three cases in 1975 and 1976. Conspiracy law was discussed on voir dire, opening and closing statements, and in the jury charge. The result is that references to the law of conspiracy are permissible in a trial for the basic offense on voir dire and in the opening statement if more than one person is charged with the crime (though not necessarily in one trial) and the state intends to use section 455. It is permissible in closing arguments and in the jury charge only if a prima facie case has been made.

In conjunction with the hearing suggested above, references to conspiracy should be allowed only after a prima facie showing has been made. Before that time, it is not "the law applicable to the case" as required for argument and clearly should not be charged to the jury.

Conclusion

The coconspirator exception to the hearsay rule is devoid of sound theoretical basis. The relative rarity of its use in actual conspiracy trials belies the claim of necessity. Nor do declarations of coconspirators possess guarantees of reliability when not within some other recognized hearsay exception. Nonetheless, use of the rule continues virtually unchallenged. Until such time as the legislature remedies its abuses, the courts

121. State v. Dotch, 298 So. 2d 742 (La. 1974).
122. See note 94, supra.
123. State v. Kaufman, 331 So. 2d 16, 21 (La. 1976). References to conspiracy during closing arguments were held permissible in Brown if there is any evidence of conspiracy. 326 So. 2d at 843. This was an apparent inadvertence on the part of Justice Bolin for as recognized in Kaufman, conspiracy is not a part of the "law applicable to the case" until a prima facie case is established.
124. LA. CODE CRIM. P. art. 774.
should strive to contain the exception strictly within its statutory bounds. Not only the substantive law of conspiracy, but also its evidence law exemplifies the "tendency of a principle to expand itself to the limit of its logic"—and beyond.\(^{125}\)

\(\text{Roy S. Payne}\)
