HEARSAY AND CONSPIRACY: A REEXAMINATION OF THE CO-CONSPIRATORS' EXCEPTION TO THE HEARSAY RULE

Joseph H. Levie
Member, New York Bar
HEARSAY AND CONSPIRACY

A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule

Joseph H. Levie*

The expansion of the law of conspiracy and the increasing number of prosecutions for its violation have been much commented on lately.1 Many kinds of anti-social conduct directed principally against the public welfare are now frequently punished by prosecution for conspiracy instead of prosecution for the substantive offense. Conspiracy is an ideal way to deal with organized crime and has been used extensively against quasi-treasonous activities. Similarly the Sherman Act's2 criminal sanctions are primarily couched in terms of conspiracy and the civil conspiracy action for divestiture or dissolution is the usual method of enforcing the antitrust laws. This emphasis on conspiracy is advanced most frequently in the federal courts but is not restricted to them.3

Two sources have fed this development. First, some actions which are conspiracies are not otherwise criminal. The illegal agreement already punishable as a conspiracy may never ripen into the substantive crime. Furthermore, the object of the conspiracy need not be criminal in itself.4 Second, prosecution for conspiracy offers the prosecutor practical advantages. Many defendants may be tried jointly5 which makes trials cheaper and easier. Venue may be more advantageously set.6 Finally—and it is to this aspect that the present article is directed—the usual rules of evidence, particularly the hearsay rule,

* Member, New York Bar; First Lieutenant, J.A.G., United States Army.—Ed.
3 Conspiracy is a federal felony under 18 U.S.C. (Supp. V, 1952) §371. In most states it is a misdemeanor only as it was at common law. See Michael & Wechsler, Criminal Law and Its Administration 636-637 (1940).
4 See cases collected Michael & Wechsler, Criminal Law and Its Administration 639-648 (1940).
6 A conspiracy may be tried in any district where an overt act was committed as well as the district in which it was hatched. Brown v. Elliot, 225 U.S. 392, 32 S.Ct. 812 (1912). See 1 Holmes-Pollock Letters, Howe ed.,193-199 (1941) for a spirited discussion of this point.
offer the prosecution tactical advantages. Expansion of the substantive
law of conspiracy has been paralleled by relaxation of the hearsay rule.

Essentially a conspiracy is only an unlawful agreement. Prosecutors did not rely on conspiracy until late in the nineteenth century. Then its use became more frequent and its expansion in the past twenty years has been very marked. Typically the reason given for making the agreement itself criminal is that concerted action is so much more dangerous to the public that the combination itself should be punished. But its very nature makes conspiracy hard to prove. Proving the existence of a plot is hard and it may be very difficult to connect some parties to it. This becomes acute in a mass trial (as many conspiracy trials are) where some defendants are clearly implicated in the confederacy and others are not. Since, putting the overt act aside, all that is necessary to convict for conspiracy is a subjective meeting of minds regarding the criminal aim, direct proof is impossible. The closest approximation would be the reduction of the agreement to writing—which is very rare, and it would be even rarer for such a document to come into the hands of the authorities. Unless a conspirator obligingly turns state's evidence there remain only two other methods of proof, circumstantial evidence and the conspirators' own declarations. Neither is completely free from difficulty.

Circumstantial evidence is said by the courts to be much favored in conspiracy cases. Typically, the jury is asked to draw an inference of agreement from conduct which seems to be following some plan. But such use of circumstantial hypothesis is subject to inherent limitations. If the conspiracy is apprehended early or discontinued there is little conduct from which to draw the inference. Besides, alternative explanations of whatever conduct there was may exist and make it difficult to prove guilt beyond all reasonable doubt. For example, a general rise in prices may be explained as the result either of a conspiracy or of the law of supply and demand.

7 The history of conspiracy is long and complicated. It originated as a mixed tort and crime (like trespass) directed at abuse of procedure. The tort of conspiracy is largely obsolete and criminal conspiracy was reshaped by Star Chamber into a misdemeanor and used against economic crimes. See Winfield, History of Conspiracy and Abuse of Legal Process (1921); Bryan, Development of the English Law of Conspiracy (1909).
9 See Allen v. United States, (7th Cir. 1924) 4 F. (2d) 688, affd. sub nom. Mullen v. United States, 267 U.S. 598, 45 S.Ct. 353 (1925) (75 defendants).
10 Very little suffices to constitute an overt act. See Bartoli v. United States, (4th Cir. 1951) 192 F. (2d) 130 (telephone conversation).
The last source of evidence is the use of testimonial utterances of the conspirators against each other. Such declarations find their way into court in many ways. The conspirators may communicate among themselves, keep partial records for one reason or another, ask others to join in the scheme, make statements in the course of carrying out the conspiracy in the presence of third parties or just talk. But such statements made out of court are excluded as hearsay unless a conspirator repeats them on the stand, or they are included within one of two special conspiracy exceptions to the hearsay rule: the so-called co-conspirators' exception, one of the family of exceptions for vicarious admissions, or a res gestae exception. The co-conspirators' exception is by far the more important. In the subsequent discussion of these exceptions the reader will observe how the law is changing. Perhaps he will conclude that we were willy-nilly on the way to exempting from the hearsay rule most statements connected with or concerning a conspiracy and that the broadening of the substantive law of conspiracy could not have been effective without weakening the hearsay rule—a quiet steady process long under way and hardly commented on.

I

The co-conspirators' exception to the hearsay rule is soon stated: any act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided that a foundation for its reception is laid by independent proof of the conspiracy. Often the rule is stated in the negative: mere “narrative” declarations of the one co-conspirator cannot be admitted against co-conspirators. All three conditions of admissibility (furtherance, pendency, foundation) resemble principles of agency. Furtherance is “scope of employment” modified for conspiracy. Requiring the declaration to have been made during pendency follows logically for if the conspiracy does not exist acts cannot be within its scope. The independent foundation finds a parallel in the rule that agency cannot be proved by declarations of the agent alone.

The odd thing about this exception to the hearsay rule is its very existence. Why single out conspiracy for preferential treatment? The cases reveal three further areas of ambiguity: what declarations are “in furtherance” of the conspiracy? How long is the pendency of a conspiracy? How much proof is required to lay the foundation? When can it be admitted? And of what kind must it be? After a digression to examine the history, we will take up each of these points in turn.

Like so much of that common law customarily attributed to the
genius of the thirteenth century or of King Alfred the Great, the hearsay rule is certainly post-medieval. The early history of the admissions exceptions to hearsay is a mystery. Apparently the hearsay rule, originally not very broad, was simply not extended to admissions. They were not thought to be hearsay. The early history of the vicarious admission is involved. In the trials for the infamous Gordon Riots of 1780 the cries of the mob and the banners they carried were admitted against persons shown to be ringleaders. These precedents were used to create the present co-conspirators' exception. Afterward further vicarious exceptions were made for co-trespassers and co-partners.

The co-conspirators' exception as we now know it was first stated late in the eighteenth century in a series of treason trials of fellow travelers of the French Revolution, which show an amazing similarity to recent Smith Act prosecutions. The treason charge was never an act of rebellion; it was always "teaching and advocating" the death of the King. There was always concerted action of some sort; the defendants had some relation to a society advocating Republicanism. Hardy and Horne Tooke were officers of such a society. William Stone was the Society's printer.

The American courts had already gone further in civil cases. By 1791, New Jersey was admitting all declarations made in the course of any illegal combination. Since the early English cases turned on the substantive point of whether one party was bound by another's statements, this decision was an extension of the law to its logical extreme. If admissions were not hearsay there was no reason for not admitting

For the early history of hearsay, see 9 Holdsworth, History of English Law 214-222 (1926).

Admissions were not thought of as hearsay. See Gilbert, Law of Evidence 152 (1754); Swift, Digest of the Law of Evidence 126 (1810). This notion persisted into modern times in a diluted form. Morgan, "Admissions and the Hearsay Rule," 30 Yale L.J. 355 (1921).

The early history of the vicarious exceptions, particularly the agency exception, is extraordinarily difficult to trace. Not only are the cases confusing but since counsel was not permitted in criminal prosecution (treason excepted) we rarely have reports of the cases. The best discussion is 3 Wigmore, Evidence, 3d ed., 1076-1086 (1940).

Trial of George, Lord Gordon, 21 How. St. Tr. 485 at 535 (1781).


Patton v. Freeman, 1 N.J.L. (Cox) 113 (1791).
the declaration of a conspirator within the scope of his agency against all confederates. The dangers of hearsay were not mentioned. Several states, the English courts in the cases previously mentioned, and the early text writers followed New Jersey. Then in the leading case of United States v. Gooding, the United States Supreme Court approved the broad doctrine. Little was added throughout the nineteenth century. Since the crime of conspiracy was rarely invoked by prosecutors, except for trade union combinations, and since the broad English law of treason out of which the rule had grown was not received in this country, the exception found its main use in those crimes and torts which happened to be committed in concert.

But when the law of conspiracy started to grow again, extensive use of the co-conspirators' exception by the prosecution strained the rule and left its agency rationale out of plumb with the practice. The classical view hardly explains, for example, what is going on in antitrust cases and it was repudiated by the American Law Institute's Model Code of Evidence. The search for the rationale of the co-conspirators' exception is now timely. Hence we return to our first problem. Why is there such a rule at all?

Once it was believed that admissions were not hearsay. Nobody today would adopt so naive a view. The usual reason given for the co-conspirators' exception is the classical agency rationale that conspirators are co-agents and, as such, liable for each other's declarations. Wigmore differs, claiming that such evidence is unusually trustworthy, like declarations against interest generally, and therefore is admitted although hearsay. It is submitted that neither view is really

21 Broughton v. Ward, 1 Tyler (Vt.) 137 (1801); Claytor v. Anthony, 6 Rand. (Va.) 285 (1828); Reitenbach v. Reitenbach, 1 Rawle (Pa.) 361 (1829). See Woodruff v. Whittlesey, Kirby (Conn.) 60 (1786).
22 See note 18 supra. The English cases have had much influence in America—perhaps even more than the early American cases. See also Nichols v. Dowding and Kempt, 1 Starkie N.P. 81, 171 Eng. Rep. 408 (1815) (Lord Ellenborough); Rex v. Hammond and Webb, 2 Esp. 719, 170 Eng. Rep. 508 (1793) (Lord Kenyon).
23 PHILLIPS, LAW OF EVIDENCE 74 (1st Amer. ed. 1816); 2 STARKIE, LAW OF EVIDENCE 403 (1823).
25 GREGORY, LABOR AND THE LAW, rev. ed., 18-30 (1949). Criminal conspiracy became obsolete and was replaced by the civil injunction within a few years.
27 A.L.I. MODEL CODE OF EVIDENCE, Rule 508(b) (1942).
28 See note 13 supra.
30 4 WIGMORE, EVIDENCE, 3d ed., §1080a (1940). According to Wigmore this is the rationale for all the vicarious admissions.
defensible, and that the true reason, aside from brute history, for admitting such evidence is the very great probative need for it.

Both as the official doctrine and because of its substantial effect in determining the exception’s scope, the agency rationale should be discussed first. Learned Hand has said:

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

Or, to put it another way, a conspiracy is a species of agency, and preferential treatment for agent’s hearsay is one of the incidents of agency. But why should it be? Several reasons are advanced.

The oldest one is that the conspirators’ words are somehow interwoven into their acts. This is a res gestae notion of the sort which Thayer thinks may be the original source of many of the hearsay exceptions. One of the older statements is still the best. Starkie said:

“Where several combine together for the same illegal purpose, each is the agent of all the rest, and any act by one in furtherance of the unlawful design is, in consideration of law, the act of all and, as a declaration accompanying an act strongly indicates the nature and intention of the act, or, more properly, perhaps, is to be considered as part of the act, a declaration made by one conspirator at the time of doing an act in furtherance of the common design is evidence against the other conspirators.”

This does not explain the cases. As the above quotation from Learned Hand points out, the declaration is admitted as an act, not to illuminate some unclear act. The administrative difficulties of such an exception are enormous—when is an act unclear? When do words make it clearer? Nor does it explain why preferential treatment should be given conspirators’ hearsay. Hearsay is excluded partly because the witness is likely to report it poorly but principally because the true declarant cannot be cross-examined. There is no showing how such evidence is trustworthy enough to justify omitting cross-examination.

Notions of waiver provide another argument. If a man associates himself with a group (which must be independently proved) then it is only fair to charge him with his associates’ statements. True, but

31 Van Riper v. United States, (2d Cir. 1926) 13 F. (2d) 961 at 967.
32 THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 523 (1898).
33 2 STARKIE, LAW OF EVIDENCE 403 (1824).
why waive the hearsay rule? These statements are not likely to be well reported or particularly trustworthy. Hearsay is a rule of evidence; such notions confuse procedural and substantive law without good reason.

Lastly we reach the best argument for the agency exception to the hearsay rule. This argument, which deserves our serious attention, is that there has been in fact no deprivation of the right to cross-examination. The original declarant is the principal himself who gave his agent instructions. He can hardly wish to cross-examine himself and, if he does, he can take the stand. Yet defendants in criminal cases may have legitimate reasons for not wishing to take the stand. Passing over that, the argument succeeds only if there are two conspirators, one to make the original declaration and one to repeat the hearsay. Suppose, however, that there are more than two and the original declarant and the party opposing the admission of the hearsay are not the same. The opponent cannot call the original declarant; the privilege against self-incrimination will be interposed, depriving him of his cross-examination. Nor is good reporting particularly likely. On the contrary, the hearsay repeated by the declarant-conspirator will be a true report only if it is in his interest. It may well be in the interest of a conspirator to misstate his instructions either to shift responsibility or to give a false impression of the aims of the conspiracy.

The agency argument accordingly fails because it shows no reason for exempting conspirators' utterances from the hearsay rule. To say that the substantive law does so only begs the question. The rules of agency govern the substantive law of conspiracy; they decide who is a member of the conspiracy. As such they are involved in determining against whom the evidence may be admitted. The point is that they are not relevant in determining why it should be admitted.

Wigmore's theory that such declarations are admitted because they are trustworthy (and accordingly the need for cross-examination is less acute) fares no better. Wigmore argues that since the interest of all conspirators is identical, an admission of one against his interest is against the interest of each. This fails to distinguish between declarations showing the existence of a conspiracy and declarations concerning its membership or aims. Of course sane men do not falsely admit to conspiracy. Conspirators' declarations are good to prove that some conspiracy exists but less trustworthy to show its aims and membership. The conspirator's interest is likely to lie in misleading the listener into

35 See note 30 supra.
believing the conspiracy stronger with more members (and different members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law.

We must conclude therefore that neither of these proposed rationales of agency or of trustworthiness is very impressive. Meanwhile the co-conspirators' exception has expanded rather than shrunk which is not typical of rules without a reason. The true reason for the exception explains both its growth and the parallelism of that expansion to the expansion of the law of conspiracy. That reason is simple: there is great probative need for such testimony. Conspiracy is a hard thing to prove. The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation in the law of evidence. Conspirators' declarations are admitted out of necessity.

If then, conspirators' evidence is admitted out of necessity it remains subject to all the dangers of hearsay; and declarations of conspirators are likely to be overestimated by juries. The problem facing the courts then becomes: how shall conspirators' evidence be admitted and used but kept within the limits of fairness to defendants? What protections have been erected to protect defendants? What protections should be added?

The simplest answer is to require corroboration of the conspirators' declarations. This is done by the rule forbidding conviction solely on the testimony of accomplices, if interpreted to include the declarations of conspirators. The federal jurisdiction where conspiracy prosecutions are most frequent has no such rule.

Another way to protect defendants is to require a high standard of "legal relevancy." Conspirators' declarations would be generally admitted but only when trustworthy. This is largely a matter for the trial courts. The appellate courts will not (probably cannot) review their trial courts' determinations of relevancy except in the unusual

36 See note 97 infra and the text thereto for fuller discussion of this point.
37 Since the rule requiring corroboration of accomplice testimony is statutory, the wording of the individual statute governs. See note 94 infra and the text thereto for fuller discussion.
38 See note 95 infra and text thereto. A few federal cases go even further and forbid the use of statements made among the conspirators to identify a third person as a co-conspirator.
39 For this paper "Relevancy" connotes logical pertinency. "Materiality" requires logical pertinency and an actual contribution in probative force substantial enough to outweigh any improper prejudice and administrative difficulties that the evidence may cause.
40 What is meant here is that only the more trustworthy declarations are to be admitted among conspirators' declarations and not that conspirators' declarations are necessarily always trustworthy.
case which is flagrantly wrong. Instead a general rule of relevancy is sometimes laid down removing a particular situation from the determination of the trial court. For example, evidence of subsequent repairs by a railroad cannot be admitted in grade crossing accidents to prove negligence by the railroad prior to the accident.\(^{41}\) Here the rules of legal relevancy have been crystallized. The same thing might well be done for conspirators' declarations—they might be generally admitted but under certain circumstances held to be per se irrelevant. Sometimes the courts seem to move in this direction as when they exclude certain declarations of conspirators as "merely narrative."\(^{42}\) The agency theory has been pushed aside. This is the best and most realistic way to deal with conspirators' hearsay and most befits the responsibility of appellate courts to their trial courts.

The usual practice, however, is to protect defendants by keeping the agency rules in force. Holding to the agency rules is better than leaving defendants without protection, and defendants are never in greater danger than when a superficially clever court sees through the agency rationale and fails to replace it with anything else. But the law suffers, for if the agency rules are kept to protect defendants, the strain distorts them. There is pressure to admit all conspirators' declarations and there is counter-pressure to protect defendants. Since neither of these forces is related to the law of agency, the cases concerning the co-conspirators' exception are notoriously unsatisfactory. We shall examine the three requirements of furtherance, pendency and foundation to see what the courts are actually doing. We cannot expect much clarity, for one doctrine (agency) is either being used in behalf of some other doctrine (necessity, defendants' protection) or else when applied following its own rationale comes in conflict with more important principles (hearsay). Justice may be done in individual cases but the rules of law are obscure and sometimes unsatisfactory.

II

We turn now to the requirement that the declaration be "in furtherance of the conspiracy." The requirement is based upon that agency rationale which we have already found unsatisfactory. It is equivalent to the requirement that an agent's act or declaration must be within the scope of his agency before it can be charged against his principal.


\(^{42}\) Exclusion of "narrative" details gives an excellent opportunity to shut out facts insufficiently connected.
Practical considerations limit such an operation of the requirement and it is often ignored, rejected or criticized.

One practical problem lies on the threshold. How can the court determine what is in furtherance of the conspiracy when the declaration admitted may be practically the only evidence of the terms of the illegal agreement? This by itself often makes it impossible to apply agency rules strictly and therefore they are not applied. The courts avoid this problem by loose application of the agency principles defining "furtherance." If some connection is established between the declaration and the conspiracy, then the declaration is taken as in furtherance of the conspiracy. This considerably weakens the practical importance of limiting conspirators' admissions to those in furtherance of the conspiracy. An example may make the point clearer. In Vitagraph Company v. Perelman a conspiracy to stop double featuring, constituting a violation of the antitrust laws, existed among certain distributors of motion pictures. One member of the conspiracy made a speech before an industry meeting detailing what had been done previously to stop the practice and what the conspirators proposed to do in the future. The other conspirators were present and remained silent, but plaintiff did not show that they had authorized the speech. A good argument could have been made that under agency law the declarations were unauthorized, but the hearsay was admitted. Admission of the speech can be explained on the basis that the opponents of admission, by remaining silent, had adopted the declaration. It seems easier to explain the case as one where the court adopted an unusually broad view of agency. They looked for a nexus, some connection between the declaration and the conspiracy. When they found it—here mere propinquity—they did not examine the law of agency carefully. No doubt the opponents of admission would be permitted to come forward with evidence to prove that the declarations were not in fact authorized. In effect the burden of coming forward has been shifted. To prevent the admission of conspirators' declarations the opponents of the evidence are forced to present more evidence about the terms of the conspiracy.

43 In the federal courts the corroborating evidence need only show a joint venture and the hearsay may be used to prove the illegality. See note 92 infra.

44 (3d Cir. 1938) 95 F. (2d) 142.

45 Such cases where silence is held to imply assent furnish still another way to avoid furtherance. Cf. State v. Murray, 216 N.C. 681, 6 S.E. (2d) 513 (1940); annotation 80 A.L.R. 1243 (1932).

46 For a similar view of the relation of agency law, see Harvey v. United States, (2d Cir. 1928) 23 F. (2d) 561 (excellent opinion of Swan, C.J.).
Practical considerations permit the trial judge to be more liberal than the letter of the law. Admission of evidence is always subject to some discretion in the trial judge but appellate courts often remark that his latitude is unusually broad in conspiracy cases, because conspiracies are hard to prove. The appellate courts frequently divest themselves of too close a supervision over their trial courts by the harmless error rule.

Beyond these practical considerations which operate to allow trial courts to be liberal in admitting conspirators' declarations, there are changes in the substantive law which abolish or limit furtherance as a condition of inadmissibility. The Model Code of Evidence, adopted by the American Law Institute, would abolish furtherance. California and Georgia have statutes which can be interpreted to abolish this condition of admissibility. The courts have wavered in interpreting them, sometimes assimilating them to the common law (thus requiring furtherance) and sometimes not. Other courts have gotten rid of the requirements without a statute. The Seventh Circuit blandly explains that "furtherance of the conspiracy" refers to the content of the declaration, not to the circumstances under which it was made. A little reflection leads to the conclusion that this is total admissibility because if its content did not concern furtherance of the conspiracy, the declaration would be immaterial. There is some state authority for the same position and instances abound where the requirement has been ignored or evaded by means of the harmless error rule.

The Supreme Court has begun to clarify its position. In Krulewitch v. United States Justice Black, speaking for the Court, doubted the
wisdom of preferential treatment for conspirators' hearsay but found the law well established. Further expansion was disapproved and, since any stick will do to beat a dog, the Court declared that declarations not made in furtherance of the "main aim" were inadmissible. This position will be difficult to maintain. Logically, furtherance derives from that agency rationale which the Court rejects and can only be defined by using agency notions. Probably the Court will either further discourage conspiracy prosecutions by still further limiting the co-conspirators' exception—and it clearly recognized the intimate relation between preferential treatment for conspirators' hearsay and conspiracy prosecutions—or else the *Krulewitch* case will be undermined. The Seventh Circuit's Pickwickian definition of furtherance may be adopted or *Krulewitch* may be distinguished away. This last possibility is quite real since the disputed declarations are inadmissible in any case as made after termination of the conspiracy.\(^{55}\)

Still another path to free admission of conspirators' declarations runs through manipulation of res gestae exceptions. This ought to be distinguished from res gestae as the rationale for the whole exception. By use of this doctrine a declaration made by any conspirator during the pendency of the conspiracy becomes part of the res gestae of the conspiracy. There is no reason in the world for such a conclusion and it amounts to abolishing the requirement of furtherance.\(^{56}\)

Finally there are the civil antitrust cases.\(^{57}\) In this important field of conspiracy law the requirement of furtherance seems to be largely inoperative although the courts sometimes refer to it. There are no cases where evidence has been excluded because it was not in furtherance of the conspiracy. On the other hand, at least one trial court has abandoned the whole hearsay rule for civil antitrust cases with-

\(^{55}\) Id. at 442.

\(^{56}\) Jones v. United States, (9th Cir. 1910) 179 F. 584 overruled Mayola v. United States, (9th Cir. 1934) 71 F. (2d) 65. See also Shea v. United States, (6th Cir. 1918) 251 F. 440.

out a jury, and another abandoned furtherance outright. Most of these cases are tried by a judge without a jury. The trial judge may be trusted to weigh hearsay fairly and the extraordinary protections of the criminal law do not apply. The evidence is often predominately documentary. Finally, the activity of the conspiracy is so diverse that almost anything is in furtherance of it. As one able trial court said:

"Whether a declaration is in furtherance of a conspiracy must perforce turn upon the scope and extent of conspiracy. When the alleged conspirators are large corporations, doing a worldwide business, with seats of authority geographically distant one from another, numerous internal communications within each corporation are necessary in order to appraise large numbers of corporate officers of the nature of the negotiations, the attitude of the representatives of other co-conspirators, the decisions reached, their import and the understanding of the agents of the corporation of the decisions reached. Moreover in a conspiracy which continues over many years, which has been adapted to changed conditions, which has altered techniques and tactics from time to time and where the individuals operating the affairs of the corporate members of the conspiracy have changed with the passing of years, the keeping of records of past agreements and understandings, the preparation of summaries of past relationships between the parties and the making of reports are in aid of the overall purpose."

The observant reader will have noted that narrative declarations of past occurrences can be in furtherance of such a conspiracy. Probably the law is progressing toward abolishing the hearsay rule in civil antitrust cases but criminal antitrust cases should not provide any exception to whatever co-conspirator limitations remain.

Taken together all of these limitations cast very serious doubt on the practical utility of requiring declarations to be in furtherance of the conspiracy. At least so far as we can discover from appellate reports only "merely narrative" declarations are excluded. Frequently

68 United States v. United Shoe, (D.C. Mass. 1950) 89 F. Supp. 349 (Wyzanski, D.J.). The court pointed out that the F.T.C. can consider hearsay in a like case and a district judge should be as competent in the weighing of evidence as an administrative agency. For a general discussion of evidence in a trial without jury, see 46 J. L. Rev. 915 (1952).


60 Ryan, D.J., in United States v. Imperial Chemicals, (D.C. N.Y. 1952) 100 F. Supp. 504 at 512. See also Zamloch v. United States, (9th Cir. 1952) 193 F. (2d) 889, not an antitrust case where narrative declarations of past events were in actual furtherance of the conspiracy.

these cases in which a conspirator tells of past actions involve confessions to the police while the conspiracy is still pending.

Only the most extreme error produces reversal. Yet not every declaration made during a conspiracy need be admitted, especially where a jury sits. There must be some way to separate useful evidence from lies and gossip spread in the course of a criminal scheme. It is suggested that the proper practice would be to admit declarations made during the pendency of a conspiracy unless the declaration is self-serving. A conspirator’s hearsay declaration exculpating himself at the expense of others is too prejudicial in proportion to its probable truth. Let the conspirator turn state’s evidence if he wishes and appear on the stand to be sworn, cross-examined and confront those he accuses. Hearsay is weak enough; self-serving hearsay ought not to be regularly admitted into evidence. If the trial court screens out irrelevant evidence and self-serving declarations, the purposes served by this condition of admissibility are satisfied and it could be dispensed with.

III

The second condition of admissibility requires the declaration to have been made “during the pendency of the conspiracy.” Pendency is the actual duration of the illegal agreement; those declarations made before the conspiracy was hatched and after its termination are inadmissible. Declarations during its term are admissible even though made prior to the cut-off date of the statute of limitations or at a time when the agreement was not criminal.

Once a declaration is admitted it incriminates all conspirators including those who join in the conspiracy afterward. The after-entering partner accepted the terms of the illegal bargain and ratified prior action. Any other holding would make that bargain unprovable against him.

Declarations made before the illegal bargain was struck are mere predictions. The illegal agreement is still in the future; no accurate statement can be made about terms or parties. Such statements are “legally irrelevant,” i.e., too lacking in probative force to be admitted. The prejudicial effect of their admission would outweigh their probative value.

---

Declarations made after the conspiracy ends are particularly untrustworthy. Once the conspiracy terminates, the interest of every member is to avoid responsibility and shift the blame. What he says about himself by way of admission or confession may well be true and is, at any rate, against his own interest. But what he says about others may be based on spite, fear, pique, malice, a desire to stand well with the prosecutor, or many other motives not leading to truth. Direct knowledge may be wanting, for although a conspirator is responsible for his partners' acts, he need not be well informed about them. In a "loose" conspiracy he knows little about specific acts. 65

The case for admitting only declarations made during the pendency of the conspiracy resembles that for furtherance. Any declaration made while the conspiracy is pending is risky, and the conspirator's interest in avoiding responsibility is balanced by his desire for criminal gains. Similar results follow from an agency rationale. For if declarations are admitted because a legal relationship exists, then admissibility ends with the relationship.

This condition of admissibility makes furtherance superfluous. Both conditions screen out declarations which might have been exclusively to absolve the declarant by incriminating another. If either is effective, the other is unnecessary. Most statements excluded are in both categories; but probably furtherance adds nothing to pendency which is free of some of the complications furtherance entails.

The actual cases are not as neat as these generalizations. So great is the hunger for evidence of conspiracy that some courts even admit declarations made prior to the illegal contract against all subsequent conspirators. And the definition of when the conspiracy terminates is difficult and manipulated to admit late admissions.

Those few cases which admit declarations made before the conspiracy are freaks. The avenue used is the exception for statements of motive 66 and the reasoning is this: declarations of motive are admissible; a declaration regarding a conspiracy made before the agreement is a declaration of motive; ergo, such a declaration is admissible against all conspirators. The non sequitur is plain. Assuming that the declarant is bound by his declarations of motive why admit them against accomplices? Whatever his statements about his own intentions may be, those about others are only speculation.

More important is the termination of the conspiracy. Post-termi-

65 Cf. Van Huss v. United States, (10th Cir. 1952) 197 F. (2d) 120.
nation declarations are more common and carry greater weight. They look impressive and the fine point of restricting admissions to the party who made the declaration is often lost on a jury.

Termination occurs either when the conspiracy ends or when one party leaves which terminates it as to him. Thereafter his declaration may be used only against him and not against his former confederates.67

The law governing when a party resigns from a conspiracy is incidental to this paper. It is enough to note that in addition to resignation from the conspiracy,68 indictments,69 apprehension,70 or confession71 terminate the party’s involvement in the conspiracy except under the most unusual circumstances. The courts have been particularly strict in forbidding the admission of confessions against anyone but the confessor.72

When the conspiracy itself ends is less clear. Of course if the conspirators are apprehended or indicted the conspiracy is usually over but what if the conspirators achieve their aims? Or just stop meeting? Conspiracy is a continuing crime but the courts warn: “Though the result of the conspiracy may be continuing, the conspiracy does not thereby become a continuing one.”73

Once the conspiracy has been shown, the burden is upon the conspirators to prove it has ended.74 The difficult cases are those where a crime has been committed. The conspiracy does not necessarily end; it continues until its aim has been achieved. Thus a conspiracy to kidnap continued until the ransom money was passed.75 Similarly a robbery continues until the fruits of the crime have been disposed of.76 This is so because the aim of the conspiracy was not to commit the crime so much as to make a profit by illegal means. One case even admits declarations made after all criminal aims were achieved as a “final settlement” of the criminal scheme.77

68 However, it is not easy to resign from a conspiracy. See Eldredge v. United States, (10th Cir. 1932) 62 F. (2d) 449.
69 Link v. United States, (8th Cir. 1929) 30 F. (2d) 342.
70 Graham v. United States, (8th Cir. 1926) 15 F. (2d) 740.
71 Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224 (1946); Logan v. United States, 144 U.S. 263, 12 S.Ct. 617 (1892); Gambino v. United States, (3d Cir. 1939) 108 F. (2d) 140.
72 This principle is very old. King v. Tong, Kelyng 18 res. 5 (1663) but is still strictly enforced. See Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224 (1946), and cases therein referred to.
74 United States v. Pugliese, (2d Cir. 1945) 153 F. (2d) 497.
75 McDonald v. United States, (8th Cir. 1937) 89 F. (2d) 128 at 135.
76 Murray v. United States, (7th Cir. 1925) 10 F. (2d) 409 at 411.
77 United States v. Groves, (2d Cir. 1941) 122 F. (2d) 87.
The *Krulewitch* case again marks the end to expansion of the federal rule. There, after the illegal transportation had violated the Mann Act, certain declarations were made in the course of an attempt to suppress evidence. The government argued that the aims of the conspiracy had not yet been achieved. It pointed out that a conspiracy obviously includes an intention to escape punishment. Accordingly, declarations made in the course of an attempt to escape responsibility are during "pendency." Rejecting this argument, the Court restricted the duration of a conspiracy to its "main aim." Otherwise the conspiracy would never end. No doubt there could be a second conspiracy to suppress evidence and declarations then made would be admissible *against its members* to prove their guilty knowledge of the first crime.

A recent Supreme Court decision, however, suggests there may still be an opening left for the admission of acts done after termination of the conspiracy. If the Court refers only to circumstantial use of such acts there is no expansion of the present law. An act however can be used in a step of hearsay proof by showing the state of mind of the actor, and as such ought to be treated the same as any other hearsay. Any assumption that an act is more trustworthy than a declaration seems dubious.

*Krulewitch* is an exceptional case. Few state courts are as critical and careful in handling the termination date. Many do admit post-termination declarations made during an attempt to suppress evidence against conspirators not parties to the collateral offense. There is the familiar talk about res gestae and statements of motive. Frequently the silence of one conspirator when accused after the conspiracy is over is taken as admission of guilt by all. Pendency is no "paper rule" but, unless a confession is involved, the courts are erratic in enforcing it.

---

78 Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481 (1953). See also Ferris v. United States, (9th Cir. 1930) 40 F. (2d) 837. Certain defendants were arrested with contraband liquor and kept nervously looking up the road. Other defendants came down the road as if to meet them. The acts of the first group were admitted against the second by way of hearsay inference from conduct, from their acts to a state of mind.


83 See note 45 supra.
The last condition of admissibility requires "independent proof" of the existence of the conspiracy and of the connection of the declarant and the defendant with it. The order of proof among the independent evidence ("the foundation") and the declarations is within the trial court's discretion; evidence may be admitted subject to later proof of the foundation. If the subsequent proof does not satisfy the court, the evidence is stricken from the record or limited in application to the declarant and a cautionary instruction given the jury. If the court admits the evidence, its determination is provisional and the jury is charged to reconsider the adequacy of the foundation.

The independent evidence must amount to enough evidence to go to a jury, a "prima facie case." It must show more than a grave suspicion. So, in a conspiracy to bribe a public official, evidence that the official knew certain persons to be gamblers, never molested them, visited their place of business regularly and could not explain certain large bank deposits amply show the existence of a conspiracy although the same evidence would probably not justify a conviction. On the other hand, it is not enough to prove that all the alleged conspirators ran away together from the scene of the crime or that the declarant was a boarder in the defendant's house or that the alleged conspirators were close friends. Nor may the foundation be established by other hearsay for "otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence." A foundation proved by testimony on the stand by a co-conspirator is adequate, for the accused has not been denied his rights of cross-examination, oath and confrontation.

84 Newman v. United States, (9th Cir. 1946) 156 F. (2d) 8. Cf. 4 Wigmore, EVIDENCE §1087 (1940).
85 People v. Talbot, 65 Cal. App. (2d) 654, 151 P. (2d) 317 (1944). Query—how much is this worth in practice?
87 McIntosh v. Commonwealth, 272 Ky. 159, 113 S.W. (2d) 1144 (1938).
91 State v. Erwin, 101 Utah 365, 120 P. (2d) 285 (1941); State v. Stogsdill, 324 Mo. 105, 23 S.W. (2d) 22 (1929).
We have seen that both the declarant and defendant must be connected to the conspiracy, but how much proof of the conspiracy itself is necessary? A doctrine has been developed in the federal courts that only the joint venture of the conspirators must be shown. The declarations themselves may prove the illegality of the scheme once the venture is established. Against such a rule it may be argued (1) that this is no time to relax the co-conspirators' exception particularly in the light of the *Krulewitch* case; (2) corroboration ought to extend equally to all parts of the offense. Nevertheless the rule seems well advised. Proof of the joint venture, which amounts to more than proof of mere acquaintance, is difficult enough to have real value as corroboration. Though the declarations may alone show the illegality of the venture, the tribunal must always be convinced beyond all reasonable doubt before conviction. Absence of some such rule could cripple the enforcement of the antitrust, alien property, and similar laws when the available evidence usually is documentary hearsay. Besides, without the rule, there is no support for admitting declarations made during a legal venture which subsequently turns illegal.

Analytically, the rule brings the law of conspirators' utterances nearer harmony with the statutes requiring corroboration of accomplice testimony in force in many states. The two rules have diverse histories, the co-conspirators' exception being a common law exception to the hearsay rule while the rule requiring corroboration of accomplice testimony originated as a warning to the jury and was enacted into statute in many states, although not in the federal jurisdiction. Where corroboration is required, accomplice testimony will not support a conviction unless supported by proof of "participation or identity" of the accused. Whether the evidence is admissible hearsay or direct evidence is irrelevant. The stress is upon connecting the accused with the crime—not on independent proof of its occurrence. Conspirators' evidence may be considered a species of accomplice testimony; stress upon connection with the offense fits in well with conspiracy prose-

---


93 See text to note 63 supra.

94 See generally 7 WMORE, EVIDENCE §§2056-2060 (1940).

95 Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917). It is said that it is better practice to give a cautionary warning but failure to do so is not fatal error.
cutions where the inadequacy of the connecting proof is often complained of. Proof of conspiracy is often easier than showing the participation of some of the defendants in it. The federal courts who have taken the lead in simplifying the proof of the conspiracy proper do not require corroboration of accomplice testimony. Their position is none the less reasonable when it is remembered how broad a use they make of the co-conspirators' exception which includes all hearsay accomplice testimony. We may state the federal rules for the use of accomplice testimony thus: accomplice testimony is good evidence and sufficient to convict by itself. Hearsay accomplice testimony is not good evidence unless it complies with the conditions of furtherance and pendency and must be corroborated by independent evidence.

Certain practical matters remain to be discussed. Since it is possible to admit evidence valid against only one or several defendants in a joint trial there is always a possibility that the jury will apply the admitted hearsay against a defendant who has not been connected with the conspiracy. The jury room protects the secrecy of the jury's deliberation. No matter how carefully the judge charges them, the jury may be honestly confused or may disregard what it thinks are lawyers' quibbles. The same moral reappears: the trial judge must control the trial, particularly against the prosecutor. If he is not master in his own house, the case is sure to be tried on extraneous and prejudicial matters. Mere inconvenience to the prosecution should not justify departure from the usual order of proof because once evidence is admitted it can never really be stricken. And, since these abuses are most likely in the mass trial for conspiracy the liberal granting of severances ought to be encouraged as making for fairer trials.

96 All accomplices are, of course, conspirators. Since the co-conspirators exception is not restricted to cases of conspiracy, it covers all hearsay accomplice testimony. Should the exception ever be restricted to conspiracy prosecutions, then it would be necessary for the federal courts to adopt some kind of a rule limiting accomplice evidence to protect the rights of the accused.

97 "How far a jury which had heard evidence can in practice use it against one of several accused and not against others is very questionable at best; most persons cannot think in watertight compartments. However it is often necessary to tell the jury to try to do so, when there is a joinder of several accused. . . ." L. Hand, C.J., in United States v. Pugliese, (2d Cir. 1945) 153 F. (2d) 497 at 501. See also the comments of Justice Jackson concurring in Krulewitch v. United States, 336 U.S. 440 at 453-454, 69 S.Ct. 715 (1949), and dissenting in Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481 (1953).