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The JOURNAL takes great pleasure in announcing the appointment to the Editorial Board of S. Beekman Laub, Yale, 1906, of Natchez, Miss.; Thomas Anthony Thacher, Yale, 1908, of New Haven, Conn., from the third year class, and Earnest Alexander Inglis, Ph.B., Wesleyan University, 1908, of Middletown, Conn.; Roy A. Linn, B.A., Monmouth University, 1908, of Monmouth, Ill., and Howard Nathaniel Rogers, B.S., Cole College, 1908, of Sac City, Ia., from the second year class.

THE STATUTE OF LIMITATIONS IN CONSPIRACY CASES.

In the case of the *United States v. Kissel et al., New York Law Journal,* Vol. XLII, No. 26, the United States circuit court has handed down a decision which if upheld on appeal will undoubtedly have great effect in stopping many so-called anti-trust prosecutions. The decision under consideration arose from the successful choking off of a rival by the American Sugar Refining Company through somewhat dubious methods. About eight years ago Adolph Segal, a Philadelphia financier, promoted a new independent sugar refining company. This company, the Pennsyl-

vania Sugar Refining Company, from the outset seems to have been in financial difficulties and lack of funds made its future very dark. In 1903, however, Mr. Segal found a lender in the defendant, Mr. Kissel, who agreed to lend him $1,250,000 upon his note with collateral including a majority of the stock of the Pennsylvania Sugar Refining Company, upon certain conditions. These conditions included the voting of the shares by the defendant. The importance of this provision apparently put in merely for the strengthening of the security was brought home to Mr. Segal when he learned that Mr. Kissel was secretly acting for the American Sugar Refining Company, and that a new board of directors, also acting for that company, had voted immediately after their election that the Pennsylvania Refining Company be closed.

On July 1, 1909, the United States government filed an indictment alleging that these acts were a conspiracy in violation of the Sherman Law of July 2, 1890. The defendants not denying the truth of the allegations, relied on their claim that the original transaction was closed on or before January 4, 1903, and that such minor acts of the defendants done afterwards could not stop the running of the *Statute of Limitations.* The defendants declared therefore that the prosecution was barred by Section 1044, *Revised Statutes,* which allows only three years for such prosecutions. It was upon this point that the case turned with the result that the defendants were upheld.

The Sherman Act does not define conspiracies but simply makes "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations" illegal and constituting a misdemeanor. It is necessary to go to the common law and to the earlier decisions to find out what constitutes a conspiracy. The offense of conspiracy was recognized as early as the reign of Edward III, and it has been a source of some legal confusion since that time. As was said by Gibson, C. J., in *Mifflin v. Commonwealth,* 5 M. & S. (Pa.), 461: "The law of conspiracy is certainly in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent." It is an unfortunate fact that even to-day the courts differ very widely as to the nature of conspiracy, and this disagreement of decisions is painfully evidenced in cases where the *Statutes of Limitations* have been applied to conspiracies.

The general rule is that the *Statute of Limitations* begins to run from the commission or consummation of the crime. Wheaton, *Crim. Pl.,* Section 321. Some offences however cannot be said to be completed at one particular time and this has resulted in a sharp division into two classes. "An instantaneous crime, such as arson or killing, is consummated when the act is completed. A continuous crime, such as the carrying of concealed weapons, endures after the period of consummation." In the former case the *Statute of Limitations* begins to run with the consummation, while in the latter, it only begins with the cessation of the criminal conduct or act. *United States v. Owen,* 32 Fed., 537.

The case of *United States v. Irvine,* 98 U. S., 450, cited in this opinion, is clearly of the first class. A collected $525 of B's pension money, and when demanded of him in 1870, A refused to give it up. *Held,* that a suit brought against him in 1875 was barred. This case is merely in agreement with the usual rule as to notes, claims, etc. In the present opinion, Judge Holt denied that a conspiracy under the Sherman Act was a continuing offense and therefore governed by the principles of continuing nuisances and continuing trespasses.

The question then arose as to whether a later overt act would result in a new running of the *Statute of Limitations.* Judge Holt in his opinion declares that such a later act would have no effect. While the indictment in this case was brought under the Sherman Act and not under *Revised Statutes,* 5440, yet the federal cases arising under the later law are in point as regards the effect of such new overt acts. There is a marked conflict in opinions. Four district courts have held that after the statute has once begun to run new overt acts do not result in starting it again. *U. S. v. Biggs,* 157 Fed., 264. Two district courts, one circuit court and one circuit court of appeals, that after each additional overt act the statute begins anew. *Ware v. U. S.,* 154 Fed. 579. In the state courts where this question has arisen in a few cases, it seems to be the rule that the new act works a new running of the statute. *Am. Fire Ins. Co. v. State,* 75 Miss., 24, 35.

The court in this case holds that even if it should be guided by the principles that a new overt act starts the *Statute of Limitations* running, still the plaintiffs would have no case because of the comparatively unimportant acts done after January, 1903. It must be acknowledged that those acts necessary to constitute a

new offense must have a tendency to carry out the objects of the conspiracy or in some way make it effectual. *Ware v. U. S.*, 154 Fed., 579. Here the overt acts were certain resolutions of the American Sugar Refining Company agreeing to indemnify its president and its counsel for any liability in the Segal matter, certain letters written by one of the defendants to the secretary of the American Sugar Refining Company, and a bill for disbursements rendered by defendant Kissel, to the American Sugar Refining Company, all in the year 1907. Whether these were sufficient overt acts there might easily be a difference of opinion about. It is not stated whether the directors of the Pennsylvania Sugar Refining Company as a body or any of them separately, were reelected during the years after 1903. If this were done it is hard to see why such elections would not constitute sufficient overt acts.

While the case under consideration may be affirmed, it is possible that the defendants will be held liable in the upper court. Such a reversal would at least be more equitable from the public point of view as here the judge practically gives as the reason for his decision Lord Campbell's exclamation many years ago. "Hard cases must not make bad law." *East India Co. v. Paul,* 1 Engl. Law and Eq. Rep., 44, 48.

PERSONAL INJURIES, ELEMENTS CONSIDERED IN ESTIMATING DAMAGES.

Should one who was a tramp and vagrant at the time of injury recover less because of that fact than he would under different conditions, in a suit for damages for personal injuries? This question presents in a novel form the old question in damages as to what extent, as a measure of damages, shall the previous earning capacity of the injured party enter into an adjudication for compensating him for his injuries. In the recent case of *Central Georgia Railway Co. v. Moore,* decided by the Court of Appeals of Georgia in February, 1909, and cited in the *Southeastern Reporter*, Vol. 63, p. 642, this question, coming up before the district court, which charged that it should have no effect on the measure of damages but that the future inability to work should govern, was later denied by the Court of Appeals which reversed the judgment of the lower court and in its review held that the plaintiff should not recover as much as any other man injured in the same circumstances but that his previous life of vagrancy

should enter into a determination of the damages allowed where the suit was for a dimunition of the earning capacity and the plaintiff had been shown not to have been working.

In this case the plaintiff was severely injured by the train of the defendant company which ran over him as he was sitting on its track in a faint condition, due to his physical condition at the time. Negligence of the defendant's engineer was a point at issue, but the defendants attempted to show that should the plaintiff recover, his recovery should be limited by the fact that he had, at the time of the accident, been pursuing no occupation but was in fact a common tramp. The instructions of the lower court to which the defendant excepted, included in the charge these words: "The only bearing that the evidence introduced before you should have is as affecting the credibility of the witness; but, if you believe that he is entitled to recover as I have said, under the law and evidence of the case, his character would not effect it at all. He would be entitled to recover just as much if he were a tramp as if he were a great deal different." The Superior Court did not take this view and in reversing the judgment took occasion to say: "This was an erroneous instruction and probably did the defendant great injustice. Comparing this extract with the rest of the charge we are sure that the court did not mean to convey the impression which the language palpably conveys. What the court was trying to impress upon the jury was that, if the plaintiff had suffered a wrong at the hands of the defendant he was entitled to have it redressed, though he were a tramp, no less than if he were a man of a different character." The court, by this charge, ruled that one who had, through choice or necessity and force of circumstances, been unfortunate enough to have been a tramp previous to a serious accident which deprived him of his ability to earn a future living, should recover a less amount than had he been in better circumstances and a more prosperous condition. In other words, that his past activity or inactivity and not his future inability should measure the damages. It is submitted that this view is too broad and would work many hardships. The court is entirely justified to hold this where there has been a past occupation from which could be measured the damages and the previous earning capacity of the injured party can be made a standard by which the loss can be estimated. See *Seaboard Manufacturing Co. v. Woodson,* 11 Southern Reporter, 733; the *City of Joliet v. Conway,* 119 Ill., 489. The broad view

is narrowed by the statement in the *Cyclopedia of Law,* Vol 13, p. 48, which says: "In actions of torts, where the quantum of damages is within the discretion of the jury, evidence of the nature and extent of the plaintiff's business and general rate of profit he has realized therefrom which has been interrupted by the defendant's wrongful act, is properly received, *not* on the ground of its furnishing a measure of damages to be adopted by the jury but to be taken into consideration by the jury to guide them in the exercise of that discretion which is to a certain extent always vested in them." This, of course, applies where the injured party is not able to continue that work he had previously been doing and not where there was no past work, as in the case under discussion, to measure by.

Where the injured party is deprived of the opportunity of doing work which, but for the accident he might have done, a different standard to measure from must be taken. Many courts of dignity and learning equal to the Georgia courts have held that the standard which should be taken to compensate the injured party *should not be the previous earning capacity but the future earning ability which has been hurt.* See *M. K. & T. Railway Co. of Texas v. Flood,* 79 Southwestern, 1106. Also *Louisville & Nashville Ry. Company v. Falvey,* 104 Maryland, 405, and *Macon v. Paducah Street Ry. Co.,* 62 Southwestern, 496.

In *Fisher v. Jansen,* a case in point is found where this exact issue is raised and reviewed and authority is given for this view. In that case the plaintiff, who had formerly been in business but had retired and was traveling for his health in hopes of re-entering business in the future, was injured on the defendant company's train. At the time of injury and for some time before, he was doing no work and there was no measure by which the damages could be estimated as to his earning capacity in the past. But the court instructed: "In determining the amount of damages which plaintiff is entitled to recover, *if* the jury find from the evidence, under instructions from the court, that plaintiff is entitled to damages, they have a right to and should take into consideration, all the facts and circumstances in the evidence before them * * * * * they may consider future inability to labor or transact business. The question must be *whether a person is entitled to recover any damages because of inability to labor or transact business in the future resulting from*

his injuries. We think very clearly that he is entitled to recover and that it can upon no principle make any difference whether a person is at the time being, engaged in a business paying a definite amount or is then not engaged in business but is by the act of injury prevented from engaging in any in the future that he might reasonably expect but not be entirely certain he would have success." This judgment then, puts the measure on future inability and not past success in work. It does so because it is the only fair, the only possible estimate that can be made. It should not militate against the injured party that he has been unfortunate doubly, both because he has not worked and now cannot. It is not denied that the question of past work is an important one where there has been past work and where by introducing this it can then only take a mathematical calculation to reduce the damages to an exact amount.

If this should be allowed to mitigate against an injured party we could follow the reasoning just a bit farther and hold that an infant who has done no past work, or a married woman who because of just marrying has rendered no service to her husband would recover less, though their future capacity for work is impaired, then they might had not minority and time prevented their services from being ascertained exactly. This, of course, has never been held. See *Western Ry. Co. v. Young,* 81 Ga., 397, in which an infant child, nine years old, was injured and his father suing for damages for loss of his labor, was rewarded with this charge: "Among the results of the injury to be considered are pain and suffering * * * * *and impaired capacity to pursue the ordinary avocations of life, at and after reaching majority."* Again, *Union Pacific Ry. Co. v. Jones,* 21 Col., 340, says, that a husband suing for injuries to his wife might recover for "loss, past, present and prospective of her services caused by the injuries." See also *Jordan v. Middlesex Ry. Co.,* 138 Md., 425; *Sloan v. New York Central Railway Co.,* 1 Hun., 540; *Traver v. Eighth Avenue Ry. Co.,* 42 N. Y., 497.

These cases show that the courts are unanimous in their opinion that where there is a past service it should be taken as a measure of damages, but where for any reason the injured party has not had any past remunerative employment to govern the award, his not working, even had he been a tramp or vagrant, should not militate against him where the accident has deprived

him of earning a living in the future which he might have earned had it not been that his ability to do so was impaired. "In an action for personal injuries it is proper to instruct that *if the result of injuries was to diminish plaintiff's capacity to earn money in the future, that fact should be a consideration in estimating damages.*" *Louisville & Nashville Ry. Co. v. Falvey,* 104 Md., 409.