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period of one to four years sorely needs an opportunity to refurbish his rusty skills and should be assured that for one year he need not compete in the labor market with those who may have become more proficient in the course of these years. It is, however, significant to note that due to an omission by the legislature to account for World War I veterans, and their widows and dependents, these too can be supplanted by a veteran of World War II. Simple legislation can remedy such defect.

SAUL STEPHAN DAVIS.

VARYING ELEMENTS OF CONSPIRACY UNDER FEDERAL LAW

Two recent cases in the Federal District Court for the District of New Jersey were prosecutions for conspiracy. One was for conspiracy in restraint of trade,[1] the second for conspiracy to violate a regulation or order of the Emergency Price Control Act.[2] In one, the court dealt with the question of reentry into a conspiracy, in the other, whether conspiracy is a crime apart from the Act sought to be violated or a crime under such Act. Both cases show that conspiracy is not a well defined crime, the essentials of which are uniform, but rather one in which they vary somewhat with each charge.

In *United States v. National Wholesale Druggists' Association*,[3] the corporate defendant had participated in agreements for price schedules which allegedly constituted a conspiracy in restraint of trade. The corporation later filed a voluntary petition in bankruptcy. From December 8, 1938 until July 1, 1941, the corporation was in the custody and control of the court, whose trustee was in exclusive possession and management. During this time the corporate officers remained the same but under the control of the court. Throughout this period the purchase and sale of drug products were continued at prices in accord with the schedules established under the agreement or alleged conspiracy. On July 1, 1941 the trusteeship was terminated and the original officers of the defendant corporation were reinstated. The question was whether upon resumption of legal control of the business and assets of the defendant corporation by the same officers and agents, their compliance with the prices previously established constituted a reentry into the conspiracy.

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[1] United States v. National Wholesale Druggists Association, 61 F. Supp. 590 (D. C. N. J. 1945).

[2] United States v. Schenley Distillers Corporation, 61 F. Supp. 601 (D. C. N. J. 1945).

[3] United States v. National Wholesale Druggists Association, 61 F. Supp. 590 (D. C. N. J. 1945), cited *supra* note 1.

The court held that the defendant reentered a conspiracy, indicated that the trustee could not be held for conspiracy and passed the question whether identity of officers would be necessary in every case to constitute reentry into a conspiracy.

Tracing and analyzing the conspiracy we can agree with the court on the question of the defendant's guilt but would hold that the court should also find the trustee a participant in the conspiracy, and that identity though not necessary to hold the defendant for conspiracy might be necessary if the charge were to be limited to reentry into a conspiracy.

The conspiracy consisted of fixing a schedule of prices in violation of the Sherman Anti-Trust Act. The plan contemplated would naturally require each conspirator after adoption to adhere to the schedule. The conspiracy, therefore, had two aspects: forming the schedule, and continuing to maintain the schedule. This was a single continuing conspiracy. "When the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies rather than to call it a single one." [4] Thus, up until December 8, 1938, the defendant was engaged in a continuing conspiracy.

The next two periods of control, that of the trustee and later the defendant again, cause difficulty in tracing the conspiracy. The court held that the trustee's action in adhering to the price schedule was not a continuance of participation in the conspiracy theretofore existing, and that when the defendant resumed control its practices could not be considered merely as a continuation of the practices established by the trustee. It held these acts of the defendant to be the result of deliberate choice and that adherence to the schedules already established was to be deemed a resumption of their original attitude.

It is true that each of the three periods of control were separate and distinct and that no act or intent of one group carried over to another. It is also true that during the period of trusteeship there was no legal capacity in the defendant to engage in the conspiracy. The defendant was then not in control, so the conspiracy, as to him, ended. What happened to the conspiracy in the interim, during which time all the policies of the conspiracy were adhered to voluntarily? It has been held that, "where numerous competitors fixed the prices they agree to maintain and another competitor not a party to the agreement originally adopts the schedule and makes his prices agree to the last penny, as the petitioners did with the prices which the competitors fixed and charged, he cannot avoid responsibility even though he be less active in the first instance or because his sub-

[4] United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168 (1910).

sequent action was without affirmative, express agreement on his part to maintain the prices fixed by others." [5] The trustee had to make a choice of adopting the price schedule in being or make a different one. He adopted the schedule the making of which constituted one aspect of the conspiracy. The adoption was tantamount to being present at the making of the schedule and by enforcing the agreement the trustee participated in the second aspect of the conspiracy.

By like method the defendant, if the officers were not identical on the second occasion, would be a participant in the conspiracy.

It follows then that where a continuing conspiracy has been found, if one member withdraws and another as his successor continues, the new member is chargeable as a conspirator and the subsequent renewal of activity by the member who previously withdrew constitutes a reentry by him into the conspiracy.

In this case it is to be noted that no mention of intent or overt act in furtherance of the conspiracy is made. At common law the crime of conspiracy was complete when one had agreed with others either to do an unlawful act or a lawful act in an unlawful manner. However, many courts have repeatedly held that the crime of conspiracy under the United States Code [6] was complete only when there was an overt act by some member of the conspiracy which act was in furtherance of the conspiracy and that the common law rule does not apply.[7]

The Sherman Act itself provides that "every contract, combination . . . or conspiracy in restraint of trade" [8] violates the Act. In an indictment under the Sherman Act it is not necessary to allege in detail the evidence of the conspiracy and the conspiracy need not be described with the same degree of particularity required in describing a substantive offense. Nor is it necessary that an indictment under the Sherman Act allege overt acts in furtherance of the conspiracy charged.[9] This is one of the differences between conspiracy as a separate crime and conspiracy as a violation of the Sherman Act.

In the *Schenley Distillers Corporation* [10] case, the corporation and others were indicted for conspiracy to commit offenses against

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[5] Eugene Dietzgen and Co. v. Fed. Trade Commission, 142 F. (2d) 321 (C. C. A. 7th, 1944); Minnisohn v. United States, 101 F. (2d) 477 (C. C. A. 3d, 1939); United States v. Wilson, 23 F. (2d) 112 (N. D. W. Va. 1927).

[6] 35 STAT. 1096 (1909), 18 U. S. C. A. 88 (1940).

[7] United States v. Goldstein, 135 F. (2d) 359 (C. C. A. 2d, 1943); Hamner v. United States, 134 F. (2d) 592 (C. C. A. 5th, 1943); Smith v. United States, 92 F. (2d) 460 (C. C. A. 9th, 1937); Billingsley v. United States, 249 Fed. 331 (C. C. A. 9th, 1918).

[8] 26 STAT. 209, 210 (1890), 15 U. S. C. A. 1-7 (1890).

[9] Mercer v. United States, 61 F. (2d) 97 (C. C. A. 3d, 1932); United States v. Waltham Watch, 47 F. Supp. 524 (S. D. N. Y. 1942).

[10] United States v. Schenley Distillers Corporation, 61 F. Supp. 601 (D. C. N. J. 1945), cited *supra* note 2.

the United States. The F. and A. Distributing Company applied for leave to file a complaint in the Emergency Court of Appeals against the Administrator of the Office of Price Administration setting forth objections to the validity of the regulations as the Emergency Price Control Act provided. The court denied the application on the ground that the right to file a complaint was limited to those who had been involved in criminal proceedings for violation of the Act itself and does not include proceedings involving criminal conspiracy even when the conspiracy was directed toward violation of the Emergency Price Control Act. The court held that this charge was not a charge under the Act.

Other cases have held also that a charge of conspiracy is a charge separate and apart from the provision toward which the conspiracy was directed. In *United States v. Rabinowich,*[11] a conspiracy to violate the Bankruptcy Act, the court held that the defendant could not avail himself of the Statute of Limitations prescribed by the Bankruptcy Act. In *United States v. Hirsch* [12] the defendant was allowed to take advantage of the Statute of Limitations of conspiracy and did not come under the longer period provided for under the revenue laws which he conspired to violate. After this case the revenue laws were amended to provide that any offense arising under the conspiracy statute should have a six-year period of limitation. In *Braverman v. United States,*[13] a later case, and also an indictment for conspiring to violate the revenue laws, the court held that the crime of conspiracy does not fall under the law violated; it constitutes a separate crime. Nevertheless, the period of limitation as set forth in the revenue laws was applied.

It would appear that no reference to the law which is the object of the conspiracy should be allowed other than whether the conspiracy was to violate that law. The punishment is governed by the criminal code; the same should apply to the Statute of Limitations. From the standpoint of social welfare this departure from strict adherence may be very valuable and when this is true, logical construction should not supersede social welfare. However, strict construction should not be the rule only when it favors the prosecution.

In the *Schenley* case the defendant would find it exceedingly difficult to determine whether he was doing an unlawful act. The framers of the Emergency Price Control Act evidently had some doubts about its validity when they inserted the clause providing for a challenge. The court has not allowed the defendant to take advantage of that clause. To test its constitutional validity independent of that provision, the defendant would have to show that he was injured by the operation of the statute.[14] Again he would be met with

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[11] United States v. Rabinowich, 238 U. S. 78, 59 L. ed. 1211 (1915).
[12] United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539 (1879).
[13] Braverman v. United States, 317 U. S. 49, 87 L. ed. 23 (1942).
[14] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 80 L. ed. 688 (1936).

the obstacle that he was not accused under the statute of the Price Control Act. Here is a vicious circle. A law which might be flagrantly unconstitutional could be in effect indefinitely without challenge.

Our law of conspiracy needs clarification, not to permit offenders to avoid entrapment, but to allow each alleged transgressor to know definitely that he will not be convicted for doing a lawful act in a lawful manner and to prevent the exceptions from becoming so numerous that they completely overwhelm the original Section 37 of the Criminal Code.

KATHARINE CURNEN MULLEN.

COMPETENCY OF CHILDREN AS WITNESSES; SIGNIFICANCE OF OATHS TO CHILDREN

In New York, no unsworn testimony is admissible on the trial of either a civil or a criminal case, except in one instance. The exception is to be found in Section 392 of the Code of Criminal Procedure:[1]

> The rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided in this code. Whenever in any criminal proceedings a child actually or apparently under the age of twelve offered as a witness does not in the opinion of the court or magistrate understand the nature of an oath, the evidence of such child may be received though not given under oath if, in the opinion of the court or magistrate, such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence.

The unsworn testimony of an infant is inadmissible in a civil action[2] (unless waived by both parties), and that leads to our first query, "At what age is an infant competent to testify under oath?" Whereas, in a criminal jurisdiction, if a witness is over twelve, the law presumes capacity; in civil jurisdiction there is no definite rule as to the age at which an infant is competent to testify under oath. The test is an individual one. In one case, it was held no error to admit sworn testimony of a boy five years old; this on the ground of the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the truth.[3] A witness, six and a half years old, who knew she would

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[1] As amended by Chapter 279 of the Laws of 1892.

[2] Gehl v. Bachmann-Bechtel Brewing Co., 156 App. Div. 51, 141 N. Y. Supp. 133 (1913); Arico v. New York Central R. R., 240 App. Div. 721, 265 N. Y. Supp. 503 (1933).

[3] Wheeler v. United States, 159 U. S. 523, 40 L. ed. 244 (1895).