*Argued by*
MARTIN W. LITTLETON

# Court of Appeals
OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent,*

*against*

JAMES J. HINES,
*Defendant-Appellant.*

## BRIEF FOR DEFENDANT-APPELLANT

### Statement

This is an appeal from an order of the Appellate Division of the First Department unanimously affirming a judgment of the Court of General Sessions of the County of New York convicting the defendant-appellant of the crimes of conspiracy and contriving, proposing and drawing lotteries. The appeal comes to this Court by permission of Hon. Irving Lehman, Chief Judge of this Court, pursuant to an order certifying that questions of law are involved which should be reviewed by the Court of Appeals (fol. 11561, *et seq.*).

The indictment was returned on May 26th, 1938, at an Extraordinary Term of the Supreme Court, New York County. On June 9th, 1938, appellant demurred to the indictment, which demurrer was thereafter and on July 11th, 1938,

overruled by Mr. Justice Pecora. Appellant was then placed on trial at said Extraordinary Term, before Mr. Justice Pecora and a jury. The trial commenced on August 17th, 1938, and continued until September 12th, 1938, upon which date Mr. Justice Pecora declared a mistrial by reason of improper cross-examination on the part of the District Attorney.

Thereafter, on application of the District Attorney, the action was transferred to the Court of General Sessions and came on for trial in that Court on January 23rd, 1939 before Judge Charles C. Nott, Jr., and a jury. The trial continued until February 25th, 1939, upon which date the jury rendered a verdict of guilty upon all of the counts contained in the indictment and appellant was thereafter, on March 23rd, 1939, sentenced by Judge Nott to an aggregate term of imprisonment of not less than four and not more than eight years.

Execution of the sentence was stayed pending appeal to the Appellate Division, pursuant to a certificate of reasonable doubt granted by Mr. Justice Peter Schmuck of the Supreme Court, New York County, and defendant was admitted to bail in the sum of $35,000.00 pending the hearing and determination of the appeal. The opinion rendered by Mr. Justice Schmuck upon the granting of the application for the certificate is reported at 12 N. Y. Supp. (2nd) 454.

The judgment of conviction was affirmed by the Appellate Division on January 26th, 1940, by a Per Curiam Opinion (fol. 11572, *et seq.*). Thereafter and on January 30th, 1940, an application for leave to appeal was granted by the Chief Judge of this Court and the defendant's bail was continued pending the determination thereof.

## The Indictment (fol. 10, *et seq.*)

The indictment herein contains thirteen counts, the first of which (Count 1) charges that from in or about March, 1931, to and including January 13th, 1937, appellant and others therein named conspired together to commit the crimes of "contriving, proposing and drawing lotteries and keeping, occupying and using places, rooms and apparatus for policy playing". Fifteen overt acts in furtherance of the conspiracy are alleged to have been committed upon dates ranging from March, 1931, to April 25th, 1936.

The remaining twelve counts of the indictment (Counts 2 to 13 inclusive) charge the same defendants with contriving, proposing and drawing and assisting in contriving, proposing and drawing lotteries known under the name of the "numbers game" and "policy", upon certain dates therein specified between May 29th, 1933, and October 22nd, 1935, each count charging a separate violation upon a separate date.

The charge set forth in Count 1 is a misdemeanor, being a violation of Section 580, Penal Law.

The charges set forth in Counts 2 to 13, inclusive, are felonies, being violations of Section 1372, Penal Law.

## The Facts

Omitting non-essential details, the following is a summary of the proof adduced upon the trial in support of the charges contained in the indictment:

For some years prior to 1931, certain gambling games commonly known under the name of the "numbers game" and "policy" were being oper-

ated in the City of New York by persons known as "policy bankers" (fols. 643-647). The bankers employed agents who were called "controllers" and each controller, in turn, employed numerous "collectors" (fols. 649-657). The games were played in the following manner:

The player would select a number containing three digits, from 000 to 999. He would write the number on a slip of paper known as a "policy slip" and hand it to a collector, together with the amount of money which he desired to bet. If the number selected happened to correspond to a combination of figures in the pari-mutuel prices paid that day at a certain race track, the player would receive six hundred times the amount of his bet (fols. 661-666). At one time, the daily total Stock Exchange transactions were used as the basis for determining the winning numbers and, before that time, the daily Clearing House totals were used (fol. 653).

The slips collected by the collectors would be turned over each day to the controllers and then taken to "policy banks" for tabulation (fols. 695-698). Daily settlements were had between players, collectors and controllers and, after winning bets were paid off, commissions were deducted by the collectors and controllers and the balance would go to the bankers (fols. 725-735).

The policy games were a poor man's form of gambling and were operated on every day in the year except Sundays and holidays (fols. 369, 652, 1223-1226).

In 1931, one Arthur Flegenheimer, alias Dutch Schultz, who had theretofore been engaged in various illegal enterprises, decided to take over the "numbers game" or "policy racket". Thereupon, with the aid of one George Weinberg and

one J. Richard Davis, a policy lawyer, Schultz proceeded to coerce and threaten the independent policy bankers who then controlled and operated the games and, by force and strong-arm methods, compelled them to turn over their games to a combination of which he became the head (fols. 4823-4838). Schultz put his own lieutenants in charge of the policy banks and, from that time on, he dominated and controlled the combination and received the major share of the profits derived therefrom (fol. 2300).

In or about April, 1932, some months after Schultz had taken over the business, he allegedly contacted appellant, a Democratic District Leader, and hired him, at a stipulated salary of $500 to $1,000 a week, to use his political influence with the Police Department and with certain Judges to prevent the arrest and prosecution of members and employees of the policy combination (fols. 2129-2150). At that time, according to one of the People's witnesses, Schultz gave appellant $1,000 as an advance payment for his services and thereafter appellant received regular payments as agreed, until some time in 1935, when Schultz told appellant that he was hard-pressed for money to defend a Federal charge pending against him, and appellant accordingly accepted a "reduction" (fol. 2816).

After he was hired, as aforementioned, appellant allegedly used his political influence on behalf of Schultz and his associates whenever called upon to do so. From time to time, various police officers who had molested or threatened to arrest or molest members of the Dutch Schultz gang, were transferred to other precincts, presumably through appellant's efforts or influence. On one occasion, according to Weinberg's testimony, appellant, at Weinberg's request,

communicated with Magistrate Capshaw and induced him to dismiss policy charges pending before him against employees of the combination who had been arrested by the police (fols. 2546, 4917). On another occasion, upon a similar request from Davis, appellant allegedly used his influence with the late Magistrate Erwin, for a similar purpose (fol. 4896). Other testimony was introduced tending to show that appellant interceded with other officials, on behalf of Schultz and his associates (fols. 5027-5030).

Schultz continued in control of the policy combination until October, 1935, when he and several of his henchmen were murdered (fol. 4539). Shortly thereafter, in December, 1935, the policy games were taken over by some "Italians" and the policy banks were moved to New Jersey (fols. 4696-4703). After Schultz's death, Davis fled to New Mexico (fol. 5053) and Weinberg, who had been Schultz's manager in the business, and Harry Schoenhaus, his assistant, became salaried employees of the "Italians" (fol. 4702). Notwithstanding Schultz's demise and notwithstanding the fact that the business had been taken over by other interests, Weinberg testified that he continued to make payments to appellant and that he paid him "maybe seven or eight payments going into 1936" (fols. 2821-2822).

The record in this case contains a vast amount of additional testimony relating to the methods by which Schultz took over the policy games in 1931; to certain schemes devised and employed by Schultz and his associates to cheat the policy players; to certain systems and "dream books" used by players to aid them in selecting winning numbers; to the circumstances under which certain police officers were transferred or demoted; to assistance allegedly rendered to appellant by

Schultz and his associates in connection with political campaigns; to testimony given upon the hearings before Magistrates Capshaw and Irwin and to the propriety of their decisions; and to a variety of other matters which are not pertinent to the issues presented upon this appeal.

## POINT I

**Offenses relating to "policy" games are not subject to prosecution under the provisions of the Penal Law relating to "lotteries".**

In this State, the prosecution and punishment of offenses relating to the game commonly known as "policy" is specifically prescribed by Section 974, Article 88, of the Penal Law, in the following language:

> "A person who keeps, occupies or uses, or permits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing or for the sale of what are commonly called 'lottery policies', or who delivers or receives money or other value consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a 'lottery policy', or for any writing or document in the nature of a bet, wager or insurance upon the drawing or selection, or the drawn or selected numbers of any public or private lottery; or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or selected, or to be drawn or selected, or in what is commonly called 'policy', or in the nature of a bet, wager or insurance, upon the drawing or selection, or the drawn or selected numbers of any public or private lottery; or

> any paper, print, writing, number, device, policy slip, or article of any kind such as is commonly used in carrying on, promoting or playing the game commonly called 'policy'; or who is the owner, agent, superintendent, janitor or caretaker of any place, building or room where policy playing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, *or who aids, assists or abets in any manner in any of the offenses, acts or matters herein named, is a common gambler, and guilty of a misdemeanor.*"

The prosecution of offenses relating to "lotteries" is separately provided for in Article 130, entitled "Lotteries". By Section 1372 of that article, "contriving, proposing or drawing a lottery", or "assisting" therein, is made punishable as a felony. Various other accessory acts committed in connection with the conduct of lotteries are designated misdemeanors (Secs. 1373-1386).

In construing these statutes, the courts have invariably differentiated between "policy" and "lottery" and have uniformly held that offenses relating to one may not be prosecuted under the statutes directed against the other.

Thus, in *People* v. *Bloom*, 248 N. Y. 582, this Court reversed a conviction for unlawfully possessing policy slips, upon the ground that:

> "although the defendant's gift enterprise constituted a lottery (Penal Law, section 1370) the certificates in his possession were not shown to be policy slips, and *defendant was not shown to be engaged in the game or scheme commonly known as policy.*" (Italics ours.)

The same distinction was recognized and applied in *People* v. *Lyttle,* 225 App. Div. 299, affirmed 251 N. Y. 347, where the Court found that the game in which the defendant was engaged:

> *"was more in the nature of a lottery than of policy".*

Again, in *People* v. *Edelstein,* 231 App. Div. 459, the Appellate Division of the First Department (the same Court which affirmed the conviction in the case at bar) pointed out that, in the *Bloom* case:

> "The Court of Appeals has held that there is a substantial difference between policy and lottery."

In *People* v. *Weber,* 245 App. Div. 827, the Appellate Division of the Second Department held squarely that the operator of a policy game could not be prosecuted under Section 1372 of the Penal Law for contriving, proposing and drawing a lottery. The Court said as follows:

> "The proof is clear that appellant was guilty of a violation of sections 974 and 975 of the Penal Law in operating a 'policy game', but such violation constitutes a crime which must be distinguished from violations of the criminal law respecting lotteries included within article 130 of the Penal Law, for the violation of one of which, section 1372, he has been indicted and convicted."

In a still later case, *Matter of Praither,* 246 App. Div. 846, affirmed by this Court without opinion at 271 N. Y. 598, it was held that a statute giving a Court of Special Sessions jurisdiction to hear "lottery" charges did not authorize it to hear "policy" charges. The Court said:

> "Violations of section 974 of the Penal Law, dealing with the game of policy, have

> been differentiated from lottery, provided for under sections 1370-1386 of the Penal Law."

In each of these decisions the Court recognized a clear-cut distinction between policy and lottery, based upon the provisions of the Penal Law. In the case at bar, however, the Court has held that there is no difference between policy and lottery, and has ruled that the existence of the policy statute did not preclude appellant's prosecution under the lottery statute,—a ruling in direct conflict with all previous decisions.

The theory advanced in support of the conviction is that policy, like lottery, is "a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance" (Penal Law, Section 1370). The fundamental weakness of that theory is that it completely ignores the fact that the Legislature has specifically differentiated between policy and lottery, for the purpose of criminal prosecution.

The statutory definition of lottery is unquestionably broad enough to include policy, as well as every other form of gambling. All gambling schemes and devices are essentially "schemes for the distribution of property by chance." The law is well settled, however, that the lottery laws of this State were never intended to apply to any form of gambling except lotteries, as that term was commonly understood when the lottery laws were originally enacted. In referring to the lottery provisions, this Court, in *People ex rel. Lawrence* v. *Fallon*, 152 N. Y. 12, 17, said as follows:

> "That statute defines lottery as a scheme for the distribution of property by chance,

> among persons who pay or agree to pay a valuable consideration for the chance. It is obvious from the language of this statute, and the circumstances existing at the time of its passage, that it was not intended to include within its provisions every transaction which involved any degree of chance or uncertainty, *but its plain purpose was to prohibit and punish certain well-known offenses which had existed and been regarded as crimes before the enactment af that law.*" (Italics ours.)

The same conclusion was reached in *In re Dwyer,* 14 Misc. 204, where the late Judge Gaynor pointed out that the lottery provisions constituted a distinct line of legislation, separate and apart from the statutes relating to other forms of gambling. He wrote, in part, as follows, at page 206:

> "Thus there existed two distinct lines of legislation on two distinct subjects,—two distinct systems of statutes, the one on lotteries and the other on betting and gaming,—no one ever suggesting that the statutes in the one system also created or covered the offenses created and covered by the other."

It should be borne in mind that the lottery laws were enacted long before the game of "policy" came into existence. When the special statute relating to policy was enacted and placed in the article dealing with betting and gaming, the legislature obviously recognized that policy and lottery were different *types* of gambling. Policy is essentially a *betting* game. The record in this case is replete with testimony showing that, in policy, the player *bets* a given amount upon a number which he selects. If the number wins, he is paid off at certain stipulated odds. In a lot-

tery, on the other hand, no bets are made and no odds are quoted. The player purchases a ticket bearing a number and, if the number is drawn, he receives a proportionate share of the prize offered. Moreover, in policy, as many players can win as select the winning number. In lottery, howeved, only one person in a class can share in the prize or prizes distributed.

Another characteristic peculiar to policy was judicially recognized by this court in *People* v. *Adams,* 176 N. Y. 351, when it said, in referring to Section 344a of the Penal Code, now Section 974 of the Penal Law:

> "Section 344a immediately follows a section dealing with keeping betting and gaming establishments, and is an amplification of the law looking to the suppression of gambling, it being aimed at the game of 'policy' so-called, which offered an opportunity to the poorer classes of making trifling bets and who could ill afford to lose their small earnings." (p. 359)

The same characteristic—that policy was a poor man's game and involved bets of trifling sums—was repeatedly stressed by the prosecutor upon the trial of this case (fols. 369, 652).

Thus, it is manifest that there was sufficient ground for the Legislature to differentiate between policy and lottery and to justify it in according "policy" special legislative treatment. Whatever reason may have motivated the Legislature, the fact that it did enact a statute relating specifically to "policy" indicates clearly that it did not intend that "policy" should be prosecuted under the existing "lottery" statute.

Further evidence of the intent of the Legislature to differentiate between policy and lottery may be found in the fact that prior to 1926,

policy, like lottery, was a *felony*. In that year, by amendment to Section 974, the Legislature reduced the crime to a misdemeanor, but made no change whatever in the penalty prescribed by Section 1372 for contriving, proposing and drawing lotteries. The purpose of the amendment, as pointed out by Judge Pecora in his decision overruling the demurrer herein (fol. 176) was to bring policy violations "*within the jurisdiction of the Courts of Special Sessions and thereby render prosecutions swifter and make convictions easier by making the penalties less drastic*". The fact that the Legislature did not similarly amend Section 1372 is further proof that that section was never intended to apply to policy, as, otherwise, the amendment of Section 974 would have been an idle gesture and could not have accomplished the purpose for which it was enacted.

As authority for the contention that policy may be construed as lottery notwithstanding the existence of a special statute relating to policy, the People rely mainly upon *Wilkinson* v. *Gill*, 74 N. Y. 63, where the Court permitted a recovery of moneys lost in policy playing, under a statute providing for a civil penalty of double the amount paid for a share or interest in an "illegal lottery". A reading of the decision in that case readily demonstrates that the principle upon which it was decided has no application here.

In the *Wilkinson* case the Court was not called upon to decide whether policy and lottery were different *types* of gambling—for the purpose of determining which of two criminal statutes applied. As the Court pointed out, the statute there sued upon provided that "every lottery,

*game or device of chance in the nature of a lottery* other than such as have been authorized by law, shall be deemed unlawful,'' and it permitted a recovery solely upon the basis that policy had the same essential features as a lottery and was, therefore, within the broad purposes of the statute.

The Court indicated clearly that its ruling would not apply in a criminal case—a fact which was also recognized by Judge Gaynor in *In re Dwyer, supra.* When the defendant in the *Wilkinson* case claimed that the Legislature had created a distinction between policy and lottery by the enactment of Chapter 504, Laws of 1851 (the original statute making policy a criminal offense), the Court expressly held that, while the distinction applied to *criminal* prosecutions, it did not affect the recovery of *civil* penalties. In referring to the civil penalty statute upon which the suit was based, the Court said:

> "That section is general, but very comprehensive, and although the particular device adopted by the defendant may not then have been practiced, yet if its comprehensive terms embraced it, the subsequent passage of an act making such device criminal cannot affect its provisions. *There is no authority for holding that a criminal remedy by one act supersedes another act giving a civil remedy.*"

The plain import of this language is that, if the statute there involved were a *criminal* statute prohibiting lottery, the subsequently enacted statute relating to policy *would supersede it*, and that the criminal penalty prescribed by the policy statute would then apply instead of the one provided by the earlier statute affecting

lottery. That is exactly what the appellant claims in this case. Instead of supporting the People's contention, the *Wilkinson* case is direct authority to the contrary.

Another case upon which the prosecution seems to place great reliance as authority for its contention is *Forte* v. *United States*, 83 Fed. (2nd) 612. In that case the operators of a "numbers game" similar to that involved in the instant action were convicted under a statute of the District of Columbia which provided as follows:

> "If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing any policy lottery or policy shop, or shall sell or transfer any ticket, certificate, bill, token or other device purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize, to be drawn in any lottery, or in the game or device commonly known as policy lottery or policy * * * he shall be fined not more than five hundred dollars or be imprisoned not more than three years, or both."

It will be observed that this statute prohibits *both policy and lottery* and prescribes exactly the *same penalty* for either. Thus, the statutory situation was entirely different from that which exists in this State, where the contriving, proposing and drawing of a lottery is a felony, while the commission of offenses relating to policy are only misdemeanors.

The question involved in that case was not whether policy was lottery, but whether the prohibition of the statute extended to the "numbers game", the defendant contending that the "numbers game" was unknown at the time the

statute was enacted. The Court rejected that contention and said:

> "Appellant's contention that the prohibition of the statute is limited to the so called 'policy game' cannot be sustained."

The question which was involved in the *Forte* case—"Is the 'numbers game' a 'policy game'?" —is not even in issue in the case at bar. Appellant concedes that "numbers games" are "policy games". He contends, however, that, being "policy games", they must be prosecuted under the statute relating to "policy games" and not under the statute pertaining to "lottery".

In the *Forte* case, by way of dictum, the Court states that even if policy were not prohibited *by name* in the District of Columbia statute, it could be construed as lottery for the purpose of criminal prosecution. Unquestionably, in the absence of a special statute relating to policy, that would be true. If there were no penal statute in the State of New York specifically relating to policy, then, undoubtedly, the operator of a policy game would be subject to prosecution under the lottery laws. *But, since the Legislature enacted a law directed particularly and exclusively against policy, there is no basis for contending that policy may be prosecuted under the lottery laws, rather than under the statute expressly prohibiting policy.*

It is true that in certain other states, policy games have been held to be subject to prosecution under statutes prohibiting lotteries. Unlike New York, however, those states do not have a separate statute directed against policy. In those states the only statute available for the prosecution of policy games is a lottery

statute, and there is no statutory basis for any distinction between policy and lottery. Hence, the courts in those states are not confronted with the question at issue here, namely, can policy games be prosecuted under the lottery laws *notwithstanding the existence of a special statute relating to policy?*

The decision of the court below rests upon an erroneous assumption that *"policy was originally embraced within the lottery section"* (fol. 11576). As a matter of fact, policy and policy playing had not even been heard of when the original lottery statute was enacted. Lotteries were prohibited in this state as early as 1721, during the colonial days, whereas the first law against policy was not enacted until 1851 (Chapter 504). Policy was never taken out of the lottery statute, because it was never in it. From its inception, the policy statute was intended to apply exclusively to the particular scheme or method of betting on selected numbers called and known as "policy", and it has always been included within the provisions of the article of the Penal Law dealing with *"Betting and Gaming"*. The lottery statutes, on the other hand, were always included in a separate and distinct article entitled and devoted exclusively to "Lotteries", and were never identified with or intended to apply to any of the other forms of gambling prohibited in the "Betting and Gaming" article. (*People ex rel. Lawrence v. Fallon, supra; In re Dwyer, supra*).

The court below is also in error when it suggests, in its Per Curiam opinion, that:

> "Because difficulty in securing convictions for felony was encountered, the Legislature made policy, originally included in the crime of lottery, a misdemeanor. By

> so doing, there was no intention evidenced to repeal, alter or amend the original lottery section. The new section neither 'explicitly' referred to the old, nor did it directly repeal or amend it (Section 2500. Penal Law)."

It is apparent that the court confused the enactment of the original policy statute in 1851 with the subsequent reduction of penalty in 1926, seventy-five years later. There is no evidence of any "difficulty in securing convictions" of *lottery violations*, either at the time of the enactment of the original policy statute or at any other time. It is true, that when policy games became prevalent, in 1926, the Legislature, in order to facilitate convictions, reduced *that crime* from a felony to a misdemeanor. But that reduction in penalty had no connection whatsoever with the lottery statute or with lotteries.

The rule against repeal by implication (Penal Law, Section 2500) has no bearing upon the question involved in this case. Appellant does not claim that the enactment of the policy statute or its subsequent amendment in 1926 was intended to "repeal, alter or amend" the *lottery section*. On the contrary, appellant contends that in dealing with policy and lottery, the Legislature was dealing with two different subjects of criminal prosecution, and that its enactment or amendment of the statutes relating to one, did not in anywise affect the statutes relating to the other. Until the affirmance of the conviction herein, all of the appellate courts in this State, including the court below, recognized the distinction between the two subjects. (*People v. Bloom, supra; People v. Lyttle, supra; People v. Edelstein, supra; People v. Weber supra; Matter of Praither, supra*).

The Court below also cites the familiar principle of law that:

> "Penal statutes covering substantially the same offenses may stand together (People *v.* Dwyer, 215 N. Y. 46, 52) and that where there are several sections 'the District Attorney may prosecute for the felony or misdemeanor, as he chooses' (People *v.* Bord, 243 N. Y. 595, 596)."

Appellant has no quarrel with that rule, but contends that it has no application under the facts of this case. It is perfectly true that where there are two sections prohibiting the *same crime*, one as a felony and the other as misdemeanor, the District Attorney may prosecute under either section. Thus, in the *Bord* case, it appeared that the crime of incest, under the Penal Law, was a felony. The Domestic Relations Law, however, declared the same crime to be a misdemeanor, and this Court very properly held that the defendant could be prosecuted under either statute as, under those circumstances, it was not possible to determine whether the Legislature intended incest to be a misdemeanor or a felony. In the case at bar, on the other hand, there is no inconsistency between the two statutes, as they relate to two different subjects, both by express provision and under uniform judicial ruling. To hold that policy is a *felony* would be directly contrary to the declared intent of the Legislature in making it punishable as a *misdemeanor.*

While there can be no doubt as to which of the two statutes in suit apply to the acts allegedly committed by defendant, the law is well settled that even where such a doubt exists, it must be

resolved in favor of the defendant. In an analogous situation, this Court said as follows:

> "Even if there was doubt with respect to the question as to which of these two sections applies to the wrongful act with which the defendant was charged, we would, I think, under all the principles and analogies of the criminal law, be required to hold that it was a misdemeanor rather than a felony. Courts are not justified in giving a strained or extreme construction to criminal statutes in order to bring some particular act within their scope, when it is plain that the same act is covered by another statute defining offenses of an inferior grade."
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> *People* v. *Knatt*, 156 N. Y. 302, 305.

As further evidenced by its Per Curiam opinion, the Court below adopted the fallacious theory that the specific designation of policy as a misdemeanor could be disregarded, by reason of the fact that policy is "a scheme for the distribution of property by chance" and therefore falls within the general definition of lottery, as expressed in Section 1370 of the Penal Law. As already indicated above, the statutory definition of lottery covers all forms of gambling. It is the root of the tree from which all gambling grows, but the tree has many branches. The branches are similar in many respects, yet each branch has some individual characteristic which was recognized by the Legislature as differentiating it from the other. That differentiation cannot be disregarded without destroying the constitutional prerogative of the Legislature.

It is apparent, also, that the Court below failed to appreciate the true import of the decisions in *People ex rel. Lawrence* v. *Fallon*, *supra*, and *In re Dwyer, supra*. It is true that

those cases involved a type of gambling other than policy. But the type of gaming involved is wholly immaterial under the principle upon which the cases were decided. The Court specifically limited the application of the lottery law to "certain well known offenses which had existed and been regarded as crimes before the enactment of that law". (*People ex rel. Lawrence* v. *Fallon, supra,* at p. 17.) In each instance, the Court held that none of the offenses covered by the *"Betting and Gaming"* provisions could be brought within the lottery statute, notwithstanding that they were "schemes for the distribution of property by chance". Obviously, that ruling applies to policy, since policy, also, is one of the offenses specifically covered in the "Betting and Gaming" provisions of the Penal Law.

The *rationale* of those decisions is disclosed by the following excerpt from the opinion in the *Dwyer* case, at page 208:

> "The legislature having specifically singled out racing for stakes, and made it a distinct crime, and prescribed a punishment for it, it cannot be called some other crime, and punished as such."

The particular type of gaming sought to be prosecuted under the lottery laws in the *Dwyer* case happened to be "racing for stakes". But the same principle would apply if the game of policy had been involved instead, since the legislature also *"specifically singled out"* policy and *"made it a distinct crime, and prescribed a punishment for it."* Upon the same theory, policy *"cannot be called some other crime and punished as such."*

The opinion of the Court below reveals a serious mistake of fact concerning the issue involved

in *People* v. *Weber,* 245 App. Div. 827, where the conviction of a policy game operator under an indictment charging him with contriving, proposing and drawing a lottery, was reversed by the Appellate Division of the Second Department. In commenting upon that decision, the Court below in its Per Curiam opinion, says:

> "In People *v.* Weber (245 App. Div. 827) the question was not whether policy is lottery, but whether possession of lottery slips was sufficient to justify a conviction for contriving, proposing or drawing a lottery."

A mere reading of the decision in the *Weber* case shows that this statement is wholly incorrect.

In holding that the defendant's conviction of contriving, proposing and drawing a lottery was improper, the Appellate Division of the Second Department expressly assumed that the proof was sufficient to show that he was the *operator* of the game and said:

> "The proof is clear that appellant was guilty of a violation of sections 974 and 975 in *operating a 'policy game'* but such violation constitutes a crime which must be distinguished from the violation of the criminal statutes respecting lotteries." (Italics ours.)

In the light of this clear and unmistakable language, it is difficult to understand upon what theory the Court below finds that the issue was not "whether policy is lottery, but whether possession of lottery slips was sufficient to justify a conviction for contriving, proposing or drawing a lottery." Although it is unnecessary to go behind the opinion in the *Weber* case to ascertain the basis upon which the conviction was reversed, recourse to the Record on Appeal

shows that it was not even contended that the proof showed only "possession of lottery slips" and not "operation". That the only issue in the case was whether policy can be prosecuted under the lottery laws, is shown by the following excerpt from the Record on Appeal in the *Weber* case:

At folio 689:

> "Mr. Kean (For the People): I ask your Honor to charge that policy is one of other games that comes within the provisions of Section 1370 of the Penal Law as to lottery.
> The Court: I charge that, provided the Jury find that the testimony given by the officers as to what policy is and how it is played is true and correct.
> Mr. Kean: No other requests.
> Mr. Ryan (Defendant's Counsel): I except to that part of the charge, if your Honor please, and I ask your Honor to charge the Jury that the statutes and the Code recognize a distinction between policy and lottery, as being distinct and separate crimes, in that the People of the State of New York have to prove that distinction before the jury can convict the defendant as charged in this indictment.
> The Court: No, I decline to charge that.
> Mr. Ryan: Exception."

The case at bar was submitted to the jury upon the same erroneous theory. Judge Nott charged as follows (fol. 11162):

> "I will charge you under the law that the operation known as policy is a lottery—one sort of a lottery."

It is futile, therefore, to attempt to distinguish the *Weber* case from the present case, as the identical question was involved: Is the operator of a policy game guilty of contriving, proposing or drawing a lottery?

The disposition of the case at bar involves much more than the mere question of whether policy is to be construed as lottery. It involves the broader question of whether the District Attorney or the Legislature shall prescribe the penalty for prohibited acts. There are many instances in which particular acts declared to be misdemeanors might be construed as felonies under statutes which were never intended to apply to such acts. Just such a situation was present in *People* v. *Knatt, supra,* where this court said:

> "Courts are not justified in giving a strained or extreme construction to criminal statutes in order to bring some particular act within their scope, when it is plain that the same act is covered by another statute defining offenses of an inferior grade."

Here, the Legislature, by Section 974 of the Penal Law, has specifically declared that offenses relating to "*policy*" shall constitute misdemeanors. Yet, in order to avoid the effect of the statute of limitations, the District Attorney has been permitted to prosecute such offenses as felonies, under an earlier statute prohibiting "*lotteries*", which was never intended to apply to the game commonly known as "policy", and the "*plain purpose of which was to punish certain well-known offenses which had existed and been regarded as crimes before the enactment of that law*" (*People ex rel. Lawrence* v. *Fallon, supra*). To uphold such action would not only be contrary to the most fundamental principles of law, but would cause chaos and confusion in the future administration of the criminal law.

## POINT II

**The proof fails to establish that the defendant Hines "assisted in contriving, proposing or drawing a lottery", within the meaning of Section 1372 of the Penal Law.**

The crime of which the defendant Hines has been convicted under counts 2 to 13 of the indictment is defined by Section 1372 of the Penal Law, as follows:

> "A person who contrives, proposes or draws a lottery, or assists in contriving, proposing or drawing the same, is punishable by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both."

The scope of the statute, it will be observed, is expressly limited to three specific acts or incidents involved in the operation of a lottery, and the application of the statute is made dependent upon the commission of one or more of the three prohibited acts. A similar statute was construed by this court in *People ex rel. Lichtenstein* v. *Langan,* 196 N. Y. 260, 267, where Chief Judge Cullen, speaking for the court, said:

> "While in reality the statute is directed against gambling, not against its incidents, the law has laid hold of certain incidents on the theory that those being prohibited the evil itself will be suppressed because of the impracticability of carrying on gambling on a large scale without some of the accessories denounced by the statute. How far this plan has proved successful in operation is for the Legislature, not the courts, to determine,

> and we cannot hold that the act of the relator constitutes a crime unless it falls within the terms of the statute."

To bring the defendant Hines "within the terms of the statute" it was not sufficient, merely, to show that he aided or assisted in the *general* operation of the alleged lotteries. It was incumbent upon the People to show that he participated in one or more of the three specifically prohibited acts of "*contriving, proposing or drawing.*" Otherwise, he could not be held guilty of the crime defined by the statute under which he was indicted.

The meaning of the term "contriving, proposing or drawing a lottery" is reasonably plain: To conduct a lottery, it is first necessary to create or devise a plan of operation. Those who do so, "contrive" the lottery. The next step is to launch the enterprise or set it on foot. That act constitutes the "proposing" of the lottery. The "drawing", obviously, is the mechanical act by which the winner of the prize or prizes in the lottery is determined. Each of these acts is an integral part of the lottery itself, as distinguished from collateral acts which merely aid in the general operation of the lottery or further the interests of the operators.

As aptly stated by Mr. Justice Pecora in the opinion rendered by him on the overruling of the demurrer herein, the person who assists in contriving, proposing or drawing a lottery must be a "*direct agent in the lottery machinery*" (fol. 177) and an "*essential element in the scheme*" (fol. 179).

In the case at bar, it was not claimed that the defendant Hines was engaged in the direct operation of the policy games in suit or that he

participated in any way in the contriving, proposing or drawing thereof. It was charged only that he aided in the general scheme, by protecting the operators and their employees from arrest and prosecution. Those acts could not constitute a violation of Section 1372 of the Penal Law, as they were not a *constituent part* of "contriving, proposing or drawing a lottery". No matter how helpful his services may have been in the general scheme, he was neither "a direct agent in the lottery machinery", nor an "essential element" therein.

Despite the specific limitation contained in the statute, the trial judge refused to attach any significance to the term "contriving, proposing or drawing", and submitted the case to the jury upon the theory that proof of any acts of assistance or cooperation in the general running of the policy games was sufficient to convict. He charged the jury as follows (fol. 11144):

> "If the scheme was a general one and they all went into it to carry out this general purpose of a combination that was to run the lottery business, then each of them, *no matter what part he played,* so long as the part aided, abetted or assisted in that general scheme, is liable for every occasion on which a lottery policy was run under that scheme on any day it was run." (Italics ours.)

In adopting this theory, the court clearly misinterpreted the language and intent of the statute. Section 1372 does not prohibit the general running or conduct of a lottery. It expressly limits the acts prohibited thereby to the contriving, proposing or drawing of the lottery. As pointed out by Chief Judge Cullen in *People ex rel. Lichtenstein* v. *Langan* (*supra*), the court is not concerned with the reasons which actuated the

Legislature in limiting the statute to certain "incidents" of the lottery, instead of making it applicable to the lottery itself. It must take the statute as it stands, and, unless the defendant's acts fall with its specific terms, he cannot be held guilty of the crime defined thereby.

The fact that the statute expressly prohibits "*assisting*" in the contriving, proposing or drawing of a lottery does not in anywise enlarge its scope so as to make it applicable to acts which do not relate directly to contriving, proposing or drawing. It is not disputed that, under Section 2 of the Penal Law, one who aids, abets or assists in the commission of a crime is just as guilty as the person who commits the crime. In order to invoke the provisions of that section in this case, however, it was not sufficient merely to show that the defendant aided, abetted or assisted in the general conduct or running of a lottery, since that is not the crime defined by the statute under which he was indicted. On the contrary, to bring him within the terms of that statute, it was necessary to show that he aided, abetted or assisted in either of the specifically prohibited acts of contriving, proposing or drawing.

In ruling upon defendant's motion to dismiss the indictment, at the close of the People's case, the trial judge stated as follows (fol. 6823):

> "In this case the defendant is not charged with assisting in running the actual operation or the business. It is charged that he aided, abetted or assisted the drawers, contrivers and proposers of the lottery by certain acts in connection with the judiciary and police."

While this statement applies to the *conspiracy* count of the indictment, it does not correctly set forth the charge under the *felony* counts. As

already demonstrated, under Section 1372 the question is not whether a defendant aids or assists the operators of a lottery in the general running of the business. The controlling question is whether he assists in the *contriving, proposing* or *drawing* of the lottery. His assistance in any other part of the business would not and could not bring him within the terms of the statute. "Acts in connection with the judiciary and police", being in the nature of obstruction of justice, unquestionably constitute a crime. They do not, however, constitute the crime of which the defendant Hines was accused by the indictment in this case.

The theory that any acts of assistance in the general operation of a lottery constitute a violation of Section 1372 is further contradicted by the fact that various acts other than "contriving, proposing or drawing" are separately prohibited and made punishable as misdemeanors, in the succeeding sections of Article 130 of the Penal Law. Thus, by Section 1373, the selling of lottery tickets is specifically prohibited and classified as a misdemeanor. If providing protection "assists the drawers, contrivers and proposers of the lottery", then, obviously, selling tickets in the lottery does likewise. If anything, the selling of the tickets is infinitely more vital and essential than the providing of police protection. Lotteries can and have functioned without protection. But the very life and existence of the lottery depends upon the selling of the tickets.

The court below, in its Opinion of affirmance, cites certain dictionary definitions in an effort to show that the word "contrive" encompasses not only those who create or devise the lottery, but also those who participate in the manage-

ment and conduct thereof. If that were the intended meaning of "contrive", it would have been entirely unnecessary for the Legislature to separately prohibit "proposing" and "drawing", since both of those acts are necessarily involved in the conduct of the lottery. Moreover, such a construction of the term "contrive" would be wholly inconsistent with the enactment of the sections relating to the various other acts also necessarily involved in the conduct of lotteries (Penal Law, Sections 1373-1386).

Whatever may be the precise meaning of the term "contrive", however, it is manifest that it was not intended to encompass persons who were not direct agents in the lottery machinery and who were not involved in the actual instituting or administering of the lottery. That theory is borne out by the very decision cited by the court below (*State* v. *Wong Took*, 147 Wash. 190; 265 Pac. 459). In that case the defendants sought a reversal of a conviction for assisting in contriving, proposing and drawing a lottery, upon the ground that they had no proprietary interest in the lottery and were mere employees. The trial court had charged the jury that if they believed the evidence, *which showed that the defendants were engaged in the actual running of the lottery*, it was immaterial whether they were the proprietors or only "employees, servants, agents or clerks". In commenting upon the charge, the Appellate Court said as follows:

> "The instruction was entirely appropriate and correct under the facts of the case to the effect that the appellants conducted the enterprise in the back room of a store building and in doing so, they, from time to time and interchangeably, served in the several

> capacities of doorkeeper, marking tickets and duplicates and taking in and paying out money."

It will be noted that the Court places the emphasis of its ruling upon the fact that the defendants were engaged in the *physical administration and operation* of the lottery. That controlling factor is conspicuously absent in the case at bar, where the defendant's acts were admittedly performed in connection with matters wholly outside of the lottery machinery. His acts were not a constituent part of "contriving, proposing or drawing a lottery", irrespective of how beneficial or advantageous they may have been to those who did contrive, propose or draw the lottery.

## POINT III

**Prejudicial error was committed by the Court**

**(1) In receiving into evidence the testimony adduced before Magistrates Capshaw and Erwin upon the hearing of certain charges against employees of the so-called "policy combination",**

**(2) In submitting to the jury for determination as a question of fact whether the Magistrates were right or wrong in dismissing the charges.**

The claim that the defendant provided protection from criminal prosecution to the members of the so-called "policy combination" is predicated upon the alleged improper dismissal of

certain cases in the Magistrates' Court of the City of New York. As appears from the evidence, the police arrested certain employees of the combination and charged them with possessing policy slips. Subsequently, after preliminary hearings in the Magistrates' Court, the charges were dismissed for lack of evidence. There were three cases in all, two of which were disposed of by Magistrate Hulon Capshaw, and the third by the late Magistrate Erwin. The People claimed that the defendant had "fixed" the cases, and two of its witnesses—J. Richard Davis and George Weinberg—testified that, at their request, the defendant had communicated with the Magistrates in advance of the hearings and had arranged for the dismissal of the charges.

After proving the arrests and the pendency of the charges, the People were permitted, over objection and exception, to read into evidence a stenographic transcript of each of the hearings (fols. 887, 5932, 6464). Immediately after the reading of the first transcript, the District Attorney requested the Court to charge the jury that, upon the evidence before him, the Magistrate was under a "legal duty" to hold the defendants and that he had acted improperly in dismissing the charge (fol. 1137). The Court denied the request, but submitted the question to the jury for determination as an issue of fact. The following are excerpts from the Court's charge to the jury:

At folio 11199:

> "I shall tell you what the law is as to possession and then you are to determine whether the Magistrate was right in discharging those men or whether he was wrong * * *"

At folio 11204:

> "And the question therefore is: did these two Magistrates, in dismissing these three cases, have sufficient cause to believe that the defendants committed the act?"

At folio 11211:

> "Therefore, it is for you to say whether the Magistrate had evidence before him on on which he might have formed a reasonable belief that they were connected, that they were committing this crime."

At folio 11213:

> "It is for you therefore to say whether the Magistrate was justified under the law or not in discharging that number of defendants, I think it was twenty-six."

Under these instructions, the jury was obviously required to pass upon the legal propriety of the dismissal of the charges, based upon the evidence before the Magistrates. Whether the Magistrates were "right or wrong" was made a direct issue of fact to be considered by the jury as an element in deciding whether the defendant improperly influenced the Magistrates.

Appellant respectfully submits that the correctness of the Magistrates' ruling was not a relevant issue in this case. If the defendant arranged in advance for the dismissal of the charges, as testified to by Davis and Weinberg, he was guilty of improper conduct, whether or not the Magistrates were legally justified in dismissing the charges under the evidence before them. On the other hand, if he was not instrumental in causing the dismissals, he was not chargeable with them, no matter how improper and indefensible they were from a legal stand-

point. Consequently, whether the dismissals were legally correct or incorrect had no bearing or probative value upon the question of whether the defendant approached the Magistrates, as claimed.

A similar question was presented in the recent prosecution of Martin T. Manton, former Chief Judge of the Circuit Court of Appeals. In that case Judge Manton attempted to defend himself against a charge of corruption in connection with the rendition of certain decisions, by showing that the decisions were legally correct. Both the trial court and the appellate court held, however, that it was wholly immaterial that a decision rendered pursuant to a corrupt agreement was legally sound. (*U. S.* v. *Manton,* 107 Fed. (2nd) 834, 845.) Although the situation in the case at bar is reversed, the same principle applies. Obviously, the fact that a Judge renders an incorrect decision is no indication that he is dishonest or that some one influenced him to make it. It was wholly improper, therefore, for the Court to direct the jury to consider the legality of the Magistrates' actions in determining the defendant's guilt, and to instruct the jury that it had "evidentiary" value in the case (fols. 11218-11219).

It is true that, under Judge Nott's charge to the jury, the legal correctness of the Magistrates' decisions was not the *sole* issue upon which the defendant's guilt depended. It is true that the jury was also instructed to determine whether the defendant Hines caused the alleged improper dismissals. The effect of that instruction was nullified, however, by Judge Nott's refusal to charge, as requested by defendant's counsel, that the jury could not find that Hines caused the dismissals unless it believed the testi-

mony of the witnesses Davis and Weinberg (fol. 11261). It must be borne in mind that the only testimony which in anywise connected Hines with the three Magistrates' Court cases in question, came from the lips of Davis and Weinberg. The only inference that the jury could reasonably draw from Judge Nott's refusal to charge as requested, therefore, was that, even if it placed no credence in the testimony of Davis or Weinberg, it could still find Hines guilty upon the basis of the legal impropriety of the dismissal of the charges in the Magistrates' Court.

It cannot be properly contended that only harmless error was committed in receiving the Magistrates' Court testimony into evidence and in asking the jury to determine therefrom whether the Magistrates were right or wrong in discharging the defendants. Davis and Weinberg, the only witnesses who testified against Hines with respect to those cases, were disreputable underworld characters. Davis was a disbarred lawyer, and Weinberg was a convicted thief (fol. 2912). Both admitted that they had perjured themselves on many prior occasions (fols. 2914, 5145). Moreover, both Davis and Weinberg had pleaded guilty to the indictment herein and were obviously testifying against Hines, in the expectation of receiving consideration for themselves. Under these circumstances, it was most important that no extraneous or irrelevant matter be permitted to becloud the jury's consideration of the real issue, to wit: Did the defendant communicate with Magistrates Capshaw and Erwin, as testified to by Davis and Weinberg?

Instead of limiting the evidence to that question, the Court made the alleged legal impropriety of the dismissals in the Magistrates'

Court the dominant issue in the case. Throughout the trial, great stress was laid upon the violation of duty on the part of the Magistrates in dismissing the charges, in the light of the apparent sufficiency of the evidence before them, showing constructive possession of policy slips. Judge Nott personally cross-examined Magistrate Capshaw and plainly indicated that he disagreed with the Magistrate as to his theory of the law of constructive possession. The same subject was repeatedly referred to, both in the summation of the District Attorney and in Judge Nott's charge to the jury. In short, the question of whether the defendant had anything to do with the Magistrates' Court cases was completely subordinated to the issue of whether or not the evidence before the Magistrates was legally sufficient to show constructive possession of policy slips and whether they erred in dismissing the charges.

By asking the jury to pass upon the legal propriety of the Magistrates' decisions, the Court made the defendant answerable for any mistakes the Magistrates might have made and placed upon the defendant the unfair burden of attempting to justify their decisions from a legal standpoint, lest the jury infer his guilt therefrom. Under the Court's charge, the jury had no alternative but to find that the charges had been improperly dismissed by the Magistrates. By the same token, the defendant's conviction was a foregone conclusion, since the Court, in effect, instructed the jury that it could infer defendant's guilt from the improper dismissal of the charges, even if it placed no credence in the testimony of Davis or Weinberg.

The devastating effect of injecting into this case the question of whether Magistrates Cap-

shaw and Erwin had properly dismissed the charges before them, cannot be underestimated. The constant reference to the apparent sufficiency of the evidence, and the conflict between Judge Nott and Magistrate Capshaw as to law of constructive possession, unquestionably exaggerated the importance of that question in the mind of the jury. The logical effect of submitting to the jury for its determination the question of whether the Magistrates were "right or wrong" in dismissing the charges, was to make the jury's verdict dependent upon its finding in that respect. Under the Court's charge, if the jury found that the Magistrates' decisions were legally incorrect, they were at liberty to infer not only that the Magistrates were dishonest, but that the decisions were the result of corrupt influence on the part of the defendant. Thus, the legal sufficiency of the evidence before the Magistrates was made an essential element in the determination of the defendant's guilt, although it was a circumstance clearly beyond his control.

In his charge to the jury, Judge Nott indulges in a lengthy dissertation upon the fallibility of Judges and the danger of attributing improper motives to the author of an unsound decision (fols. 11216-11220). Judge Nott's action in this case was directly contrary to the theory which he expounds. Under that theory, the fact that Magistrates Capshaw and Erwin decided incorrectly could have no "evidentiary value" in determining whether they were corruptly influenced (fol. 11219). In referring to the Magistrates' Court testimony, Judge Nott asks himself "Why was it all let in?" (fol. 11216). The question is quite appropriate, in the light of his concession that an erroneous decision does not

imply dishonesty. If that be so, why was the legal correctness of the decisions of Magistrates Capshaw and Erwin made an issue in this case and why was the jury instructed to determine whether the Magistrates were "right or wrong" in discharging the defendants, *upon the evidence before them?*

The harmful effect of Judge Nott's action might have been lessened to some extent, if he had charged, as requested by defendant's counsel, that in order to arrive at a conclusion that the complaints in the Magistrates' Court were dismissed through defendant's corrupt influence, the jury must at least believe the testimony of Davis and Weinberg—the only witnesses who had given any direct testimony on the subject. The jury might then have understood that, even if the decisions of the Magistrates were wrong, it could not infer that the defendant was responsible therefor, *unless Davis and Weinberg were telling the truth.* When Judge Nott eliminated the necessity of believing the testimony of Davis and Weinberg, by refusing to charge as requested, he conveyed the unmistakable impression to the jury that it could infer the defendant's guilt from the mere fact that the charges had been improperly dismissed by the Magistrates, since there was no other testimony in the case upon which the jury could come to such a conclusion.

Incidentally, it should be noted that, in refusing to charge as requested with respect to Davis and Weinberg, Judge Nott endorsed and adopted the position taken by the District Attorney in summation, that the jury could convict Hines upon the records of the Magistrates' Court hearings alone, and that *"You don't even need the testimony of Davis and Weinberg."* (fol.

10853). That statement by the District Attorney made the charge requested by defendant's counsel particularly appropriate and necessary, and made the refusal to so charge infinitely more damaging and prejudicial to the defendant.

In the Court below, the District Attorney contended that the Magistrates' Court testimony was not introduced for the purpose of showing that the disposition of the charges was legally incorrect, but only for the purpose of showing, from their questions, that Magistrates Capshaw and Erwin had a preconceived determination to dismiss the charges. It is difficult to see how a jury could, with any degree of accuracy, determine the mental processes of a Judge, from the questions which he asks in the course of a judicial proceeding. The record in this case is clear, however, that the sole purpose for which the testimony was introduced and received, was to establish that the evidence before the Magistrates was sufficient to place them under a legal duty to hold the defendants and that they acted contrary to law in dismissing the charges.

The District Attorney revealed his purpose immediately after the reading of the first transcript, by making the following request of the Court (fol. 1137):

> "Mr. Dewey: Your Honor, solely in view of the earlier decision of the Court, which I think might leave some misapprehension in the minds of the jury, I ask the Court to instruct the jury now that the minutes have been read on the raid on the Ison bank, *that from the minutes it is apparent that the Magistrate was under a legal duty to hold the twenty-six defendants there and not discharge them.*" (Italics ours.)

Moreover, as already pointed out hereinbefore, Judge Nott expressly directed the jury

to determine, whether the Magistrate was "right in discharging those men or whether he was wrong" (fol. 11199). The jury could only determine that fact by a consideration of the testimony of the witnesses. At no time during the trial did the Court attempt to limit the jury to the question of whether the attitude or demeanor of the Magistrates indicated that they had been improperly approached. On the contrary, by his charge, Judge Nott constituted the jury an appellate tribunal to sit in review of the legal propriety of the Magistrates' conclusions as to the sufficiency of the evidence before them. The issue submitted to the jury was not whether the Magistrates acted suspiciously, *but solely whether they had decided the cases correctly.*

The contention that the minutes were read into evidence for the purpose suggested by the District Attorney is not only without the slightest basis in fact, but manifestly absurd. To even form an opinion as to what a Judge has in mind in asking certain questions would require at least a knowledge of the law and some experience in the trial of cases, neither of which a jury of laymen is presumed to possess. Even such an opinion could not be accurate, and would depend largely upon how well one knows the particular Judge involved. Very often, as this Court well knows, a Judge asks questions from the bench which indicate a purpose entirely different from that intended. To permit the jury to speculate upon what was in the minds of Magistrates Capshaw and Erwin in asking certain questions appearing in the record of the hearings before them would, therefore, have been wholly improper in any event.

The admission into evidence of the testimony of the witnesses who appeared before Magistrates Capshaw and Erwin was improper for

another equally sound and formidable reason. The Civil Rights Law (Sec. 12) and the Code of Criminal Procedure (Sec. 8) both provide that a defendant in a criminal action is entitled to be confronted by the witnesses appearing against him. These statutes were flagrantly violated by the reading into evidence of testimony adduced on hearings to which the defendant was not a party, given by witnesses whom the defendant had no opportunity to cross-examine.

It is futile to argue that the veracity of the witnesses who appeared before the Magistrates was not in issue in this case. The fact remains that, under Judge Nott's charge, the jury was required to consider the testimony of those witnesses in order to decide whether or not the Magistrates had correctly dismissed the charges before them. The jury could not properly decide that issue unless it had the same opportunity to observe and hear the witnesses in person, as the Magistrates had. Moreover, since it was an issue which the jury was directed to take into consideration as one of the elements in determining the defendant's guilt, he was legally entitled to cross-examine the witnesses upon whose testimony that issue was to be decided. That principle is not a mere technicality, but involves a most fundamental right (*Matter of Greenebaum* v. *Bingham*, 201 N. Y. 343, 347).

For the reasons above set forth, appellant respectfully submits that the admission of the Magistrates' Court testimony and the submission to the jury of the issue based thereon as to the legal propriety of the Magistrates' decisions, was wholly improper and highly prejudicial to the defendant and, apart from any other consideration, warrants a reversal of the judgment of conviction herein.

## POINT IV

**The conspiracy count is fatally defective, it appearing from the face of the indictment that no overt act in furtherance of the conspiracy occurred within the statutory period of limitations.**

The crime of conspiracy, being a misdemeanor, is subject to a two year period of limitation (Sec. 142, Code of Criminal Procedure).

From the face of the indictment in this case, it appears that the last overt act in furtherance of the conspiracy charged occurred on *April 26th, 1936*,—more than two years prior to the filing of the indictment.

Appellant contends therefore that, under the provisions of Section 583 of the Penal Law, as supplemented by Section 398 of the Code of Criminal Procedure, the conspiracy count is invalid on its face.

Section 583 of the Penal Law provides as follows:

> "Overt acts, when necessary.
>
> No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act besides such agreement be done to effect the object thereof by one or more of the parties to such agreement."

Section 398 of the Code of Criminal Procedure provides:

> "Upon a trial for a conspiracy, in a case where an overt act is necessary to constitute the crime, the defendant cannot be convicted unless one or more overt acts be expressly

> alleged in the indictment, nor unless one or more of the acts alleged be proved; but any other overt act not alleged in the indictment may be given in evidence.''

These provisions, obviously, make the doing of an overt act an essential ingredient of the crime of conspiracy. Since no agreement to commit a crime *''amounts to a conspiracy''*, unless some act be done to effect the object thereof, the crime is not complete until the overt act is done. Thus, the commission of the crime depends upon the overt act, and the unlawful agreement or combination, without the overt act, is insufficient to constitute the crime.

The People assert, however, that, while Section 398 provides that one or more overt acts must be alleged in the indictment, it does not *expressly* provide that any of such overt acts must occur within the statutory period of limitations. Upon that ground, the People contend that the indictment in this case meets the requirements of Section 398, as it alleges fifteen overt acts, even though none of them occurred within the period of limitations.

At the outset, it should be noted that the position which the People take is inconsistent. They concede the necessity of *proving* an overt act within the Statute of Limitations, although Section 398 contains no *express* requirement therefor, but, upon that very ground, they deny any obligation to *plead* it. An analysis of the pertinent statutes and a consideration of the purposes thereof, however, readily demonstrate that the People's position is untenable.

Since there can be no valid basis for a charge of conspiracy unless an overt act be done to effect the object thereof, the law necessarily implies that such act must be done within the

statutory period of limitations. Otherwise, the Statute of Limitations would be completely nullified, with respect to the crime of conspiracy. By the same token, when the Legislature, by Section 398, declared that no defendant may be convicted of conspiracy unless one or more overt acts be *pleaded* and *proved,* it necessarily implied also, that one or more of such acts to be so *pleaded* and *proved,* must be within the period of limitations.

If the theory urged by the People were to be adopted, it would produce a result directly contrary to the manifest purpose of the statute. Under the plain language of Section 398, a defendant can be convicted upon proof of one or more *of those overt acts alleged in the indictment.* Obviously, therefore, at least "one or more" of the overt acts *alleged in the indictment* must be within the period of limitations. Otherwise, if all of the overt acts alleged in the indictment were already barred by the Statute of Limitations, the crime would be fully established by proof of "one or more" *of those barred acts.*

The difficulty with the theory urged by the People is that it relies upon a principle which prevailed under the old common law, but is no longer in force, since the enactment of the statutes making an overt act an essential ingredient of the crime of conspiracy, and providing that the doing of such act must be *pleaded and proved* as a condition precedent to conviction. Under the old common law, the unlawful agreement or combination itself constituted the crime. The overt acts were considered merely evidentiary of the agreement. That rule, as shown by the decisions, has been completely discarded in those jurisdictions where statutes were enacted containing specific requirements as to overt acts.

The precise question involved here was passed upon by the United States Supreme Court on several occasions. Those decisions are applicable and controlling in this State, as the Federal conspiracy statutes contain substantially the same provision as ours with respect to the necessity for overt acts. Section 5440 of the U. S. Revised Statutes (now U. S. Crim. Code, Sec. 37), provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, *and one or more of such parties do any act to effect the object of the conspiracy,* each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

In *Hyde* v. *United States,* 225 U. S. 357, the Supreme Court, writing through Mr. Justice McKenna, considered every phase of the question and said:

> "It is contended by the defendants that the conspiracy—the union in an unlawful purpose—constitutes the crime and that the requirement of an overt act does not give the offense criminal quality or extent, but that the provision of the statute in regard to such act merely affords an opportunity to withdraw from the design without incurring its criminality (called in the cases a *locus penitentiae*). * * *
>
> "Indeed, it must be said that the cases abound with statements that the conspiracy is the 'gist' of the offense or the 'gravamen' of it, and we realize the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by Section

> 5440, supra. It is true that the conspiracy—the unlawful combination—has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but Section 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object, and provides that when such act is done 'all the parties to such conspiracy' become liable. Interpreting the provision, it was decided in Hyde *v.* Shine, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760, that an overt act is necessary to complete the offense. And so it was said in United States *v.* Hirsch, 100 U. S. 33, 25 L. ed. 540, recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it.
>
> "It seems like a contradiction to say that a thing is necessary to complete another thing, and yet that other thing is complete without it. It seems like a paradox to say that anything, to quote the Solicitor General, 'can be a crime of which no court can take cognizance.' *The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction.*" (Italics ours.)

The relationship of the overt acts to the conspiracy and their effect in determining the application of the Statute of Limitations was specifically considered in *Brown* v. *Elliott*, 225 U. S. 392, 401, where the Supreme Court held squarely that the statute runs from the date of the *last*

*overt act alleged in the indictment.* The Court there said, in part:

> "In Lonabaugh *v.* U. S., 179 Fed. 476, the Circuit Court of Appeals for the Eighth Circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The Court said (p. 478) by Mr. Justice Van Devanter, then Circuit Judge: 'While the gravamen of the offense is the conspiracy, the terms of Sec. 5440 are such that there must also be an overt act to make the offense complete' (Hyde *v.* Shine, 199 U. S. 62, 76); and so the period of limitation must be computed from the date of the overt act, rather than the formation of the conspiracy. *And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof,* and this although some of the earlier acts may have occurred more than three years before the indictment was found." (Italics ours.)

To the same effect, see:

*United States* v. *McElvain*, 272 U. S. 633, where an indictment for conspiracy was dismissed because it failed to allege the doing of an overt act within the statutory period.

Also, *Hedderly* v. *United States*, 193 Fed. 581.

In another case, *United States* v. *Milner*, 36 Fed. 890, the Court said:

> "An act to effect the object of the conspiracy therefore becomes a material matter, and it must be *alleged and proved with the usual certainty required in criminal pleadings.* See 1 Chitty Criminal Law, page 169." (Italics ours.)

These decisions are directly in point and squarely overrule the theory that the statute

runs from the date of the last overt act *proved*, rather than from the last overt act *pleaded* in the indictment.

In its Per Curiam Opinion of affirmance in the case at bar the Court below contends that an indictment for conspiracy need not allege an overt act within the statutory period of limitation, by virtue of the fact that:

> "Section 398, Code of Criminal Procedure provides that overt acts not alleged in the indictment may be given in evidence."

The inclusion of that *permissive* clause, however, does not destroy the *mandatory* requirement that at least one overt act must be *pleaded* and *proved*. Concededly, the People may offer proof of additional overt acts not pleaded in the indictment. But they must start with a valid charge in the first instance. They may *corroborate* the overt acts alleged in the indictment by proof of additional acts not alleged. But they cannot *establish* the crime in that manner:

> "The right to offer evidence of overt acts not pleaded in the indictment to establish the crime of conspiracy within the period of limitations is a debatable one. While such proof is admissible under section 398 of the Code of Criminal Procedure, it is probable that, as said in United States *v.* Hosier, D. C. 50 Fed. 2nd 971, such proof is only corroborative of the overt acts charged in the indictment. It would seem that if overt acts alleged in the indictment are barred, the establishment of an overt act not so alleged, even though it occurs within the period of limitations, is incompetent to establish the proof of conspiracy."
>
> (Excerpt from decision of Schmuck, J., granting certificate of reasonable doubt, reported at 12 N. Y. Supp. (2nd) 454—People *v.* Hines.)

In the case cited by Judge Schmuck (*United States* v. *Hosier,* 50 Fed. (2nd) 971, the Court said:

> "The prosecution will, of course, be entitled to offer proof of any of the twelve overt acts alleged, and my appreciation of the law is that others may be shown, but only as corroborative of those charged, but the defendants could not be convicted unless the prosecution successfully established at least one of the acts alleged."

The decision of the Court of Appeals in *People* v. *Tavormina,* 257 N. Y. 84, is not applicable to the question at issue in this case and does not, in any sense, conflict with the Federal decisions. In that case the Court was not concerned with the sufficiency of the indictment or the Statute of Limitations, and the inference which the People seek to draw from the language of that decision is unwarranted. The sole question there involved was whether the conspiracy merges in the substantive crime committed pursuant to the conspiracy. In reaching his conclusion that the conspiracy and the substantive crime are separate and distinct crimes, Judge Hubbs observed that:

> "The crime of conspiracy does not consist of both the conspiracy and the acts in carrying it out, but of the conspiracy alone."

Standing alone, that statement might be interpreted as a ruling that the unlawful agreement in and of itself, constitutes the crime. Upon a consideration of the entire opinion, in relation to the question involved, it becomes readily apparent that Judge Hubbs did not intend to rule that overt acts were not essential ingredients of the crime of conspiracy.

If the statement were so construed, his ruling would be directly contrary to the provisions of the Penal Law that "No agreement * * * amounts to a conspiracy unless some act besides such agreement be done to effect the object thereof". It would also be in conflict with the purpose of the Legislature in prescribing, as a procedural requirement, that "the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved".

The earlier decisions decided under the common law, and the cases in other jurisdictions having no statutory requirements similar to our own, are not applicable. The later decisions dispel all doubt on the subject and demonstrate conclusively that, in order to constitute a valid charge of conspiracy, *at least one overt act within the statutory period of limitations must be alleged in the indictment.*

The final theory advanced by the People—that even though the indictment fails to allege the doing of an overt act within the period of limitations, proof of such act may be supplied at the trial—is ill-founded. The law is well settled that a defective indictment cannot be cured by proof. *People* v. *Van Every*, 222 N. Y. 74, 78.

## POINT V

**The evidence failed to establish the existence of the conspiracy, or the commission of an overt act in furtherance thereof, within the statutory period of limitations.**

From the testimony adduced upon the trial of this action, it appears conclusively that the con-

spiracy charged in the indictment expired upon the death of Dutch Schultz, in October, 1935. Schultz concededly created the policy combination upon which the charge is founded and he dominated and controlled it until the day of his death. He was the supreme overlord of the combination and it was his reputation as a notorious gangster and gunman that was the cohesive force which held it together.

The testimony further shows that Schultz dictated all the policies of the combination and directed all its activities. He appropriated as much of the profits derived from the business of the combination as he desired. He threatened, ordered, directed—in short—it was just another of his many criminal "rackets".

It appears further, from the undisputed evidence, that immediately after Schultz's death, a new "mob" of Italian criminals took over his policy business and thereafter operated it from New Jersey (fols. 4696-4703); that Davis, Schultz's chief aide and adviser, fled to New Mexico (fol. 5053); and that Weinberg, the manager of the combination, and Schoenhaus, his assistant, became salaried employees of the new owners (fol. 4702).

It is not contended for a moment that policy playing ceased entirely upon Schultz's death. Some of the policy bankers who were forced into the original combination by Schultz did continue to operate thereafter; but those bankers operated independently, not as a combination, and there was no longer any central organization or pooling of profits, as theretofore.

Moreover, while it is claimed in the testimony that appellant rendered certain services on behalf of the policy combination prior to Schultz's death, the record is barren of any evidence of

such services after Schultz died. Schultz was the man who allegedly employed appellant and appellant's connection with the policy combine was based entirely upon his personal relationship with Schultz. Obviously, that relationship ended upon Schultz's death.

It is conceivable, of course, that after Schultz died, some of his former associates could have gotten together and agreed among themselves to continue operating the policy games as a combination, and that they could have renewed the agreement allegedly made with appellant by Schultz. But there is not a word of evidence in the record showing any concerted action of any kind with respect to the operation of policy games after Schultz died. On the contrary, the evidence clearly indicates that when Schultz died, the combination died with him, and appellant's connection with it, if any, permanently ceased.

To bring the conspiracy charge within the Statute of Limitations, however, the prosecution attempted to show that moneys were paid to appellant long after Schultz's death, even though the policy combine no longer existed and even though appellant was never called upon to render any services of any kind in connection therewith, after Schultz died. Two witnesses were used for that purpose: Weinberg, a confessed habitual perjurer, and Schoenhaus, his assistant and the former bookkeeper of the combination. Insofar as Weinberg is concerned, the attempt proved abortive, as his testimony fell far short of the purpose for which it was obviously intended.

At folios 2813 to 2819 of the Record, Weinberg testified that, at a meeting between Schultz, Davis, appellant and himself, held in *June, 1935*, at the Stratford Hotel, in Bridgeport, Connecticut, Schultz reduced appellant's salary to $250.00

a week. The Court then asked the following questions and Weinberg gave the following answers, folio 2820:

> "Q. Well, on how many occasions after this Bridgeport conversation that you have just told us about, did you personally give any money to Hines? A. Well, not many.
>
> "Q. Well, how many about, to your best recollection? A. I don't believe it was more than two times.
>
> "Q. Do you remember how much you gave him on each of those two occasions? A. *No, I don't remember.*"

Immediately after giving this testimony in response to questions by the Court, Weinberg testified as follows, in answer to questions by the District Attorney (fols. 2822 to 2823):

> "By Mr. Dewey:
>
> "Q. After the fall of 1935, did you give any money to Hines, or into the year 1936? A. *Yes, going into 1936.*
>
> "Q. How often did you give money to Hines in the year 1936? A. *Well, maybe seven or eight times or so during that time.*
>
> "Q. During that year, and in what sums were those made? A. *Well, they were made in sums of generally a thousand dollars.*
>
> "Q. And what conversation was there about what the sum was for at that time, during those times? A. *There was just no conversation.* He started in asking me *how am I doing* and I said, 'I will see you again some other time.'
>
> "Q. And was there anything said about what the period was, covered by that money? A. *We didn't make any arrangements on that. I mean, I didn't say anything about how long it would be for.*"

It will be observed that Weinberg's answers to the questions propounded by the Court di-

Weinberg's testimony, which was given on the mistrial before Judge Pecora, was read into evidence on the present trial, Weinberg having committed suicide in the meantime.

Apparently realizing the insufficiency of Weinberg's testimony, the District Attorney attempted to bolster it up through Schoenhaus. On direct examination (fol. 4492) Schoenhaus tried to make it appear that Schultz's death caused no change in the operations of the policy combination and intimated that he and Weinberg continued to run a policy bank just as before. He also swore that "about every four weeks" he, Schoenhaus, gave Weinberg $1,000 to give to appellant, and that the payments by him *to Weinberg* continued until October, 1936.

On cross-examination, however, the falsity of both Schoenhaus's and Weinberg's testimony was instantly revealed.

> "By Mr. Stryker, *folio 4698:*
>
> "Q. So, it is a fact, isn't it, that right after Schultz's death, the Italians moved in and took charge of this policy business? A. Yes."

*At folio 4702:*

> "Q. In other words, Schoenhaus, from the time of Schultz's death to the time of your indictment, the Italians moved in and operated those banks; is that right? A. Yes, sir.
>
> "Q. And during that period you and Weinberg were merely salaried employees of these Italian criminals? A. Yes."

Thus, during the very period that Schoenhaus was allegedly giving Weinberg money for appellant, both he and Weinberg were in the employ of persons who had not been connected in any way with the original combination and who did

not appear on the scene until after Schultz was killed. Schoenhaus's testimony is definite proof that the original conspiracy died with Schultz. Just as Schultz, in 1931, had taken over the policy business by force from others, so too, a new "mob" of Italian criminals stepped in and took it over at his death. Schoenhaus admitted that neither he nor Weinberg had any financial interest in the business after Schultz's death, being salaried employees only, Weinberg receiving a salary of $200 a week, and Schoenhaus $75 a week. Neither Schoenhaus, nor Weinberg, nor any other witness claimed that appellant had entered into any arrangement with the "Italians", and no witness even suggested that appellant knew who they were.

In the light of Schoenhaus's testimony, there was no basis upon which the jury could find that the conspiracy charged in the indictment continued beyond Schultz's death. The story about payments to appellant after Schultz died was an obvious attempt to inject life into a dead corpse, for the purpose of reviving a charge legally barred from prosecution. In any event, those payments could not constitute overt acts in furtherance of the conspiracy charged in the indictment, in view of the positive proof that the conspiracy no longer existed at the time they were allegedly made, the policy business having been taken over by entirely new interests with whom appellant had no connection.

The theory upon which Judge Nott submitted the question of the Statute of Limitations to the jury has no application to the situation presented by the evidence. In charging the jury, after a request for further instructions, Judge Nott said (fol. 11283):

> "If a conspiracy is once proved to exist, and a defendant is proved to have participated in that conspiracy, then he is presumed to remain in the conspiracy, unless there is evidence showing that he withdrew from the conspiracy and disassociated himself from it and left it."

Unquestionably, a conspiracy once established, is presumed to continue. Here, however, that presumption was completely destroyed by the positive proof that the business of the conspiracy passed into other hands upon the death of the main conspirator. After Schultz died, there was no longer any conspiracy in existence from which appellant could withdraw or disassociate himself. Concededly, if nothing had happened to disrupt the conspiracy, appellant would have been obliged to show that he withdrew before the two year periods of limitations. Schultz's death and the taking over of the business by the new mob of Italians, however, not only disrupted the conspiracy, but ended it, insofar as appellant was concerned.

Upon reading that portion of Judge Nott's charge which relates to the question of the Statute of Limitations, it becomes readily apparent that, in submitting the question to the jury, he acted under a mistake of fact as to the testimony. He charged the jury as follows (fol. 11145):

> "Let me say here, however, there is one question that comes in in the conspiracy count that is not present in the felony count, and that is the Statute of Limitations. The Statute of Limitations for misdemeanors is two years. The indictment was found about May 27th or 26th, 1938. Therefore, there has to be some proof of the existence of the conspiracy and the overt act

later than May 23, 1936, that is to say, within the two-year limitation. That is a question for you to decide. That is a disputed point. The defendant's contention is that soon after the murder of Dutch Schultz this conspiracy evaporated, came to an end; that while some of these people continued to play or participate in this lottery policy business, they did not do so under the original combination or conspiracy charged in the indictment. On the other hand, the People's contention is that they did continue even after the death of Schultz to participate in that conspiracy, and that the defendant, according to the testimony of one witness, I think Schoenhaus, was paid by Schoenhaus for his services, the same services he had been rendering, as late as October, 1936, which would be within the Statute of Limitations.

"It is for you to determine conflicting claims. The defendants claim that the conspiracy ended when they took new positions under a new auspices with other employers. The People's claim is that the original conspiracy did persist and that the defendant was paid for his services within the Statute of Limitations. Now that is for you to determine. If you find that the Statute of Limitations has run against the conspiracy, the misdemeanor count, you will acquit on that, and you will then take up the question of the felonies."

It will be observed that Judge Nott was under the erroneous impression that Schoenhaus had testified that he personally made payments to appellant "as late as October 1936". After the jury had retired and had deliberated for some time, Judge Nott realized his mistake and recharged the jury as follows (fol. 11284):

"I might say here, examining the evidence, I inadvertently made one statement to you that was incorrect. I stated that

> Schoenhaus testified that he personally paid the defendant moneys as late as October, 1936. I find upon looking the matter up that he testified that he paid Weinberg the money to pay this defendant. Weinberg testified that he paid the defendant seven or eight times in 1936, but he did not state how late in 1936 those payments extended."

Judge Nott made no mention of Weinberg's testimony in his original charge. That fact, coupled with the fact that, when he re-charged the jury, he admitted that Weinberg did not state *"how late in 1936 those payments extended"*, indicates very definitely that Judge Nott did not consider Weinberg's testimony evidence of an overt act within the period of limitations. In his original charge, he submitted the question to the jury solely upon the theory that Schoenhaus had testified that he personally had paid moneys to appellant as late as October 1936. If, at that time, Judge Nott had realized that Schoenhaus did not so testify, it is reasonable to assume that he would not have submitted the question to the jury at all, as the only other testimony with respect to payments, was Weinberg's, which testimony he admittedly deemed insufficient.

The uncertainty in Judge Nott's mind, as to the question of the Statute of Limitations, is further apparent from the following observation which he made in ruling upon a motion to dismiss the conspiracy charge, at the end of the People's case (fol. 6836):

> "Now, as to the misdemeanor count, to my mind there is a troublesome question there on the Statute of Limitations. The evidence to my mind is not clear and more or less conflicting on that point."

The testimony of Weinberg and Schoenhaus as to the payment of moneys to appellant after Schultz died is unquestionably in conflict with the *undisputed* evidence in the record that the policy combination was not even in existence at that time. But neither Weinberg's nor Schoenhaus's testimony, even if assumed to be true, presented any question of fact upon which the application of the Statute of Limitations depended.

Certainly Weinberg's testimony raised no such issue, since he did not testify that he paid any money to appellant after May 26th, 1936, or at any time within the statutory period. Nor does Schoenhaus's testimony raise such issue, for two reasons: *First*, appellant was not connected in any way with the payments allegedly made to Weinberg, and there was no evidence showing that the money ever reached appellant. *Second*, such payments cannot be construed as overt acts in furtherance of the conspiracy charged in the indictment, in any event, as the "combination" upon which that charge is predicated was no longer in existence when the payments were allegedly made.

Suppose Schoenhaus did give money to Weinberg for appellant after Schultz died. What were those moneys to be paid for and on whose behalf were they to be paid? Weinberg and Schoenhaus were no longer interested in any "combination". They were salaried employees of persons who had never been connected with the original conspiracy. No relationship existed between them and appellant which required the making of any payments. Certainly, mere payments, unless made for services in connection with the conspiracy charged in the indictment,

cannot constitute overt acts *in furtherance of that conspiracy.*

While, therefore, the claim that payments were made to appellant after Schultz died created a conflict in the testimony, in the sense that it conflicted with the obvious truth, it did not create any conflict in respect to the applicability of the statute. That claim, palpably perjurious as it was, did not prove that the conspiracy charged in the indictment was in existence after May 26th, 1936, or that any overt act in furtherance of that conspiracy was done after that date.

That the jury did not believe either Weinberg's or Schoenhaus's story is apparent from the following question which they submitted to Judge Nott after deliberating for some time:

> "If it were found that defendant participated in the conspiracy prior to May 26th, 1936, and although the conspiracy continued after that date, *the defendant was not shown to have been guilty of any overt act or to have received money therefrom,* would the statute of limitations apply."

In response to this question Judge Nott made the observation quoted above (fol. 11283) that:

> "If a conspiracy is once proved to exist, and a defendant is proved to have participated in that conspiracy, then he is presumed to remain in the conspiracy, unless there is evidence showing that he withdrew from the conspiracy and disassociated himself from it and left it."

It is obvious, therefore, that, although the jury did not believe that any moneys had been paid to or for appellant after May 26th, 1936, they were, nevertheless, impelled to decide the question of the Statute of Limitations adversely to

him, on the theory that affirmative evidence of his withdrawal was necessary. That theory, as already indicated, while sound law, has no relevancy in this case. Here the testimony shows that the policy combination was destroyed by the death of the chief conspirator and that the business of the combination was taken over by others with whom appellant concededly had no connection. The destruction of the combination obviated the necessity of withdrawing and there was nothing left to withdraw from. The only way in which appellant could *affirmatively withdraw*,—as Judge Nott charged was necessary,—would be by hunting up the members of the original combination who remained alive after Schultz died, and entering into a formal agreement of dissolution with them.

It is apparent, therefore, that the jury's verdict on the question of the Statute of Limitations was based upon an erroneous application of the law. They clearly indicated, by their question to the Court, that they disbelieved the testimony of Weinberg and Schoenhaus as to payments to appellant after Schultz died. The only plausible explanation for their verdict is that they understood, from Judge Nott's charge, that it was incumbent upon appellant to signify his withdrawal by some affrmative act, even though the evidence showed that no policy games were operated under the original combination or conspiracy charged in the indictment after Schultz died, or at any time within the statutory period of limitations.

That no policy games were operated by the combination after Schultz died is further evidenced by the fact that the last substantive offense alleged in the indictment occurred on

*October 22nd, 1935,* at or about the time of his death. It must be borne in mind that, according to the theory of the prosecution, each day's operation of the policy games constituted a separate contriving, proposing and drawing of a lottery. The District Attorney admitted that he picked the dates out at random and that, except for the fact that he did not wish to make the indictment unwieldy, he could have charged a separate substantive violation for every day on which the game was operated. That being so, the question presents itself: Why do all the substantive offenses alleged in the indictment fall within the period prior to Schultz's death? The answer is obvious—there were no policy games operated by the combination after Schultz died.

## POINT VI

**The Court erred in permitting the testimony of the deceased witness Weinberg to be read into evidence, and in refusing to permit any inquiry into the circumstances of his suicide.**

At the incompleted trial of this defendant resulting in a mistrial upon the withdrawal of a juror because of improper cross-examination by the District Attorney, George Weinberg, an important witness for the People, was called, examined, and cross-examined by the defendant. After the commencement of the trial resulting in the judgment of conviction appealed from and before he was called as a witness for the People, Weinberg committed suicide.

In reliance upon Code of Criminal Procedure, Section 8, his testimony at the mistrial was

offered in evidence. Objection and exception was taken to its admissibility generally (fol. 1971). Further, the defendant sought to prove the circumstances of Weinberg's suicide. It is understood that Weinberg pleaded guilty to all counts of the indictment before the mistrial and that he then, with other witnesses in the case, all convicted felons awaiting sentence, was permitted by an order of a justice of the Supreme Court to be removed from the City Prison and housed in a residence in the County of Westchester, where they were supposedly under police guard. Through the negligence, it was claimed, of one of these guards, Weinberg was enabled to procure the officer's pistol and with it he shot and killed himself. The Court, however, refused to permit any inquiry into the circumstances of Weinberg's suicide, to which objection was duly made (fols. 1962, 2119). The testimony of Weinberg was thereupon read to the jury. That testimony is the only source of proof of some of the most important and essential elements of the People's case against the appellant.

Two serious errors, the appellant contends, were thereby committed:

Code of Criminal Procedure, Section 8, so far as material, reads as follows:

> "Section 8. Rights of defendant in a criminal action.
>
> In a criminal action the defendant is entitled * * *
>
> 3. To produce witnesses in his behalf and to be confronted with the witnesses against him in the presence of the court, except that * * * (d) where the defendant *has previously been tried* upon an indictment or information embracing the same charge, the

> testimony of any witness who has testified upon such prior trial may be read in evidence upon any subsequent trial of the same indictment or information, upon it being satisfactorily shown to the court that the witness is dead or insane, or can not with due diligence be found in the state.''

The italicized words, ''has previously been tried'' furnish the grounds for the first assignment of error, which is, that, where an attempted trial results in the withdrawal of a juror and therefore a mistrial because of misconduct on the part of a prosecutor, the defendant has not *been tried* in the sense in which that phrase is used in Section 8, Subdivision 3-D.

It does not appear that this exact question has ever come before the courts of the State of New York. Various situations have been presented, falling to one side or the other of the problem.

In *Taft* v. *Little,* 178 N. Y. 127, the Court of Appeals held that, where there had been a hearing before a referee at which a witness had testified; the trial or hearing never having formally terminated because of the death of the referee before the evidence was finally submitted to him, although both sides had rested; and the witness himself having thereafter died; upon a subsequent hearing before a new referee the testimony of the deceased witness might properly be read in evidence.

It has also been held by the Court of Appeals in *People* v. *Elliott,* 172 N. Y. 146, that upon a second trial of an indictment, a judgment of conviction obtained at the first trial having been reversed, the testimony of a witness at the first trial, deceased at the time of the second trial, may be properly read in evidence.

These cases seem to proceed on the theory that all of the evidence was before the trier of fact, with a full and complete opportunity for cross-examination.

But in other cases where this opportunity for cross-examination was interfered with or where the untimely termination of the trial was the fault of the party seeking to read into evidence the testimony of a witness since deceased, the right to read such evidence has been considerably curbed.

Such a case was *Morley* v. *Castor,* 63 App. Div. 38. There the plaintiff sought to recover a share of rents and profits. The case came on for trial, and after the plaintiff had rested, the defendant was called. In the course of his cross-examination, a variance was developed between his testimony and the allegations of his answer, and a motion to conform the answer to the proof was made. Plaintiff's counsel pleaded surprise, and the Court held that he was entitled to an adjournment, as the answer ought to be amended. The plaintiff's request for an adjournment was thereupon granted; thereafter the answer was amended and the action came on again to be tried. Meanwhile, however, the witness whose cross-examination was interrupted and left incomplete had died. Upon the retrial, his previous testimony was admitted under objection and exception. It was held that this was error. The Court said (p. 40):

> "It is contended, however, that as the witness had not completed his testimony and there had not been a trial, but a mistrial, the testimony was inadmissible. This contention, we think, should be sustained. It was not testimony given on a trial, for there was none. Besides, the examination of a witness consists not alone of the direct but also of

the cross, and a party cannot be deprived of the right to cross-examine his adversary's witnesses.

He may waive the privilege as by defaulting on the trial, or he may forfeit it through his fault or by not taking advantage of the opportunity, but he cannot be deprived of or have such right taken away.

It is here conceded that on the cross-examination of Charles S. Morley, the witness was interrupted by the discovery that the evidence varied from the defense pleaded, and the court was authorized upon the plaintiff's counsel stating that he was surprised, to grant an adjournment, as he did, for the purpose of enabling defendants to amend their pleading. The contention of the defendants that the plaintiff, had he so desired, might have completed the cross-examination and, therefore, it is his own fault that it was not completed, is without merit. The trial was interrupted to enable defendant to apply for the amendment, and until that was granted or denied and a new trial had, it was entirely right to suspend further examination of the witness. Therefore, the cross-examination was prevented and rendered incomplete by no fault of the plaintiff."

It must be conceded in the present case that Weinberg's cross-examination, so far as desired down to the time of the declaration of the mistrial, had been completed. It is entirely possible, however, that before the conclusion of the taking of evidence, further cross-examination might have been rendered advisable and had it been requested, the Court would no doubt have been justified, if not compelled, to grant it.

*People* v. *Severance*, 67 Hun 182, 22 N. Y. S. 91.

Until the evidence on both sides is completed and the case finally submitted to the jury, the possibility always exists that circumstances may arise rendering further cross-examination not only proper but imperative. The appellant had not been tried theretofore; he had been mistried; this fault was none of his, and the necessary conditions for an admission of Weinberg's testimony, as laid down by Code of Criminal Procedure, Section 8, Subdivision 3-d, therefore did not exist, and the admission of the testimony was error. It must be borne in mind that we are dealing with a criminal statute, of which the appellant is entitled to a strict construction.

A further and equally substantial error, however, was committed in the refusal of the Court to permit inquiry into the circumstances of Weinberg's death.

The defendant sought to elicit such circumstances, and from the record it appears that it was contended and is, as a matter of fact, more or less general knowledge, that after the declaring of the mistrial in this case an order was made by Mr. Justice Pecora at the instance of the District Attorney by which Weinberg and other People's witnesses who had also pleaded guilty to the indictment were removed from the City Prison and lodged outside of the city in a place known only to the District Attorney and his representatives, and that while they were in this lodging and supposedly under police or other official guard, Weinberg, through the negligence of one of his keepers or guards, was enabled to procure the officer's revolver and shoot himself with it.

Proof of these facts, it is submitted, would have necessitated the exclusion of Weinberg's statement.

*Motes* v. *United States,* 178 U. S. 458, presents a strikingly similar situation. Upon an appeal from a judgment of conviction, it appeared that one Taylor was an important witness against the defendants. Taylor was originally charged with the same offense jointly with the appellants, but became a witness for the Government and testified and was cross-examined at a preliminary hearing. It then appeared from the testimony of an agent of the Federal Government:

> "That Taylor and the other three defendants on trial with him were held for trial by the commissioner and committed to jail without bail to await trial, and that since that time the said Taylor has been confined in the Jefferson County, Alabama, jail under commitment issued by said commissioner; that after the beginning of the present trial on the 20th of September, 1898, he went to the jail, took said Taylor into his custody more than two days before said Taylor escaped, and that said Taylor had not been in jail since, but that he had placed him in charge of one Ed. May, a witness for the Government in this case, and instructed May to let Taylor stay at the hotel at night with his family, and that in pursuance of said instruction Taylor remained at the hotel Tuesday night and Wednesday night before he absconded on Thursday; that he saw Taylor in the corridors of the court room about 10 o'clock a.m. Thursday, before he was called as a witness, about 11 o'clock the same day, and that when Taylor failed to respond he made a search for him in the city of Birmingham, and telegraphed to several places, and could not find him or learn anything at all as to his whereabouts."

Upon the trial, the foregoing facts being shown, the Court permitted the testimony of

Taylor on the preliminary examination to be read in evidence against the defendants. The Supreme Court of the United States held that this was error, necessitating the reversal of the conviction against the defendants thereby prejudiced and wrote as follows:

> "We are of opinion that the admission in evidence of Taylor's statement or deposition taken at the examining trial was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the Government. Taylor was a witness for the prosecution. He had been committed to jail without bail. We have seen that the official agent of the United States in violation of law took him from jail after the trial of this case commenced, and strangely enough, placed him in charge not of an officer but of another witness for the Government with instructions to the latter to allow him to stay at a hotel at night with his family. And on the very day when Taylor was called as a witness, and within an hour of being called, he was in the corridor of the court house. When called to testify he did not appear."

If it be contended that in the decision of the *Motes* case the Supreme Court was bound by the provision of the Federal Constitution necessitating confrontation of witnesses upon a criminal trial, the reply is that this right to confrontation is no less a part of the basic jurisprudence of this State; for this requirement appeared in the Bill of Rights and is now a part of Civil Rights Law, Section 12. The provisions of Code of Criminal Procedure, Section 8, therefore, pre-

suppose that the absence or death of the witness whose previous testimony is sought to be used shall be in no way the fault of the People.

The appellant stands convicted upon the testimony of Weinberg, a convicted felon and admitted perjurer, and the credibility of Weinberg's testimony in this trial has never been passed upon by any jury which saw him on the stand and heard him testify. This is not the appellant's fault. The mistrial was caused by the People through the misconduct of their representative, the District Attorney. At the instance of the People's officer, the District Attorney, and, it would appear from the record, somewhat against the better judgment of the Justice of the Supreme Court who made the order, Weinberg was taken from the City Prison and lodged in a dwelling house in the custody of armed guards. Through the negligence of one of these guards, the People's servant, Weinberg was enabled to procure the guard's weapon and kill himself with it, something which certainly would not have happened in the City Prison. Through no fault of his own, therefore, but solely through a series of careless and improper acts on the part of the People's representatives, the appellant has been deprived of the invaluable and inviolable right of being confronted with the witnesses against him in the presence of the court by which he was finally convicted. The refusal of the trial judge to permit any inquiry which would have enabled him to demonstrate this for the purpose of the record and bring himself within the principle of the *Motes* case, and the eventual admission of the testimony, are errors compelling a reversal of this judgment.

## POINT VII

**The judgment of conviction should be reversed.**

Respectfully submitted,

LITTLETON & LEVY,
*Attorneys for Defendant-Appellant,*
Office and Post Office Address,
149 Broadway,
New York City.

IRVING GOLDBERG,
RICHARD H. BROWN,
*Of Counsel.*