Argued by
STANLEY H. FULD

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JAMES J. HINES

Defendant-Appellant.

RESPONDENT'S BRIEF

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Statement

This is an appeal from a judgment and order of the Appellate Division, First Department, which unanimously affirmed a judgment of the Court of General Sessions, New York County, convicting the defendant of the crime of CONSPIRACY (Penal Law, § 580) and of twelve separate crimes of CONTRIVING, PROPOSING OR DRAWING A LOTTERY (Penal Law, § 1372), after a trial before NOTT, J., and a special jury.

The trial court suspended sentence upon the conspiracy count and imposed separate sentences, to run consecutively, upon four of the substantive counts (Second, Third, Fourth, and Fifth), each for an indeterminate term of from one to two years in state prison (11411-3).* The total term thus imposed aggregated an indeterminate period of from four to eight years.

* References are to folios in the printed record.

The Appellate Division wrote a *per curiam* opinion (11575-85; 258 App. Div. 466).

Leave to appeal to this Court was granted by LEHMAN, Ch. J. (11561-8).

Introduction

The first count of the indictment charges a conspiracy to commit crimes of policy, in violation of section 974 of the Penal Law, and of contriving, drawing, and proposing a lottery, in violation of section 1372. The remaining twelve counts charge substantive crimes of contriving, proposing, drawing, and assisting in contriving, proposing, and drawing a lottery, in violation of section 1372.

Nine defendants were originally accused—James J. Hines, J. Richard Davis, George Weinberg, Harry Schoenhaus, Martin Weintraub, and four others who had not been apprehended at the time of the trial. Davis, Weinberg, and Schoenhaus pleaded guilty before the trial. Weintraub was granted a separate trial and the case proceeded against Hines alone.

The evidence establishes that in the year 1931 a group of criminals, headed by the notorious gangster Dutch Schultz, formed a Combination to gain control of and operate various policy or numbers game enterprises.[1] By 1932 the Combination had consolidated these into a coordinated business which operated a daily lottery yielding an annual income of hundreds of thousands of dollars. It was in that year that the defendant

[1] The lottery here involved is known as the numbers game. In the record, however, the words "policy" and "numbers game" are used indiscriminately.

Hines joined the Combination. His principal contribution to the conspiracy consisted of obtaining for his confederates a freedom from arrest, and a virtual immunity from conviction, for crimes which they were then committing and which he knew they would continue to commit. In addition, he performed other acts which aided and abetted the operation and conduct of the criminal enterprise. The Combination continued—with the defendant as one of its members—until the fall of 1936.

THE FACTS

As was noted by the Appellate Division in its opinion, the defendant concedes that the evidence constituted him a member of the conspiracy (11575-6; 258 App. Div., at p. 467):

> "The concession of appellant's counsel that 'unquestionably, the testimony was sufficient *prima facie* to establish that appellant was a member of the conspiracy to commit the crimes charged, as alleged in the indictment,' renders unnecessary any extended review of the evidence. Indeed, an examination of the record and briefs leads to the conclusion that it would have been futile for counsel otherwise to contend. Questions of law only, therefore, need be considered."

However, the questions of law raised can only be considered against the background of the facts presented by the record. In the following pages the People seek to set forth—as briefly as possible—a resumé of the proof and thus present an accurate picture of the criminal enterprise which the defendant Hines and his accomplices conspired to, and did, carry on.

Persons mentioned in testimony

ARTHUR FLEGENHEIMER alias DUTCH SCHULTZ alias the DUTCHMAN: Charged in the indictment as conspirator; a notorious criminal who assumed control and leadership of various numbers "banks" and welded them into one racket having its headquarters in New York County; killed in October, 1935.

J. RICHARD DAVIS: Defendant; pleaded guilty and testified as witness for People; acted as attorney for Combination; was intimate with both defendant Hines and Schultz, frequently acting as contact man between them.

GEORGE WEINBERG: Defendant; pleaded guilty and testified as witness for People at the first trial; committed suicide after the commencement of the second trial, making it necessary to read into evidence the testimony he had previously given; was general manager of the Combination, looked after its financial details, and served as one of the contact men between defendant Hines and Schultz.

HARRY SCHOENHAUS alias BIG HARRY: Defendant; pleaded guilty and testified as witness for People; had charge of books and records for Combination under George Weinberg's direction; occasionally made payments of money for the Combination to defendant Hines.

JOHN COONEY alias JOHN SYKES; SOL GIRSCH alias SOLLY; and HARRY WOLF alias LITTLE HARRY: Defendants, not apprehended at time of trial; members of Combination, performing miscellaneous duties in furtherance of conspiracy.

MARTIN WEINTRAUB alias MOE WEINTRAUB: Defendant, granted a trial separate from defendant Hines; appeared in court and tried policy cases for Combination as employee of Davis (4881-2).

ABRAHAM WEINBERG alias Bo WEINBERG: Defendant, not apprehended; one of Schultz' principal aides who acted as "trigger man" for Schultz gang and "strong arm man" for the Combination (1201-3, 1676-7, 1692, 3527); probably killed about the same time as Schultz (2153, 4659).

BERNARD ROSENCRANZ alias LULU ROSENCRANZ: Charged in indictment as conspirator; acted as chauffeur and bodyguard for Schultz (2226, 4841, 4913); assisted in various jobs for Combination; killed with Schultz.

OTTO BERMAN alias ABADABA alias HAVASACK: Charged in indictment as conspirator; official handicapper at race track in Cincinnatti (2770-1); attended to rigging of pari-mutuel figures for Combination (2787-9); killed with Schultz.

LOUIS KOCH: Conspirator not specifically charged in indictment; acted as bondsman for Combination (1733, 2355, 2533, 2559).

WILFRED BRUNDER; MARCIAL FLORES; JOSEPH MATHIAS ISON alias BIG JOE; MASJOE JOSEPH ISON alias LITTLE JOE; ELMER MALONEY; ED MALONEY; HENRY MIRO; and ALEXANDER POMPEZ: Numbers bankers located in Harlem; brought into Combination by Schultz.

HULON CAPSHAW; FRANK ERWIN; and WILLIAM COPELAND DODGE: Judicial officers who, at Hines' request, conducted themselves in such a way as to give members of the conspiracy a protection from prosecution.

JACK PLUNKETT: Friend and intimate of defendant Hines; acted as one of his chief lieutenants at Hines' political club (2611, 3686-7, 4869, 4871).

ED HOLLEY: Friend and intimate of defendant Hines; performed various errands for defendant, including payment of racing bets (4869, 4928-31, 6219).

"Policy" or the "Numbers Game"

At the trial, witnesses explained the numbers game in some detail. It was, in brief, a game in which the player might "take a chance" that a number chosen by himself would be selected as the winning number. The game was operated daily by persons known as collectors, controllers and bankers.

The player chose a number from 000 to 999 and wrote it on a piece of paper, called a policy slip, which he handed to a collector (663-4). Since the players were drawn mainly from the poorer classes in Harlem, the plays, though not limited in size, usually amounted to only a few cents (652). Collectors were either professionals with no other occupation, or store keepers, elevator operators, and other persons engaged in occupations entailing contact with large numbers of people (651, 661-3). At a fixed time of the day, the collector, retaining the money, turned over all the slips to a pick-up man, who brought them to a "drop station" maintained by his employer, the controller (696, 698). From there they were taken to the "bank"—in the nature of a clearing house—by an agent of the banker (729-32), where they were sorted and the balances due to or from the collectors were computed.

The collectors retained possession of the money until after the result of the day's plays became known (729-35). They then settled, net, with the controllers, who, in turn, settled, net, with the bankers.

The winning number was selected, or drawn, every day except Sundays and legal holidays (4476-7), by adding together certain pari-mutuel race track figures (656-7). The respective amounts paid on two dollar pari-mutuel tickets purchased on horses finishing first, second, and third in each of the first three races were added together, and the numeral immediately to the left of the decimal point in the total figure furnished the first digit of the winning number. The second digit was determined by applying the same procedure to the first five races; and the third, by using the entire seven races as a basis (672-89; Peo's Exh. 2, p. 3810).[2]

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[2]The following table is illustrative:

RACE TRACK RESULTS

First Race			
Stagehand (first)	$8.20	$4.60	$3.40
Esquire (second)		6.00	4.30
Occult (third)			4.20
Aggregate amounts paid.....			30.70
Second Race (aggregate amounts paid).....			40.60
Third Race (aggregate amounts paid).....			50.80
			122.10
Fourth Race (aggregate amounts paid).....			70.40
Fifth Race (aggregate amounts paid).....			80.60
			273.10
Sixth Race (aggregate amounts paid).....			30.20
Seventh Race (aggregate amounts paid).....			40.10
			343.40

The winning number, consisting of the digit to the left of the decimal point in each of the three totals, is **233**.

Since only one number between 000 and 999 was drawn each day, a number chosen by a player had but one chance in a thousand to win; the winner was paid, however, at the ratio of only 600 to 1 (665-6, 690).

Schultz' formation of the Combination

In 1931, a goodly portion of the numbers business was in the hands of five independent competing banks which were doing a combined business of about $35,000 a day (2448-9). These were conducted by Alexander Pompez, Joseph Ison, Henry Miro, Marcial Flores, and Elmer Maloney. A number of other bankers, including Wilfred Brunder and Harry Schoenhaus, were also active at about the same time.

In that year, Dutch Schultz decided to gain control of these lucrative ventures. There is no need to detail the testimony as to the means he employed to accomplish his purpose. Suffice it to say that, by means of threats and violence, Schultz obtained absolute control over each of these banks and placed his own men in charge (1200-2, 1204-6, 1220-1, 1226, 2240-1, 2244, 2218-9, 2227-30, 1665-1712, 1713-6, 2252-3, 4462-7).

The entire enterprise was centralized with George Weinberg as general manager for the Combination, in charge of the headquarters set up at 351 Lenox Avenue (2352). J. Richard Davis was delegated the Combination's attorney, to manage the enormous legal and semi-legal aspects of its criminal business (4838); John Cooney was placed in charge of paying the fines of those arrested; and Louis Koch was appointed bondsman who, with a number of assistants, was to be available at all times to bail out those taken into custody.

Schultz, in addition to borrowing considerable sums of money and collecting large amounts labeled "expenses," drew $4,000 a week from the profits (2439, 2469, 4449).

Although the daily net intake had grown to $45,000 by the fall of 1932 (4457-8), the leaders were not satisfied. They contrived a scheme whereby the profits might be still further increased through rigging of the pari-mutuel figures upon which the pay-offs were based (2762-5). This involved control of the third or final digit so that no heavily played number would be hit. The Combination paid Otto Berman, known as "Abadaba," $10,000 a week to manipulate the odds on the last race in such a way as to achieve this end (1785-9, 2793, 4500-4, 4509-17).

The Combination thus organized by Schultz in the year 1931 continued to operate until about October of 1936. Schultz himself maintained active control until his murder in 1935, when the leadership passed—without any interruption in the operation of the conspiracy—to two of his partners commonly referred to as the "Italians" (4698-4700).

The defendant Hines' entry into the Combination

As the number of individual bankers—forced in by Schultz' strong-arm methods—increased, and as their activities became more centralized, the Combination grew more conspicuous and its operations grew correspondingly more vulnerable to attack by law enforcement authorities. It therefore became essential to the continued growth and profit of the enterprise that some means be

found to provide immunity from such attack. As Schultz himself expressed it (2136):

> "I could arm [force] these different bankers in, but I can't protect them in the courts, or protect them from the police making arrests."

The defendant Hines was chosen to furnish this protection.

Accordingly, in April, 1932, Schultz arranged a conference, attended by him and three of his lieutenants—Bo Weinberg, George Weinberg, and Lulu Rosencranz—to which Hines was invited (2127-8). At this conference Weinberg described the operation of the Combination and pointed out the damaging consequences that followed a raid on a bank or the arrest of one of the Combination's higher-ups (2137-40, 2142-4). Thus, he explained to Hines (2137):

> "in order to be able to run our business and bring it up the right way, we would have to protect the controllers that are working for us, all the people working for us, protect them"

and (2138):

> "We would have to protect them from going to jail, and if we got any big arrests, that would hurt our business; we would want them dismissed in the Magistrates' Courts so that they shouldn't have to go downtown [to Special Sessions] * * *."

He also stated that they were not concerned with the small arrests of the "ordinary collectors on the street" (2139), but with the large ones "Such as bank or big controllers, or a big drop station" (2140). As Weinberg said (2139):

> "we would want to have them dismissed in the Magistrates' Court, to show the people

> in Harlem there that are working for us that we had the right kind of protection up there, and that we could protect them from going to jail."

Hines agreed to join the criminal conspiracy. He promised to use his influence in the Police Department to reduce as much as possible the danger of arrest of the Schultz mobsters, of the bankers, and of the large controllers associated with them (2137-8). Hines asserted that while he did not "control the Police Department * * * he still would be able to do quite a lot" (2143) and, more specifically, said that "he thought he could handle" the Sixth Division "O. K." (2143-4). This Division supervised police activities in Harlem, where the numbers game was largely played. He agreed, with even more assurance, that, if there were a slip-up and an arrest occurred, he would set everything right by having the case thrown out in the Magistrates' Court (2137-40, 2142-50).

Hines knew full well, of course, what his participation in the criminal enterprise would achieve. Weinberg expressly told him that the members of the Combination would be able to commit crimes with impunity and would shortly be in a position to "control all the business in Harlem" if they had "the right protection" (2144). Thus, Weinberg testified (2144-5):

> "Q. Was anything said about the effect of getting new business? A. Well, we thought if we had the right protection, to prove to the people working for us that we had the right protection, it would help us build our business; we would be able to control all the business in Harlem at the time.
>
> * * *

> "Q. What else was said? A. Well, then I also explained to him [Hines] that we were going around there wide open ourselves and that we wanted to be protected against being picked up.
>
> "Q. Now, did you explain what you meant by 'we'? A. Well, myself and whoever else was helping me in running the business, in fact, all of Schultz's mob."

And Hines assured them of his support, saying (2146):

> "he would take care of that, not to worry about it."

In addition to this promise of active service in their behalf, Hines readily acceded to their use of his name whenever expedient or necessary. Thus, Weinberg testified (2147-8):

> "I asked him if I could use his name and he said I could.
>
> * * *
>
> "And he said I could use it wherever I thought necessary, where I might need it."

Payments made to the defendant Hines by the Combination

This engagement on the part of Hines was not limited to any definite period; he had, it appeared, signed up for the duration of the conspiracy. His participation was bought at a handsome price, considering that those were depression years, for he was to receive a regular payment of from $500 to $1,000 a week. The first of those payments was made by Schultz at the very conference to which we have referred (2146-7).

These weekly payments continued for several years—until October of 1936. It will be noted, however, that sometime in 1935, the payments

were reduced to an amount ranging from $250 to $500 a week and remained at this figure until the end (2818-20).

The payments to Hines were entered on the books of the Combination as regular payroll expenses, first under the heading of "J. H." and then by the entry "Pop" (2437, 4451-2). That Hines received these payments is borne out not only by the testimony of the several accomplices, but also by independent non-accomplice evidence (5611; Deft's Exh. AA, p. 3837; 5777, 5781, 5914-22, 6214-20).

Resumé of acts performed by the defendant Hines in furtherance of the conspiracy

Following his entry into the conspiracy, Hines performed a number of acts which aided and assisted in the commission of the crimes contemplated by that conspiracy.

He took part in setting up the Combination's central headquarters at 351 Lenox Avenue for, as Schultz advised Weinberg, the headquarters were not to be opened until Hines' approval had been procured (2352-61; *infra*, pp. 14-15).

Hines sought to arrange the removal of the Combination's banks to Mount Vernon at a time when the New York police were making particular efforts to close the banks located in New York (2604-22; *infra*, pp. 14-15).

Hines prevented the arrest of those associated with him in the conspiracy by providing for the transfer of police officers who were efficiently performing their duties (*infra*, pp. 15-20).

Hines prevented effective prosecution in the magistrates' court of those associated with him in the conspiracy by influencing two magistrates to dismiss cases before them (*infra*, pp. 21-36).

Hines sponsored, selected and financed the campaign of the successful candidate for election to the office of district attorney of New York County in 1933, and thereafter prevented serious investigation by the district attorney's office into his own activities and the activities of those associated with him in the conspiracy (*infra,* pp. 36-40).

Hines sought to prevent the appointment of a special prosecutor, because it seemed likely that such appointment would lead to effective criminal investigation of himself and those associated with him in the conspiracy (*infra,* pp. 40-41).

The defendant Hines' assistance in opening the Combination's headquarters and in attempting to have the Combination's banks moved to Mount Vernon.

In 1932, when the Combination was anxious to advertise its political power and its immunity from arrest, Schultz decided to open a central headquarters at 351 Lenox Avenue. Before this plan was executed, it was submitted to, and approved by, the defendant Hines (2352-61).

Later, in 1933, when police activity in New York County made it advisable to move the banking activities of the Combination elsewhere, Hines was again consulted. The banks went to Mount Vernon, where they remained for about ten months. In January of 1934, when the authorities of Mount Vernon declined to permit the banks to continue, and a drive in New York City was imminent (4932), Hines' aid was once more enlisted to the end that the banks might relocate in Mount Vernon (2604-5, 2732). However, the authorities of that city proved adamant, and

Hines' efforts met with failure (2622, 2733, 3980). The testimony of Weinberg and Davis concerning the above transactions and negotiations was fully corroborated by the testimony of the mayor of Mount Vernon (3708 *et seq.*) and of a substantial business man in the Bronx, named Jack Kearns (3682 *et seq.*).

The protection afforded to the Combination by the defendant Hines

As indicated, Hines did his utmost to protect his fellow conspirators from being arrested or prosecuted.

Protection from arrests

General charge of gambling arrests was in the hands of plain clothes policemen. Those whose jurisdiction especially affected the principal areas involved in the case at bar were (1) the Sixth Division with primary jurisdiction, (2) the Borough Headquarters Squad, which had charge of the whole Borough of Manhattan, and (3) the Chief Inspector's Squad, operating out of Police Headquarters, with jurisdiction over the whole city.

1. The Sixth Division

As soon as the Combination began its operations, Weinberg informed Hines that the Sixth Division was proving troublesome and that something had to be done to curtail its activities (2372). Hines told Weinberg that he thought he could handle that Division (2142).

Prior to this talk, the Division had been responsible for about twenty gambling arrests a day (2380). Thereafter the arrests dropped to eight and, at times, four a day (2381). On several subsequent occasions when the arrests in-

creased, Weinberg spoke to Hines (2397). In each instance, Hines promised to do something about it, and, immediately, the arrests again decreased to four or five a day (2398-9). By the fall of 1932, the Sixth Division presented no further problem: it had ceased to trouble the Combination or its members (2400-1).

2. Borough Headquarters Squad

Terminelli, a plainclothesman attached to the Borough Headquarters Squad—which had jurisdiction over Manhattan—began to take an annoying interest in the Combination's activities. When in the fall of 1932 he visited the Combination's headquarters at 351 Lenox Avenue and sought to search Weinberg's desk, the latter warned him that if he dared to interfere, he, Weinberg, would see Hines and have Terminelli transferred from the Squad. Terminelli replied (2496):

> "I don't care about you or Hines, I have got work to do and I am going to do it."

The police officer persisted. Continuing to check up on the stores used by the Combination, he received additional threats from Weinberg (2499, 2501). Finally, when he arrested one of the Combination's men (2505-6), Weinberg saw Hines. He told him that if something were not done, if Terminelli were not transferred, the Combination would lose face in Harlem (2508-9). Hines took Terminelli's name and Squad number, advising Weinberg that he would attend to the matter immediately (2509).

Within forty-eight hours, Terminelli was transferred from the Squad and placed back into uniform (2509-10). This was done, although his record for arrests was among the highest of any on

his Squad—as former Police Commissioner Bolan was forced to admit upon his cross-examination (7311-22).

No further activities of the Borough Headquarters Squad ever troubled the Combination.

3. Kiley and Maher

Two officers of the Broadway Squad, named Kiley and Maher, had been instructed to follow, and to search for weapons, any members of the Schultz gang seen in their district (5735). They carried out their instructions with such diligence that in December, 1933, Marty Krompier—a Schultz henchman substituting for the absent Bo Weinberg in the latter's supervisory capacity—threatened to "take care of" them (5745). When Hines was informed about these men, he promised to take care of them (4948-9).

Two days later, Kiley and Maher were transferred out of the district to another command (4949, 5746).

4. Chief Inspector's Squad

However, the unit that most seriously interfered with the activities of the Combination was the Chief Inspector's Squad under Captain Bennett. Its members made repeated major arrests of the Combination's employees. Weinberg, intensely annoyed, took up the matter of their removal with Hines (2565). Although he tried to arrange the transfer of some of the men (2565), Hines accomplished nothing for some time.

Sergeant Gray and Officers Canavan, Stilley, and McCarthy had proved particularly troublesome to the Combination. Some of them had raided a bank of the Combination and arrested

Weinberg himself—under the name of Klein—together with fourteen others. Gray was in charge of a raid on Flores' and Ison's banks and was responsible for arresting twenty-six more of the Combination's employees. McCarthy, with another officer, had arrested Schultz' bodyguard, Lulu Rosencranz.

After these arrests, Hines promised and arranged to have those cases dismissed in the magistrates' court. This phase of his activities is treated at greater length hereafter (*infra*, pp. 21-36). Although the outcome thus engineered by Hines was favorable, the raids and arrests by Gray, Canavan, Stilley, and McCarthy were a source of irritation to the Combination, and Hines was continuously opportuned to have those men removed to some other Squad (2645, 2648-51). Upon the appointment of Bolan as Police Commissioner, Hines promised to get rid of the whole Squad (2565). Thereafter, on October 5, 1933, an order was issued directing the transfer of five men (2652, 4063). A few days later, another order was put through, calling specifically for the transfer of Gray, Canavan and Stilley—a procedure hitherto unknown in the Department (4213-6). The Squad was thus reduced from its original number of sixteen to eight (4079).

The Combination had nothing more to fear from that unit.

Other witnesses besides Weinberg and Davis testified to these transfers. John F. Curry, the leader of Tammany Hall during the time covered by the conspiracy, described the methods that Hines and the other district leaders employed to accomplish police transfers (4263, 4270-81, 4349).

Detective Canavan told of the threats made by Weinberg and other members of the Combination

to have him transferred and demoted (3902, 3904, 3908), of his subsequent transfer, and of the surrounding circumstances (3909-10).

Captain Bennett and former Chief Inspector O'Brien also testified concerning the general order reducing the Chief Inspector's Squad, and the unprecedented order calling for the specific removal of Sergeant Gray and Patrolmen Canavan and Stilley, despite their efficient work and exemplary conduct (4166-73):

> "Q. Prior to that time five men had been transferred out of that squad, had they not? A. That is right.
>
> "Q. You hadn't the slightest complaint against their efficiency, integrity or anything about their work, had you? * * * A. I did not.
>
> "Q. Now, on this date, about a week or ten days later, you say Commissioner Bolan gave you some more orders. Again tell us what that order was. A. Well, the order—in fact, it was not an order; he gave me the names of three men * * *. [4166-7]
>
> * * *
>
> The Court: Did he tell you what to do?
>
> The Witness: He told me that he wanted them transferred. [4170]
>
> * * *
>
> "By Mr. Dewey:
>
> "Q. Did he tell you that he wanted those three men transferred out of the squad? A. That is right.
>
> "Q. [Who were] Those three men * * * that he gave you the names of? A. Sergeant Gray * * *.
>
> "* * * A. Canavan, and a man by the name of Stilley.
>
> "Q. Did you have any complaint about the work of those men? A. No, sir, I did not.

"Q. Did you have any complaint about their efficiency? * * * A. I did not.

"Q. Did you have any complaint about their integrity? A. I did not. [4172-3]"

Another detective by the name of Salke had also bothered Schultz and the Combination. Weinberg spoke to Hines about him, urging that "he should get Salke put back in a uniform" (2658). Deputy Police Commissioner Lyons substantiated that account. He testified that he had received an order for the transfer of Detective Salke, but that its execution had been effectively blocked by the United States Attorney for the Southern District of New York (6062-4).

In order to rebut any possible inference that the transfers might have been the result of normal police routine and not of Hines' intervention, it was shown that the officers transferred had been performing satisfactory services and that the transfers had been made against the wishes of their immediate superiors (4060-1, 4166-7, 4173, 6064-5). As a matter of fact, as we have already noted, former Police Commissioner Bolan who, as Borough Commander, was Terminelli's immediate superior, admitted that Terminelli's record for arrests, immediately prior to his transfer, had been among the highest of any on his Squad (7311-22).

Protection from prosecution in the magistrates' court

When Hines joined the conspiracy, he assured Schultz and Weinberg that he could handle cases in the magistrates' courts, and he agreed to engineer dismissals if the need arose. This was no idle boast. We have already referred to

three occasions when important arrests were made by the Chief Inspector's Squad; as a matter of fact, these were the only important arrests affecting the Combination in the five year period embraced by the conspiracy. In each instance, Hines spoke to the magistrate and assured Weinberg and Davis of a certain dismissal—and, just as he predicted, each of the three cases was dismissed. We discuss these cases separately.

1. November, 1932—Discharge of Weinberg and fourteen other defendants by Magistrate Capshaw

On Thanksgiving Eve of 1932, Sergeant Gray, together with police officers Magnus and Canavan, conducted a raid on the Pompez bank (2523). Fifteen employees, including George Weinberg, who gave the name of Klein, were arrested (2531).

Weinberg immediately communicated with Davis and told him (4886):

> "I am going to get in touch with Jimmy [Hines], to see if he can help us in getting the thing thrown out."

Davis read the Magistrates' Court complaint in Weinberg's presence and then advised him that an iron-clad case was made out and that (4887):

> "I don't see how any Judge is going to throw this case out * * *."

Weinberg, however, knew what to do. He again informed Davis (4887):

> "I am going to see Jimmy, it must be done."

The case was postponed (2541, 4888) and Weinberg spoke to Hines (2535). Weinberg stressed the need for a dismissal of the case, saying (2538-9):

> "this was one pinch, one of the big pinches that we would have to throw out in the Magistrate's Court.
>
> * * *
>
> "'And if we don't throw it out, that would surely prove that we didn't have the right O. K. to go up there.' First we get the pinch from the cops and then we can't throw it out."

After giving the matter some thought, Hines said (2539):

> "See if you can have that postponed until it gets to Magistrate Capshaw."

When Weinberg expressed some doubt as to the selection, Hines assured him that Capshaw was the man, that he was one judge who would do his, Hines', bidding. Thus, Hines replied (2540):

> "If I didn't think he was O. K., I wouldn't tell you to get in front of him,"

adding (2540):

> "And when you get it postponed, you can get it postponed, in front of him and you can let me know."

Weinberg reported Hines' instructions to Davis (2541). Accordingly, the case was adjourned in order to have it come on before Magistrate Capshaw (4888; Peo's Exh. 30, pp. 2017, 3826). Before it had been reached, Hines and Weinberg met Capshaw at the Keating Democratic Club, located on Amsterdam Avenue and 126th Street. Hines mentioned the matter to Judge Capshaw, saying (2546):

> "I have a policy case, a very important case. Would you be able to handle it for

> me, a case coming up before you, and I would like you to take care of it for me,''

and further stressed its importance (2546-7):

> ''But it is very important that this case should be taken care of. I am very much interested in it.''

Capshaw's reply was brief, but very clear (2547):

> ''I haven't failed you yet. I will take care of it.''

As planned, the case, which merely charged the defendants with possession of policy slips, was heard by Magistrate Capshaw on December 9, 1932. At the hearing before Capshaw, the officers testified to the facts of the raid. There had been literally hundreds of thousands of policy slips in the premises. Seven or eight defendants were engaged in sorting them, while six or seven other defendants were in an adjoining room, operating adding machines (5940-6, 5954). There were additional piles of policy slips next to the machines (5946).

Weinberg had confessed to one of the officers, Canavan, that ''you have one of the biggest banks in Harlem'' (5965). Weinberg and another defendant had claimed that they were there to fix the adding machines, but they had no tools or other implements for such purpose (5965). All of the others had admitted that they had been working in the bank (5940, 5950, 5965-6, 5991). Every one of the defendants had keys for the apartment (5966). Several bags containing about 200,000 policy slips were found in the apartment (5943). Weinberg had a key for them: when one of the officers prepared to rip one open, Weinberg

handed him the key, asking him not to destroy the bag (5967).

Further proof of Weinberg's criminal complicity was his almost incredible audacity in approaching Detectives Canavan and Magnus in the corridor during one of the adjournments to ask them for permission to look at the pay-off sheets, which they were holding as evidence, so that the "hits" could be paid off (5967-9). Thus, Canavan testified before Magistrate Capshaw that Weinberg said to him (5969):

> "Is there any chance to look at those sheets? We have to know how much we have to pay out on the hit numbers."

After hearing the foregoing testimony, Magistrate Capshaw discharged Weinberg and his co-defendants, on the ground that no *prima facie* case had been established, and this conclusion was reached in spite of the fact that—as Capshaw himself admitted on the stand in the instant case—he was known as a "tough judge" in policy cases, having dismissed only forty out of the nineteen hundred such cases that had been before him (8671-3).

Magistrate Capshaw, called as a witness for the defense in the present case, attempted to justify the dismissals on the ground that he had not believed the officers. It is unnecessary to review his entire testimony; several instances will suffice to illustrate the absurdity of his efforts to avoid the effect of the testimony of Davis and Weinberg that the case was thrown out as a direct result of his talk with, and promise to, Hines. His credibility was, we submit, completely destroyed by the testimony he gave dealing with his alleged

reasons for dismissing the case; we mention a few of those reasons.

First: Officer Canavan had testified before Magistrate Capshaw that Weinberg had admitted to him that the raid had caught "one of the biggest policy banks in Harlem." Yet Magistrate Capshaw gave the following testimony on cross-examination (8492-3):

> "Q. You knew it was a policy bank, didn't you? A. I did not.
> "Q. You mean, you thought it was something other than a policy bank? A. I didn't know what a policy bank was."

Second: He criticized the officers for testifying that the defendants, whom they had arrested, had admitted that they "worked" at the bank, claiming that the use of the word "worked," without further explanation of what the term signified, was suspicious (8507-10). The magistrate admitted that the officers "said the defendants said they worked there" (8514), but asserted he wanted them to add something to that testimony (8514-7). Judge Nott himself was moved to ask the witness (8515):

> "Q. Now, how could the officers explain to you what the defendants meant by that? A. Well, the officers could explain to me what they saw, and what——
> "Q. That is not answering my question at all. How could the officers explain to you what the defendants meant when the defendants said they worked there? A. They could tell me what else in connection with work the defendants said and what they saw, your Honor."

Third: The magistrate really distrusted the officers then, he said, because they had asked the

defendants whether they "worked" at the bank, instead of asking them whether they had handled the policy slips (8519-20, 8523). The record of the magistrate's hearing shows clearly, however, that this was a fabrication on the part of the magistrate: both Magnus and Canavan had asked each of the defendants at the time of their arrest whether they "handled the slips" (5947, 5989).

Fourth: Magistrate Capshaw further attempted to justify himself by charging that the police had not asked the defendants whether they "owned" the slips (5828), protesting that he did not know that "the man who works in a policy bank does not own slips" (8528). The question was, of course, immaterial, yet it appeared that, at the hearing before him, the officers had testified that they had asked those arrested "whose slips they were" (5969, 6989). The magistrate, however, still insisted that his disbelief of the officers sprang from their failure to use the apparently magic word "ownership." Thus, he testified (8538-9):

> "Q. It appears now that Canavan asked the question. You said they were disbelieved because they did not ask? A. He did not say anything about ownership. He said whose they were, which would be a little different."

Fifth: Magistrate Capshaw also asserted that he disbelieved Canavan because Gray had not testified that Canavan had *told him* that Weinberg stated that he had raided one of the largest policy banks in Harlem. Judge Nott, again impelled to take part in the questioning, asked Capshaw (8624-5):

> "You thought that Gray ought to have told you what Canavan told him about what the defendants told Canavan; is that it?"

And the magistrate replied (8625):

> "Yes."

As Judge Nott justly remarked (8625):

> "That is hearsay, isn't it? It would have been a hearsay statement. If the defendant's counsel had objected to it it would not have been admissible * * *?"

Sixth: Perhaps the most obvious example of Capshaw's anxiety to create *ex post facto* justification for his conduct is found in his absurd suggestion that the defendants might have been working in this policy bank as cooks or waiters (7579, 7621, 8579). He was quickly forced, however, to admit that it appeared from the evidence that there were only two cups and a few slices of one pie in the apartment (8561-70). Finally, he fell back upon the alternative suggestion that they might have been there for a social visit (8581-2) or might have "dropped in there to see somebody else" (8582).

2. December, 1932—Discharge of the Flores and Ison bank defendants by Magistrate Erwin

On December 22, 1932, there was another raid, also conducted by the Chief Inspector's Squad, but this time on banks managed by Ison and Flores. Sergeant Gray was again in charge (2555-6). Twenty-six persons working in two banks situated in a single apartment were arrested (1040).

Once again the matter was brought to Hines' attention. Both Davis and Weinberg went to see him and asked him to have the case dismissed in

the magistrates' court (2562). Weinberg told him that this was the second big raid and that (2562):

> "if we throw this out, that will prove to everybody that we really have the right O. K., that nobody can annoy us."

And Hines replied (2562):

> "Well, I couldn't—even if I could get in front of him, I couldn't give it to Capshaw, as he has just thrown out this big one.
>
> "* * * I will have to think who to give it to, and I will straighten that out [with] Dick."

Davis spoke to Hines about "what could be done in order to have the case thrown out of court" (4893), and later Hines told him (4894-5):

> "that we would have to adjourn the case, for me [Davis] to find out who is sitting there."

When advised that Magistrate Erwin was to preside, Hines directed Davis (4895):

> "Adjourn it before him and I will talk to him."

Hines later informed Davis that he had seen the magistrate and had arranged everything. Davis testified (4897):

> "he told me that he saw Judge Erwin, and to try the case before him, that the thing would be okay."

Magistrate Erwin heard the case and dismissed it (1135, 4898).

The charge, as in the other case, was the simple one of possessing policy slips. In spite of that, a reading of the record of the proceedings discloses that the magistrate was intent upon devel-

oping the fact that no policy slips had been collected, sold, or offered for sale on the premises.

The defendants were seated at a long table upon which there was "a very large quantity" of policy slips (1034 *et seq.*). Nevertheless, the magistrate took the extremely bizarre view that the admissions made by the defendants that they had been sorting slips and had therefore been in possession of them, were of no avail, since "the corpus of the crime"—whatever that might be—had not been proved. Thus, said Magistrate Erwin, in excluding these admissions (1046):

> "His admissions are of no avail to the People unless you prove the corpus of the crime. You know that. Confessions are never of any value to the People unless the People first prove the corpus of the crime."

When the officer testified that another defendant had also admitted handling the slips, Magistrate Erwin repeated his novel theory (1058-9):

> "Q. Did you have any conversation with the defendant? A. I asked the defendant if they were policy slips and she said they were. I asked her what she was doing with them. She said she was assorting them.
>
> "By the Court:
>
> "Q. She said what? A. She said she was assorting them. * * *
>
> "The Court: Again we have admission—an alleged confession without proving the corpus of the crime. You haven't proved that she was actually in possession of them."

We refrain from giving further details of evidence before Magistrate Erwin, but respectfully refer the Court to the record of those proceedings (Peo's Exh. 6, pp. 341-379).

collect policy slips in front of the premises 419 West 148th Street, they drove to that vicinity (6479, 6482-3). At about 3:45 p. m., an automobile, operated by the defendant Rosencranz, slowed down near the curb in front of number 419 while a colored man ran from the doorway and passed a blue package into the car (6471-2). As the defendant sped off, the officers followed (6472-3), and when Rosencranz stopped for a traffic light, Jones attempted to open the door of the defendant's car (6473, 6495). The light changed and Rosencranz drove off (6495). McCarthy gave chase in the police car, not waiting for Jones (6474). At 153rd Street, the defendant made a sharp turn, "threw this package out" of the window, and came to a stop thirty-five or forty feet further on (6474-5). When Jones arrived a few minutes later, McCarthy (6475)

> "told [him] * * * to pick up that package. He brought the package over to me"

—the same package which McCarthy had seen Rosencranz throw out of his car. When opened, it was found to contain several envelopes filled with great numbers of policy slips (6476).

The magistrate subjected the officers to a sharp and merciless cross-examination and then called the defendant to the stand. He asked him seven questions, including these (6567):

> "Q. Are those policy slips here yours?"
>
> "Q. Did you have them in the car with you?"
>
> "Q. Did you throw them out in the street?"
>
> "Q. You swear none of these were ever in your possession?"

Upon receiving satisfactory denials, Judge Capshaw made his ruling (6568):

"All right, defendant is discharged."

On the stand, Magistrate Capshaw explained his action by stating that he did not believe the officers. He gave a number of alleged reasons for this disbelief, some of which we consider briefly.

First: He did not believe the officers because they failed to shoot at Rosencranz' car when he drove off (8621-2), even though they possessed no evidence that a crime had been, or was being, committed (8279). He maintained, for a time, however, that the tip they had received from their informant constituted legal evidence (8277-81).

Second: He did not believe McCarthy because that officer testified to everything that had happened from the time that Rosencranz was first observed until the arrest was made. He should have related no more than that he saw the defendant throw the package out of the car (8103-6), declared Capshaw (8105),

> "because we are very much pressed for time in the Magistrates' Court. We have a lot of cases we are trying * * *."

McCarthy's account of these details covers but two pages of the present record (8113-8)!

Third: He did not believe the officers because they failed to bring their informant in as a witness. That such action would disclose the informant's identity and destroy his usefulness did not bother the magistrate (8412-7, 8430-1):

> "Q. You expected them to produce the man who gave them this information and walk him into court for the defendant and everybody else to look at, did you? A. I saw no objection to it, if they could prove this man's guilt. That is what they want to do, I assume. [8430-1]"

A particularly strange requirement when, as Capshaw himself conceded, the informant could have testified only as to the contents of the package, which was already offered in evidence following McCarthy's testimony that it contained policy slips (8417-8). Thus, the magistrate testified (8417):

> "Q. Do you mean that by bringing their informant, you thought he would be able to give testimony as to what was in that package right before you in court? A. I assumed that he would be able to help in that respect.
>
> "Q. Why didn't you look at the package, magistrate? A. Why didn't the officer look at it * * *."

Fourth: He did not believe McCarthy because, so he claimed, the officer had not testified that he had seen Rosencranz throw the package from the car (7743-6). Not only is it a fact that McCarthy did so testify (6474-5), but Capshaw admitted on further cross-examination that such was the fact (7989, 8002, 8007) Nevertheless, McCarthy was not to be believed because when asked (8308):

> "How do you know this package was ever in the possession of this defendant?"

he had said (8309):

> "I seen it."

instead of giving an answer which should, in the magistrate's words, have been as follows (8308-9):

> "Why, I saw it thrown from the car; I saw where it landed, I saw Jones pick it up, and this is the package."

Moreover, the magistrate testified, McCarthy's testimony that (8157)

> "As he [Rosencranz] turned the corner of 153rd Street he threw this package out"

was incredible, because the officer did not say that he "saw this package thrown out" (8315).

Fifth: The magistrate even intimated that the package picked up might not have been that thrown from Rosencranz' car, but rather one thrown from some nearby house (8011-2):

> "Q. He said he saw a package come out of the car; he saw a package put in the car; he had Jones pick up that package. How could there be any doubt about it? A. Well, if Jones picked up that package, there could not be any doubt about it.
>
> "Q. Did you have any doubt that Jones picked up the package? A. I certainly did, yes.
>
> "Q. What package did you think he picked up? A. I don't know.
>
> "Q. Well, a package thrown from a house window or what? A. Possibly a different package that might have been thrown or placed by somebody else.
>
> "Q. Well, how could McCarthy tell him to go and pick it up then if it was thrown from a house? A. McCarthy might have seen a package of the same color.
>
> "Q. Hurtling through the air from a window? A. He does not say he saw it thrown. He says it was thrown, and he may have seen

> it when he came up to the street, lying there, a package of the same color.
>
> "Q. That is, as he was driving by he saw a package of the same color lying on the street that somebody else threw? A. Possibly, yes, sir."

Sixth: Another of Capshaw's alleged reasons for dismissing the case is even more fantastic. He testified that he believed that the defendant had schemed with the police officers to have himself arrested so as thereby to avoid paying off on the hits (8371, 8365-73, 8375-9). Such testimony prompted Judge Nott to inquire (8381):

> "What has this got to do with the scheme that originated in 148th Street to have the defendant somehow chased through the streets?"

To which Capshaw replied (8381-2):

> "Well, it may have been in their mind, your Honor, as I thought then, that they wanted to have a break in the testimony, so there would not be any holding—There might be an arrest; they would get the credit for it; they would not give the Magistrate a sufficient line of testimony to justify his holding; the Magistrate would dismiss the case and they would get the credit. The man who was arrested would probably not have to pay off on his hits and everybody would be satisfied and the Magistrate could hold the bag."

Then, when the district attorney bluntly asked (8383):

> "Did you or did you not believe that it was a fixed-up arrest so that the defendant would not have to pay off on his slips?"

the magistrate's only response was (8383):

"I can't answer that."

The testimony of Weinberg and Davis establishes the fact that Hines used his influence and obtained assurances from both Capshaw and Erwin that they would throw out the cases before them. Consideration of the records of the proceedings in the Magistrates' Court goes far to substantiate the accomplices' testimony that the dismissals were dictated, not by any independent process of reasoning, but solely by Hines. That conclusion becomes a certainty when considered with, and in the light of, Capshaw's ludicrous testimony seeking to justify his action.[3]

Use of influence and protection in the district attorney's office

The defendant Hines' contribution involved not only protection from arrest and assurance of dismissals in the magistrates' court, but also the use of his influence in the office of the district attorney to prevent effective crime investigation and law enforcement.

Hines had selected William Copeland Dodge as his candidate for district attorney in 1933 (4951) and had assured Davis that there was nothing to fear with Dodge filling that position (4952-3):

"'I wouldn't worry about it. I can handle him. I can take care of him.'

* * *

"He again said, 'Now, don't worry about him, I can handle him.'"

---

[3] The Appellate Division, in considering Magistrate Capshaw's removal, reviewed the testimony he gave upon the trial of the present case. [See *Matter of Capshaw* (1st Dept. 1940) 258 App. Div. 470.]

In September of 1933, Dutch Schultz directed Weinberg and Davis to support Dodge, and to give him all the assistance, financial and otherwise, that was needed (2707-9, 2710). Weinberg testified that sometime later Schultz further discussed the coming election (2712-3)

> "and the help we would have to give Hines, and he said, 'We have got to concentrate on the district attorney more than anything else.'"

Hines also told Davis that, since Dodge was his candidate, it would be up to him, Hines, to finance the campaign, and he asked Davis to speak to Dutch Schultz about it (4954-5, 4960). Hines minced no words (4955):

> "Would you talk to the Dutchman to see if you can get some money to back Dodge in this campaign."

Davis spoke to Schultz, who agreed to supply the funds for Dodge (4956-7). When Davis told Schultz that (4957):

> "Jimmy seems to have an awful lot of faith and confidence in the fact that he can handle and control him [Dodge]"

Schultz responded (4957):

> "If Jimmy says so, he knows what he is talking about, he knows what to do, you can back him to the limit."

Thereafter Davis personally turned over to Hines between $12,000 and $15,000 for Dodge's campaign (4959). The total furnished by the Combination aggregated some $30,000 (2729-30, 4486). The funds were raised by assessing the various banks belonging to the Combination (1327-9, 1750-1, 2727-8). Other members of the

Combination, in addition to Davis, paid Hines, usually in sums of $2,000 or $3,000 (2714). On at least one occasion Weinberg turned $3,000 over to Hines in the office of Joseph Shalleck, an attorney, while Dodge was present (2717-21). Fifteen hundred dollars more in cash was paid to Hines on Election Day at his clubhouse (4488-9, 4971-2).

In addition to the testimony of Davis, Schoenhaus and Weinberg, corroborative evidence was supplied by other witnesses:

John F. Curry, at that time Leader of Tammany Hall, testified that Dodge's candidacy was the defendant's personal project; that Hines had not advocated the candidacy of anyone else for county office (4234-5); and that he, Curry, had given Sobol, Dodge's campaign manager, the name of no leader other than Hines "in connection with getting money for Dodge" (4251).

Henry Sobol, Dodge's campaign manager testified that he received about $11,000 (4790) from the defendant Hines, all of it in cash and most of it in bills of $1,000 and $500 denominations (4772, 4776-7, 4781, 4790). Some of the payments were made at Shalleck's office (4775-9).

In the early part of 1935, after Dodge had been elected District Attorney, the Commissioner of Accounts of the City of New York initiated an investigation into policy and called Davis as a witness (4990-1). His testimony having been given widespread publicity (4991), he received a grand jury subpoena from the office of the district attorney (5012). This inquiry involved Schultz and the various policy bankers connected with the Combination (5025). Davis became apprehensive and spoke to Hines (5013):

> "You ought to get in touch with Dodge and see what this thing is going to lead up to."

Hines said that he would. Thereafter, Hines told Davis that he had spoken to Dodge (5013-4)

> "and that Dodge told him that they had no evidence before the Grand Jury of any kind against me or against anybody connected with me. * * * For me to go into the Grand Jury room and answer any questions asked of me and there would be no trouble."

Although he did not sign a waiver of immunity, Davis testified before the grand jury (5017). He became more apprehensive now—on behalf of others. He warned Hines that if something were not done to stop the inquiry, it would reach such proportions as to involve everybody (5026). Hines said "that he would get in touch with Dodge" (5026).

Finally, in June of 1935, Davis advised Hines that he had even been questioned about Hines' activities in the policy enterprises. Hines delayed no longer; he called on Dodge, personally, and was with him for about three-quarters of an hour (5026-7); Davis waited outside, and when Hines emerged, he told Davis the gist of his talk with Dodge. He had informed Dodge, he said, that things were getting too warm. He had requested him to put an end to the inquiry. Thus, Davis testified (5028-9):

> "He [Hines] told me that he told Dodge that they were asking questions of me in the Grand Jury room about him, Jimmy, about Schultz, about all the bankers, about me, that I had been responsible, and so had Schultz, for having obtained, as he knew, the moneys for his campaign, and that the thing should be stopped, and he told me that Dodge responded for me to go into the Grand Jury room the next time, because I had been complaining about Wahl to Jimmy in my prior

> conversations. I was told there would be someone else to examine me, that there would be a perfunctory examination as to general matters, and that then I wouldn't be needed any more."

As Hines had arranged, when Davis next went into the grand jury room, Wahl was not there. He was questioned instead, very briefly, either by Dodge, or an assistant, and dismissed (5030-1). Thereafter, Davis again discussed the matter with Hines and when Davis remarked (5034):

> "It was a pretty close call, I will tell you that,"

Hines responded,

> "Yes, I know it, but, * * * it is all over now, and that is all we are interested in. * * * It is over with. Let us forget about it."

Former District Attorney Dodge, of course, testified in Hines' behalf.

Efforts to prevent appointment of special prosecutor

At about this time, a move was set on foot to have a special prosecutor appointed (5034-5). The name of the present district attorney was mentioned as a possibility. The prospect worried Davis and he told Hines that Dewey's appointment was to be prevented at all costs (5035). To impress Hines further with the vital importance of stopping any such appointment, Davis took a prominent attorney, James D. C. Murray, to Hines' home in Long Beach, solely for the purpose of discussing the matter with Hines (5037-41).

This testimony was corroborated by Mr. Murray himself, who testified that he had gone to see Hines with Davis and had spoken to him

about the matter. Murray recalled that after he had given his opinion that Dewey "would indict anyone regardless of who he was if the occasion arose" (6620), Davis remarked to Hines (6620):

> "He will destroy us all"

and again urged Hines (5042)

> "to see Dodge and see if you can stop his appointment."

Hines responded (5042):

> "I will get in touch with him [Dodge] immediately,"

and (6620):

> "We will see."

The defendant Hines' continuance in the conspiracy until the fall of 1936

In 1935 there was a falling off of revenue owing to the fact that Schultz had long been a fugitive from a federal income tax indictment and had been unable to give sufficient personal attention to the Combination. Some of the banks had dropped out of the Combination. Schultz decided that the salaries of all the Combination's employees, including Hines, had to be reduced (2809-10, 2819-20). In June of 1935, Schultz called Hines to Bridgeport and there, in the presence of Davis and Weinberg, explained the financial state of affairs and told him that things were so bad that he was compelled to cut down on the money being paid out (2812-6, 5046). Thus, Weinberg testified that Schultz told Hines (2816):

> "One of the reasons I want to talk to you is to tell you, as I guess you know, things are getting pretty tough and I am

> using up a lot of money for my case. I will have to cut down on your money."

And Hines replied (2816-7):

> "Well, if things are tough, I suppose I will have to take a cut."

Accordingly, the payments to Hines were reduced to an amount ranging from $500 to $250 a week (2818-20, 4491-2), and those payments continued until October of 1936. After Schultz' death in October, 1935, the conspiracy continued just as before. Weinberg and Schoenhaus continued to manage the banks, to handle the records, and to pay the defendant Hines for his services, until the fall of 1936 (4492-6, 2819-22, 4539-44, 3665-75).

The evidence was clear and undisputed. From the lips of principals in the numbers racket came direct testimony that Hines had not only played a part in setting up the Combination's headquarters (2352-61), but had protected the criminal enterprise by interfering with police activities (*supra*, pp. 15-20), by obtaining dismissals in the Magistrates' Court (*supra*, pp. 21-36), and by fobbing off investigation in the district attorney's office (*supra*, pp. 36-40). In addition, documents and witnesses, unimpeached and unimpeachable,[4] furnished corroboration which, at the trial, rendered impossible effectual denial or refutation by the defendant, and which, on appeal, compels acknowledgment that the evidence established his participation in the criminal conspiracy.

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[4] In passing, we note that there was considerable evidence from disinterested witnesses establishing the intimacy which existed between Hines and Schultz (1619, 1819-20; 4900-7; 5553, 5555-7; 6102, 6229-30, 6311, 6359, 6420; 6473-7, 6581).

POINT I

Policy or the numbers game is a form of lottery within the prohibition of section 1372 of the Penal Law [In answer to Defendant's Brief, Point I, pp. 7-24].

A lottery is defined in section 1370 as

> "a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise or by some other name."

There are, of course, a great many kinds of lottery. [See, *e.g.*, *People* v. *Miller* (1936) 271 N. Y. 44; *People ex rel. Ellison* v. *Lavin* (1904) 179 N. Y. 164; *Hull* v. *Ruggles* (1874) 56 N. Y. 424.] It is the People's position that the numbers game is one form.

As we have already noted (*supra*, pp. 6-8) the numbers game, as conducted by the Combination, was a game of chance in which the player selected a number containing three digits and bet his money, from a penny up, on that number. The number was written on a policy slip which was given, together with the money, to a so-called collector. The winning number was determined each day by chance—more particularly, by a computation based upon the moneys paid on the results of horse races at a designated race track. If a player succeeded in picking such winning number, he was paid six hundred times the amount of his bet; otherwise, he received nothing.

That such a scheme is a lottery is self-evident and has been so declared by the courts of this state—

Wilkinson v. *Gill* (1878) 74 N. Y. 63;
Almy v. *McKinney* (Gen. T. 5th Dept. 1886) 5 N. Y. St. Rep. 267;
People ex rel. Shaw v. *McCarty* (Gen. T. 1st Dept. 1881) 62 How Pr. 152—

and by the courts of every other jurisdiction that has been called upon to decide the matter.

See: *Forte* v. *United States* (Ct. of App. Dist. Col. 1936) 83 Fed. (2d) 612;
Reilley v. *United States* (C. C. A. 6th Cir. 1901) 106 Fed. 896, rev'd on other grounds (1903) 188 U. S. 375;
State v. *Gilbert* (1917) 6 Boyce (Del.) 374;
Thomas v. *State* (1903) 118 Ga. 774, 45 S. E. 622;
Cutcliff v. *State* (1935) 51 Ga. App. 40, 179 S. E. 568;
State ex rel. Kellogg v. *Kansas Mercantile Ass'n* (1891) 45 Kan. 351, 25 Pac. 984;
Boyland v. *State* (1888) 69 Md. 511;
Smith v. *State* (1887) 68 Md. 168;
Commonwealth v. *Sullivan* (1888) 146 Mass. 142;
Commonwealth v. *Wright* (1884) 137 Mass. 250;
People v. *Hess* (1891) 85 Mich. 128, 48 N. W. 181;
People v. *Elliott* (1889) 74 Mich. 264, 41 N. W. 916;
State v. *Hilton* (1913) 248 Mo. 522, 154 S. W. 729;
State v. *Harmon* (1894) 60 Mo. App. 48;

State v. *Martin* (1896) 68 N. H. 463, 44 Atl. 605;
Dombrowski v. *State* (1933) 111 N. J. L. 546, 168 Atl. 722;
Commonwealth v. *Chirco* (1935) 117 Pa. Super. 199;
Commonwealth v. *Banks* (1929) 98 Pa. Super. 432;
Abdella v. *Commonwealth* (Va. 1939) 5 S. E. (2d) 495.

Wilkinson v. *Gill*, *supra*, 74 N. Y. 63, was a civil action for the recovery of a penalty under a statute permitting such recovery by "Any person who shall purchase any share, interest, ticket, certificate of any share or interest * * * in any portion of any illegal lottery" (1 Rev. Stat., p. 667, § 32, now § 1383 of the Penal Law). The policy game before the Court resembled the present numbers game in every important detail (pp. 64-65). The trial court had charged as a matter of law that playing "policy" was the purchase of an interest in a lottery, and this Court, in affirming the determination, expressly held that policy did constitute a "lottery." The Court said (pp. 66-67):

> "The question is therefore presented, whether the 'policy' transactions were within the statute [relating to lottery]. The statute is very broad and comprehensive. * * *
>
> "* * * For a small sum the plaintiff was entitled to a much larger sum, depending upon the result of the drawing of the Kentucky lottery. Whether that sum came from the Kentucky institution or from the defendant or any one else, was immaterial. If the drawing in the Kentucky lottery was adopted as the wheel of fortune, although the prizes were furnished by others, the character of

> the transaction was not changed. It is not necessary that there should be an organized institution or that the scheme should be called a lottery. If the defendant had set up a wheel of his own, and sold numbers which if drawn would represent prizes, he would have had a lottery, and whoever purchased numbers which were to be drawn, would purchase and have an interest in that lottery. Is the circumstance that the Kentucky drawing was adopted, material in determining the character of the act done? Was it not at least a game or device in the nature of a lottery? It was a practice which is within the very mischief and evil intended to be remedied. *It matters not by what name it is called, or what terms are used. It has all the essential features of a lottery, and should be so construed.* It has been well said that 'the office of the judge is to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief.' (*Magdalen College Case*, 6 Coke, 125-134.)" (Italics ours.)

We submit that the *Wilkinson* decision is controlling in the present controversy. The provision of the Revised Statutes then under consideration by the Court has since been incorporated, without change, into the Penal Law as section 1383. That section and the one involved in this appeal (§ 1372) are both integral parts of Article 130 of the Penal Law. Consequently, the meaning of the word "lottery" as used in each is controlled by the general definition found in section 1370. It follows that the circumstance—so strongly urged by the defendant—that section 1383 provides a civil remedy and section 1372 a criminal sanction, is wholly without significance. The word "lottery" has the same meaning in each section, and the *Wilkinson* case is decisive of this appeal.

In *Commonwealth* v. *Wright, supra,* 137 Mass. 250 and *Commonwealth* v. *Sullivan, supra,* 146 Mass. 142, the court, in opinions written by Mr. Justice Holmes, held that persons who carried on a policy game—in essence like the present numbers game—were guilty of participating in a lottery. In the *Wright* case, *supra,* 137 Mass. 250, Justice Holmes pointed out that the ostensible distinctions between policy and lottery were of no legal significance and expressly concluded that policy was a lottery (pp. 251-252):

> "We cannot say, as matter of law, that the facts that the prize was money and not specific, and that more than one could select the same number with the same result, prevented the game from being a lottery. **It is a lottery according to the popular use of the word as shown by the dictionaries, according to history, to which lotteries with money prizes not specific have long been known, and according to the course of the decisions.** *Wilkinson* v. *Gill,* 74 N. Y. 63. See *State* v. *Lovell,* 10 Vroom, 458; and cases cited in Bish. Stat. Crimes, § 952."

It is to be noted that Justice Holmes considered *Wilkinson* v. *Gill, supra,* 74 N. Y. 63, authoritative upon the subject and cited it to support his conclusion in a criminal case.

Forte v. *United States, supra,* 83 Fed. (2d) 612, was a prosecution growing out of the operation of a so-called numbers game, the defendant being charged with the sale and possession of *lottery* tickets. The numbers game, as described in that opinion (pp. 613-614), was similar to the numbers game operated by the conspirators in this case. The defendant's sole contention was that he could not be prosecuted for selling *lottery* tickets because the numbers game was not a lot-

tery. After careful discussion of the authorities, the court—which also relied upon *Wilkinson* v. *Gill*—held that the numbers game was a form of lottery, and said (pp. 615-616):

> "The first contention of counsel for appellant is that the numbers game is a direct bet or wager on horse races. This contention has been generally rejected by the courts. Commonwealth v. Wright, 137 Mass. 250, 50 Am. Dec. 306; Wilkinson v. Gill, 74 N. Y. 63, 67, 30 Am. Rep. 264; Commonwealth v. Banks, supra. The results of the horse races are employed merely to determine the winning number, it being entirely immaterial to the player of the numbers game which horses win. The player merely guesses that the result of mathematical calculations, based upon the prices paid at a certain track, will be a certain number.
>
> "It is further contended that the numbers game is not a lottery because there must be a physical drawing of the certificate or ticket. One of the essential elements of a lottery is the awarding of a prize by chance, but the exact method adopted for the application of chance to the distribution of prizes is immaterial. People v. Elliott, 74 Mich. 264, 41 N. W. 916, 3 L. R. A. 403, 16 Am. St. Rep. 640; 38 C. J. pp. 289, 290, § 3. Any reasonable interpretation of the statute indicates that it is the prize and not the ticket which is to be drawn.
>
> "In our opinion the 'numbers game' is a lottery.
>
> * * *
>
> "The policy game is undoubtedly a lottery (Wilkinson v. Gill, supra; People v. Elliott, supra), and in our opinion the operation of that game, and the sale, transfer, and possession of policy tickets, could be punished under section 863 even had that particular type of lottery not been prohibited eo nomine in the statute."

The defendant urges (Defendant's Brief, pp. 15-16) that the court in the *Forte* case did not pass upon the question of whether "policy was a lottery." He claims that the issue before the court was whether the "numbers game" was "a policy game" (Defendant's Brief, p. 16). In this, the defendant seriously errs. Throughout its opinion, the court stated that the question for decision was whether the numbers game was a lottery (pp. 614-616), and, at one point, specifically said (p. 614):

> "The principal question for our decision is * * * in other words, whether the 'numbers game' is a lottery."

And, as we have already noted, the court expressly and unequivocally stated, in answering that question (p. 615):

> "In our opinion, the 'numbers game' is a lottery.
>
> * * *
>
> "The policy game is undoubtedly a lottery * * *."

In truth, that case cannot be distinguished from the present one.

The circumstance that the lottery laws were enacted before the game of policy came into existence (Defendant's Brief, p. 11), does not, of course, preclude prosecution of policy transactions under the lottery statute. [See *Wilkinson* v. *Gill*, *supra*, 74 N. Y. 63, 68; *Forte* v. *United States*, *supra*, 83 Fed. (2d) 612, 615; *Commonwealth* v. *Banks*, *supra*, 98 Pa. Super. 432, 434; *Abdella* v. *Commonwealth*, *supra*, 5 S. E. (2d) 495, 496.]

Nor is there any merit in the suggestion that the enactment of Penal Law provisions dealing specifically with the game of policy (Penal Law, §§ 970, 974 *et al.*) prevented a prosecution of the defendant for contriving, proposing and drawing a lottery in violation of section 1372.

In the first place, it is quite apparent that section 1372 and the policy sections are directed at entirely different types of conduct.

Section 1372, is aimed against one who, among other things, contrives, proposes or draws a lottery, or assists in so doing (*infra*, pp. 60-69).

Sections 970 and 974 do not deal with any such activity. They do no more than define, as misdemeanors, *certain of the minor offenses* peculiar to policy. **Section 970** prohibits a person from (1) selling a lottery policy or any paper equivalent thereto, or (2) from endorsing a document to enable others to sell lottery policies, and **Section 974** prohibits one from (1) keeping an establishment for policy playing or the sale of lottery policies, (2) delivering or receiving money in playing policy, (3) possessing policy slips, (4) possessing any other articles used in carrying on policy, and (5) being the owner, agent, janitor, etc., of an establishment where lottery policies are sold.

In short, it was never intended that the policy provisions should include the more important individuals who contrive, manage, and carry on policy or numbers enterprises, or assist therein, and this conclusion is confirmed by a consideration of the legislative history of these several provisions. We respectfully refer this Court to the decision of the Supreme Court, overruling the demurrer, wherein that subject is exhaustively treated (fols. 140-176; 168 Misc. 453, 458-465).

1. The state may proceed under a general statute even though a more specific one is available.[5]

Moreover, even if it could be said that section 974 defined with greater particularity conduct proscribed by the more general statute, and that the conduct of the defendant Hines came within such limited provision, it is settled that a specific statute does not replace a more general one and does not become the exclusive method of prosecution.

As a matter of fact, the defendant in *Wilkinson* v. *Gill, supra,* 74 N. Y. 63, made a contention very similar to the one now advanced by the defendant Hines, *viz.*, that the enactment of chapter 504 of the Laws of 1851, relating to policy playing, prevented the application of the lottery statutes to situations involving phases of policy. In overruling that argument, this Court said (pp. 67-68):

> "It is claimed that the act of 1851 (chap. 504), is a legislative construction that 'policy' is not a lottery. This act makes it a criminal offense for selling lottery policies, or any writing in the nature of 'bet, wager, or insurance upon the drawing or drawn numbers of any public or private lottery.' It may be that the defendant was liable under this statute, although in fact no policy or writing of any kind was issued or delivered, but I am at a loss to see upon what principle this act can be held to limit or restrict the meaning of the word lottery in the section under which

[5] Any claim that a repeal by implication was effected must fail in view of section 2500 of the Penal Law and the cases. [See *People* v. *Bord* (1926) 243 N. Y. 595; *People* v. *Dwyer* (1915) 215 N. Y. 46; *Peterson* v. *Martino* (1914) 210 N. Y. 412; *People* v. *Schultz* (2nd Dept. 1912) 149 App. Div. 844, aff'd 206 N. Y. 627.]

> this action was brought. The particular acts which the defendant may have done in pursuing the lottery business, are perhaps described with more precision than in the section in controversy; but this cannot impair the meaning of the section as it stands. 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 provision.'"[6]

There are innumerable decisions holding that the state may proceed under a general statute, even though a more specific section is available, under which the offender might be prosecuted. The following cases are more or less illustrative.

Perjury cases:

People v. *Malavassi* (2d Dept. 1936) 248 App. Div. 784;

People v. *Lorenzo* (2d Dept. 1929) 226 App. Div. 686;

People v. *Todd* (1935) 9 Cal. App. (2d) 246, 49 Pac. (2d) 611;

State v. *Little* (Mo. 1933) 60 S. W. (2d) 83.

Larceny cases:

People v. *Gallagher* (Sup. Ct. Herkimer Co. 1908) 58 Misc. 512;

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[6] The Supreme Court, in overruling the demurrer to the indictment in the present case, expressed the same thought, writing as follows (173-4; 168 Misc., at p. 464):

> "As already observed, lotteries generally were made unlawful before 1851 and before the probable existence of 'policy playing.' When, thereafter, a legal ban upon 'policy playing' was created in 1851, it did not take policy out of the lottery statute."

Goode v. *United States* (1895) 159 U. S. 663;
State v. *Liston* (1921) 27 N. M. 500, 202 Pac. 696;
Bingham v. *State* (1929) 44 Okla. Crim. 258, 280 Pac. 636.

Miscellaneous cases:

People v. *Bord* (1926) 243 N. Y. 595;
People v. *Dewey* (Gen. T. 1890) 33 N. Y. St. Rep. 427;
United States v. *Miro* (C. C. A. 2d Cir. 1932) 60 Fed. (2d) 58;
Nichols & Cox Lumber Co. v. *United States* (C. C. A. 6th Cir. 1914) 212 Fed. 588;
United States v. *Altman* (Dist. Ct. W. D. N. Y. 1934) 8 Fed. Supp. 880;
People v. *Singer* (1919) 288 Ill. 113, 123 N. E. 327;
Bonahoon v. *State* (1931) 203 Ind. 51, 178 N. E. 570.

The *Malavassi* decision, *supra*, 248 App. Div. 784, a perjury case, is typical. Although a specific statute was available covering the type of false swearing with which the defendant was charged, he was prosecuted and indicted under the broader general perjury statute. In holding it proper to rely on the general statute, the court said (p. 784):

> "There is no provision in article 74 of the Penal Law that makes the offenses therein defined and the punishment therefor exclusive. The fact that an act is a crime under two or more sections of the Penal Law does not bar prosecution under either provision. In such a case the duty devolves upon the grand jury and the district attorney to de-

> termine under which of the applicable sections of the statute an indictment should be found. Penal statutes covering substantially the same offenses may stand together and one may be prosecuted under any one of the provisions making the act or acts an offense. (Penal Law, § 1938; *People* v. *Dwyer*, 215 N. Y. 46, 52.)"

In *People* v. *Bord*, *supra*, 243 N. Y. 595, this Court was called upon to consider whether a general statute dealing with incest could be invoked when it appeared that the legislature had enacted a statute to cover the precise factual situation involved. Section 1110 of the Penal Law punished as a felony the intermarriage of persons related within the prohibited degrees; under that provision it was immaterial whether or not carnal knowledge had occurred. Another statute, section 5, subdivision 3, of the Domestic Relations Law, provided that parties to an incestuous marriage were subject to prosecution for a misdemeanor where there was no carnal connection. The indictment against Bord failed to charge that there had been such a connection, and the evidence, he urged, established none. On appeal from his conviction of the felony, the defendnt argued that the existence of a specific statute, covering the exact act with which he was charged, prevented a prosecution for the felony under the more general statute. In rejecting that argument, this Court ruled that the district attorney was free to prosecute under either statute as he might choose, and said (p. 596):

> "*It [the specific statute] cannot be said to be exclusive* * * *. *The district attorney may prosecute for the felony or for the misdemeanor as he chooses.*" (Italics ours.)

2. Cases cited by the defendant

None of the cases relied upon by the defendant detract from the force or validity of the People's position. For the most part, they are clearly inapplicable.

Cases such as *People* v. *Bloom* (1928) 248 N. Y. 582, *People* v. *Edelstein* (1st Dept. 1931) 231 App. Div. 459, and *People* v. *Lyttle* (1st Dept. 1929) 225 App. Div. 299, aff'd 251 N. Y. 347, not only are beside the point but clearly emphasize the vice of the defendant's reasoning (Defendant's Brief, pp. 8-9). Those three decisions do not treat the question of whether policy or the numbers game is a lottery; they simply involve the problem of whether lotteries, other than policy or the numbers game, may be prosecuted under section 974. Of course, since lottery is the general term, and policy the specific one, every lottery is not policy. But the converse does not follow, for, as the authorities agree, it is clear that policy is in its very nature a lottery.

The defendant seems to rely most strongly upon *People* v. *Weber* (2nd Dept. 1935) 245 App. Div. 827 (Defendant's Brief, pp. 9, 21-23). In that case, the court reversed a judgment convicting the defendant of a violation of section 1372 and, in its memorandum, cited the above-mentioned three cases [*People* v. *Bloom*, 248 N. Y. 582; *People* v. *Edelstein*, 231 App. Div. 459; and *People* v. *Lyttle*, 225 App. Div. 299, aff'd 251 N. Y. 347] for the proposition that a distinction should be drawn between violations of sections 974 and 975 and violations of section 1372. If the Appellate Division meant to suggest thereby that those engaged in a policy enterprise could by no means

be prosecuted under section 1372, the decision is, we submit, clearly wrong and constitutes bad law.

However, it seems to us that the case does not stand for any such proposition. As observed by the Appellate Division, in the instant case, in its opinion below (11579; 258 App. Div., at p. 468):

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

In the *Weber* case, the People offered nothing but the testimony of police officers that the defendants had been seen in a room sorting and tabulating policy slips. That was the sum total of the evidence in the case. *There was absolutely no evidence that any defendant had contrived, proposed, or drawn a lottery, or assisted therein, or, indeed, that any lottery had ever been drawn.*

That, as a matter of fact, was the position that the defendant's attorney took at the trial, for he sought a dismissal on the ground that nothing but "possession of policy slips" had been shown (*Weber* Record on Appeal, fol. 657). Indeed, the trial judge even refused to charge that the People were required to prove more than naked possession of policy slips to warrant a conviction under section 1372 (*Id.*, fols. 690-691). Under such circumstances the Appellate Division had no alternative but to reverse the conviction. Consequently, the *dictum* by the court that (245 App. Div. 827)

> "a violation of sections 974 and 975 of the Penal Law * * * must be distinguished from violation of the criminal statutes respecting lotteries,"

can be taken to mean only that mere possession of policy slips (which establishes guilt under sections 974 and 975) is insufficient to establish that the defendant contrived or drew a lottery. With this natural and unstrained construction of that decision, the People do not take issue.

The defendant has also relied on *Matter of Praither* (2d Dept. 1936) 246 App. Div. 846, aff'd 271 N. Y. 598, as an authority establishing that policy is not a lottery (Defendant's Brief, pp. 9-10). There was no such question before the court. The sole issue was whether or not the Court of Special Sessions of the Town of Hempstead had power to try a defendant for the possession of policy slips in violation of section 974 of the Penal Law. Since it was a court of limited jurisdiction, having only such powers as were expressly conferred upon it by section 56 of the Code of Criminal Procedure, and since subdivision 10 thereof—which listed the lottery charges that could be heard—did not include the possession of slips or even of lottery tickets, it followed that that Court of Special Sessions lacked the power to try the case. That is all the Appellate Division held.

It was again a question of possession, and no point was raised or discussed that even remotely touched the problem involved in the present case. Although, as the defendant indicates, the court remarked that certain cases purport to differentiate policy from lottery, that was only by way of showing that, in the case before it, the same result woud have been reached, whether the papers were considered policy slips or lottery tickets. This appears clearly from the statement in the Appellate Division's memorandum opinion that "even

if 'policy' be deemed 'lottery' within the purview of the Penal Law, possession of a ticket is not included within subdivision 10 of section 56 of the Code of Criminal Procedure'' (246 App. Div. 846). Obviously, the case cannot properly be cited in support of the defendant's position.

Cases such as *People ex rel. Lawrence* v. *Fallon* (1897) 152 N. Y. 12, and *Matter of Dwyer* (1894) 14 Misc. 204, also relied upon by the defendant (Brief, pp. 10-11), are equally irrelevant. As the court below pointed out, they relate to distinctions between lottery and gambling and have nothing whatsoever to do with the problem here presented (11579; 258 App. Div., at pp. 467-468).

In *Matter of Dwyer*, for instance, the court merely held that racing horses for stakes did not constitute a lottery (pp. 204-205, 206). The facts of that case serve to differentiate it even further from the instant one. Although one statute (Penal Code, § 352) made the racing of horses for stakes a misdemeanor, the operation of that provision was, by another statute (Laws of 1887, ch. 479), suspended during thirty days of each year. The indictment against the defendant for contriving a lottery was based upon the fact that he had advertised and organized a horse race to be run *on one of those days expressly permitted by the statute*. That being so, the court refused to permit a prosecution for an act which the legislature, in the statute expressly dealing with horse racing, chose to regard as proper and legal (pp. 207-208):

> "It indisputably covers the facts of this case, namely, the racing of horses for contributed stakes. *But by chapter 479 of the Laws of 1887 the operation of this section is sus-*

> *pended during thirty days in each year on the grounds of the said association and all like associations, and the day of the race on which the alleged offense is predicated was one of those days.* The complainant, therefore, being unable to have the defendant arrested for any actual offense, but being apparently bent on having him arrested anyhow, called racing horses for a stake a lottery, and accused him, as has been seen, under section 352 of the Penal Code, which is found in the chapter on 'Lotteries,' and makes the contriving, proposing or maintaining of a lottery a crime." (Italics ours.)

There can be no pretense that the legislature had given any approval or sanction to the activities carried on by the defendant Hines or his accomplices. The simple problem presented is whether, if the acts perpetrated amount to contriving, proposing, or drawing a lottery in the nature of policy, or assisting therein, the defendant may be prosecuted under the lottery statute, even though other provisions exist which relate specifically to other phases of policy.

Indeed, we are prepared to state that, so far as exhaustive research has disclosed, every court in the United States to which the question has been presented has held that the numbers game or policy is a lottery. As the Virginia Supreme Court of Appeals recently said [*Abdella* v. *Commonwealth*, *supra*, 5 S. E. (2d) 495, 496]:

> "That it [the numbers game] is a lottery is nowhere questioned."

POINT II

The defendant's activities rendered him guilty under section 1372 of the Penal Law [In answer to Defendant's Brief, Point II, pp. 25-31].

Despite his concession that the evidence established his membership and participation in the conspiracy (11575; 258 App. Div., at p. 467), the defendant now urges that he cannot be convicted under section 1372 of the Penal Law. To support this contention, he interprets the words "contrives, proposes or draws a lottery or assists in contriving, proposing or drawing a lottery" in a highly technical and artificial manner, and further asserts that it was necessary to prove his direct or physical participation in the contriving or the proposing or the drawing of a lottery.

Not only does the defendant misconstrue the language of the statute, but he ignores the fact that his confederates performed the very acts prohibited by section 1372 and that, by virtue of the aid which he rendered in the commission of those crimes, he is himself a principal under section 2 (Penal Law), even though he did not *physically* "contrive, propose or draw a lottery, or assist" therein.

A. Meaning of the expression "contrives, proposes or draws."

The word "contrive" has been defined to mean "manage," and "carry through" (see Funk & Wagnall's *New Standard Dictionary*; Murray's *New Oxford Dictionary*; Webster's *New International Dictionary*); the word "propose," to mean "put before the mind, bring to one's no-

tice" and "forward as a scheme" (see Murray's *New Oxford Dictionary*); and the word "draw" (in connection with lotteries), to select by chance a winner of moneys or property. [See *Wilkinson* v. *Gill, supra,* 74 N. Y. 63, 66; *People* v. *Noelke* (1st Dept. 1883) 29 Hun 461, 462.][7]

Moreover, when the statute is considered as a whole—as it must be—it becomes clear that it is directed against all persons who cooperate together in the instituting, promoting and managing of a lottery enterprise, or who join together to further a general scheme, regardless of the peculiar relations they may sustain to the lottery, or to each other, in rendering such cooperation. A consideration of Article 130 of the Penal Law, of the lottery statutes in other jurisdictions, and of the cases confirms the People's position.

Article 130 constitutes a comprehensive and integrated plan for the suppression of lotteries, containing, as it does, provisions specifically relating to the various accessory incidents of a lottery, and a provision expressly directed against those who set up, operate, and conduct the lottery enterprise itself. Thus, after defining a lottery (§ 1370), the Penal Law prohibits, as misdemeanors, the letting of premises for lottery purposes (§ 1381), the keeping of a lottery office (§ 1377), the advertising of lotteries (§ 1374), and the selling of lottery tickets (§ 1373).

Those activities obviously do not include the carrying on or managing of the lottery enterprise

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[7] There can, of course, be no doubt whatsoever that the Combination of which Hines was a member engaged in the daily drawing of a lottery, *i.e.*, the mechanical act of totalling the race track odds, and thereby selecting by chance a winning number and a winner each day.

itself. Such conduct is prohibited and declared felonious by section 1372, which expressly proscribes the contriving, proposing, or drawing of a lottery, or the assisting therein. There can be no doubt, we maintain, from the structure of Article 130 itself, that that latter provision (§ 1372) is intended to encompass not only those who may have originated the type of lottery involved, but also those who carry on or promote the lottery, or handle the drawing and selecting of the winners.

The earliest forerunner of section 1372 is found in chapter 206, section 2, of the Laws of 1819, which reads in part:

> "That no person or persons shall, within this state, open, set on foot, *carry on, promote,* draw, or make publicly or privately, any lottery * * *." (Italics ours.)

This provision was incorporated into the Revised Statutes with but minor changes (see 1 Rev. Stat., p. 665, § 27), and was not displaced until four years after the adoption of the Penal Code. (See Laws 1886, ch. 593.)

The words "contrives, proposes or draws" first appeared in the draft of the Penal Code prepared by the Commissioners in 1865 (p. 138, § 372); it covered:

> "Every person who contrives, prepares, sets up, proposes or draws any lottery * * *."

Since there appears to have been no basis or reason to modify the meaning of the previous provision, we submit that the suggested verbiage was intended to be synonymous with the words "open, set on foot, carry on, promote, or draw" found in the earlier Revised Statutes (1 Rev. Stat.,

p. 665, § 27). The Penal Code section (§ 325), as finally adopted, used the precise wording now found in section 1372 of the Penal Law. Again, we note the lack of any reason or motive to effect a change in meaning.

It is clear, therefore, that the combination of the four words, "contriving," "proposing," "drawing," and "assisting," was intended to comprehend the entire conduct and operation of a lottery scheme, including all the persons acting in concert with the managers and operators of the lottery enterprise, and to exclude only those who, separate and apart from the former, merely carry on an incidental activity, such as the selling of lottery tickets (see, *infra*, pp. 67-69).

This, in effect, is the holding of the lower courts in this case. Thus, in overruling the demurrer to the indictment, the Supreme Court stated (153-6; 168 Misc., at p. 461):

> "I have not been able to find any prior source of the verbiage 'contrive and propose' as contained in the proposed Penal Code of 1864 and embodied in the present statute. There are no definitions of the word 'contrive' in any of the law dictionaries or any of the legal decisions. There is a definition in the Standard Dictionary which seems to fit the situation, in the following: 'To manage or carry through by some device or scheme.' The word 'propose' in that context is more difficult to explain. I believe, by comparison with the old section in the Revised Statutes, that it is the equivalent of the phrase 'set on foot' and 'promote.' In any event, the source of the verbiage implies a description of the crime of devising a lottery and carrying it into effect. It embraces the work of the master minds who make up the scheme and who 'set it on foot' and supervise its execution. To use an analogy from the language of sport,

> the captains, the managers and the financial backers or promoters of the scheme are the persons intended to be covered by the definition, not the players on the team, the persons on the side lines, or the spectators."

And the Appellate Division wrote in the same vein (11580-3; 258 App. Div., at p. 468):

> "We find no merit in defendant's contention that his conviction was not supported by sufficient evidence under the provisions of Section 1372 of the Penal Law which relates to one who 'contrives, proposes or draws a lottery, or assists in contriving, proposing or drawing.' It has been held it is proper to charge that these words 'are applicable to persons cooperating in the instituting and administering of the lottery whatever may be the peculiar relations they sustain to it or to each other in rendering such cooperation' (*State* v. *Wong Took,* 147 Wash. 190, 265 P. 459.)
>
> * * *
>
> "The Oxford Dictionary, among definitions of 'contrive,' contains the following: 'To succeed in bringing to pass; to 'manage,' to effect (a purpose)'; also as meaning: 'to plot, conspire;' likewise 'To invent, devise, excogitate * * * (any plan or purpose).' The Standard Dictionary defines the word 'contrive' as follows: 'To manage or carry through by some device or scheme.' At least, the evidence was sufficient to hold defendant as principal under the provisions of section 2 of the Penal Law, even though he did not actually engage in the drawing."

See, also: *People* v. *Runge* (1st Dept. 1885) 3 N. Y. Cr. 85 (cited with approval in *People* v. *Miller* (1936) 271 N. Y. 44, 47);

People v. *Wolff* (1st Dept. 1897) 14 App. Div. 73, aff'd 152 N. Y. 640.

The equivalent of section 1372 has been enacted in most of the other states of this country. While the exact verbiage employed differs somewhat, it is evident that the various legislatures were intent upon prohibiting the promotion and operation of a lottery enterprise and punishing those who were engaged therein.

Most of the states have statutes resembling those of Alabama and Massachusetts. The former (Ala. Code of 1928 Ann., § 4247) is directed at one who

> "sets up, carries on or is concerned in setting up or carrying on any lottery or device * * *";

and the latter (Mass. Ann. Laws, ch. 271, § 7) at one who

> "sets up or promotes a lottery * * *."

The California statute (Penal Code, 1931, § 320) follows that of New York quite closely, providing that one who

> "contrives, prepares, sets up, proposes or draws any lottery"

is guilty of a crime.[8]

The statutes of Minnesota (Mason's Minn. Stat., 1927, §10209) and of Washington (Rev. Stat. § 2464) are identical with section 1372. As a matter of fact, the statutes of Washington not only include the provisions of section 1372, but

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[8] The statutes in seven states are identical with the California provision. [See *Idaho*: Code 1932, § 17-2403; *Montana*: Rev. Code 1935, § 11150; *Nevada*: Comp. Laws 1929, § 10177; *North Dakota*: Comp. Laws 1913, § 9662; *Oklahoma*: Stat. § 2312; *South Dakota*: Comp. Laws 1929, § 3896; *Utah*: Rev. Stat. 1933, § 103-25-9.]

incorporate Article 130 of our Penal Law without substantial change. Consequently, any decision by its court of last resort construing the expression "contrives, proposes or draws," is entitled to particular weight.

In *State* v. *Wong Took* (1928) 147 Wash. 190, 265 Pac. 459—referred to in the opinion of the Appellate Division below—the trial court had instructed as follows (147 Wash., at p. 191, 265 Pac., at p. 460):

> "**The words 'contriving, proposing or drawing a lottery or assisting in contriving, proposing or drawing a lottery' as used in the law, are applicable to persons cooperating in the instituting and administering of the lottery whatever may be the peculiar relations they sustain to it or to each other in rendering such cooperation.** They apply to one who controls the establishment and procures or permits a lottery to be operated therein, or to one who engages in the illegal use of the premises in assisting in any way the contriving, proposing or drawing of a lottery * * *."

The Washington Supreme Court approved the charge and clearly indicated that this contriving" statute was aimed at those who "*conducted*" a lottery enterprise. Thus, it was said (147 Wash., at p. 191, 265 Pac., at p. 460):

> "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."

The defendant contends (Defendant's Brief, p. 30) that the construction accorded section 1372 by the courts below is inconsistent with the existence of the misdemeanor provisions—to which we have already adverted (*supra*, p. 61)—relating to various incidental activities that attend the conduct of lotteries. In making that argument, however, the defendant fails to distinguish between a case where a person's only connection with a lottery begins and ends with his performance of the incidental acts specified in those sections and a case where a person performs such incidental acts—*e.g.*, letting premises for lottery purposes or selling tickets—in deliberate cooperation with those conducting and managing the lottery enterprise itself, and for the specific purpose of furthering the aims and objects of that enterprise.

Cf.: *Commonwealth* v. *Harris* (1866) 95 Mass. 534;
State v. *Wong Took*, *supra*, 147 Wash. 190, 265 Pac. 459;
State v. *Chin Kee Woy* (1928) 147 Wash. 194, 265 Pac. 460;
State v. *Louie* (1926) 139 Wash. 430, 247 Pac. 728.

In the *Harris case*, *supra*, 95 Mass. 534, the defendant was charged, by separate indictments, both with the selling of lottery tickets, and with the setting up and promoting of a lottery, and the question arose whether the defendant could properly be convicted of *both* crimes at the same time. In distinguishing between the two offenses, the court pointed out that a person who sells lottery tickets and does nothing else, could not be charged with carrying on a lottery, unless he were acting in concert with the actual managers of the

enterprise. However, the court squarely held that one who performed the incidental act of selling lottery tickets "in furtherance of the [lottery] scheme itself" was guilty *both* of the crime of selling tickets *and* of the crime of promoting a lottery. Thus, the court said (pp. 539-540):

> "The question is also submitted whether the defendants can be convicted and sentenced, at the same time, upon all of these indictments. Assuming that the first indictment is for the same lottery in which the ticket, described in the second indictment, was issued, it would seem, at first thought, that the possession of the ticket, with intent to sell, must form a part of the enterprise, and was included in the offence of setting up or promoting the lottery. But this apparent identity is incidental, and not a necessary one. *A man may be guilty of setting up a lottery without having the tickets in his possession for sale; and he may sell a lottery ticket, or have it in his possession with intent to sell, without the slightest participation in the setting up or promoting of the lottery.* He may have purchased or received a ticket from a stranger, and if he offer to sell it afterwards he would be guilty of this offence. Proof of the possession and sale of a lottery ticket, and nothing more, would not sustain the charge of promoting a lottery. **The defendants in these cases undoubtedly had the tickets and were selling them in furtherance of the scheme itself; but the fact that they did thereby promote the lottery is not essential, and indeed constitutes no part of the offence of selling lottery tickets, nor of having them in their possession with intent to sell.**"

The same conclusion was reached in *State* v. *Chin Kee Woy*, *supra*, 147 Wash. 194, 265 Pac. 460. The defendants were convicted of contriv-

ing, proposing, and drawing a lottery. Another statute, similar to section 1373 of the Penal Law, made it a crime to sell lottery tickets. There was no evidence offered that the defendants did anything more than sell lottery tickets. On appeal, the conviction was reversed, the court expressly holding that merely selling tickets did not constitute contriving or proposing a lottery. In so deciding, however, the court said (147 Wash., at pp. 196-197, 265 Pac., at p. 461):

> "We are not holding that evidence of selling, giving, furnishing or transferring lottery tickets is inadmissible as proof bearing upon the question of guilt of one charged with the felony defined in the statute. We hold only that proof of selling, giving, furnishing or transferring of lottery tickets, in the absence of further proof of contriving, proposing or drawing a lottery, does not constitute sufficient proof to sustain a conviction of the felony defined by the statute. To hold otherwise would be to view the misdemeanor section as meaningless. Here is wherein this case is clearly distinguishable from that of *State* v. *Wong Took*, just decided by us, *ante*, page 190, 265 Pac. 459."

B. The Combination committed crimes in violation of section 1372, and Hines, in furnishing protection to it and to its members, was a principal therein

The defendant's attempted distinction of the *Wong Took* case, *supra*, 147 Wash. 190, 265 Pac. 459 (Defendant's Brief, p. 31) evinces, we believe, the confusion that pervades his entire argument. He urges that the court in that case placed its ruling upon the fact that, unlike Hines, Wong Took had been engaged in "the physical administration

and operation of a lottery." It may be true that Hines did not physically contrive, propose, or draw a lottery; nevertheless, the others with whom Hines had confederated and with whom he was acting in concert—*e.g.*, Schultz, Weinberg, Schoenhaus, and the bankers who had set up, managed, and operated the enterprise—were patently engaged in "the physical administration and operation of a lottery."

These men had in their employ numerous controllers, collectors, and runners, who performed the physical work of taking bets, calculating and distributing the winnings, and bringing in the profits to their superiors. In addition, there were strong-arm men to keep the bankers and other members of the Combination in line, bondsmen to supply bail for those who were arrested, lawyers to represent those who were prosecuted, and a fixer at the race track to make sure that no heavily played number could win.

There can, therefore, be no question that, in carrying on the numbers game, the smooth running machine created and operated by Schultz and his confederates, involved certain of its members in contriving or proposing a lottery, or assisting in one or the other of those activities.

But if there could be any doubt concerning the performance of such acts, there can be none at all that the daily pay-off by the Combination—depending, as it did, upon the daily selection of a winning number by making the calculations above described (*supra*, p. 7)—constituted a "mechanical act by which the winner of the prize or prizes * * * [was] determined" (Defendant's Brief, p. 26), and hence, a drawing within the conceded meaning of the statute.

Consequently, since some of the members of the Combination were engaged in the physical task of "drawing" and selecting the winning number, it follows that the conspiracy necessarily involved the commission of the crimes denounced by section 1372.

The sole remaining question, therefore, relates to Hines' participation therein, though, we submit, even that seems to have been answered by the defendant's concession that the evidence established his membership in the conspiracy to commit the crimes charged in the indictment (11575; 258 App. Div., at p. 467).

In the first place, it is apparent that everyone in a criminal organization, such as the Combination, is criminally responsible for every act done by any of its members in furtherance of the conspiracy.[9]

See: *People* v. *Luciano* (1938) 277 N. Y. 348;
People v. *Crossman* (1925) 241 N. Y. 138, 145-146;
People v. *Swersky* (1916) 216 N. Y. 471, 477;
In re Disbarment Proceedings (1936) 321 Pa. St. 81, 184 Atl. 59.

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[9] In passing, we note that the use of the word "assist" in section 1372 does not preclude the applicability of section 2 to that provision. [See *People* v. *Senes* (1926) 242 N. Y. 556, aff'g 210 App. Div. 845 (Defendant's Court of Appeals Brief, pp. 16-18; Appellate Division Brief, pp. 2-14), relating to § 1423, subd. 6, of the Penal Law.] We call the Court's attention to the fact that a large number of other sections of the Penal Law resemble section 1372 in this regard, including, as they do, such words as "assist," "aid," and "encourage." (See *e.g.*, §§ 182, 185, 303, 441, 494, 514, 752, 765, 889, 895, 960, 962, 974, 986, 987, 1030, 1081, 1140-a, 1140-b, 1250, 1421, 1423, 1427, 1710, 1962, 2034, 2052, 2152).

The language employed by this Court in the *Crossman* case, *supra*, 241 N. Y. 138, seems particularly apt (pp. 145-146):

> "Each one had an appointed place in the organization and in the operation of the machinery by which unsuspecting people were drawn into the trap and defrauded of their money. * * *
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> * * *
>
> *"The criminal organization to which these witnesses became parties, as a jury might find, was unlimited in its scope and purpose. It was not created for the purpose of fleecing any particular person but for the purpose of defrauding any person who was innocent enough to come within the area of its operation.* * * * If that view is correct these witnesses became parties to and were criminally responsible for any transaction within the scope of the conspiracy conducted by this organization or any member of it in carrying out its purpose." (Italics ours.)

In *In re Disbarment Proceedings*, *supra*, 321 Pa. St. 81, 184 Atl. 59, the court was called upon to review a situation very much like that here presented. It appeared that an attorney had become affiliated with those who were running a policy racket and had been retained to represent its members in court upon their arrest. The court concluded that the strong-arm man, the bail procurer, the policy banker, and the lawyer were all cogs in the criminal enterprise and that each was criminally responsible for the result achieved (321 Pa. St., at p. 86, 184 Atl., at pp. 61-62):

> *"The notorious 'public enemies' who established this racket had built up a smooth running machine wherein one cog fits into another.* The writer is a cog; the pickup man is a cog; the bail procurer is a cog; the strong-arm squad is no more and no less a cog of

> this machine than the inconspicuous clerk who mans the adding machine at the numbers bank. The attorney who knowingly participates in such a racket by agreeing in advance to regularly represent the organized criminals and their henchmen is still another cog." (Italics ours.)

Moreover, it has specifically been held that one who—like the defendant at bar—agrees to, and does, protect others from arrest and prosecution for their criminal acts committed and to be committed, pursuant to a conspiracy previously entered into, is a principal and criminally responsible for the ensuing crime or crimes.

See: *Collins* v. *United States* (C. C. A. 5th Cir. 1933) 65 Fed. (2d) 545, 547-548;
Cook v. *United States* (C. C. A. 8th Cir. 1928) 28 Fed. (2d) 730, 732;
Jezewski v. *United States* (C. C. A. 6th Cir. 1926) 13 Fed. (2d) 599, 601-603;
Allen v. *United States* (C. C. A. 7th Cir. 1924) 4 Fed. (2d) 688, 691-692, 694.

Cf. *People* v. *Corbalis* (1904) 178 N. Y. 516, 522;
State v. *Ingram* (1933) 204 N. C. 557, 558, 168 S. E. 837, 838.

In *Collins* v. *United States, supra,* 65 Fed. (2d) 545, Collins was a sheriff, and Brewer his deputy. A group arranged to have liquor transported as lumber and sawdust. Collins and Brewer promised protection and thereafter accompanied the trucks containing the liquor to the railroad siding. In case of interference by federal agents, they would pretend that the truck was already under seizure. The government subsequently

seized two such box cars loaded with liquor. Neither Collins nor Brewer had ever physically "transported" any liquor, yet both were indicted for, and convicted of, the *substantive crime of transporting liquor,* as well as of a conspiracy to violate the customs and prohibition laws.

Since the language is so peculiarly pertinent, we take the liberty of quoting at some length from the opinion of the Circuit Court of Appeals which affirmed the judgments of conviction. The court said (pp. 547-548):

> "It is true there was no evidence whatever to show that either Collins or Brewer was actively engaged in the shipments of the two carloads of liquor, and they denied any participation. And it may be conceded that, if an officer has knowledge that a crime is to be committed or has actually been committed, and merely stands by and does nothing to prevent the commission or to apprehend and punish the offenders, he is not necessarily guilty of aiding and abetting its commission, although he may be guilty of malfeasance in office. But, where the officer beforehand actively participates in the arrangements for committing a crime and promises protection to others in its commission, the situation is different, and it cannot be said that he did not aid and abet its commission * * *.
>
> * * *
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> "The court charged the jury, in substance, that, if the sheriff and his deputy knew about the liquor being transported and entered into an agreement to protect the persons transporting it while they put it into cars, they were to be considered as principals. It does not appear that any objection was made to this part of the charge nor was any contrary instruction requested, although eleven special charges were presented to the court.

> Regardless of that, there is no doubt the charge correctly stated the law. The verdict was responsive to the charge, and there was sufficient evidence to support it."

The decision in *Cook* v. *United States, supra,* 28 Fed. (2d) 730, is similar. There, the court said (p. 732):

> "It is our opinion that where an officer agrees to afford a person criminally inclined protection from arrest and prosecution for the commission of crime, such officer is as much an actor in the commission of such crime physically committed by the person to whom the protection is afforded as one who aids by standing guard while another person physically commits a crime. *Billingsley* v. *U. S.* (C. C. A. 8) 16 F. (2d) 754; *Allen* v. *U. S.* (C. C. A. 7) 4 F. (2nd) 688, 692; *Jezewski* v. *U. S.* (C. C. A. 6) 13 F. (2nd) 599, 601, 602. There can be no doubt that the first payment of $10 made by Jimerson and received by Cox and Cook induced Jimerson to believe that he was being afforded protection and induced him to violate the National Prohibition Act by selling whiskey, and in this way tended to effect the unlawful object of the conspiracy."

The language in the *Allen* case, *supra,* 4 Fed. (2d) 688, is also most apt (p. 692):

> "Where individuals agree or have a common understanding to grant to those selling intoxicating liquor immunity from prison sentence, the case is brought within the statute, for such immunity has for its real object the maintaining of common nuisances as defined by the Volstead Law, as well as the manufacturing, transportation, and sale of intoxicating liquors.
>
> * * *

> "All of them were actors, though some played but a minor or insignificant part in the plot. The enterprise called for pawns as well as kings—the human wrecks found in the houses of vice as well as the highest public officials in the city. All the jury was required to find was a guilty participation, knowingly undertaken. The degree of moral turpitude was immaterial."

These cases involve law enforcement officers, but that in no way affects the principles they express. The promised protection—whether by a public official, or by a Hines who can control public officials in the conduct of their official duties—aids and abets in, and encourages, the crimes thereafter committed.

The record reveals that the defendant Hines was interested in a going criminal concern and that it was to his advantage that the business continue to produce large profits. He was interested in seeing that no law enforcing authorities interfered with, or hampered, its smooth and efficient operation. The very nature of the venture entailed constant and repeated violations of law, and it was his function to guarantee that the conspiracy and its members had a license to commit crimes in the future. There is no doubt that the success of his interference in the police department, in the district attorney's office, and in the criminal courts, was a constant inducement and encouragement to his co-conspirators to continue their violations of the law "and in this way tended to effect the unlawful object of the conspiracy." [*Cook* v. *United States, supra*, 28 Fed. (2d) 730, 732.] His efforts were aimed at removing the physical obstacles that impeded the activities of these criminals. He reduced the likelihood of

raids which disrupted the very conduct prohibited by the statute, namely, the "contriving, proposing and drawing" of the daily lottery, the handling of slips, and the selection and payment of winners; and he assured the dismissal, in the magistrates' court, of cases which would otherwise have frightened the employees, crippled the banks, and destroyed the confidence of the players.

As the Appellate Division wrote (11581; 258 App. Div., at p. 468):

> "The People's evidence tended to show that his contribution to the criminal purpose was the protection from prosecution and punishment for crime committed and to be committed pursuant thereto. **Indeed, the People's proof was to the effect that the 'numbers game' could not have been carried on without such protection.** Certainly, in rendering such service, defendant was lending cooperation."

To argue that one who provides protection performs just another incidental act, similar to the letting of premises for lottery purposes, is to lose sight of the distinction that we have already noted (*supra,* pp. 67-69). In other words, while one who lets premises may be prosecuted under section 1381 of the Penal Law, he may also be charged with violating section 1372 when he acts in concert and cooperation with the persons who contrive, propose or draw a lottery. So, in the present case, Hines could unquestionably have been prosecuted for conspiring to obstruct justice. However, his guilt of that additional crime affords him no defense when prosecuted for violating section 1372, in view of the fact that he was a member of the conspiracy to commit the crimes charged in the indictment and was deliberately acting in concert with those operating and conducting the lottery. [See, *supra*, pp. 67-69; *Commonwealth* v. *Harris*, *supra*, 95 Mass. 534,

539-540; *State* v. *Chin Kee Woy, supra,* 147 Wash. 194, 265 Pac. 460; *State* v. *Louie, supra,* 139 Wash. 430, 247 Pac. 728.]

In brief, the proof of the defendant's conscious participation in the Combination's criminal enterprise—together with his concession compelled thereby—conclusively establishes him as a principal in each of the substantive crimes committed in furtherance of the conspiracy. As the violation of section 1372 was a daily activity of the Combination, the defendant Hines was properly convicted of the crimes charged in the indictment.

POINT III

The prosecution for conspiracy was not barred by the statute of limitations [In answer to Defendant's Brief, Point IV, pp. 42-50; Point V, pp. 50-63].

The defendant was convicted of twelve substantive crimes and of the crime of conspiracy. The argument under this point is addressed solely to the propriety of the conspiracy conviction. Even if the indictment had not contained a charge of conspiracy, the People would have been entitled to show that the defendant and others had been engaged in a conspiracy and had, pursuant to that scheme, performed acts that aided, abetted, or otherwise assisted in the commission of the crimes charged. In other words, all of the evidence adduced in this case is relevant to, and bears upon, the twelve substantive counts charged in the indictment.

See: *People* v. *Luciano* (1938) 277 N. Y. 348, 358, *et seq.*;
People v. *Crossman* (1925) 241 N. Y. 138;

People v. *Swersky* (1916) 216 N. Y. 471;
People v. *Becker* (1915) 215 N. Y. 126;
People v. *Cassidy* (1915) 213 N. Y. 388;
People v. *McKane* (1894) 143 N. Y. 455;
People v. *Alexander* (1st Dept. 1918) 183 App. Div. 868.

A. Count One sufficiently alleged a conspiracy within the statutory period of limitations [In answer to Defendant's Brief, Point IV, pp. 42-50].

The first count specifically charges that the conspiracy continued from March, 1931, *through January 13, 1937*. The indictment was filed on May 26, 1938. Thus, we submit, it affirmatively appears that it was seasonably commenced. Moreover, at the trial, the uncontradicted evidence showed not only that the conspiracy continued at least until October, 1936, but also that the defendant Hines continued to receive payments for his part therein until that time.

The defendant argues that, although the conspiracy is charged to have continued through January 13, 1937, the indictment is faulty because the last overt act therein set forth occurred more than two years before the prosecution was begun. Consequently, the question, simply stated, is this: where a defendant is charged with conspiracy to commit a given crime and where the indictment and proof show that the conspiracy continued well into the period of limitations provided by statute, may the defendant escape prosecution because none of the particular overt acts alleged in the indictment took place within that time, even though many overt acts—daily acts for that matter—continued far into the statutory period?

We think that an examination of the statutes involved will readily demonstrate that the legislature intended to provide no such technical immunity.

Section 275 of the Code of Criminal Procedure states that the indictment must contain

> "A plain and concise statement of the acts constituting the crime * * *."

Our problem, then, is to determine the nature of "the act constituting the crime" of conspiracy. We accordingly ask the Court's indulgence while we examine, with some particularity, the function of the overt act under the statutes relating to conspiracy.

Section 580—bearing the significant title, "Definition and punishment of conspiracy"—defines the crime and sets forth the only elements that need be alleged. That section provides that "If two or more persons conspire: 1. To commit a crime" or to commit other specified acts, "Each of them is guilty of a misdemeanor." The following section (§ 581) deals with the conspiracy to commit treason, and section 582 declares that "no conspiracy is punishable criminally unless it is one of those enumerated in the last two sections." This, then, is the criminal offense, the prohibited act.[10]

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[10] In this connection, we note the Court's recent holding in *People* v. *Silverman* (1939) 281 N. Y. 457, wherein it was said (p. 460):

> "The gravamen of the crime of conspiracy is the corrupt agreement. (*People* v. *Flack*, 125 N. Y. 324; *People* v. *Tavormina*, 257 N. Y. 84.)" See, also, *United States* v. *Kissel* (1910) 218 U. S. 601, 609-610.

Section 583, however, provides:

> "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 beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement."

This section does not provide that a conspiracy is not committed unless something else is done, but specifies that "No agreement" is to be treated as a conspiracy unless some act is done to carry it into effect. The purpose of this section is readily apparent; it affords a *locus poenitentiae* for those who wish to repudiate the criminal agreement before any overt act is done to effect its object. It is no uncommon occurrence for a number of criminals to explore, in their discussions, the possibilities of a particular crime or other prohibited act, and even to agree upon its commission at some time in the future. Manifestly, the legislature did not believe that such a talk alone was of sufficient importance—except in the specific instances enumerated in section 583—to warrant the prosecution and conviction of the participants for a crime. If no affirmative action be taken, the law chooses to overlook the improper and morally reprehensible attitude of incipient evildoers.

Thus, it seems patent that an agreement to commit a crime plus an overt act spells out the prosecutable conspiracy. In short, if a conspiracy is charged in an indictment and it appears therefrom that an overt act was actually committed after the arrangement was entered into, the act constituting the crime—within the meaning of section 275 of the Code—is set forth.

In order to further effectuate its policy and affirmatively place upon the prosecution the bur-

den of showing that the conspiracy agreement was not repudiated and that an overt act had been committed after that agreement was entered into, the legislature enacted section 398 of the Code of Criminal Procedure. That provides, in part, that

> "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 * * *."

Lest, however, this be construed as limiting the People's right to introduce evidence of other overt acts at the trial, the section contains the additional statement:

> "but any other overt act not alleged in the indictment, may be given in evidence."

In the light of these principles, the sufficiency of the first count is, we respectfully submit, beyond question. In addition to satisfying the requirements of the Penal Law (§ 583) and of the Code of Criminal Procedure (§ 398) by setting forth fifteen overt acts, the indictment specifically and in no uncertain terms charges that the conspiracy continued "up to and including January 13, 1937," a date considerably less than two years prior to the commencement of the prosecution. There is neither basis nor authority for the argument that there must be further allegation of an overt act within the same statutory period.

The attitude taken by the courts toward the effect of the overt acts alleged in the indictment is strikingly presented by the case of *United States* v. *Downing* (C. C. A. 2nd Cir. 1931) 51 Fed.

(2d) 1030, involving a prosecution for conspiracy to import intoxicating liquors. The indictment charged a conspiracy formed in Ontario, and alleged certain overt acts, some committed in Buffalo, and at least one in Ontario. Jurisdiction was laid in the United States District Court upon the strength of the overt acts alleged to have been committed in Buffalo. At the trial, the proof broke down as to these acts and was sufficient to establish only the act charged to have been done in Ontario. Another act performed in Buffalo was proved though not alleged. The language used in affirming the judgment of conviction is enlightening. Judge Learned Hand, writing for the court, said (p. 1031):

> "Again, it is true that in those cases the indictment laid, and the evidence proved, an overt act within the jurisdiction, and that it was upon this that the court relied. That was not true here, because while the indictment laid overt acts in Buffalo, the proof broke down as to them, being sufficient only as to an overt act laid in Ontario. However, the conspiracy is the crime (*Hyde* v. *Shine*, 199 U. S. 62, 25 S. Ct. 760, 50 L. Ed. 90); *the overt act is necessary only to show that performance has begun, and it may be laid outside the jurisdiction* [*Dealy* v. *U. S.*, 152 U. S. 539, 547, 14 S. Ct. 680, 38 L. Ed. 545; *Chew* v. *U. S.*, 9 F. (2d) 346, 353 (C. C. A. 8)]. Since jurisdiction depends upon where the crime is committed, and it is committed wherever any part of the agreement is performed, the act of performance relied upon need not be an overt act laid in the indictment." (Italics ours.)

If the vital element of jurisdiction can be thus based upon an overt act not alleged in the indict-

ment, there can, by like reasoning, be no objection to the analogous procedure of satisfying the statute of limitations by proof of overt acts not set forth in that indictment, particularly in view of (1) the specific allegation that the conspiracy continued to operate and function until January, 1937, and (2) the specific legislative provision for the admission of any and all overt acts whether alleged or not.

The defendant has placed his reliance solely upon inapplicable cases decided in the federal courts (Defendant's Brief, pp. 45, 49), none of which holds that an indictment which charges a conspiracy continuing within the statutory period is insufficient if it does not also allege an overt act within that time. The cases cited involve indictments of two sorts: first, those where the commission of the conspiracy was not alleged to have continued within the statutory period, and no overt act was set forth within that time—that is, both the conspiracy and the overt acts were beyond the statutory period;[11] and, second, cases wherein there was an allegation that the conspiracy continued to within three years (the statutory period) of the beginning of the prose-

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[11] In *United States* v. *McElvain* (1926) 272 U. S. 633, the indictment charged a conspiracy. The facts were as follows:

Conspiracy	Overt Act	Stat'y Pd.	Pros'n Begun
Jan. 1920-Apr. 1921	Mar. 1921	3 years	Oct. 1924

Thus, the conspiracy, according to the allegation, did not continue to within the statutory period, and the overt act charged was not committed within that time.

cution, and where the overt act alleged was also within that period.[12]

In the former case the prosecution, of course, failed, and in the latter it was successful. But neither situation was anything like the one now before this Court.

Reliance upon *Hyde* v. *United States* (1911) 225 U. S. 347, is equally unavailing. There, the Court merely held that the defendant, charged with the crime of conspiracy, could be prosecuted not alone where the agreement was formulated, but also where an overt act alleged in the indictment and proved at the trial was committed.

The defendant, however, has sought to take advantage of certain language which, in and by it-

[12] In *Brown* v. *Elliott* (1911) 225 U. S. 392, the facts were as follows:

Conspiracy	Overt Act	Stat'y Pd.	Pros'n Begun
1905-Feb. 1909	July 1907	3 years	Oct. 1909

Thus, the conspiracy was charged to have continued to within the statutory period, and an overt act was alleged to have been committed within that time. Moreover, the defendant's claim was simply that the statute of limitations should be computed not from the date down through which it was alleged the conspiracy continued, or from the overt act set forth in the indictment, but from the earliest date alleged, namely, 1905, when the conspiracy apparently came into being. The Court merely held that the statute did not run from the time the conspiracy commenced, but from the date when the last act done pursuant to it was committed.

Hedderly v. *United States* (C. C. A. 9th Cir. 1912) 193 Fed. 561, presents facts very much like those in the *Brown* case, *supra*. The facts there were:

Conspiracy	Overt Act	Stat'y Pd.	Pros'n Begun
1901-Aug. 1904	Aug. 1904	3 years	Apr. 1906

Thus, the conspiracy was charged to have continued to within the statutory period, and an overt act was alleged to have been committed within that time.

self and divorced from the facts of the case, seems to support the proposition that the statute of limitations runs from the last overt act alleged and proved (Defendant's Brief, pp. 46-47). Language is not to be removed from its context or considered without regard to the facts that prompted its use. Surely the Court, by its use of the language appearing in the defendant's brief, did not intend to rule upon a state of facts that was alien and quite unlike those before it. Words and phrases which are intended to cover a particular situation should not be extended or strained to cover other situations that have no resemblance or bearing to the facts upon which the court is passing. [See *Matter of Green* v. *Miller* (1928) 249 N. Y. 88, 97.] This same thought was expressed by Judge Nott in denying a motion to dismiss the conspiracy count on the ground now urged (201-2).

B. The evidence fully established the continuance of the conspiracy and the performance of overt acts within the statutory period of limitations [In answer to Defendant's Brief, Point V, pp. 50-63].

There was, of course, no proof that Hines had withdrawn from the conspiracy, and he makes no such claim. It is his contention, however, that the evidence failed to establish that the conspiracy continued beyond Schultz' death in 1935. The argument is without foundation. The evidence of both Weinberg and Schoenhaus is to the effect not only that the conspiracy continued at least through the fall of 1936, but that Hines continued to be paid for his services until October of that year.

The argument that, since Schultz had dominated the conspiracy, his murder put an end to it, finds no support in the cases. On the contrary,

it is settled that a conspiracy is not terminated merely because some of the conspirators withdraw from it or die.

See: *Marino* v. *United States* (C. C. A. 9th Cir. 1937) 91 Fed. (2d) 691, 696;
Telman v. *United States* (C. C. A. 10th Cir. 1933) 67 Fed. (2d) 716;
Johnson v. *United States* (C. C. A. 9th Cir. 1932) 62 Fed. (2d) 32;
Marcante v. *United States* (C. C. A. 10th Cir. 1931) 49 Fed. (2d) 156;
Rudner v. *United States* (C. C. A. 6th Cir. 1922) 281 Fed. 516.

In *Marcante* v. *United States, supra,* 49 Fed. (2d) 156, it was said (pp. 156-157):

> "There is no doubt that there can be a conspiracy to violate the liquor laws in a dozen different localities; such a conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other, or the part played by others; a member need not know all the details of the plan or the operations; he must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose."

Moreover, it affirmatively appears from the evidence that Weinberg and Schoenhaus, who had a complete knowledge of the details of the conspiracy, conducted themselves after their leader's death just as they had while he was alive; that they and Maloney and Flores continued the operation of certain of the Combination's banks and maintained the Combination's records until October, 1936 (3665-75, 4539-44).

As a matter of fact, the People not only proved that the conspiracy continued to exist, but that it continued to pay Hines for his services at the rate of $250 a week until the fall of 1936. Weinberg testified that, on seven or eight separate occasions *in 1936*, he paid Hines a thousand dollars (2822):

> "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."

The defendant's statement (Defendant's Brief, p. 54) that it was Weinberg's testimony that he made these seven or eight payments "from the fall of 1935 into the year 1936," and not "*in 1936,*" is belied by the record: he clearly and unequivocally testified that those payments were made "in the year 1936" (2822).

Since Hines was being compensated at the rate of $250 a week for his services (2819), each of the thousand dollar payments represented a month's services. If Hines received seven or eight such payments, simple calculation—not speculation, as the defendant maintains (Defendant's Brief, p. 54)—establishes that these payments to Hines must have continued through August or September of 1936.

Schoenhaus' testimony, furthermore, is clear beyond cavil. He stated in no uncertain terms that Hines received payments of a thousand dollars, representing compensation for four week periods, until October, 1936. Thus, he testified (4492-6):

> "Q. How long did that weekly charge of $250 continue? A. Until the Dutchman was killed.

"Q. Then, after that did it continue? A. Yes, sir.

"Q. Weekly or in different forms? A. $1,000 about every four weeks.

"Q. On each occasion did you give the money to George? A. Yes, sir.

"Q. $1,000 was about for four weeks, then? A. About for four weeks; yes, sir. [4492]

* * *

"Q. How long did it continue? A. *It continued until October, 1936.*

"Q. What happened in October of 1936 with reference to George Weinberg? A. Well, George Weinberg went away about November, 1936.

"Q. He quit his bank, did he? A. Yes.

"Q. And from that time on you had no more charges to Hines? A. No, sir.

"Q. * * * That payment until October of 1936 was in what sums? A. $1,000. [4493-4]

* * *

"Q. Was it then sometimes in sums different from $1,000? A. No, it was $1,000 every time it was paid; it was $1,000.

"Q. That is all I wanted to know. *But when was the last payment of that kind made?* A. *In October.*

"Q. Of nineteen—— A. About a month before George left.

"Q. *October of 1936?* A. *1936.* [4495-6]"

This entire question of whether there was a continuing conspiracy, and whether it lasted to within the statutory period, or whether prosecution therefor was barred, was left to the jury by instructions that were clear and eminently fair. The judge first charged (11145):

> "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."

He then explained the contentions of the People and of the defendant, and concluded by directing (11147):

> "If you find that the Statute of Limitations has run against the conspiracy, the misdemeanor count, you will acquit on that * * *."

In addition, at the defendant's request, the court charged "the State must prove * * * beyond a reasonable doubt" that the conspiracy continued to a time within the statutory period (11279).

Nor can it be claimed that the jury were not fully advised that they had to find whether it was the original conspiracy that continued; the court's charge upon that subject was in the clearest sort of language (11291, 11293, 11295-6, 11303-4):

> "The Court: I will charge that if that conspiracy ended then counsel is correct in saying that there would have to be evidence that Hines went into a new conspiracy. On the other hand, if the original conspiracy did not end, but was carried on, then, as I have already told you, the participation of the defendant is presumed unless there is some act showing that he withdrew. [11291]
>
> * * *
>
> "The question is whether the conspiracy itself, the original conspiracy, continues. [11293]
>
> * * *
>
> "Mr. Stryker: Whether that conspiracy which is the conspiracy testified to by Weinberg continued after Schultz's death. That is the point.
>
> "The Court: Whether it continued? *If it ended before his death, at his death, or after his death, then the conspiracy did not exist; and the question for the jury is whether it did or not.* [11303-4]"

The conspiracy was properly alleged in the indictment; the specific finding by the jury that the conspiracy continued to within the statutory period was fully supported by uncontradicted testimony.

POINT IV

The minutes of the hearings before Magistrates Capshaw and Erwin were properly admitted in evidence [In answer to Defendant's Brief, Point III, pp. 31-41].

As already noted, the defendant Hines' principal function in the conspiracy was to conserve the Combination's man-power and to enhance its prestige by protecting its members from prosecution. This he was generally able to do by exercising his influence with the Police Department. On three occasions, however, the police did arrest important members of the Combination, and Hines was forced to employ the services of two judicial officers, Magistrates Erwin and Capshaw, to secure their release (*supra*, pp. 21-36).

Davis and Weinberg both testified that they had spoken about those three cases to Hines and that he had each time indicated that he would have them thrown out in the Magistrates' Court.

At Hines' behest, the magistrates—Capshaw in two instances, and Erwin in the other—agreed to, and did, conduct hearings in cases brought against members of the Combination, and agreed to, and did, discharge the prisoners before them in spite of conclusive evidence of guilt.

The minutes of those proceedings in the Magistrates' Court were introduced by the People upon the present trial.

A strikingly similar situation is found in *People* v. *Kerr* (Oyer and Terminer N. Y. Co. 1889) 6 N. Y. Cr. 406, where records showing the bribetakers' conduct were held to have been properly received in a prosecution against the bribegiver. The defendant, an officer of a street railroad company, was charged with having given bribes to members of the New York City Board of Aldermen in order to obtain a certain franchise. One of these, the accomplice Fullgraff, testified to the bribery and also to the fact that, in consideration of the bribe, a majority of the Board had privately agreed among themselves to vote in favor of the railroad company. More, the official minutes of the Board meetings were admitted to show the conduct, actions, and votes of each member, although none of them was on trial. The court charged that these minutes could be considered against the defendant, and, substantially, that they tended [illegible].

> "a circumstance indicating that Fullgraff and the other persons acting with him were acting in obedience to some arrangement, secret understanding, that had induced and bound these persons together to act together upon the disposition of these subjects."

The court further instructed the jury (p. 467):

> "Those proceedings are admitted so far as they tend to indicate what the motive was upon the minds of the persons who were sustaining and voting for those proceedings, not because they make out an indictment itself, but because they tend to establish what was the understanding or state of mind of Fullgraff and the others with him prior to this vote on the 30th of August, 1884."

So, too, the minutes in the present case were introduced to assist the jury in determining

"what the motive was upon the minds of" the magistrates in dismissing the cases before them, and to corroborate Davis and Weinberg who testified that such a "motive" had been supplied by the command of Hines.

Although his objections to the admission of the records are confused, the defendant seems to complain of their receipt upon the ground that they constituted hearsay evidence and thus violated his right to be confronted with the witnesses who had testified before the magistrates (Defendant's Brief, pp. 40-41), and, further, that they could, at best, show only that the magistrates had erred in dismissing the cases (Defendant's Brief, pp. 33-34, 40). The first claim is absurd, the second without basis.

The records were not presented to establish the truth of the facts therein, and there was no such issue before the jury. Those facts—that each of the prisoners before the magistrates had been engaged in the numbers game—were never disputed by the defendant Hines. It follows that neither the hearsay rule nor the Civil Rights Law was in any way involved. [See 3 Wigmore *on Evidence* (2d ed.) pp. 770-773, § 1766.]

Nor was the probative effect of the minutes limited, either inherently or by the court's charge, to a showing that the magistrates had erred. On the contrary, the circumstances which they disclosed—the compelling nature of the proof before the magistrates; their outrageous indifference to evidence and law; their contrasting treatment of the witnesses for the two sides (*e.g.*, Capshaw's harsh handling of the policemen testifying for the prosecution and his extraordinary tenderness for the defendant Rosencranz alias Silverstein); and, in short, their general attitude and demeanor

in conducting the proceedings—all pointed inevitably to the presence of an outside corrupting influence, as testified to by the People's witnesses. Upon this showing, the jury were to find—and they were so instructed by the court (see, *infra*, pp. 103-105)—whether the magistrates' decisions represented their own judgments or were actuated by Hines' demands.

A. The Magistrates' Court records constitute an integral and proper part of the People's proof

When the minutes of the several magistrates' court cases were offered in evidence, it had already been established—as to each of those cases—that one or more important members of the Combination had been arrested by the police; that the evidence in the hands of the police was well nigh conclusive; that the matter had been discussed with Hines, and that he had undertaken to find a magistrate who would dispose of the case; that Hines had subsequently directed that the case be brought on before the particular magistrate involved, saying that such magistrate had agreed to dismiss the case regardless of the nature of the evidence; and, finally, that that magistrate did conduct a hearing and—pursuant to his agreement with Hines—did order the discharge of the prisoner or prisoners before him.

Since Hines had thus procured the assistance of Magistrates Erwin and Capshaw in carrying out his task of "protecting" the members of the Combination, it follows that, in their conduct of the cases brought before them at Hines' direction, the two magistrates were acting as his lieutenants, and that their judicial functions were exercised in pursuance of the criminal conspiracy charged in the indictment. If they actually knew

of the numbers game conspiracy and of Hines' participation in it, and deliberately became a part of it, then the evidence of their activities, embodied in the minutes of the particular hearings, was properly admitted under the rule permitting proof of the acts and declarations of co-conspirators.

If, on the other hand, Capshaw and Erwin were unaware that their corrupt discharge of Weinberg, Rosencranz, and the others, was part of any greater scheme or crime, the result would still be the same. For then, even though they may not have been guilty of conspiring, they were, nevertheless, agents of Hines for the specific purpose of performing the acts disclosed by the evidence now under attack. Of course, evidence of the acts which the agent commits at the instance of the principal, is admissible against the latter in a criminal prosecution.

See: *People* v. *Clougher* (1927) 246 N. Y. 106, 113;
People v. *Mills* (1904) 178 N. Y. 274, 288, aff'g (1st Dept. 1904) 91 App. Div. 331, 339-40;
People v. *Peckens* (1897) 153 N. Y. 576, 585;
People v. *McKane* (1894) 143 N. Y. 455, 459;
People v. *Sherman* (1892) 133 N. Y. 349, 355;
United States v. *Giles* (1936) 300 U. S. 41, 49;
United States v. *Gooding* (1827) 25 U. S. 460;
Wood v. *United States* (C. C. A. 5th Cir. 1936) 84 Fed. (2d) 749, cert. den. 299 U. S. 589, 623;

Hamburg-American Steam Packet Co. v. *United States* (C. C. A. 2nd Cir. 1918) 250 Fed. 747, cert. den. 246 U. S. 662;
Morse v. *United States* (C. C. A. 2nd Cir. 1909) 174 Fed. 539;
Commonwealth v. *Harley* (1844) 48 Mass. 462, 463;
State v. *Sweeney* (1930) 180 Minn. 450, 231 N. W. 225;
Commonwealth v. *Wiswesser* (1939) 134 Pa. Super. Ct. 488, 3 Atl. (2d) 983.

One of the earliest expressions of the rule by which a principal is criminally bound by the acts and declarations of his agent, is found in the leading case of *United States* v. *Gooding, supra,* 25 U. S. 460. There, the defendant was indicted for slave trading. It appeared that he had engaged a captain to outfit and command a ship to be used in that business. A witness testified that the captain, in endeavoring to engage him as mate for the voyage, told him that the voyage was for slaves, that he would obtain as part of his wages a percentage for every slave sold, and that the defendant, who was the owner of the ship, would see to it that the crew was paid. The defendant objected to this testimony as not binding upon him, but the Court (*per* Story, J.) overruled the contention, saying (p. 469):

> "The argument is, that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel are not evidence to charge the owner with an offence; and that the doctrine of the binding effect of such declarations by known agents, is, and ought to be, confined to civil cases. We cannot yield to the force of the argument. In general, the rules of evidence in

> criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must, indeed, be shown, that the agent has the authority, and that the act is within its scope; but these being conceded or proved, either by the course of business, or by express authorization, the same conclusion arises, in point of law, in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, *it is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it be done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent, when the procurer or principal may be convicted of guilt,* as in the case of infants or idiots, employed to administer poison. The proof of the command or procurement, may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency." (Italics ours.)

Similarly, in *People* v. *Peckens, supra,* 153 N. Y. 576, this Court said (p. 585):

> "what one does or procures to be done through the agency of another is to be regarded as done by him."

People v. *McKane, supra.* 143 N. Y. 455, is a singularly apposite case. There, the defendant was charged with violating a provision of the Election Law which required that lists of the registered voters be prepared and made accessible to the public for examination. The theory of the prosecution was that the defendant was the leader of a conspiracy including various officials of the town and members of the political party in control, and having for its purpose the casting of a large fraudulent vote at the election.

It was shown that various citizens were obstructed in their attempts to secure registry lists, and that, when they sought to obtain these lists or to watch at the polls, some of them were beaten, others arrested and imprisoned. Apparently, the only proof relied upon to connect the defendant with these acts was evidence that he enjoyed great political power, that he held numerous political offices in the town and controlled the others, and that he had made attempts to bring about a fraudulent election. This Court held the evidence of the assaults and arrests properly received, saying (pp. 470-471):

> "**The circumstances of the arrest of the persons at the town hall who were in search of the lists or watching the election were admissible since, upon the evidence, they could be attributed to the defendant,** at least so far as they transpired in his presence, or **so far as the acts were done by his procurement.** That part of the proof which related to the acts of others, cooperating with the defendant and in furtherance of the common purpose, was also competent upon the principle already stated."

In the *Clougher* case, *supra*, 246 N. Y. 106, the defendant, a secretary to the New York City Health Commissioner, was convicted of bribery. The Nestles Food Company, interested in obtaining permission to market cream from its dairies in Wisconsin, made a contract with one Danziger under which he was to receive one dollar for each can of cream shipped into New York City and sold by him. Between the summer of 1923 and August of 1924 Danziger (who testified for the People) saw the defendant on numerous occasions and discussed the possibility of securing a permit for the sale of the cream. The defendant

assured him that he would take care of the matter. Thereafter the defendant advised the Health Commissioner that western cream was a necessity. In August, 1924, while the commissioner was on vacation, not the defendant but a friend of his, an assistant secretary, telephoned the commissioner and told him that there was a stringency in the supply of cream. Actually, cream was then no scarcer than at the corresponding season in any other year. Relying on the facts given him by the assistant secretary, the commissioner approved the issuance of a temporary permit. On appeal, it was urged that the proof that the permit was approved by the commissioner upon recommendation of the assistant secretary should have been excluded on the ground that there was no proof that the defendant had anything to do with the matter. This Court upheld the introduction of the evidence, stating (p. 113):

> "No direct proof was produced that defendant caused his subordinate, the assistant secretary, to induce the commissioner to approve the permit. Nevertheless, the relations existing between these two secretaries, defendant's motive as revealed by his promise to Danziger and his acceptance of money together with the complete absence of any explanation by the defense justifies the jury's inference that the assistant secretary's action was instigated by defendant. Even if it was not, defendant's promise was criminal. We think that the direct proof bearing with it such plain implications sustains the first count."

In *Commonwealth* v. *Wiswesser*, *supra*, 134 Pa. Super. Ct. 488, 3 Atl. (2d) 983, a prosecution for embracery, the court said [134 Pa. Super. Ct., at p. 495, 3 Atl. (2d), at p. 986]:

> "Finally, appellant contends that certain of the evidence which was admitted on the trial of this case was hearsay and as such should have been excluded. In bill No. 204, Wiswesser was charged with embracery and solicitation to commit embracery, the juror in question being Carrie Miller. D. J. Miller, her husband, testified as to conversations with Wiswesser in which Wiswesser asked Miller to talk to his wife about the case and promised she should have a new dress. Mrs. Miller was allowed to testify as to her conversation with her husband in which he told her of the conversation with Wiswesser. * * * 'If one in attempting corruptly to influence a juror makes use of an agent to extend the promises or other means of influencing the juror, the acts of the agent done in attempted fulfillment of his instructions and his conversations with the jurors pursuant thereto, are admissible in evidence against the principal. If an agent is employed or used to deliver a verbal message or to make oral promises to a juror, his conversations pursuant to such employment constitute the act he was engaged to perform, and evidence may be given of it, as of any other act done by the agent on behalf of the principal, and is not excluded under the hearsay rule. * * *' "

In *Morse* v. *United States*, *supra*, 174 Fed. 539, the defendant was convicted of the crime of making false entries in the books of a bank. On appeal it was contended that certain bank entries made by clerks in the bank were erroneously received in evidence. In affirming the conviction, the court held that the admission of the evidence was proper (pp. 547, 548):

> "It is true that the defendant did not make any of the entries in the books or reports with his own pen. All of them were made by the employees of the bank as part of their routine work. [p. 547]
>
> * * *

> "**The entries in question found their way to the books and reports because the defendant set the machinery in motion** which required the entries to be made. He knew every detail of the various transactions. **They were all devised, accepted, or engineered by him,** and the jury were justified in finding that the entries were false, that the defendant knew them to be false, and that they were made with intent to deceive. [p. 548]"

So, also, the defendant Hines, by requesting the magistrates to "take care of" the cases for him (*e.g.*, 2546), "set the machinery in motion" and "devised * * * or engineered" the discharges and also, in effect, the rigging of the records necessary to lend a tone of legitimacy and legality to the proceedings. Being responsible for the way in which the trials were conducted and for their ultimate disposition, he cannot now complain of their proof.

Moreover, since the records themselves would assist the jury in determining whether the magistrates had dismissed the cases upon the basis of their own judgments or as a result of some outside corrupting influence, the evidence was competent for the purpose of corroborating the accomplice testimony of Weinberg and Davis that the discharges had been ordered by Hines.

See: *People* v. *Jachne* (1886) 103 N. Y. 182;
People v. *O'Neil* (1st Dept. 1888) 48 Hun 36, aff'd 109 N. Y. 251;
People v. *Doyle* (Gen. Sess. N. Y. Co. 1919) 107 Misc. 268.

In the *O'Neil* case, *supra*, 48 Hun 36, aff'd 109 N. Y. 251—which arose out of the same transaction as was involved in *People* v. *Kerr*, *supra*, 6 N. Y. Cr. 406—the General Term made a similar

ruling as to the admissibility of the minutes of the meeting of the Board of Aldermen and declared (pp. 41-42):

> "It is a familiar rule of evidence that from subsequent action the jury has the right to infer the existence of a pre-existing fact. For example, the declarations and conduct of two men may be received in evidence for the purpose of showing that at some prior date an agreement of copartnership was entered into between them. So in the case at bar, for the purpose of showing the previous agreement in reference to the subject-matter of this indictment, the people had a right to show the subsequent action of the defendant and his accomplices, which was consistent with the existence of the previous agreement, and from which the previous agreement might be inferred, because upon proof that a man has taken a bribe, it will not be difficult to infer that he had agreed to be bribed."

More particularly, this Court, which likewise approved the introduction of the proceedings of the Board of Aldermen, pointed out (109 N. Y., at p. 265):

> "They threw light upon the prior conduct of the defendant, **and tended to confirm the evidence of the accomplices,** and to show that the defendant's vote on the thirtieth of August, was in fulfillment of the corrupt agreement charged in the indictment."

So, too, in the present case, the minutes of the hearings "tended to confirm the evidence of the accomplices," and to show that the dismissals were in fulfillment of the corrupt arrangement between the magistrates and the defendant Hines.

B. The trial court's instructions with reference to the proceedings in the Magistrates' Court were fair and proper.

The defendant complains at considerable length (Defendant's Brief, pp. 31-40) that "the Court made the alleged legal impropriety of the dismissals in the Magistrates' Court the dominant issue in the case" (Defendant's Brief, pp. 35-36), and that, under the trial court's instructions, the jury "could infer the defendant's guilt from the mere fact that the charges had been improperly dismissed by the Magistrates" (Defendant's Brief, p. 38). These contentions are baseless and cannot be supported by any fair interpretation of the court's charge.

By no stretch of the imagination could the jury have considered themselves "an appellate tribunal to sit in review of the legal propriety of the Magistrates' conclusions as to the sufficiency of the evidence before them" (Defendant's Brief, p. 40). Although Judge Nott explained to the jury the elements constituting the crime of Possessing Policy Slips, and set forth the evidence that would justify a magistrate in holding prisoners charged with such crimes, this was solely for the purpose of assisting them to determine whether the magistrates had knowingly made a wrong decision upon the strength of Hines' corrupt request. Thus, in the charge, the impropriety of the dismissals was subordinated to the question *as to whether Hines had caused* the discharges, and the evidence bearing upon such impropriety was held relevant only insofar as it bore upon that issue.

In short, the jury were called upon to determine not whether the magistrates had acted wrongfully or even corruptly, but whether the defendant had procured them to act in that way. The

court clearly instructed that if the jury found that the defendant had not procured the magistrates to act corruptly, that was the end of the matter, even though the magistrates' decisions might have been improper and erroneous. We quote one or two illustrative excerpts (11215-8):

> "We are not trying the Magistrate; we are trying the defendant. And this is only important as it bears on the defendant.
>
> "You may say then, why is it all let in? A Judge certainly is not to be deemed guilty of impropriety or corruption, or anything else because he makes a mistake in his law. That would be a terrible thing * * *. [11215-6]
>
> * * *
>
> "The question is: Was the action of these Judges procured by this defendant? * * *
>
> **"On the other hand, if you assume that the Judges, the Magistrates were entirely wrong, not only in their decision, but wilfully so, if the defendant did not secure that wilful misconduct, he is not chargeable.**
>
> **"The whole thing is whether he endeavored to influence them and did influence them to turn those cases out.** [11217-8]"

Again, said the court (11218-9):

> "Now, keep that in mind. You can see it is of evidentiary value in the testimony. If you find that the Magistrates not only acted mistakenly on the law but acted in a manner that, in the case, they must have known that they were wrong, making a wrong decision, then, of course, you must ask yourselves why did they do that. Did they do it because the defendant asked them to do it or did they do it for some other reason which does not appear in the evidence? Therefore, as I say, it has that evidentiary value, but **you must keep in mind, after all, the question is**

> whether the defendant procured or endeavored to procure a wrong decision there rather than whether the Magistrates made it."

Finally, at the defendant's request, the court cautioned the jury that (11233-4):

> "The burden of proving the defendant Hines agreed to furnish protection as is charged in the indictment and that he did influence, intimidate or bribe Magistrate Capshaw, Magistrate Erwin and District Attorney Dodge is upon the prosecution."

In conclusion, we point out that the court nowhere advised the jury that they could find a corrupt arrangement between Hines and the magistrates, even though they disbelieved Davis and Weinberg and believed Judge Capshaw (Defendant's Brief, pp. 34-35). True, the defendant sought a request upon the subject (11261), but it was properly refused since (1) it was confused and inconsistent, and (2) it concerned particular portions of the evidence and the credibility of particular witnesses. As was stated in *People* v. *McCallam* (1885) 3 N. Y. Cr. 189, 198, aff'd (1886) 103 N. Y. 587:

> "The counsel has no right to separate particular portions of the evidence and ask the court to hold that such evidence may be true and the defendants still not guilty, that this witness may have testified to the truth, and the defendants still be innocent, or that the jury ought not to convict if they do not believe certain parts of the evidence offered."

As a matter of fact, the court fully advised the jury that they could not consider corroborating evidence—such as were the minutes of the hearings in the Magistrates' Court—unless they first found that the accomplices had testified truthfully (11173, 11176-8, 11190-1, 11240-2).

POINT V

The transcript of testimony given by Weinberg at the prior trial was properly admitted [In answer to Defendant's Brief, Point VI, pp. 63-71].

During the pendency of the second trial and before he had been called to the stand, Weinberg, a witness for the People, committed suicide. He had been fully and exhaustively cross-examined at the first trial. Under these circumstances, and in accordance with section 8, subdivision 3(d), of the Code of Criminal Procedure, the prosecution was permitted to read into the record a transcript of his previous testimony. The defendant's claim that the statute does not apply because the former proceeding ended in a mistrial or because the witness committed suicide, is without substance.

The word "trial" is unquestionably used in its broad, generic sense. It carries with it no connotation that the proceeding should have resulted in verdict and judgment. Thus, it is provided in section 8, subdivision 3(d), that the testimony of the deceased witness "upon such prior *trial*" is to be read in evidence "upon any subsequent *trial*"; the reference to the subsequent "trial," of necessity, means before the case is submitted to the jury, and the same construction must be given to its prior use. In fact, it has been held that no basis exists for distinguishing between trial and mistrial under such a statute.

See: *Taft* v. *Little*, (1904) 178 N. Y. 127;
People v. *Schwarz* (1926) 78 Cal. App. 561, 248 Pac. 990.

People v. *Schwarz, supra,* 78 Cal. App. 561, 248 Pac. 990, is a case precisely in point. There, under a statute virtually the same as the one in New York, the People were permitted to read to the jury the testimony given previously by certain absent witnesses. Upon appeal, the court rejected the defendant's contention that the prior proceeding was not a "former trial" because it had terminated in a mistrial, and held (78 Cal. App., at p. 578, 248 Pac., at pp. 996-997):

> "The legal distinction, if any there be, between a 'former trial' and a 'mistrial,' as applied to the instant controversy, is not indicated by appellants, and we are aware of none. * * * It is not denied that the witnesses in question, upon the previous trial of the same issues appeared in open court, in the presence of the defendants, who either in person or by counsel cross-examined them, or had an opportunity to do so. This being true, all the requirements of the statute were satisfied."

The same result was reached in a civil suit in this state, under the corresponding and almost identically worded provision of the Code of Civil Procedure (§ 830, now § 348 of the Civil Practice Act), in a situation not unlike the one now presented. In *Taft* v. *Little, supra,* 178 N. Y. 127, the witness in question had, before his death, been examined and cross-examined in a trial before a referee. That proceeding was never formally terminated because the referee had died before all of the evidence was submitted to him. The case was incomplete, therefore, and exactly like a mistrial. The testimony of the deceased witness was read into evidence upon a subsequent trial before another referee, although objection was made that the former hearing was not a trial within the

meaning of the statute. In upholding the use of the testimony, this Court said (p. 132):

> "'The fundamental ground upon which evidence given by a witness, who afterwards dies, may be read in evidence upon a subsequent trial, is that it was taken in an action or proceeding where the parties against whom it is offered or their privies have had both the right and the opportunity to cross-examine the witness as to the statement offered.' (*Young* v. *Valentine*, 177 N. Y. 347.) Here the defendant had full opportunity to cross-examine the witness, and availed himself of it. We think that the former hearing was a trial within the meaning and spirit of the section quoted."

These decisions are in consonance with the reason and purpose underlying the general rule. The right of confrontation—whether statutory or constitutional—means no more than that the defendant shall have an opportunity, at some point in the course of the proceedings, to meet the witnesses against him face to face and to cross-examine them. [*People* v. *Fish* (1891) 125 N. Y. 136, 152; *People* v. *Gilhooley* (1st Dept. 1905) 108 App. Div. 234, 237; *Mattox* v. *United States* (1894) 156 U. S. 237, 242-243.] That being the test, it matters not how far the proceedings progressed nor how they were terminated. Thus, in *People* v. *Penhollow* (Gen. T. 5th Dept. 1886) 42 Hun 103, the fact that the former trial had resulted in a disagreement of the jury was given no consideration in determining the admissibility of the prior testimony.

Morley v. *Castor* (1st Dept. 1901) 63 App. Div. 38, cited by the defendant (Defendant's Brief, pp. 66-67) is not in point. There, the cross-exam-

ination of the particular witness, who later died, had been *interrupted and left incomplete at the former trial.* Under such circumstances, the admission of the testimony upon a subsequent trial was clearly a deprivation of the right of full cross-examination, and the decision of this Court proceeded squarely upon that basis. Any incidental language to the effect that the evidence was inadmissible because there was no trial, but a mistrial, must be disregarded, particularly in view of the later decision of this Court in *Taft* v. *Little, supra,* 178 N. Y. 127.

Nor is there any merit to the defendant's argument that the trial court's alleged refusal to permit inquiry into the circumstances of Weinberg's suicide constituted error. The statute [Code Crim. Proc., § 8, subd. 3(d)] simply provides that the prior testimony may be read in evidence "upon its being satisfactorily shown to the court that the witness is dead." That is the sole requirement, and it was, of course, fully satisfied in this case.

Indeed, the record itself stamps the present contention as an after-thought; there was no objection by the defendant to the court's very proper ruling that "no speculation as to the possible causes [of the suicide] should be indulged in by the jury" (2119).

At the trial, defense counsel desired to present to the jury—not simply to the court—the circumstances surrounding Weinberg's death, so that, by permitting the jury to speculate upon possible reasons for the suicide, his testimony might be impugned (see, *e.g.*, 1889-92, 1896-9, 1909-13). It was not urged that examination into such circumstances should be a prerequisite to the admission

of the former testimony; on the contrary, the two matters were treated as separate and distinct (1889, 1971).

The law that a deceased witness—whose prior testimony is admitted—may not be impeached by showing alleged contradictory or inconsistent statements or alleged declarations that the prior testimony was false, is well settled.

See: *Hubbard* v. *Briggs* (1865) 31 N. Y. 518, 536-537;
Stacy v. *Graham* (1856) 14 N. Y. 492, 498-501;
Mattox v. *United States, supra,* 156 U. S. 237, 248-250;
People v. *Seitz* (1929) 100 Cal. App. 113, 279 Pac. 1070.

Accordingly, the court below had no alternative but to refuse to sanction any attempted impeachment of the deceased witness. Nor was objection taken to this ruling. Rather, the trial court's announcement and instruction (2117-21) were made with the apparent consent and approval of the parties (1978-86).

Motes v. *United States* (1900) 178 U. S. 458, upon which the defendant places reliance (Defendant's Brief, pp. 69-70), is inapplicable. Not only is there no federal statute comparable to section 8, subdivision 3(d), of the Code of Criminal Procedure, but the witness' absence in that case was due to an illegal act by a government agent (p. 471) and, further, might have been remedied by the exercise of reasonable diligence, for the witness had been seen just outside the courtroom only an hour before his name was called (pp. 468, 474).

The defendant has sought to bring the present case within certain language found in the *Motes* decision, *supra*, 178 U. S. 458, but in so doing, he has misstated the facts relating to the present case. At page 71 of the defendant's brief appears the false assertion that Weinberg's death was attributable to "improper acts on the part of the People's representatives." Suffice it to point out that the statement is without support in the record and is completely at variance with the actual facts. Weinberg was entrusted to the custody of the district attorney by express order of the Supreme Court, and every reasonable and proper precaution was taken to insure his availability as a witness at the second trial.

In view of the fact that Weinberg was cross-examined at great length and with complete freedom upon the first trial, Hines was accorded his full right of confrontation and the eventual outcome of the prior proceeding was immaterial. The finding of a verdict would have added nothing to the full opportunity of cross-examination that the defendant had and exercised.

Conclusion

The authorities clearly establish that the enterprise operated daily by the defendant and his fellow conspirators was a lottery and properly prosecuted under section 1372 of the Penal Law. The defendant's activities—which continued to well within two years of the filing of the indictment—in forestalling the effective investigation, arrest, and prosecution of his accomplices, were essential to the continued operation of the conspiracy and to the daily commission of the sub-

stantive crimes thereby contemplated. The defendant was therefore clearly guilty of aiding, abetting, and assisting in the commission of the several crimes charged in the indictment.

After a fair trial, the jury, having considered the evidence pursuant to the impartial instructions of an experienced and able trial judge, found against the defendant upon every issue.

The judgment of conviction should be affirmed.

Respectfully submitted,

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