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CRIMINAL LAW AND PROCEDURE - EVIDENCE - DISMISSAL OF PROSECUTION FOR REFERENCE TO OTHER CRIMES OF DEFENDANT

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CRIMINAL LAW AND PROCEDURE — EVIDENCE — DISMISSAL OF PROSECUTION FOR REFERENCE TO OTHER CRIMES OF DEFENDANT — Any discussion of Judge Pecora's declaration of a mistrial in *People v. Hines*[1] must adhere firmly to the fundamental proposition that every accused person, no matter how evident his guilt nor how great the hostility toward him, is entitled to a fair trial, conducted in accord with established rules, and to the verdict of a jury uninfluenced by improper factors. But did the judge's ruling perhaps exceed what was reasonably necessary to assure the defendant of these essentials?

Hines was charged with contriving, proposing, and drawing a lottery and with conspiracy to that end. During the course of the trial the district attorney while cross-examining a witness for the defense who had testified to transactions in a certain grand jury proceeding, asked him if he remembered any testimony therein concerning the defendant's connection with a "poultry racket." The answer might have been either "yes," or "no." But the question was at once objected to and no answer was given. The defense then asked for dismissal of the prosecution on the ground of prejudice through reference to possible other criminality on Hines' part.

It is far from indisputable that the question constituted even technical error. Defense counsel had himself called the witness to testify that he had been instructed by the previous district attorney to investigate possible connection between Hines and the "numbers racket." As part of that testimony he referred to the proceedings before the earlier grand jury. Defense counsel instructed him to "tell the entire story of that March grand jury." On direct examination the witness stated that there had been some mention of Hines during the grand jury proceedings. On cross-examination he admitted that there was also "other mention of Hines." The district attorney's question which precipitated dismissal of the prosecution was directed toward finding out precisely what that "other mention" was, as a part of "the entire story" which defense counsel himself had introduced in evidence. It is at least arguable, therefore, that the question was proper cross-examination.

But assuming that the mere asking of the question was technical error, was it also so material an error as to call for a new trial? To

[1] (N. Y. Sup. Ct., Sept. 12, 1938) 6 U. S. LAW WEEK 65 (Sept. 20, 1938).

paraphrase the New York Court of Appeals in a case of last year, "Can it be said reasonably that an admonition of the court [to disregard the question and its implication] would have removed the influence which otherwise the question would naturally have had?"[2] Fortunately for social safety, "the general rule that evidence improperly admitted must be treated as prejudicial unless there be something to show that it was not,"[3] has become at least obsolescent, under the pressure of legislative efforts to make it obsolete. The more modern rule in New York was laid down in that 1937 decision thus:

> "Ordinarily the granting or denial of the motion [to dismiss] rests within the sound discretion of the judge to whom the motion is addressed. Presiding at the trial, hearing the statement of the witness upon which the claim of prejudice is based, he is in a better position to determine whether for the protection of the accused a halt should be called upon the pending trial and a new trial ordered. Denial of the motion constitutes no legal error unless it conclusively appears that the accused has been irretrievably prejudiced by what has occurred at the pending trial."[4]

"Good judgment," said another court, "rather than definite rules of law must in such cases be our guide."[5]

Did Judge Pecora show "good judgment" in declaring that the mere question, with its possible implications of other criminality on Hines' part, might have affected the jury's judgment to such an extent as to render the accuracy of its verdict dubious? But how valuable as a social institution is "trial by jury" if so slight and relatively insignificant a factor in the mass of evidence directly relating to guilt or innocence can conceivably destroy public confidence in the jury's judgment? No wise man asserts an absolute in the field of "justice"; an answer to either question can be no more than vigorously maintained opinion. It is the present writer's opinion that Judge Pecora's ruling definitely impales the administration of criminal justice upon one horn or the other of a dilemma. Either he erred grievously, to the harm of the general public, in assuming that the jury could have been affected in their judgment by the evidentiary implications of that single question; or else, if his assumption was justified, he correctly stigmatized trial juries in general as an instrumentality so prone to irrationality, so easily influenced by incidental factors as to be utterly unreliable and fitted only for discard in the administration of justice.

[2] People v. Robinson, 273 N. Y. 438 at 445, 8 N. E. (2d) 25 (1937).

[3] Moon v. State, 161 Ark. 234, 255 S. W. 871 (1923).

[4] People v. Robinson, 273 N. Y. 438 at 445, 8 N. E. (2d) 25 (1937).

[5] People v. Purtell, 243 N. Y. 273 at 275, 153 N. E. 72 (1926).

At the American Bar Association in July, its president repeated the truism that:

> "The people must have such confidence in the efficiency, the integrity, and the wisdom of all of our courts as a matter of every-day experience that in times of stress they will instinctively feel safe in resorting thereto for the vindication of their rights. . . . in many jurisdictions that faith has been sorely tried, not by the ultimate decisions of the courts on substantive law, but . . . by outmoded technicalities of procedure and occasionally by judicial inefficiency. . . ." [6]

The writer has an unhappy feeling that Judge Pecora's declaration of a mistrial in the Hines case did much to return administration of criminal justice into the public disrepute from which it has been struggling since the turn of the century.

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[6] Vanderbilt, "United We Stand," 8 A. B. A. J. 597 at 599 (1938).

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