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Max D. Blossner

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THE DISREGARD OF THE DOCTRINE OF REASONABLE DOUBT

"The poor man under indictment is permitted to go through the forms and appearances of a trial; but such a trial is only a mockery. He dares not assert his innocence for fear of a double sentence at the end of a trial—a trial which he knows he will be a travesty."—[Excerpt from foreword by Supreme Court Justice W. O. Howard in *The Public Defender,* by Mayer C. Goldman.]

The Doctrine of Reasonable Doubt.

In the past many attorneys have learned, much to their disappointment, that in practice the well-sounding doctrine of reasonable doubt is often not strictly adhered to, and at times totally disregarded. But in fact there are many other equally well-sounding theories that share the same fate.

Since doubt is a state of the mind, it is therefore a most difficult task to ascertain whether or not a given state of facts would create a reasonable doubt in the mind of the trier of the facts. In our effort to set up a criterion by which we could determine whether or not a reasonable doubt exists in a given case, we have created a mythical "prudent man." However, the opinion of the "prudent man" is merely the expression of the opinion of the average person hearing the facts.

Under certain circumstances we find that we ourselves entertain a reasonable doubt, whereas the trier of the facts does not. In seeking the reason for this difference of opinion, we resort to various sources which tend to throw some light on this subject. It is in this manner that the writer has attempted to make out a case against the prevailing notion among members of the bar, that in all criminal cases the defendant is given the benefit of a reasonable doubt.

In criminal cases it has been the rule to require a greater quantity, weight or certainty of evidence than in civil cases.[1] The reason for this rule is an historical one. It dates back to a time when the Penal Code of England

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[1] 5 Wigmore, Evidence (2d ed. 1923) 467.

was a "fearfully bloody" one,[2] and when the judges "would warp the law in order to prevent convictions where they were not in sympathy with over-severe laws or extreme penalties." [3] In hearing the evidence, the judges would seek out a reason to doubt the defendant's guilt and acquit him if such doubt was reasonable.

Today the doctrine of reasonable doubt has its definite field of application. Specifically, it provides that in a criminal case, the defendant is to be given the benefit of a reasonable doubt, that is, if such a doubt exists. Under this doctrine, if in the opinion of the trier of the facts, the proof offered as to the guilt of the defendant is also susceptible of a finding of innocence, then a reasonable doubt exists, and the defendant must be acquitted.

Proof beyond a reasonable doubt has been defined to be that which amounts to a moral certainty as distinguished from an absolute certainty.[4] In the case of *People* v. *Barker*,[5] the New York Court of Appeals placed its stamp of approval on a definition of reasonable doubt which was contained in a charge to a jury, and trial courts have ever since used the identical words in instructing juries in criminal cases.

It will be the writer's endeavor, in the pages that follow, to point out the various considerations which enter into the trial of a criminal case, which operate to nullify and render ineffectual this well-considered doctrine of our criminal law.

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[2] *Ibid.* "When these rules began to take form and consistency, the penal code of England was a fearfully bloody code. Death, without benefit of clergy, was denounced against a multitude of misdoings which would now be considered, if offenses at all, offenses of a comparatively trivial character. The consequences of conviction to the unfortunate prisoner were not only fearful, but they were irremediable. No human judge could help commiserating the situation of the all but foredoomed prisoner. * * * 'The maxim of the law is that it is better that ninety-nine offenders shall escape than that one innocent man be condemned.' "

[3] POUND, CRIMINAL JUSTICE IN AMERICA 76.

[4] People v. Bennet, 49 N. Y. 137 (1872); People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846 (1898); People v. Bonifacio, 190 N. Y. 150, 82 N. E. 1098 (1907).

[5] People v. Barker, 153 N. Y. 111, 115, 47 N. E. 31, 32 (1897): "A reasonable doubt, gentlemen, is not a mere whim, guess or surmise; nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing; but is such a doubt as reasonable men may entertain after a careful and honest review and consideration of the evidence in this case."

THE DISREGARD OF THE REASONABLE DOUBT DOCTRINE.

There are two major safeguards thrown around a person who is on trial charged with the commission of a crime. The first is that the defendant is presumed to be innocent, while the other is that this presumption continues until the defendant has been proven guilty beyond a reasonable doubt. In practice, however, these two safeguards are said to exist only in theory.[6] In fact, it has been charged that both the presumption of innocence and the doctrine of reasonable doubt are mere fictions of the law.[7]

One author, a man of considerable reputation and experience in the trial of criminal cases, having himself been an Assistant District Attorney, has pointed out the absurdity of the presumption of innocence theory in one of his books.[8] He states that there are two factors which render this theory a dead letter. One factor is that of experience while the other is a psychological one. If *A* accuses *B* of a crime, we know from experience that the chances are largely in favor of *A*'s accusation being well founded. People, as a rule, do not go rushing around charging each other with being thieves unless they have some reason for it. The psychological factor may be found in the uncharitable readiness with which we believe evil of our fellows. This willingness to believe the worst of others is a matter of common knowledge.

Thus it is safe to assume that a defendant in a criminal case is at a distinct disadvantage at the very outset of his trial. There still remains the other major safeguard—the doctrine of reasonable doubt—to which the defendant may look. But here, too, he is doomed to disappointment, for the truth of the matter is that the defendant rarely, if ever, receives the benefit of a reasonable doubt.

Of course we cannot find any decision or statement by a court to the effect that the doctrine of reasonable doubt

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[6] R. H. SMITH, JUSTICE AND THE POOR 110; M. C. GOLDMAN, THE PUBLIC DEFENDER. At page 36 of his book, Mr. Goldman calls the doctrine of reasonable doubt a "theoretical safeguard."

[7] TRAIN, COURTS AND CRIMINALS 24.

[8] *Ibid.* at 15, 16.

has been abrogated to some extent. We must also consider the fact that a reasonable doubt is an intangible thing which can exist only in the mind of the trier of the facts. However, since we can determine to a reasonable degree of certainty the intent with which an act was committed, so, too, by considering the records, decisions and opinions of cases tried over a period of time, together with the facts and circumstances under which they arose and were disposed of, we can determine with a reasonable degree of certainty, the operation of the mind of the great majority of the judges sitting in our criminal courts.

Every now and then we have brought to our attention the facts relating to some miscarriage of justice in a criminal case. More recently, the press throughout the nation informed the public of the wholesale miscarriages of justice in cases tried in the "Women's Court" of the Borough of Manhattan, City of New York. The disclosures concerning the cases tried in that court speak eloquently for themselves in the matter of proving the denial to defendants of that which is theirs by right, namely, the benefit of a reasonable doubt.

There are a number of factors which seem to have a telling effect upon the decisions of judges sitting in the trial of criminal cases. One of the chief factors lies in the fact that very few cases are appealed. Of all the appeals heard by the New York Court of Appeals, only eight[9] or ten per cent of the number are cases involving convictions in the criminal courts. Of these criminal appeals, the majority are from convictions by juries. Of the latter, a large number are from convictions of murder in the first degree, because appeals are mandatory in those cases. Therefore it is quite evident that cases which are tried before Magistrates very rarely reach the Court of Appeals. The great majority of cases are not appealed and, therefore, the decisions of the courts in deciding the questions of fact against the defendants stand regardless of the merits of these convictions. Thus, injustices remain permanent in innumerable cases. As a result, abuses of a glaring nature crept in and flourished

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[9] CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS 78.

unchecked and unabated, as in the case of the so-called "Women's Court" where the Magistrates went about their work of deciding cases in a perfunctory manner which led to the denial to defendants the benefit of a reasonable doubt.

The outstanding cause of this evil lies in a policy adopted by the courts and the legislature of this state in the matter of the trial and disposition of criminal cases. An article appearing in recent issues of the New York Law Journal clearly and definitely impresses one with an important policy in vogue in our criminal courts.[10] The author of the article attempts to state a proposition of law, but in so doing, he incidentally outlines what seems to be the crystalized policy of our criminal courts. This policy seems to be, that in the trial of cases, speed and economy are desirable, if not paramount, considerations.

At this point it should be noted that speed and economy are the present-day by-words of industry, where efficiency experts are employed for that very purpose. These experts break up the various operations on a product into a number of simple and distinct movements and then perfect a machine for each motion. Thereafter, a separate worker is trained to work an individual machine. This process develops experts or specialists for each motion or process. In the course of time these specialists learn to utilize the materials they work on with a minimum of waste. In this way more products are produced at a lower operating cost. So deeply rooted has this process become in recent years that its existence has given rise to a new school of economic thought known as Technocracy.

The same tendency is present in our criminal court system. Especially is this true in the case of the Magistrates' Courts of the city of New York where we have "Specialization Courts" such as the "Women's Court," where vagrancy (prostitution) cases and wayward minor cases are dealt with; the "Traffic Court"; the "Family Court"; the "Homicide Court"; the "Commercial Frauds Court"; the "Municipal Term" where violations of certain city ordinances are

[10] "Transfer of charges from Special Sessions to General Sessions," Part I, at p. 738 of the New York Law Journal of August 30, 1932, and Part II, at p. 752 of the New York Law Journal of August 31, 1932.

tried; and the newly organized "Juveniles or Adolescents' Court." Certain Magistrates are regularly assigned to preside in these "Specialization Courts." After they try the same type of case over a period of time, they become specialists and apply a certain measure or yardstick by which they determine the guilt or innocence of defendants. They become like the expert craftsman who throws aside very little waste in shaping the materials to fit a particular design. The judge in this position selects from the testimony only those elements that he feels make up the crime or offense charged, and if they are present, the defendant is invariably found guilty.[11]

The testimony for the prosecution in these cases is practically stereotyped.[12] The complaining witnesses are asked only those questions which elicit answers proving the elements of the crime or offense charged. Little or no time is lost or wasted with cross examination. Trials move swiftly. The by-word is speed. Thus, trials involving the liberty and reputations of human beings are conducted along the same principles on which the production manager operates the factory. Time is saved and a greater number of cases disposed of. However, because of certain factors which affect the decisions of these judges, the quest for efficiency leads to a disregard of the doctrine of reasonable doubt. It would seem that the courts are turned into factories where justice is meted out in terms of efficiency.

One author, heretofore referred to, describes how the policy of speed works out in the trial of cases in the Court of Special Sessions.[13] In relating the facts of a case which lasted only three minutes, he shows how the People's case

[11] In the case of People v. Rose Davis, 9th District Magistrates' Court of the Borough of Manhattan, in the City of New York (defendant was tried on August 6, 1924, and sentenced on August 8, 1924), the court stated at p. 32 of the stenographic record: "It may not be amiss for me at the present time to state that the defendant's guilt has been proven to my satisfaction beyond a reasonable doubt; * * *. *All essential ingredients and circumstances to warrant arrest are present in this case.*"

The conviction in this case was reversed on the ground that the People had failed to make out a mere *prima facie* case. (N. Y. L. J., Nov. 11, 1924, decision of the Appellate Part of the Court of Special Sessions, First Judicial Department.)

[12] See *post* the Probative Value of Police Testimony.

[13] TRAIN, THE PRISONER AT THE BAR 86-89.

is made out by the Assistant District Attorney who asks the complaining witnesses two or three pointed questions. No time is lost in cross examining witnesses. The defendant takes the stand, and after denying his guilt, he is not cross examined. The decision of the judges is immediately announced from the bench.

This tendency towards specialization in our criminal courts causes a question to arise. The question is, "What special training, if any, is necessary in order to make one an efficient trial judge in criminal cases?"

Before attempting to answer this question it becomes necessary to state that there are apparently two diametrically opposed theories. One holds [14] that

> "of the judge, like the engineer, expert training or trained experience are required for the framing of legal precepts and for applying them."

The other theory [15] is that

> "the amount of training requisite to preside with efficiency at an ordinary trial is comparatively small, and provided the judge be honest, impartial, possessed of common sense, and what is known as 'backbone,' neither the prosecutor nor defendant's counsel need, as a rule, complain."

It would seem that the second theory is the more reasonable one. In fact, the trier of the facts in criminal cases does not need any special training. The objections raised at a criminal trial are always practically the same. The charge to the jury in a criminal case, with the exception of the statement regarding the law applicable to the case, is always the same. In fact, if there were any need for training judges to frame legal precepts and in applying them when objections are raised, what justification, if any, is there for training a judge in the trial of a particular type of criminal case in which he is to be the sole trier of the facts?

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[14] POUND, *op. cit. supra* note 3, at 43.

[15] *Supra* note 13, at 230.

The most that can be said for the first theory, when taken in connection with the trial of criminal cases in which the judge is the trier of the facts, is that it is in line with the present-day theory of speed and economy. Regardless of the merits of either theory, the fact remains that the tendency is towards specialization. The idea of specialization is firmly entrenched in our present criminal court system and it is safe to say that it will remain with us for some time to come.

Opinions by both trial and appellate courts seem to point with approval to the fact that[16]

> "the Justices of the Court of Special Sessions are experienced and fair-minded men who have heard many similar cases,"

and also to the fact that[17]

> "the defendant was found guilty by a unanimous decision of three Justices of the Court of Special Sessions, each experienced in the trial of 'shoplifting' cases."

The judges writing these opinions lose sight of the fact that the honesty of these judges of the lower court is not questioned, but that defendants object to being tried by judges whose decisions are affected by certain factors which deprive them (the defendants) of the benefit of a reasonable doubt.

Specialization is a fine thing, and is to be desired where commodities are concerned. But in the trial of criminal cases, courts should not be concerned with the output of cases in the same manner in which production managers are concerned with the output of their products. They should bear in mind that they are dealing with the lives and fortunes of human beings and give them the benefit of a reasonable doubt in cases where such a doubt exists. It is here proposed to show where this system of specialization is leading us.

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[16] People v. Marcus, 236 App. Div. 93, 98, 258 N. Y. Supp. 196, 201 (1st Dept. 1932).

[17] *Ibid.*

IMPLICIT FAITH IN TESTIMONY.

In the case of *People* v. *Wade*,[18] the Court states:

> "It is a matter of common knowledge that in the great majority of cases removed from the Court of Special Sessions the object is not to obtain a speedy trial, but to get away from one."

In the writer's opinion, this statement is far from the truth. In that case the Court had before it statistics dealing with the large number of cases removed from the Court of Special Sessions to the Court of General Sessions under an old statute by which a defendant was entitled to a removal of his case as a matter of right. The Court in that case was considering the time and expense involved in the presentation of such cases to grand juries and trial by petit juries. The Court did not consider the fact that innumerable defendants desired removals because they preferred a jury trial to one before judges who had a subconscious prejudice against defendants. A large number of defendants seeking removal of their cases do so because of the fact that they feel that the Justices of the Court of Special Sessions have an implicit faith in the testimony of municipal and private police officers and detectives appearing in that court.

In becoming prejudiced against defendants in the manner stated above, the judges of that court have in effect prejudged the cases of defendants who thereafter appear in their court. In the case of *People* v. *Helen Gold,* the defendant, in her affidavit which was submitted on a motion for the removal of her case, complains of the implicit faith which judges give to the testimony of certain witnesses, and also explains a situation under which a defendant cannot expect to receive the benefit of a reasonable doubt.[19]

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[18] People v. Wade, 26 Misc. 585, 588, 57 N. Y. Supp. 645, 647 (1899).

[19] The following is an excerpt from an affidavit by the defendant in the case of People v. Helen Gold, who was charged with petty larceny in an information which was filed against her in the Court of Special Sessions of the County of New York on April 13, 1928:

> "Deponent is informed and believes that day after day in the Court of Special Sessions the store detectives of the complaining store are

Section 974 of the New York Penal Law makes it a misdemeanor to possess policy slips. It is customary for two or more police officers to participate in the raids in which an arrest is made for violation of this section. The defendant in such a case is arraigned upon the complaint of one of the police officers who caused his arrest. When the case is finally tried in the Court of Special Sessions, only one police officer, that is, the one who swore to the complaint, is called to testify against the defendant. The other officers who assisted in the arrest do not even appear in court. The same is also true of cases tried in the "Women's Court."[20] The reason for this practice is obvious—the policemen know that the courts have implicit faith in their testimony and think that it is unnecessary for more than one officer to testify in a given case.[21]

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testifying as witnesses before the same judges of that Court in Petty Larceny cases. Deponent is informed and believes that in all such cases the word of the store detectives against the defendant is so implicitly believed that an acquittal in thousands of such cases each year is extraordinarily rare. Deponent respectfully submits that the frequent appearances of such store detectives as witnesses and the convictions consequent on their testimony has perhaps unconsciously in the minds of the judges of that Court created an atmosphere of credibility towards the detectives' testimony. Deponent feels that the result of this situation in such a case is that the defendant, contrary to the first principle of Criminal Procedure, starts with a presumption of guilt against her instead of a presumption of innocence in her favor. Deponent respectfully urges on this Court that she should be granted a trial before a jury of her peers which has not seen and knows neither her accusers nor herself."

[20] Since the investigation into the Magistrates' Courts of the First Judicial Department of the State of New York, the Magistrates sitting in the "Women's Court" are more exacting in the matter of the amount of proof necessary in order to convict a defendant charged with vagrancy (prostitution). They now require the testimony of all available witnesses. They also require the production in court of the alleged "unknown man" in order that he may be identified and his testimony taken.

[21] In the case of People v. Drake (2d District Magistrates' Court in the Borough of Manhattan, City of New York, stenographic record dated Oct. 9, 1929), five police officers had participated in the raid in which the defendant was arrested and charged with knowingly permitting a room to be used for purposes of prostitution. At the trial, but one police officer appeared and testified against the defendant. He was the police officer who had sworn to the complaint in the case. The defendant's counsel, on cross-examining the police officer, asked him whether the other officers who had assisted in the arrest of the defendant were in court. The police officer replied that they were not. When he was further pressed on this matter, he stated that he did not believe that it was necessary for them to be present in court. *The police officer stated that he felt that his testimony was sufficient and was all that was necessary.* When the defendant's attorney asked the police officer whether he expected the Court to believe his uncorroborated testimony, the Court demanded an apology

This practice on the part of the prosecution in which it did not call available witnesses was condemned in the cases of *People* v. *Wachtel* [22] and *People* v. *Martin*,[23] which were originally tried in the "Women's Court."

In the *Wachtel* case, the People's case rested on an alleged admission by the defendant. This admission was denied by the defendant under oath and by another witness who was present at the time of the arrest. Nevertheless the defendant was convicted. An appeal was taken by the defendant. In its opinion the appellate court voiced its disapproval of the practice of only calling one police officer to testify in cases where there are other witnesses who are available to the prosecution. The appellate court ordered the judgment of conviction reversed on the facts, dismissed the complaint and discharged the defendant.

In the *Martin* case [24] the defendant was arrested in a hotel. The complaining officer testified that his brother officer was with him when the arrest was made, as was the hotel manager. On cross examination, in response to a question which asked for the reason for the non-appearance of his brother officer who was not present in court, the complaining officer stated that he "didn't feel it was necessary to get him." The defendant took the stand, and her story of the arrest completely contradicted that of the officer. She denied that she

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from the lawyer who, in turn, insisted that he had not said anything of an offending nature. The Court thereupon declared a mistrial and set the case down for trial *de novo* before another judge. The defendant's attorney objected to the mistrial, and later sued out a writ of *habeas corpus* in the Supreme Court. The latter court discharged the defendant on the hearing of the writ, on the ground that a new trial would constitute double jeopardy.

[22] People v. Wachtel, 137 Misc. 205, 206, 244 N. Y. Supp. 462, 463 (1930).

[23] People v. Martin, 9th District Magistrates' Court of the Borough of Manhattan, City of New York, stenographic record dated Oct. 20, 1930.

[24] *Ibid.* the Court stated:

> "It is significant to note that not until the cross-examination of Officer Brady was there any intimation that any other officer was concerned in the arrest.
>
> "On cross-examination it developed that another officer, Morris, entered the apartment with Brady and was present and saw practically everything that transpired. It was later developed by the defense that Officer Morris entered the apartment by an appreciable length of time before Officer Brady. The District Attorney at no time called Officer Morris to testify.
>
> "The District Attorney did not see fit to call Officer Morris in rebuttal."

had misconducted herself. The defendant's attorney argued for an acquittal on the ground that the officer's testimony was uncorroborated. The Court found the defendant guilty. The conviction was appealed to the appellate part of the Court of Special Sessions. In reversing the conviction and ordering a new trial, the appellate court again voiced its disapproval of the practice of calling only one police officer to testify in cases where there are other witnesses available to the prosecution.[25]

On the new trial the prosecution called the additional witnesses and the defendant was acquitted. The subsequent acquittal of the defendant Martin shows the danger of permitting the practice of calling only one officer to testify in cases where two or more officers were witnesses to the facts. It also shows the dangers arising out of the implicit faith that judges have in police testimony.

Before leaving the subject of implicit faith, it is indeed significant to note that the Court of Special Sessions, which determines appeals from convictions before city Magistrates, and which condemned the practice complained of above, permits the very same practice to continue in its own court where misdemeanors are tried.

CONVICTION ON MERE ACCUSATION.

Some very interesting facts can be deduced from stenographic minutes of trials had before city Magistrates. The results which follow are the fruits of a system which denies to defendants the benefit of a reasonable doubt. These cases show that Magistrates have a suspicion that all defendants are guilty, and that they must prove themselves innocent.

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[25] *Supra* note 23, the Court stated:

"It appears on page 6 of the stenographic minutes that Officer Browser testified that his partner Williamson and the hotel manager were in the room at the time when he demanded and received from defendant the return of the fifty dollars marked money which he alleges he gave to the defendant. The prosecution did not call these witnesses.

"In a closely contested case like this, we feel that their testimony should have been introduced by the people." (See unreported opinion of the Appellate Part of the Court of Special Sessions, dated Feb. 5, 1931.)

In the cases of *People* v. *Davis*,[26] *People* v. *Harris and Brown*,[27] and *People* v. *Miller, et al.*,[28] the police officer in each case testified that he found an "unknown man" in the defendant's apartment; that he (the "unknown man") stated that he came there for a good time and had paid a sum of money to the defendant for that purpose. The police officers further testified that the various defendants then and there, and in the presence of the "unknown men," denied the charge made by the latter, who were never produced in court. The cases, as they stood before the Magistrates, were merely the testimony by an officer of an alleged statement by an "unknown man," and the denial of the charge by the defendant. None of the acts charged in the alleged statement by the "unknown man" had occurred in the presence of the officers. The testimony of the officers was mere hearsay, and when taken in connection with the denial of the defendants, was worthless as proof. However, the Magistrates convicted all of these defendants. In each case an appeal was taken and the conviction was reversed, complaint dismissed and the defendant discharged on the ground that the People had failed to make out a *prima facie* case.

It would seem that the Magistrates felt that all that was necessary in order to convict a defendant was to have an accusation made against her under suspicious circumstances. It did not matter where, how and under what circumstances the accusation was made, and that none of the alleged "unknown men" were ever produced in court. In the last analysis, the proof of guilt in these cases was merely the accusation made by an alleged "unknown man" who was not produced in court and who was not under oath at the time of making the charge. In basing convictions merely on such testimony, the Magistrates were in effect putting the defendants in a position whereby they had to prove

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[26] People v. Davis, 9th District Magistrates' Court of the Borough of Manhattan, City of New York, stenographic record dated Aug. 6, 1924.

[27] People v. Harris and Brown, 9th District Magistrates' Court of the Borough of Manhattan, City of New York, stenographic record dated Oct. 17, 1929.

[28] People v. Miller, *et al.*, 9th District Magistrates' Court of the Borough of Manhattan, City of New York, stenographic record dated May 15, 1930.

themselves innocent beyond a reasonable doubt, thereby reversing the proper order of things.

In the case of *People* v. *Brown*,[29] the defendant was charged with offering to misconduct herself with an "unknown man" for the sum of $5.00 and that she exposed her person for that purpose. The arresting police officer testified that the defendant Brown, at the time of her arrest, was fully clothed and was seated in the living room of her apartment in the company of several other women. He further testified that no money was passed between the alleged "unknown man" and the defendant. Thus the proof offered by the prosecution clearly established the innocence of the defendant. The evidence also failed to prove the material allegations of the complaint. The defendant rested on the People's case, and moved to dismiss on the ground that the People had failed to prove the material allegations set forth in the complaint. The Magistrate denied this motion and found the defendant guilty. The defendant appealed her conviction. The appellate court reversed the conviction, dismissed the complaint and ordered the defendant discharged. It is significant to note that before the defendant Brown moved to dismiss the complaint, the Magistrate had indorsed the following on the complaint against her: [30]

> "No competent legal proof of any demand or receipt of any consideration by defendant. Dismissed. Dec. 19, 1929.
>
> (Signed) 'Initials of Magistrate.' "

After the defendant had rested on the People's case, the Magistrate put ink lines through the above words, and found the defendant guilty. What caused the Magistrate to do this? Were his suspicions aroused by the fact that the defendant rested on the People's case? If they were, he should have borne in mind that under our system of criminal justice, the defendant must be proven guilty beyond a reasonable doubt, and not convicted on mere suspicion. To

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[29] People v. Brown, 9th District Magistrates' Court of the Borough of Manhattan, City of New York, stenographic record dated June 21, 1928.

[30] Notation endorsed on the complaint filed in the case cited *supra* note 29.

require the defendant to offer a defense in this case is tantamount to requiring her to prove her innocence beyond any shadow of suspicion.[31]

SOME FACTORS WHICH SEEM TO AFFECT THE DECISIONS OF JUDGES.

Many Magistrates have convicted defendants for reasons which do not appear on the record. This must not be taken to mean that the courts in those cases had acted dishonestly or corruptly. However, this does mean that certain factors which are not disclosed by the record had a

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[31] In the case of People v. Hecht, *et al.* (2d District Magistrates' Court of the Borough of Manhattan, City of New York, stenographic record dated June 22, 1930), the arresting police officer charged the defendants with disorderly conduct in that they used "threatening, abusive and insulting behavior, with intent to provoke a breach of the peace, and whereby a breach of the peace might be occasioned; *that the said defendants at the hour of about 2:30 P. M. did then and there obstruct the sidewalk while engaged in a game of dice for money with a numbers of others.*"

At the trial, the police officer gave the following testimony:

> "Q. Were these defendants right in the group? A. They were nearby watching the game.
>
> Q. Did you see the various defendants roll the dice? A. No, none of these boys.
>
> Q. Did you at any time see these defendants handle or engage in the handling of any money? A. No, I did not."

The proof offered by the prosecution failed to prove any of the material allegations in the complaint. Yet the Magistrate denied the defendants' motion to dismiss at the end of the People's case. One of the defendants took the witness stand and testified in his own behalf. He denied the allegations in the complaint. On cross-examination he was asked merely four questions. When the defendants' counsel called a second witness (one of the defendants) to the stand, the following took place between the Court and the attorney:

> "The Court: Do you want to swear each one of them?
>
> Defense Counsel: Just as you say.
>
> The Court: All right, we will continue this."

Each of the other defendants then took the stand and denied the allegations in the complaint. No trouble was taken to cross-examine them. The failure to cross-examine these defendants, when viewed in the light of the conversation between the Court and the defendants' counsel, is indicative of the fact that the Court had concluded that they were guilty. The Court did not take into consideration the fact that the officer had stated that the defendants did not participate in the game. Nevertheless, each of the defendants was found guilty.

In this case the proof offered by the prosecution not only failed to make out a *prima facie* case, but also established the innocence of the defendants. However, the Magistrate overcame the reasonable doubt doctrine and the deficiency of proof by drawing inferences which the evidence did not legally justify. The convictions were appealed, and the Appellate Part of the Court of Special Sessions ruled: "Convictions reversed as against the weight of evidence, defendants discharged, complaint dismissed and fines ordered returned."

decisive effect upon the ultimate decision of the trier of the facts.

Some judges have publicly acknowledged that they convicted a defendant because they did not believe that a police officer would commit perjury. Even the Court of Appeals, in affirming a conviction, stated that to believe the defendant's story was to conclude that all witnesses against him had committed perjury.[32] In dissenting from an opinion reversing a conviction of a defendant in a vagrancy case, a Justice of the appellate part of the Court of Special Sessions said that he was unable to agree with the prevailing opinion because, in so doing, he would in effect find that perjury had been committed by four police officers who had testified against the defendant at the trial in the "Women's Court." [33] Thus, it would seem that a factor which is not disclosed in the record is that judges hesitate to acquit a defendant when, in so doing, an inference that the complaining witnesses had committed perjury might be suggested.

Another factor which is not disclosed by the records is that suspicious attitude which courts seem to take towards the testimony of the defendant and his witnesses. This is due in part to the fact that the defendant has a personal interest in the outcome of the case. It is also due in part to the inability of the defendant to prove a motive for a police officer or other prosecution witnesses to give false testimony. It is almost impossible to make a police officer admit things which would tend to prove a motive on his part to testify falsely. In affirming a conviction, an appellate court stated: [34]

> "The oral evidence against them (the two defendants) is furnished by two police officers, whose testimony is easily preferred to the manifestly contrived stories of the defendants."

[32] People v. Barker, 153 N. Y. 111, 114, 47 N. E. 31, 32 (1897).

[33] People v. Hammerstein. See dissenting opinion of unreported case on appeal in which decision was rendered by the Appellate Part of the Court of Special Sessions on Oct. 22, 1930.

[34] People v. Solomon, *et al.*, 174 App. Div. 144, 145, 160 N. Y. Supp. 942, 943 (2d Dept. 1916).

Since the appellate court acts upon the record of the case and is not personally acquainted with the facts, its statement can be ascribed only to the suspicious attitude judges assume towards the defendants' stories.

There cannot be any doubt but that the activities of certain so-called reform organizations, which have certain courts under their vigilant eye, seriously interfere with a true and just administration of justice in those courts. These organizations, self-appointed reformers of mankind, which gather funds from noble-minded persons, publish periodic reports in which the work of the various judges and other officials attached to the courts under review is discussed. These reports also list the number of cases tried, and the number of acquittals or convictions had before each judge. They seem to impress one with the idea that a large number of convictions can be obtained if attention tantamount to pressure is directed towards the court. Judges, in deciding cases, have the ever-present fear of criticism in case their average of convictions falls below that of the other members of their court. Thus, many defendants are deprived of the benefit of a reasonable doubt because of the activities of these organizations.

Every now and then the press or some other agency arouses the public to a sort of consciousness of an existing crime wave or to the recurrence of a particular type of crime. On such occasions convictions are more frequent and sentences are more severe than usual. These occasions are known as periods of hysteria, during which judges seem to refuse to assume the responsibility of discharging defendants in numerous instances where a reasonable doubt as to the defendant's guilt clearly existed.

During the investigation of the Magistrates' Courts of the First Judicial Department, the Tombs Prison of New York County was overcrowded with prisoners. This condition resulted from a hysteria among the Magistrates because some of them had been called upon to account for their official acts. The timid Magistrates were convicting defendants in more cases than usual, because complaints, which ordinarily were dismissed, were entertained and convictions

had. Thus, a hysteria in many instances deprived a defendant of the benefit of a reasonable doubt.

The fear that the decision of the court may be affected by the hysteria of the age seems to have been a problem from time immemorial. It would not be amiss to direct the attention of our present-day jurists to the vigorous plea, made by Socrates before the Greek senate, in which he staked his life in order that justice, free from prejudice and hysteria, might triumph.[35] The action of Socrates is cited as an illustrious model of judicial duty fearlessly performed.

THE PROBATIVE VALUE OF POLICE TESTIMONY.

Careful examination discloses that the testimony of police officers is to be closely scrutinized, because[36]

> "The memoirs and reminiscences of experienced trial lawyers contain abundant and uniform testimony to the effect that the evidence of the police is apt to be so colored and warped as to be the subject of grave doubt."

In their zeal to convict a person whom they believe to be guilty, they not only overlook that which would prove a defendant's innocence, but they withhold such information from the prosecutor, defense attorney, and the Court, and believe themselves justified in doing so.

A review of numerous stenographic records of trials had in the "Women's Court" reveals that the testimony of police

[35] "What I am going to tell you may be a commonplace in the Courts of Law; nevertheless it is true. * * * When you wished to try the generals, who did not rescue their men after the battle of Arginusæ, in a body, which was illegal, as you all came to think afterwards, the tribe of Antiochis, to which I belong, held the Presidency. On that occasion I alone of all the Presidents opposed your illegal action, and gave my vote against you. The speakers were ready to suspend me and arrest me; and you were clamoring against me, and crying out to me to submit. But I thought that I ought to face the danger out in the cause of Law and Justice, rather than join with you in your unjust proposal, from fear of imprisonment or death." (Quoted at pp. 94 and 95 of the brief submitted by the relator-respondent in the case of People, etc., *ex rel.* George A. McManus v. The Warden of the City Prison, etc., 226 App. Div. 364, 235 N. Y. Supp. 112 [1st Dept. 1929].)

[36] POUND, CRIMINAL JUSTICE IN AMERICA 72.

officers is nearly the same in every case. In fact, in some instances the testimony seems to be identical. The testimoney of the same officer in two or more cases is the same, verbatim, the only differences being in the names and addresses. Testimony by a police officer, such as "I asked this 'unknown man' what he was doing there, and he said 'I came here for a good time'; I then asked the defendant if this was true, and she said 'Yes, give me another chance,'" appears in record after record. To say that the identical words were used in every case and that every defendant admitted her guilt in the same fashion, is a fact that should cause a Magistrate to become highly suspicious of those giving that testimony, and to cast grave doubt upon it. The fact remains that the same judges heard the same police officers telling them the same story time and again and believed them without hesitation. It seems incredible that judges should prefer such testimony, which clearly appears to be stereotyped, to the straightforward stories of defendants and their witnesses.

In reading the cases referred to above, one comes to the conclusion that police officers are experienced witnesses who know the elements of each crime and supply details whenever they are needed in order to make out a case. These officers seize every opportunity to testify to some alleged admission that the defendant made. It is indeed dangerous for a defense attorney to ask a police officer on cross examination, "What did the defendant say when you questioned her?" Almost invariably, the reply will be "She said, 'Yes, I did it, give me another chance.'" They seldom, if ever, testify to a denial by a defendant.

It is significant to note that the New York City Police Department issues certain rules and regulations which explain in detail the testimony required in various types of cases. When testifying in court, police officers usually make their testimony fulfill the requirements laid down in these rules and regulations. Police officers receive instructions in criminal law and in the testimony required in prosecutions for infractions of those laws. Gambling experts explain various games to them, and assistant district attorneys instruct them as to how testimony should be given in

criminal cases and the proof necessary in order to obtain a conviction. The following, taken from the stenographic record of a case, bears witness to the foregoing:[37]

> "By the Assistant District Attorney: Q. Have you had instructions, school instruction, in the matter of the playing of policy, policy playing?
> "By the Police Officer: A. I have."

From the foregoing it is clear that caution should be used when police testimony forms the main support of the People's case. Especially should this be done in cases where the defense produces witnesses to disprove the complaining police officer's story. However, courts insist on giving greater credence to the testimony of police officers than to the testimony of the defendant and his or her witnesses. It therefore becomes just a matter for the police officer to make out a *prima facie* case in order that a conviction follow. Under such a state of affairs, a defendant cannot receive the benefit of a reasonable doubt. Yet, that is exactly the state of affairs that was shown to exist in the "Women's Court."

PERJURY BY STATE'S WITNESSES.

The recent investigation of the Magistrates' Courts of the First Judicial Department disclosed that state witnesses had committed perjury in innumerable cases. Wholesale "framing" of defendants was disclosed. The following cases are examples wherein the testimony of the state witnesses were open to grave doubt, but nevertheless, the defendants were convicted. In some instances the stenographic minutes of the case or an opinion or a decision either openly or impliedly suggests that the complaining witnesses had committed perjury in order to obtain a conviction.

In the case of *People* v. *Edwards,*[38] the defendant appealed her conviction for vagrancy (prostitution) claiming that

[37] People v. Joseph Olivo, 9th District Magistrates' Court of the Borough of Brooklyn, City of New York, stenographic record dated June 13, 1930, p. 4.
[38] People v. Edwards, 180 N. Y. Supp. 631 (1920).

she had been convicted on the perjured testimony of two police officers. In that case the police officers testified that one of the women in the apartment was disrobed. However, on cross-examination it was developed that this woman was fully clothed and wore an apron when she was brought to the station house. The defense witnesses testified that they were fully clothed and that the police officers, after entering the apartment through a ruse, took the women to the station house in the same condition in which they were found. They stated that the woman who was alleged to have been disrobed and in the company of a man, was fully clothed and wore an apron over her dress while ironing clothes. Their testimony further showed that no other men outside of the two police officers were in the apartment. The Appellate Court, after analyzing the evidence, reversed the conviction and dismissed the complaint, stating that the testimony of the police officers had all the earmarks of fabrication.

Could it be said that the Magistrate, before whom the *Edwards* case was tried, analyzed the officers' stories, or that he used caution in accepting their testimony? The attitude assumed by some magistrates was that if the police officer said so, then it was true. They could not lead themselves to believe that police officers would commit perjury. A defendant cannot expect to be given the benefit of a reasonable doubt under such conditions.

In the case of *People* v. *Minnie Stein*,[39] the defendant

[39] In the case of People v. Minnie Stein (9th District Magistrates' Court of the Borough of Manhattan, City of New York, stenographic record of this case in which the defendant was convicted on Sept. 21, 1925), the defendant had been held up and robbed by one Horowitz. She appeared against the robber in the Magistrates' Court and before the Grand Jury which indicted him for robbery. Friends of the indicted man made several attempts at silencing Mrs. Stein, but they were unsuccessful. He informed the police that her family and herself had been threatened and that they were in danger of being bodily harmed. The detective who had arrested Horowitz arranged for her to telephone him for immediate aid whenever the occasion for such aid arose. On several occasions, when she telephoned to the detective for assistance, he arrived shortly after the intruders had disappeared. On one occasion, he caught a police officer in civilian clothes attempting to break into Mrs. Stein's home in order to work up a prostitution case against her. The detective reported this incident to his captain.

Some time thereafter, Mrs. Stein heard someone trying to break the door leading into her apartment. She climbed out of the window and went to the street and then down to the corner drug store where she entered a telephone

not only created a reasonable doubt as to her guilt, but she apparently succeeded in proving that she was the victim of a plot to "frame her" in order to save a robber against whom

booth and attempted to call the detective. While in the telephone booth, a man entered the drug store and dragged her out of the booth. While taking her back to her apartment, he slapped her and tore her house dress. In the apartment there was another man holding her boarder who had been asleep in his room, the door of which had been bolted at the time when Mrs. Stein fled from the apartment window. The two men, who later turned out to be police officers, informed Mrs. Stein and her boarder that they were under arrest, but did not mention the nature of the charge against them. The two prisoners were then taken outside to an automobile in which the police officers took them to the police station. Near the automobile stood a short dark man who had a short conversation with the police officers. The police officers charged Mrs. Stein with committing prostitution with an "unknown man" who later turned out to be the short dark man who stood near the automobile. The boarder was charged with maintaining a house for immoral purposes. The police officers failed to appear for the trial of the border and the charge against him was dismissed and he was discharged. However, they appeared in court in order to testify against Mrs. Stein.

Pending the trial of Mrs. Stein, the alleged "unknown man" visited her store and informed her that he felt sorry for her; that she was being "framed" by the friends of Horowitz; that Horowitz's friends had paid the police officers to frame her in order to discredit her; that he had influence in the "Women's Court"; that he could obtain her acquittal if she paid him the sum of $250.00; and that part of the $250.00 was to go to the police officers who had arrested her. She told him to return another day and that she would then have the money for him. When he did return, the detective in the Horowitz case stood secreted behind a partition from where he could see the "unknown man" and could hear him talk to Mrs. Stein. Upon the "unknown man's" assuring Mrs. Stein that she would be discharged if she paid him the sum of $250.00, and after repeating in sum and substance the story that he had told to her on the previous occasion concerning the "framing" of her case, she paid him in marked money which he placed in the leather band on the inside of his hat. Thereupon, the detective seized him and, after recovering the money, arrested him for extortion. After the boarder had testified at the first day of Mrs. Stein's trial, he was severely beaten by thugs and removed to a hospital, where he was found to be suffering from a fractured skull.

The defendant Stein produced, in her defense, numerous other witnesses besides the detective above mentioned. She and her boarder denied that any other men outside the police officers were in the apartment when they were arrested. The case before the Court clearly proved that Mrs. Stein was being "railroaded" in order to save the robber against whom she was to testify in the County Court. Notwithstanding the fact that the Court had all this proof before it, Mrs. Stein was convicted and sentenced to a term in jail.

The case was appealed to the Appellate Part of the Court of Special Sessions and the defendant was released in bail pending the determination of her appeal. The conviction was reversed and the case was sent back for a new trial. In the meantime, the alleged "unknown man" was convicted of extorting money from Mrs. Stein and received a jail sentence. Enraged at the failure of the two police officers to save him from going to jail, the "unknown man" confessed that the case against Mrs. Stein was "framed" and that he was never in her apartment.

When the case was called for retrial, the Court dismissed the complaint on motion of defense counsel (Jan 6, 1926). The District Attorney's office consented to the dismissal of the charge.

she was to testify in the County Court. However, she was convicted and sent to jail by the Magistrate who heard the case. It was only through the timely action of an appellate court that she was enabled to prove her innocence and send the alleged "unknown man" to jail as an extortionist.

The *Stein* case clearly shows that it is almost impossible for a defendant to receive the benefit of a reasonable doubt when the acquittal of a defendant who claims that she was "framed" might result in justice being dealt out to those who had attempted to swear her liberty away.

Another case which emphasizes the point raised in the preceding paragraph is that of *People* v. *Hammerstein.*[40] In that case, the widow of a theatrical magnate was arrested and charged with vagrancy (prostitution). At her trial, four police officers testified against her. A number of witnesses appeared for the defendant. She was convicted, after a bitterly contested trial. An appeal was taken and the conviction was reversed, complaint dismissed and the defendant discharged. However, one of the justices of the Appellate Court dissented from the judgment of that court and wrote an opinion, in which he stated that he was unable to vote for a reversal of the conviction in the lower court because, in so doing, he would in effect imply that the four complaining police officers had committed perjury at the trial. Such an attitude on the part of a judge is extremely dangerous, because he is assuming a position which is highly prejudicial to defendants appearing before him. In effect, it causes him to deny to them the benefit of a reasonable doubt because the police officers later might be accused of perjury.

It is interesting to note what the future held in store for the four police officers whom the dissenting justice refused to believe would commit perjury. Three were indicted for perjury as the result of the disclosures in the Magistrates' Courts' investigation and were suspended. Of these three, one died while under suspension and indictment; a second was tried and acquitted and restored to duty as a police officer; the third was tried, convicted and sentenced to prison. The

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[40] *Supra* note 33.

conviction of this last police officer was affirmed by both the Appellate Division and the Court of Appeals.

Would the dissenting Justice still consider the testimony of police officers unimpeachable under any and all circumstances after he learned of the fate of three of the men whom he refused to believe would commit perjury? In finding that a reasonable doubt exists, the trier of the facts does not necessarily have to conclude that the police officers had committed perjury, but he finds that the evidence of guilt is not inconsistent with innocence. The attitude of the dissenting Justice, as evidenced by his opinion, is therefore unjustifiable.

THE REASONABLE DOUBT DOCTRINE AND THE JURY.

Earlier in this article reference was made to the fact that a large number of defendants prefer a trial by jury to one before the Court of Special Sessions, where three judges are the triers of the facts. This must not be taken to mean that in obtaining a trial before a jury a defendant is assured that he will be given the benefit of a reasonable doubt. The truth of the matter seems to be that jurors do not apply the doctrine of reasonable doubt very freely. However, because of their lack of legal training, juries are more apt to acquit a defendant in cases where sympathy, mercy or leniency is desirable, than a judge who is schooled in legal precepts and in their application to a given state of facts unaffected by any outside considerations.

There seem to be four conditions under which juries are unable properly to apply the doctrine of reasonable doubt. These conditions are:

1. Where the jury is selected after the press or some other agency has inflamed public opinion.
2. Where a threatening mob outside the courthouse demands the conviction of the defendant.
3. Where the Judge or District Attorney has made an inflammatory statement in the presence of the jury.

4. Where the jury does not understand the doctrine of reasonable doubt, even though the court has taken great pains to explain it to them.

Experience has taught us that, under certain conditions, human beings will abandon reason and will let their emotions control their actions. Such occasions arise where public opinion is aroused by the press or some other agency.[41] The result is "mob action." Persons affected in this manner will not listen to reason. Unfortunately, this mob atmosphere is very often carried into both the jury box and the jury room.

Very few persons will seriously contend that a defendant who is on trial while the state militia has to guard the courthouse from a hostile mob which is desirous of entering the building and lynching him, will be given the benefit of a reasonable doubt. Yet, such was the condition in the case of Leo Frank in the state of Georgia and of the colored youths in the more recent Scottsboro case. Could these defendants expect to receive the benefit of a reasonable doubt from juries selected from the very same neighborhood that the restless mob outside the courthouse came from? Undoubtedly, the verdicts of these juries expressed the sentiment of the people in the neighborhood. The verdicts of these juries, in effect, gave to the howling mobs that which they desired—blood.

In relating the story of the capture of the actual perpetrators of a bank robbery at Lamar, Colorado, in which several persons were slain, a newspaper reporter very vividly portrays the atmosphere under which four innocent men had been previously arrested for that crime and faced what may be termed "judicial murder": [42]

> "The trial of the four suspects (the innocent men) in Lamar approached, and public demand for retribution was so great, a verdict of guilty seemed assured, although the prosecutor had not been able to break down their alibis."

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[41] POUND, CRIMINAL JUSTICE IN AMERICA 69, 70; People v. Tait, 234 App. Div. 433, 443, 255 N. Y. Supp. 455, 465 (1st Dept. 1932).

[42] N. Y. World-Telegram of Feb. 4, 1933, at 13.

The newspaper account very clearly shows the danger of proceeding to trial under such conditions. The public is desirous of obtaining a conviction, and does not concern itself with such matters as the protection of the rights and interests of accused persons. They come to court to convict the defendant and not to give him the benefit of anything, not even the benefit of a reasonable doubt. Under such conditions, "a verdict of guilty seemed assured."

In the city of New York, the press had aroused public opinion to such a tense pitch, through statements concerning members of the vice squad of the Police Department, that certain members of this squad who were tried for perjury while the Magistrates' Courts' investigation was in progress were convicted, while others, who were more fortunate in being tried after the clamor for their conviction had subsided, were acquitted. A strange coincidence, which occurred as a result of the above investigation, was the conviction of one police officer named Tait and the ultimate reinstatement of his brother officer. Both of these police officers had participated in the arrest of a colored woman whom they charged with prostitution. Tait was tried while the investigation was still in progress, while his brother officer was tried after the investigation had closed and public opinion against them had subsided.

During the investigation, women who had previously been arrested and charged with prostitution were called as witnesses and they charged that they had been "framed" by police officers and sent to jail as the result of perjured testimony. The press of the nation, and more particularly of the city of New York, broadcasted the stories and charges of these women. Civic organizations took an active interest against the police officers involved. Newspapers carried lengthy editorials denouncing the vice squad. They were also denounced from the pulpits of many churches. Public sentiment ran high against the accused men.

While the press was still carrying the stories of the "framing" of women, a number of police officers were indicted by the Grand Jury, which charged that the police officers had committed perjury in the cases of these women. One of these police officers was one Sidney D. Tait. He was immediately

placed on trial. The witnesses against him were a prostitute, an inmate of her establishment, and one Chile Acuna, a confessed "stool pigeon," who claimed to have helped Tait "frame" the woman. Tait was convicted.

The conviction of Tait was appealed, but the Appellate Division, by a vote of three to two, affirmed the conviction. The Court of Appeals, by a divided court, affirmed the decision of the Appellate Division. However, the significant fact about this case is the dissenting opinion of one of the justices of the Appellate Division. This opinion clearly demonstrates the danger of placing a defendant on trial while public opinion is strongly against him. The opinion states that a defendant in such position is not given the benefit of the safeguards provided by law, and also states that such person does not receive a fair trial.[43] With the facts as they are disclosed in the dissenting opinion of the *Tait* case in mind, could serious contention be made that he might expect a jury to give him the benefit of a reasonable doubt?

In cases where the issues are close, and the jury may as a matter of fact find that there exists a reasonable doubt as to the defendants' guilt, defendants are frequently deprived of the possibility of an acquittal when the judge, in charging the jury, makes an inflammatory statement which might readily cause a jury to become emotional, abandon reason and resort to the "mob spirit." However, such statements are sometimes made by judges who are honest, but who would not like to see the acquittal of a defendant whom they believe

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[43] In the case of People v. Tait, *supra* note 41, at 443, 255 N. Y. Supp. at 465, one of the dissenting justices states:

> "The defendant entered upon the trial under a presumption of innocence. It must be borne in mind that the trial of the defendant in the Court of General Sessions was held soon after the revelations as to the alleged 'framing' of dissolute women by members of the Vice Squad of the New York Police Department, and at a time when public feeling ran high and prejudice had been aroused against members of the Vice Squad for such claimed dishonest practices. A sensational public press, ever ready to seize upon the spectacular, did much to influence the public mind against honest police officers as a whole for wrongful acts committed by a comparatively few. It was at such a time and under such unfavorable circumstances that the defendant was indicted and tried. There was not a scintilla of evidence, nor was there any claim, that the defendant had received anything as a consideration for the alleged false testimony which he was charged with having given in Magistrates' Court."

is guilty. Such attitude on the part of trial judges should be discouraged because [44]

> "Nothing strikes so sharply at our conception of liberty as the failure of criminal justice, and the conviction of a defendant not legally proven guilty. * * * The partisan judge, who makes up his mind to convict or acquit if he can, may be right nine times out of ten, but the other time he commits an outrage."

In the two cases, summaries of which follow, the trial Court made a statement to the jury which the attorneys for each of the defendants involved took exception to. In each case an appeal was taken, but the conviction was affirmed. However, careful consideration of each statement leads one to the irresistible conclusion that they are extremely dangerous and must have a telling effect upon a jury which is always on the alert to take its cue from the court as to the latter's opinion of the guilt or innocence of a defendant.

In the case of one Stein, the defendant was arrested and charged with the crime of murder in the then famous "Vivian Gordon case." Shortly after the arraignment of Stein on the murder charge, a woman identified him as the man who had robbed her about a year prior thereto. After his acquittal on the murder charge, Stein was brought to trial on the robbery charge. The latter trial was bitterly contested, the issues were close, and the defendant produced witnesses who proved a reasonable alibi in his behalf. But the court, in charging the jury, made the following remark: [45]

> "There is a constant warfare between the criminal and society, and jurors and judges are the last line of defense in that warfare."

Surely, the jury could not have otherwise supposed but that, as "the last line of defense in that warfare," a verdict of guilty was expected of them. What did a so-called "warfare between the criminal and society" have to do with guilt

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[44] TRAIN, COURTS AND CRIMINALS 239.
[45] People v. Harry Stein, 255 N. Y. Supp. 967 (1932).

or innocence of Stein. The question for the jury to decide was whether Stein had been proven guilty beyond a reasonable doubt of the robbery charged against him. Stein was convicted and he appealed, claiming that the remark deprived him of the benefit of a reasonable doubt because it tended to arouse the passions of the jury against him. However, the conviction was affirmed without opinion. It is to be regretted that the Appellate Court did not see fit to write an opinion on such an important matter as the propriety of the remark and the effect it must have had.

The same trial Judge presided in the case of *People* v. *Salmore,* and another, in which, at the close of the charge, he instructed the jury that: [46]

> "If juries will not bring in honest and proper verdicts, we might as well close up the courts and turn the city over to the racketeers."

In the *Salmore* case, the defendants were charged with criminally receiving stolen property. What did the question of "closing up the courts and turning the city over to the racketeers" have to do with the guilt or innocence of the defendants? The question for the jury to decide was whether the defendants had been proven guilty beyond a reasonable doubt, and not how they felt about racketeers. The defendants were convicted. On appeal, their convictions were affirmed despite the prejudicial remark referred to above.

The statements by the court to the jury in both the *Stein* and the *Salmore* cases may have indicated very plainly its own belief in the defendant's guilt, and unmistakably conveyed that impression to the jury. An attempt by the presiding judge to influence the verdict of a jury does not coincide with the declared function of a judge presiding in a jury trial.[47] The ultimate effect of permitting the remarks com-

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[46] People v. Salmore, 233 App. Div. 522, 253 N. Y. Supp. 589 (1st Dept. 1931).

[47] In the case of People v. Wansker, 108 Misc. 84, 88, 177 N. Y. Supp. 295, 297 (1919) the Court stated:

> "Under our system of trial by jury in criminal cases, the presiding judge has one great duty to perform. He does not sit to prosecute the accused; he is not there to aid the attorney for the people to secure a conviction; he is not there to control the ultimate action of the jury in

plained of in the above cases will be, if unchecked, to reduce the jury system to a barren formality, an empty form with only a curious historical meaning. Certainly the conception of trial by jury entertained by the framers of the Constitution was something more than a body of men designed to record perfunctorily the decisions and impressions of the trial judge.[48]

Can it therefore be said that, after it has heard a judge make an inflammatory statement which might be taken as an indication of his belief that the defendant is guilty, a jury will retire and give the defendant the benefit of a reasonable doubt? Clearly, the effect of such a remark is to prejudice the jury against the defendant in such a manner that they are unable to give him the benefit of a reasonable doubt.

Lastly, it has been charged by various authorities that juries do not intelligently understand the court's explanation of the doctrine of reasonable doubt,[49] nor that they are competent enough to apply it. Regardless of what the cause or causes may be, the ultimate result is always the same—the defendant fails to receive the benefit of a reasonable doubt.

> the discharge of its function of passing upon the guilt or innocence of the defendant. But he is there to see that justice is administered impartially, not according to his own views as to the guilt or innocence of the accused, but according to established rules of legal procedure."

[48] In the case of People v. De Martine, 205 App. Div. 80, 88, 199 N. Y. Supp. 426, 432, 433 (2d Dept. 1923), citing People v. Becker, 210 N. Y. 274, 104 N. E. 396 (1914), the Court stated:

> "Jurors are always alert to discover the impressions made upon the more experienced mind of the trial judge, and the influence exerted by a forceful judge is very potent, and when, although unintentionally, his attitude portrays emphatic approval of one side and all connected therewith, there must necessarily result an impairment of that free and unbiased verdict which under our system of jurisprudence is regarded as essential to the administration of justice."

FLOYD HENRY ALLPORT, in his book, SOCIAL PSYCHOLOGY, at 426, states:

> "We have long standing attitudes of respect and obedience to age, prestige, and expert opinion. Hence, any language suggestion from sources of this character liberates the response suggested."

ROBERT S. WOODWORTH, in his book, PSYCHOLOGY—A STUDY OF MENTAL LIFE, 549, states:

> "Suggestion may be exerted by a person. * * * If by a person, the more prestige he enjoys in the estimation of the subject, the greater his power of suggestion. A prestige person is one to whom you are submissive."

[49] R. H. SMITH, JUSTICE AND THE POOR 110; 5 WIGMORE, EVIDENCE (2d ed. 1923) 465, 466

CONCLUSION.

Various reasons have been advanced for the abolition of the reasonable doubt doctrine. Some individuals would abolish it entirely without substituting anything in its place. This group seems to feel that the reason for the existence of the doctrine no longer exists.[50] Another group would make the doctrine more effective by placing at the disposal of defendants the same facilities and processes of the state that are available to the prosecutor. Among those who favor the latter step are those who advocate the public defender idea.[51] However, as long as persons are in danger of being convicted on perjured testimony or because of the "mob spirit" or because of hysteria, so long does the necessity for the doctrine exist. In this so-called civilized age it is still better to permit an infinite number of offenders to escape punishment than to punish one innocent person.[52]

Various recommendations for the abolition of "Specialization Courts" have been made, but these have gone and still go unheeded.[53] Changes in legal routine and procedure take place very slowly, and when they finally are made, they are looked upon as revolutionary.

In conclusion, it should be remembered that [54]

> "What the people want in our criminal courts is, of course, a 'fair trial,' but they want a 'fair trial' that results in the acquittal of the innocent and the conviction of the guilty—so long as he is convicted by what they deem fair means."

The deplorable abuses to which the non-observance of this fundamental doctrine of our law have led, make incumbent upon lawyers an ever-zealous insistence upon its strict

[50] 5 WIGMORE, EVIDENCE 466.
[51] R. H. SMITH, JUSTICE AND THE POOR 111; M. C. GOLDMAN, THE PUBLIC DEFENDER 1-3, 36-40.
[52] M. C. GOLDMAN, THE PUBLIC DEFENDER 5.
[53] Recommendations made by Judge Seabury and others after the close of the Magistrates' Courts' investigation in the First Judicial Department of the State of New York. These recommendations sought to abolish such "Specialization Courts" as the "Women's Court."
[54] TRAIN, THE PRISONER AT THE BAR 232.

observance. The convictions of defendants who are denied the benefit of a reasonable doubt is not granting them the "fair trial" that they want and have a right to expect. It is to be hoped that the future will be more favorable for the application of the doctrine of reasonable doubt.

MAX D. BLOSSNER.

New York City,
October 3, 1933.