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# Criminal Law—Perjury Conviction Upheld Despite Grand Jury Misconduct Leading to Indictment

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to reverse. But a strong dissent argued that the court could not assume the jury was not influenced, and urged a new trial because the remarks were *calculated* to prejudice the jury, ". . . and that is the single and sufficient reason for granting a new trial . . ." (209 App. Div. at 286, 204 N. Y. Supp. at 697).

In the instant case the appellate court expressly conceded that the jury verdict was adequately supported by the evidence (283 App. Div. at 37, 125 N. Y. S. 2d at 372). The decision appears, therefore, to represent a recognition of the particularly delicate nature of a divorce action, and indicates the propensity of the courts to utilize the power of reversal for a new trial on the ostensible grounds of prejudice as a disciplinary weapon against counsel. While such decisions are defensible on ethical grounds, they may have the practical effect of punishing an innocent litigant for the offenses of counsel.

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## CRIMINAL LAW — PERJURY CONVICTION UPHELD DESPITE GRAND JURY MISCONDUCT LEADING TO INDICTMENT

Defendant, indicted for perjury as a result of statements made before a federal grand jury investigating espionage activities, appealed his subsequent conviction alleging irregularities in the grand jury proceedings and an improper charge to the jury. The conviction was reversed and remanded on the latter grounds. 191 F. 2d 246 (2d Cir. 1951), *cert. denied,* 343 U. S. 907 (1952). Instead of proceeding on the original indictment, the government returned a new indictment based on perjured testimony at the first trial. Defendant, again convicted, urges that perjurious statements made at a trial under an illegally procurred indictment cannot be subsequently prosecuted. *Held* (2-1): Assuming without deciding that the first indictment was bad because of government misconduct, the court had jurisdiction over the crime and the person and the defendant could not lie with impunity. *U. S. v. Remington,* 208 F. 2d 567 (2d Cir. 1953), *cert. denied,* 74 Sup. Ct. 476 (1954).

The subsequent quashing of an indictment for failure to state an offense does not immunize a defendant from prosecution for perjury in the defense of that indictment as long as the court had jurisdiction over the alleged crime and the person. *U. S. v. Williams,* 341 U. S. 58 (1951). The majority admitted that the instant case was distinguishable because of the allegation of government misconduct but found no difficulty in extending the *Williams* doctrine in as much as the defendant had chosen to lie rather than attack the indictment for illegality.

In a vigorous dissent, Judge Learned Hand denied that the *Williams* case, *supra,* was controlling, insisting that the government's action was akin to the illegal use of evidence and entrapment. He urged that since the government may not use evidence it has gained directly or indirectly through illegal methods, *Nardone v. U. S.,* 308 U. S. 338 (1939); *Silverthorne Lumber Co. v. U. S.,* 251 U. S. 385 (1920), any fruits from a bad indictment cannot be utilized by the government. The majority rejected this argument because the *Nardone* and *Silverthorne* cases, dealt with evidence admissible in the prosecution of crimes already committed whereas the instant case deals with a new and separate crime committed *after* the alleged government misconduct.

In *Sorrells v. U. S.,* 287 U. S. 435 (1932), the defense of entrapment was held to be available when the criminal design originated in the mind of government officials who then persuaded the accused to commit the criminal act. The dissenter felt this doctrine should be broadened to cover the instant case, because the government knew that the defendant must inevitably repeat the statements which were the basis of the illegal indictment at the trial or impliedly admit his guilt by his silence. But the majority pointed out that a third avenue was open to the defendant and that was to attack the indictment for its illegality.

This writer suggests that the court was faced with choosing between two wrongs; the government's misconduct and the defendant's *subsequent* perjury. Perhaps what troubled the dissenting jurist was the fact that the government had a marked advantage over the defendant because of the secrecy involved in grand jury proceedings and the difficulty encountered in attempting to obtain the record. The fact that the substantive offense in both indictments was perjury does tend to convey the impression that the defendant was caught in a web, but it was his own weaving that ultimately led to his conviction. The majority decision is sound, legally, but the dissent is indicative of the limit to which a conscientious jurist will go to safeguard an individual's rights in times of political turbulence.

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## EXECUTION — WIFE OF JUDGMENT DEBTOR IN CONTEMPT FOR VIOLATION OF RESTRAINING PROVISION OF C. P. A. § 781

In proceedings supplementary to judgment a third-party subpoena was served on the judgment debtor's wife who, in spite of the restraining provision, continued to expend the funds of her husband which were in her bank account for the living require-