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## Criminal Law—Indictment—Defects

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to section 361-b of the Public Authorities Law.<sup>65</sup> The Authority undoubtedly performs a task which is essentially the function of the state itself—the construction and maintenance of its highways. The closeness of its relationship to the state prevented it from being treated as a separate entity for suit purposes.

The Court held that the constitutional amendment relating to the Court of Claims did not limit the court's jurisdiction to suits against the state itself but continued its jurisdiction as it had existed prior to the amendment—extending to the state, its employees and its agencies. There is nothing in the records of the Constitutional Convention evincing a purpose on the part of the amendment's drafters to make a sweeping change in the concept of the court's jurisdiction.<sup>66</sup>

The dissent did not question the immunity of true agents of the state but felt that the Authority was not a state agency but an independent public corporation and hence not within the jurisdiction of the Court of Claims.

Due to the complexities of modern government, it is inconceivable that the amendment was drafted to hamstring the effective workings of the government by forcing the state to act through its central agency and denying it the privilege of acting through agents if it desires to retain its sovereign immunity. The state should be permitted to set up corporate bodies when it feels they are necessary to the carrying on of a function. Both common sense and the history of the amendment appear to support the majority's conclusion that the amendment was not intended to decrease the jurisdiction of the Court of Claims.

## CRIMINAL LAW

### Indictment—Defects

*People ex rel. Hirschberg v. County Court*<sup>1</sup> was an appeal from the dismissal by the Supreme Court of the relator's petitions in habeas corpus and for an order of prohibition. The petitions alleged that the proceedings before the committing magistrate were defective in that they were based on an information that failed to contain three alleged confessions, and, secondly, in that the constitutional rights of the petitioner were violated by police advice to waive counsel and hearing.

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65. Section 361-b conferred exclusive jurisdiction on the Court of Claims to hear and determine all claims against the New York State Thruway Authority for alleged torts and breaches of contract.

66. RECORDS OF 1938 CONSTITUTIONAL CONVENTION Vol. IX, PROBLEMS RELATING TO JUDICIAL ADMINISTRATION AND ORGANIZATION.

1. 1 N. Y. 2d 258, 134 N. E. 2d 818 (1956).

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The Court in affirming the decision of the court below<sup>2</sup> held that the validity of a grand jury indictment is not affected by claimed defects in the proceedings before a committing magistrate, and therefore there was no necessity to try the allegations of the petitions. The alleged infringement of rights occurred in proceedings before a committing magistrate which was distinct from the grand jury's inquiry.

Historically in New York there have been four grounds for setting aside an indictment. Two of these are prescribed by statute, providing that an indictment may be set aside either where it is not found, indorsed and presented as required by statute,<sup>3</sup> or when a person has been improperly permitted to be present during the session of the grand jury.<sup>4</sup> The other two, arising from case law, are where a defendant's constitutional rights have been violated before the grand jury,<sup>5</sup> and where the indictment has been returned without sufficient legal evidence.<sup>6</sup> In the instant case petitioner apparently argued the non-statutory grounds, that he had not been represented by counsel at the magistrate's proceedings and thus was deprived of his constitutional rights, and that there was a failure of sufficient legal evidence to support the indictment since alleged confessions were not contained in the information. The latter argument is clearly ill founded. An information or indictment may be based on legally sufficient evidence without using all the evidence available, since only the probability of a crime and the prisoner's connection thereto need be established.<sup>7</sup> As to the constitutional issue the petitioner's argument was seemingly based on the concept that if any defects occurred in the magistrate's proceeding they would be carried over into the resulting indictment, thereby making *it* defective. It is obvious that lack of representation by counsel at the trial level in a capital case would give rise to a constitutional question.<sup>8</sup> However the Court did not deal with the question of whether or not counsel was required at a magistrate's proceeding, but inferred that the absence of counsel at that level would not affect the validity of an indictment. It is well established law that proceedings before a magistrate are not a prerequisite to an

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2. 1 App. Div. 2d 961, 150 N. Y. S. 2d 925 (2d Dep't 1956).

3. N. Y. CODE CRIM. PROC. §313 (1). The indictment may be set aside . . . upon . . . motion . . . when it is not found, indorsed, and presented as prescribed . . .

4. N. Y. CODE CRIM. PROC. §313 (2). The indictment may be set aside . . . upon . . . motion . . . when a person has been permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration . . . . *People v. Scannel*, 36 Misc. 40, 72 N. Y. Supp. 499 (Sup. Ct. 1901).

5. *People ex rel. Janicky v. Warden*, 231 App. Div. 131, 246 N. Y. Supp. 194 (2d Dep't 1930).

6. *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396 (1907).

7. *People v. Stepski*, 174 Misc. 1080, 20 N. Y. S. 2d 612 (Sup. Ct. 1940); *People v. Grout*, 85 Misc. 570, 147 N. Y. Supp. 591 (Sup. Ct. 1914).

8. *Powell v. Alabama*, 287 U. S. 45 (1932).

indictment;<sup>9</sup> and even if such proceedings have been held, an indictment stands notwithstanding the fact that prior actions of the committing magistrate may be subject to review.<sup>10</sup>

The Court, in this writer's opinion, was quite correct in holding that the grand jury's authority did not depend on, nor could that authority be cut down by, a previous magistrate's hearing, even though it was initiated to investigate as a result of that hearing. The petitions presented no grounds for invalidating the indictment, releasing the prisoner or restraining his trial.

### Completed Acts as an Attempt

*People v. Jelke*<sup>11</sup> involves the interpretation of section 2460, subdivision 2 of the Penal Law, which specifically makes a crime an *attempt* to induce a woman to lead a life of prostitution, but fails to provide for consummated inducement of the same acts.<sup>12</sup> Defendant argued on appeal that the attempt was not punishable for apparently two reasons: first, that it fell into that category of cases which does not sustain an attempt as violative, where the act, if successful, would not have constituted a crime; and second, that it was not, in fact, *unsuccessful* and therefore not an attempt.

The defendant cited *People v. Teal*<sup>13</sup> and *People v. Jaffe*<sup>14</sup> in support of his first category. In both of these cases, however, the attempt was made up of acts which neither in themselves nor if carried to conclusion could have constituted a crime. They involved attempts under section 2, the general attempt provision, of the Penal Law,<sup>15</sup> which are crimes only in so far as they relate to other penal sections. If the acts would not have satisfied these other penal sections, the incomplete acts cannot satisfy their "attempt" counterparts. But in the instant case, there is involved no question of satisfying any referent penal provision. Section 2460, in itself, makes the attempt in question a crime.

9. *People v. Diamond*, 72 App. Div. 281, 76 N. Y. Supp. 57 3d Dep't 1902); *People v. Heffernan*, 5 Parker Crim. R. (N. Y.) 393 (1858); *People v. Hylar*, 2 Parker Crim. R. (N. Y.) 566 (1855); *People v. Molineux*, 15 N. Y. Crim. R. 136 (1899).

10. *People v. Friedman*, 205 N. Y. 161, 98 N. E. 471 (1912); *Reiss v. Levy*, 165 App. Div. 1, 150 N. Y. Supp. 440 (2d Dep't 1915); *People ex rel. Sadness v. Morhous*, 279 App. Div. 687, 108 N. Y. S. 2d 21 (3d Dep't 1951).

11. 1 N. Y. 2d 321, 135 N. E. 2d 213 (1956).

12. N. Y. PENAL LAW §2460.2: Any person who shall . . . compel or *attempt* to induce, entice, procure or compel her to live a life of prostitution shall be guilty of a felony. (emphasis added).

13. 196 N. Y. 372, 89 N. E. 1086 (1909).

14. 185 N. Y. 497, 78 N. E. 169 (1906).

15. N. Y. PENAL LAW, §2: . . . An act done with intent to commit a crime failing to effect its commission is an attempt to commit that crime.