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Criminal Law—Substantive—Completed Acts as an Attempt

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indictment;⁹ 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.¹⁰

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*¹¹ 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.¹² 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*¹³ and *People v. Jaffe*¹⁴ 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,¹⁵ 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.

Section 260 of the Penal Law¹⁶ provides that a person may be convicted of an attempt to commit a crime even though the proof adduced on trial shows consummation of the crime itself. Attempts covered by this section are the general attempts of section 2.¹⁷ However, even if section 260 doesn't literally pertain to section 2460 attempts, it is certainly analogous. It would be an anomaly if a conviction under a section 260 attempt could stand upon proof that the defendant had succeeded in his act, and a conviction under a section 2460 attempt could not so stand on the same proof. The Court, in answer to defendant's second contention, refused to accept such an irrational result. To gain a conviction for an attempt, the prosecution need prove only the necessary overt acts, amounting to more than mere preparation;¹⁸ if it goes beyond, and shows completion of the acts, the defendant cannot be heard to complain.

Confession—Requirement of Additional Proof

A confession alone, without additional proof that the crime charged has been committed, will not be sufficient to sustain a conviction.¹⁹ *People v. Louis*²⁰ was an appeal from a conviction of the defendants of murder in the first degree on the basis of their confessions and the medical examiner's testimony that the deceased had been choked to death. The Court held, reversing the Appellate Division,²¹ that this was sufficient basis to sustain a conviction and that the charge of the trial court²² was not contradictory to the requirements of the Code of Criminal Procedure, section 395.²³

Prior to the enactment of section 395, convictions based solely on confessions were sustained.²⁴ The object of the statute is to prevent a conviction where, in fact, no crime has been committed.²⁵ The Court has considered the policy

16. N. Y. PENAL LAW, §260: A person may be convicted of the attempt to commit a crime although it appears on trial that the crime was consummated unless the court in its discretion discharges the jury and directs that the defendant be tried for the crime itself.

17. *People v. Casad*, 253 App. Div. 104, 1 N. Y. S. 2d 132 (4th Dep't 1937).

18. *People v. Graham*, 176 App. Div. 38, 154 N. Y. S. 1041 (3d Dep't 1916).

19. N. Y. CODE CRIM. PROC. §395. A confession of a defendant . . . is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

20. 1 N. Y. 2d 137, 134 N. E. 2d 110 (1956).

21. 286 App. Div. 792, 146 N. Y. S. 2d 779 (1st Dep't 1955).

22. "I think it is safe to say that Mr Brutofsky is dead . . . and it is not disputed that he was killed." 286 App. Div. 792, 793, 146 N. Y. S. 2d 779, 780 (1st Dep't 1955).

23. See note 19 *supra*.

24. *People ex. rel. Smith v. Bennett*, 37 N. Y. 117, 4 Abb. Prac., N. S. 89 (1867).

25. *People v. Brasch*, 193 N. Y. 46, 85 N. E. 809 (1908).