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CRIMINAL LAW—INDICTMENT DISMISSED WHERE
ILLEGAL EVIDENCE INFLUENCED GRAND JURY

Witnesses before a grand jury stated opinions and assumptions which were prejudicial to defendant and illegal. *Held* (3-2): Indictment dismissed on defendant's motion. Where the sufficiency of all the evidence to support the indictment is a close question, the receipt of some illegal evidence likely to have influenced the grand jury will invalidate the indictment. *People v. Leary*, 280 App. Div. 679, 117 N. Y. S. 2d 392 (3d Dep't 1952).

N. Y. Code Crim. Proc. § 313, enacted in 1881, stated that an "indictment must be set aside by the court in which defendant was arraigned, and upon his motion, in either of the following cases," *viz.*, where not found by twelve jurors, not endorsed a true bill and signed by the foreman, or not presented in court in the presence of the jurors and filed by the clerk, or where a stranger has been present during sessions of the grand jury. After 1881, the courts dismissed indictments for reasons other than those stated in § 313. See, *e. g.*, *People v. Clark*, 8 N. Y. Crim. R. 169, 14 N. Y. Supp. 642 (Ct. Oyer & Ter. 1891); *People v. Brickner*, 8 N. Y. Crim. R. 217, 15 N. Y. Supp. 528 (Ct. Oyer & Ter. 1891) (insufficient evidence); *People v. Moore*, 65 How. Pr. 177 (Ct. Oyer & Ter. 1883) (incompetent testimony); *People v. Sellick*, 4 N. Y. Crim. R. 329 (Ct. of Sess. 1886) (illegal evidence); *People v. Singer*, 5 N. Y. Crim. R. 1 (Ct. Oyer & Ter. 1886) (defendant compelled to testify against himself).

The tendency of the courts to disregard the limitations of § 313 apparently attracted the attention of the legislature, which amended § 313 in 1897 by adding to the phrase, "in either of the following cases," the words "but in no other." At first, the additional phrase was generally interpreted to negative the judicial power to dismiss indictments for other grounds on defendant's motion. *People v. Rutherford*, 47 App. Div. 209, 62 N. Y. Supp. 224 (3d Dep't 1900); *People v. O'Connor*, 31 Misc. 668, 66 N. Y. Supp. 126 (Co. Ct. 1900); *People v. Scannell*, 37 Misc. 345, 75 N. Y. Supp. 500 (Gen. Sess. 1902). However, notwithstanding § 313, courts have since continued to dismiss indictments for uncorroborated testimony, *People v. Argo*, 259 App. Div. 1091, 21 N. Y. S. 2d 289 (2d Dep't 1940); *People v. Nitzberg*, 289 N. Y. 523, 47 N. E. 2d 37 (1943); for insufficient evidence, *People v. Sylvester*, 149 Misc. 138, 267 N. Y. Supp. 399 (Gen. Sess. 1933), *aff'd*, 241 App. Div. 861, 271 N. Y. Supp. 1005 (1st Dep't 1934); for illegal evidence, *People v. Nicosia*, 164 Misc. 152, 298 N. Y. Supp. 591 (Co. Ct. 1937); *People v. Levis*, 96 Misc. 513, 161 N. Y. Supp. 824 (Gen. Sess. 1916); where defendant was indicted upon his own testimony without

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waiving immunity, *People v. Baumer*, 136 Misc. 17, 241 N. Y. Supp. 733 (Sup. Ct. 1930); and where defendant was compelled to testify against himself, *People v. Macner*, 171 Misc. 720, 13 N. Y. S. 2d 451 (Sup. Ct. 1939).

Two theories might be advanced to explain the dismissal of indictments on defendant's motion, on grounds not enumerated in § 313:

(1) Protection of defendant's constitutional rights. Defendant has a right to an indictment by a grand jury. N. Y. CONST. Art. I, § 6. In upholding an indictment where some illegal evidence was received, the Court of Appeals asserted by way of dictum that the judiciary has the power to dismiss indictments in order to protect defendant's constitutional rights, without defining the extent of such rights. *People v. Glen*, 173 N. Y. 395, 400, 66 N. E. 112, 114 (1903). A later dictum indicated the constitutional right reaches two cases: where the evidence is clearly insufficient or where illegal evidence is the sole basis of the indictment. *People v. Sexton*, 187 N. Y. 495, 511, 80 N. E. 396, 402 (1907).

(2) The grand jury can receive none but legal evidence. N. Y. CODE CRIM. PROC. § 256. The Code does not express the effect of receipt of illegal evidence. Furthermore, indictments have not been dismissed for receipt of illegal evidence where sustained by sufficient legal evidence. *People v. Rabinowitz*, 277 App. Div. 793, 97 N. Y. S. 2d 534 (2d Dep't 1950), *aff'd*, 301 N. Y. 763, 95 N. E. 2d 825 (1950); *People v. Smith*, 258 App. Div. 800 (2d Dep't 1939); *People v. Grout*, 174 App. Div. 608, 166 N. Y. Supp. 718 (2d Dep't 1916).

Neither of the above theories, whatever their validity, sustains the instant case. The evidence received was neither clearly insufficient nor solely illegal, nor was the sufficiency of the evidence determined. The majority opinion conceded the sufficiency of the evidence was a close question, *People v. Leary*, *supra* at 680-681, 117 N. Y. S. 2d 392, 394, but invalidated the indictment because illegal evidence "must have influenced the deliberations of the Grand Jury." This would appear to be an extension of the law since the court dismissed the indictment without having determined the basic question, the sufficiency of the evidence.

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