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THE INDICTMENT IN NEW YORK*

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The struggle behind the adoption of the indictment by New York, as the required process of accusation for infamous crimes, may be traced to 1683 with enactment of the "Charter of Liberties and Privileges." Acting under instructions given him by James, then Duke of York and Proprietor of the Colony, Governor Dongan issued writs for the election of a "General Assembly of All the Freeholders." The representatives met in New York on October 7, 1683, to "consult and debate among themselves all matters as shall be apprehended proper to be established for laws for the good government of the said Colony of New York and its dependencies."[1] One of the assembly's first acts of the fifteen passed,[2] was the adoption of the charter mentioned above.[3]

For the purpose of this study, the most important clause in that charter was that providing for indictment by a grand jury in criminal cases. This provision was as follows:[4]

> "Thatt, in all cases capitall or criminall, there shall be a grand Inquest, who shall first present the offence, and then twelve Men of the Neighbourhood to try the Offender, who, after his plea to the indictment shall be allowed his reasonable challenges."

Following approval by the governor, the charter was immediately proclaimed and put in force.[5] But its effect was short lived. Though the instructions given by James to Governor Dongan were such as to lead the colonists to expect that the proprietor would approve the act[6] and though the charter was in fact signed and sealed by him,[7] his

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[1] 2 BRODHEAD, HISTORY OF THE STATE OF NEW YORK (1871) 372.

[2] SPENCER, ROYAL GOVERNMENT IN NEW YORK (1905) 58. See, SATTERLEE, POLITICAL HISTORY OF THE PROVINCE OF NEW YORK (1885) 75.

[3] 1 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK (1906) 432.

[4] CHARTER OF LIBERTIES AND PRIVILEGES, reprinted in 2 BRODHEAD, *op. cit. supra* note 1, 659, 660.

[5] *Supra* note 1, at 384.

[6] 1 LINCOLN, *op. cit. supra* note 3, 433. See also INSTRUCTIONS TO GOVERNOR DONGAN, 3 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF NEW YORK (1853) 331, 332. (hereinafter cited COL. DOC.)

[7] 2 BRODHEAD, *op. cit. supra* note 11, 416; 3 COL. DOC. 348.

accession to the throne apparently changed his mind for he vetoed the charter on the third of March, 1685.[8] Thus, the first attempt to secure to the colonists of New York the right of indictment in criminal cases proved abortive.[9] The general assembly met again in 1685 and adjourned until September, 1686, after the enactment of six laws.[10] At that time, Governor Dongan "for weighty and important reasons" prorogued it until 1687, and, on January 20th of that year, it was dissolved by his proclamation.[11]

The colonists, however, did not rest content with the outcome of this effort. Following the flight of James and the beginning of the reign of William and Mary, a similar attempt to secure the process of indictment took place.[12] The new governor, Sloughter, was empowered to call general assemblies to join with him and the council in making laws which were to be as nearly as possible "agreeable unto the Laws and Statutes of this our kingdome of England."[13] He called an assembly which convened in New York on April 9, 1691,[14] a date said to mark the establishment of the first permanent popular assembly in the state.[15] On May 13th, this assembly passed "An Act declaring what are the rights and privileges of their Majesties subjects inhabiting within their province of New York",[16] the close adherence of which in form to the previous ill-fated Charter of Liberties, may have been an evil omen. At any rate, history was destined to repeat itself for this act also fell a prey to royal displeasure, being

[8] 1 LINCOLN, *op. cit. supra* note 3, 435. Several provisions of the charter were thought to grant privileges greater than those accorded to inhabitants of any other colony. A technical objection was that the charter referred to a "Lord Proprietor" who had, of course, become the king. 3 COL. DOC. 357–359, 369, 370; 2 BRODHEAD, *op. cit. supra* note 1, at 423.

[9] It should be noted that the indictment appears to have been in use in the colony at this time. See, 1 LINCOLN, *op. cit. supra* note 3, at 428; 2 BRODHEAD, *op. cit. supra* note 1, at 639.

[10] None of these concerned indictments. They dealt with taxation, fees, naturalization and other matters. SPENCER, *op. cit. supra* note 2, at 58.

[11] 1 LINCOLN, *op. cit. supra* note 3, at 435; SATTERLEE, *op. cit. supra* note 2, at 81; and see also 3 COL. DOC. 230, 331.

[12] An assembly was called by Leisler in 1690, during the confusion attendant upon the change in rulers, but it accomplished nothing worthy of note as far as this inquiry is concerned. SATTERLEE, *op. cit. supra* note 2, 89 *ff.*; SPENCER, *op. cit. supra* note 2, at 59; 1 LINCOLN, *op. cit. supra* note 3, 437, 438.

[13] COMMISSION OF GOV. SLOUGHTER, 3 COL. DOC. 623.

[14] 1 LINCOLN, *op. cit. supra* note 3, at 438; 2 BRODHEAD, *op. cit. supra* note 1, at 642. See 3 COL. DOC. 756.

[15] 1 LINCOLN, *op. cit. supra* note 3, at 438.

[16] 2 BRODHEAD, *op. cit. supra* note 1, at 645; 1 LINCOLN, *op. cit. supra* note 3, at 438; SATTERLEE, *op. cit. supra* note 2, at 99.

disallowed in 1697.[17] It will be observed that the act was in force in the colony for more than six years, and Lincoln[18] justly remarks that its repeal by the crown probably did not affect materially any principle declared in it.

Neverthcless, there was no constitutional provision in New York requiring prosecution by indictment after 1697. However, it is probable that the indictment was used to a considerable extent since the colonists had been familiar with it and since the instructions to the various governors provided that the laws of the colony should be similar to those of England. Yet it was not until 1727, that a renewed effort was made to legislate on the subject. This time the occasion for the enactment seems to have been the abuse of the information by the attorney general resulting in "An Act for Preventing Prosecutions by Informations."[19] This, in itself the culmination of a political dispute, initiated a long controversy between the provincial legislature and the attorney general,[20] with the crown intervening at crucial moments in behalf of its officer.[21]

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[17]See 4 COL. DOC. 263, 264. King William is said to have disallowed the act on the ground that it was incongruous for a subordinate legislature to declare "what are its privileges." SATTERLEE, *op. cit. supra* note 2, at 99.

[18]*Supra* note 3, at 441.

[19]The act of 1727 provided that no one should be " . . . disturbed in his liberty or estate . . . upon pretence of any misdemeanor committed otherwise than by presentment of a Grand Jury or by information by an order from the Governor . . . signed in Council for such prosecution." It also provided for quashing informations previously filed by the attorney general and for payment of costs and forfeitures by him in certain situations. The preamble alleged that many inhabitants had been prosecuted for trivial offenses "to the grievous hurt and oppression of his Majestys good Subjects inhabiting the Said Colony." 2 COL. LAWS OF N. Y. (ed. 1894) 406.

[20]The act was almost immediately denounced as part of a general design to weaken royal power in the colony. In 1728 the bill was disallowed. See 5 COL. DOC. 844, 870, 871; JOURN. OF THE LEGISL. COUNCIL OF NEW YORK 826. In 1734 a bill entitled "An Act for Regnlating costs upon prosecutions by information" was introduced in the House, being almost identical with that disallowed in 1728. No further action was taken on it until it was introduced in the Council and given its second reading, almost ten years later. *Id.* at 810, 826, 827. In 1754 a somewhat similar "Act to prevent malicious informations in the Supreme Court of Judicature of the Colony of New York" was passed. *Id.* at 1181; 3 COL. LAWS OF N. Y. (ed. 1894) 1007. It required informers to enter into recognizances to prosecute, providing that they pay costs in event of acquittal or *nolle prosse.*, except where the information was issued by order of the governor and council or of the supreme court. This constituted a withdrawal by the assembly from its earlier position that informations should be abolished, but apparently afforded some relief from the situation against which the first act was aimed.

[21]Richard Bradley, attorney general 1723–1751, seems to have been continually

No further legislation on the subject seems to have been enacted prior to the revolution. The Constitution of 1777, primarily concerned with setting up a form of government, made no specific requirement as to the use of the indictment. However, it is apparent from several provisions, that its use was contemplated in some criminal cases, although there is no indication that it was intended to be the exclusive method of initiating prosecutions.[22] The bill of rights passed by the legislature in 1787 contained a provision regarding indictments,[23] but the first constitutional provision of this kind appears in Article VII, § 7 of the Constitution of 1821, requiring indictment for capital or otherwise infamous crimes. In 1846 this provision was embodied in Article I, § 6, of the constitution and has remained the same throughout subsequent revisions.

It now becomes material to discover what the courts have done in construing that requirement. The decisions in the main are less concerned with the process of indictment than with determinations as to the formal requisites of the written accusation. Numerous criticisms have been leveled at the absurdly technical decisions in this field,[24] but strangely enough, the New York courts adopted a most liberal attitude in scrutinizing these documents. It must be remembered, however, that there are very few cases on the subject prior to statutes simplifying the indictment. Existence of such legislation may have influenced the courts in situations other than those which the acts were designed to cover. Two early cases, indeed, seem to be fairly subject to criticism on the ground of technicality. One interesting opinion by Chancellor Kent[25] holds that the caption of an indictment stating that the grand jurors were sworn and charged without saying "then and there" is fatally defective because of this omission. "This," he said, "being an objection to form merely, the strength of it must rest altogether on positive authority." Thereupon he adopted the rule as laid down in certain English cases and reached the conclusion

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at swords points with the assembly, which charged him with filing informations on his own motion in order to extort money from the accused. He lost no opportunity to protest against these legislative proposals and it is significant that none were approved until he was gathered to his fathers. 5 COL. DOC. 900, 901; 6 *id.* 17, 736.

[22]See ARTS. 33, 34, in 1 NEW YORK LAWS, 1, 15.

[23]1 NEW YORK LAWS 47.

[24]Much of the criticism has been unintelligent. One exception to this is a striking article. Perkins, *Absurdities of Criminal Procedure* (1926) 11 IOWA L. REV. 297. As to the situation in England, see 1 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 275 *ff.*

[25]People v. Guernsey, 3 Johns, Cas. 265 (N. Y. 1802).

stated. In a somewhat later case,[26] an indictment for stealing a bank note which did not conclude, *contra formam statuti* was held bad, since the crime was entirely statutory and not known to common law.[27]

In the main, the statement that New York courts were liberal appears justified by a review of the cases. In a number of instances the courts upheld indictments which might well have been invalidated in other jurisdictions.[28] Thus, an indictment for illegal sale of liquor which alleged commission of the offense on a named day and "on divers other days" was held sufficient, and the latter portion of the allegation rejected as surplusage.[29] An indictment for murder charged a killing with a knife, but omitted the word "with" so as to make it appear that the charge was against the knife. Though the judgment was reversed on other grounds, the indictment was held sufficient, since the meaning was perfectly plain.[30] Similarly, omission of "the" in reciting the title of a statute was held immaterial.[31] The description of certain bank notes, while not technically accurate, was held sufficient.[32] In regard to setting out written matter on which a charge was based, New York originally purported to follow the Massachusetts case of *Commonwealth v. Houghton,*[33] but apparently had more respect for its stated exceptions to common law than for its holding.[34] When the point involved in the *Houghton* case squarely arose, the court resorted to a statute which had been passed in the meantime and held that the requirement was merely a matter of form and need not be insisted upon.[35]

Though New York has been rather strict in holding that, in purely

[26]People v. Cook, 2 Park. Cr. R. 12 (N. Y. 1823).

[27]*Cf.* STATUTE OF 1829 (2 R. S. 728) providing that this shall not invalidate an indictment.

[28]Some cases from Massachusetts, which probably went as far as any jurisdiction in insisting on observance of technical requirements, are cited in following notes. In a number of instances, Massachusetts and New York courts reached different conclusions when confronted with similar situations.

[29]People v. Adams, 17 Wend. 475 (N. Y. 1837); *Cf.* Commonwealth v. Moore, 11 Cush. 600 (Mass. 1853).

[30]Shay v. People, 22 N. Y. 317 (1860); *Cf.* Commonwealth v. A Man Whose Name is Unknown, 6 Gray 489 (Mass. 1856).

[31]People v. Walbridge, 6 Cow. 512 (N. Y. 1826).

[32]People v. Jackson, 8 Barb. 637 (N. Y. 1850); *Cf.* Commonwealth v. Wilson, 2 Gray 70 (Mass. 1854).

[33]8 Mass. 107 (1811). The case held it necessary to set out such matter exactly.

[34]People v. Kingsley, 2 Cow. 522 (N. Y. 1824); People v. Badgley, 16 Wend. 53 (N. Y. 1836).

[35]Tomlinson v. People, 5 Park. 313 (N. Y. 1862); 2 R. S. (1829) 728.

statutory crimes, the indictment must bring the offense precisely within the stated terms,[36] a slavish adherence to the very words of an act has not been generally required.[37] The courts have also been quite willing to save indictments by disregarding certain allegations as surplusage not necessary to be proven, for example, allegations appropriate in charging felonies in indictments for misdemeanors.[38] Although an allegation of time was essential, as long as it was alleged, even though it made an indictment show on its face that the offense was committed more than three years before and hence was barred by the statute of limitations, it was held the alleged date was wholly immaterial and commission of the offense within the statutory period could be proven.[39] This decision was probably in accord with common law and seems to be an illustration of the failure of the indictment to fulfill its purpose of informing a defendant of the charge against him. Allegations of the precise place of commission of an offense were held immaterial as long as jurisdiction was shown—the courts taking judicial notice, for example, of location of towns within their respective counties.[40]

From the foregoing discussion, it appears that New York courts if left to themselves, might have worked out a system of criminal pleading free from taint of technicality, thus making legislative intervention unnecessary. But despite the apparent truth of this assertion, the fact is that attempts to "reform" the indictment by statutory simplification have been made for well over a hundred years. The first measure, passed in 1801[41] was not at all comprehensive but merely provided that failure to inelude "with force and arms" or words of similar nature should not render void an indictment for treason,

[36]Thus, an indictment for embezzlement under a statute covering embezzlement by clerks and servants was held bad because it alleged the defendant was an agent. People v. Allen, 5 Den. 76 (N. Y. 1847). An indictment for defrauding a gas company which followed the words of the statute but did not state the name of the gas company was held bad. People v. Wilber, 4 Park. 19 (N. Y. 1857).

[37]People v. Rynders, 12 Wend. 425 (N. Y. 1834); People v. Enoch, 13 Wend. 159 (N. Y. 1834); Thompson v. People, 3 Park. 208 (N. Y. 1856).

[38]*E. g.*, an allegation charging an act done wilfully and corruptly. People v. Bogart, 3 Abb. Pr. 193 (N. Y. 1856); an indictment charging facts constituting a felony but an intent which, under statute, constituted only a misdemeanor. Lohman v. People, 1 N. Y. 379 (1848), *aff'g* People v. Lohman, 2 Barb. 216 (1848).

[39]People v. Van Santvoord, 9 Cow. 654 (N. Y. 1821).

[40]Wood v. People, 1 Hun 381 (N. Y. 1874), *rev'd* other grounds in 59 N. Y. 117; Vanderwerker v. People, 5 Wend. 530 (N. Y. 1830).

[41]1 New York Laws 261.

felony, trespass or any other offense. In the same year, a simplified form of indictment for perjury was prescribed.[42] A somewhat broader enactment, designed to prevent indictments from being held insufficient for various minor mistakes, was passed in 1829.[43] This apparently concluded the movement for reform until it reappeared, as part of the general agitation for codification conducted by David Dudley Field, in 1842.

Field attempted to introduce in the state legislature a bill to simplify indictments, but without result.[44] Then in 1850, the report of the commissioners on practice and pleading, of whom Field was one, dealt at considerable length with indictments and recommended simplified forms.[45] Much was derived from Livingston's Criminal Code, drawn by authority of the Louisiana legislature twenty-five years before. The commissioners were influenced also by work being done in England along the same line.[46] They dwelt in detail on absurdities of the indictment at common law, but their illustrations appear to have been taken entirely from English cases cited in Archbold's Criminal Pleading,[47] and it may be doubted whether cases in their own jurisdiction tended to support their contentions.[48]

The pathetic prophecy of the commissioners, born of sad experience with conservatism, that "They will not flatter themselves with the idea that their labors in this respect will meet with the universal approbation of the legal profession"[49] was all too fully realized.[50] Although Field succeeded in bringing the code of criminal procedure up

[42]It was declared unnecessary to set out the record of proceedings or to state facts other than those prescribed by statute. 1 NEW YORK LAWS 313.

[43]No indictment should be held insufficient because of misstatement or omission of defendant's title or estate, non-prejudicial omission of town or county of his residence, omission of "with force and arms" or words of similar nature; omitting to declare that offense was committed contrary to statute; any non-prejudicial defect in matters of form. 2 REV. STAT. (1829) pt. 4 c. 2 tit. 4 p. 728.

[44]Letter to John L. O'Sullivan, 1 SPEECHES, ARG. AND MISC. PAPERS OF DAVID DUDLEY FIELD (1884) 223.

[45]FINAL REPT. OF THE COM'RS. ON PRACTICE AND PLEADING, CRIMINAL CODE (1850).

[46]The work of the British Commissioners resulted in Lord Campbell's Act, 14 & 15 VICT. c. 100 (1851). This was criticized for not going far enough in simplifying indictments through fear that an accused would be prejudiced. LORD CAMPBELL'S ACT (Greave's ed.) ii, iii. See 1 STEPHEN, HISTORY OF CRIMINAL LAW (1883) 286, and COHEN, INDICTMENTS ACT, 1915 (1916) with introduction by Sir Harry Poland. [47]REPORT OF COM'RS., *op. cit. supra* note 46, 142–145.

[48]See discussion of early New York cases, *supra*.

[49]REPORT OF COMR'S., *op. cit. supra* note 45, at 140.

[50]See REPORT OF THE JUDICIARY COMMITTEE OF THE ASSEMBLY ON THE BILL

for passage during the session of 1855,[51] not until 1881—after thirty-two years of delay and after adoption by eighteen other states and territories[52]—was it enacted in New York.[53] The act as passed was almost identical with that proposed in 1850 except for omission of the schedule of forms. The legislature also approved an added provision for amendment of the indictment during course of trial when not prejudicial to a defense on the merits.[54] What happened during intervening years to change the opinion of the legislature, can only be conjectured. Possibly a manifestation of a new attitude toward codification as a whole, or a growing impatience with the formalism characteristic of criminal procedure during the earlier part of the century, was responsible.[55]

At any rate, thirst for reform was satisfied, and except for a few minor changes[56] almost half a century elapsed before enactment in 1929 of a statute providing for optional use of the "short form" of indictment with bill of particulars.[57] The principle embodied in this statute had been recommended by the New York Crime Commission on at least two occasions.[58] The act specifically provides that indictments good at common law or drawn in accordance with provisions of the Code of 1881 shall continue to be sufficient, thus making the use of this short form optional with district attorneys. And this is the extent of legislation to date dealing with indictments.

Examination of cases decided since enactment of the statutes discussed above cannot be said to reveal any change in attitude of the courts regarding indictments. In view of the early cases already considered, the courts might be expected immediately to fall in with the spirit of the proposed changes and uphold the acts involved from the outset. Although few cases have been discovered in which the earlier legislation was scrutinized, it was evidently given effect.[59]

TO CONTINUE IN OFFICE THE COMMISSIONERS ON PRACTICE AND PLEADINGS (1849) 14–15. The modern observer may wonder at the vehemence of the attack set forth on these pages, but such dismal utterances were typical of the attitude of many lawyers toward codification in general. See also, *passim*, CARTER, PROPOSED CODIFICATION OF OUR COMMON LAW (1884).

[51]FIELD, A THIRD OF A CENTURY DEVOTED TO LAW REFORM (1873) 7.

[52]FIELD, LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD (1891) 12.

[53]LAWS, 1881 VOL. 2 pt. 4 c. 2. [54]*Id.* c. 3.

[55]See POUND, CRIMINAL JUSTICE IN AMERICA (1930) 160 *ff.*

[56]See NEW YORK LAWS, 1882 c. 360; 1883 c. 306.

[57]*Id.* 1929 c. 176.

[58]NEW YORK CRIME COMM. REP. (1928) 19; *Id.* (1929) at 58.

[59]Eighmy v. People, 79 N. Y. 546 (1880), holding that, under a statute (1 N. Y. LAWS, 261 (2d ed. 1807)) of 1801, an averment in an indictment for

Numerous cases holding indictments sufficient which complied with the requisites laid down by the code of criminal procedure may be cited.[60] Many of them contain expressions indicating the extent to which the courts recognized the underlying purpose of the statute and voiced approval of it. Thus, in *People v. Everest*,[61] it is said at page 24:

> "The form and method of framing an indictment as prescribed by statute is worthy of commendation for its simplicity and ready comprehension by all persons who have a reasonable degree of intelligence, and should be adhered to by the pleader having charge of the prosecution."

Other examples appear in the footnote.[62] It is interesting to note, however, the requirement that a charge must bring an offense squarely within terms of a statute was apparently not relaxed in later decisions.[63] The obviously correct view is stated thus:[64]

> " . . . the rule that the offense must be charged in plain and intelligible language, . . . is and ought to be preserved

perjury that the court had authority to administer the oath was sufficient; People v. Bennett, 37 N. Y. 117 (1867), holding an indictment sufficient under the provisions of 2 REV. STAT. (1829) 728; Biggs v. People, 8 Barb. 547 (N. Y. 1850), upholding an indictment under the same act. See, Critchon v. People, 1 Keyes 341 (N. Y. 1864).

[60]No attempt has been made to give an exhaustive citation of cases, but the following are typical: People v. Conroy, 97 N. Y. 62 (1884); People v. Rugg, 98 N. Y. 537 (1885); People v. Willson, 109 N. Y. 345, 16 N. E. 540 (1888); People v. Everest, 51 Hun 19, 3 N. Y. Supp. 612 (1889); People v. Albow, 140 N. Y. 130, 35 N. E. 438 (1893); People v. Willis, 158 N. Y. 392, 53 N. E. 28 (1899); People v. Williams, 243 N. Y. 162, 153 N. E. 35 (1926).

[61]51 Hun 19, 3 N. Y. Supp. 612 (1889).

[62]"It's (the code's) true office was to abrogate the technical rules formerly governing the construction of criminal pleadings and to substitute therefor the simplicity and liberality of interpretation presented by the new system of criminal procedure." People v. Conroy, 97 N. Y. 62, 69 (1884).

"We have inherited from England many technical rules relating to criminal practice which have long since become obsolete . . . An advanced civilization, and a more humane administration of the law have removed the causes which gave rise to these technical rules, and there is therefore no good reason for retaining them.

"This statute (2 *R. S.* 728) swept away many of the objections to the form of indictments which at times seriously interfered with an effective administration of criminal justice." People v. Bennett, 37 N. Y. 117, 120 (1867).

[63]People v. Albow, 140 N. Y. 130, 35 N. E. 438 (1893); Wood v. People, 53 N. Y. 511 (1873); People v. Tremaine, 129 Misc. 650, 222 N. Y. Supp. 432 (1927); Phelps v. People, 72 N. Y. 334 (1878).

[64]People v. Albow, 140 N. Y. 130, 134, 35 N. E. 438 (1893).

alike for the protection of the accused and in the interest of the certain and orderly administration of the criminal law."

Nor does it appear that statutory simplification of indictments has had an appreciable effect on the number of reversals by appellate courts on technieal grounds. The appended table[65] indicates that even before enactment of the code of criminal procedure, cases were not heing reversed for such reasons and no change is shown as a result of the code. Thus, though the legislation in question may have made the drafting of indictments easier and simpler, it does not seem to have affected the administration of justice.

The New York act of 1929 deserves special consideration. As has heen said, its most noteworthy feature is provision that the indictment shall merely name the offense charged while a description of acts constituting such offense shall be stated in a bill of particulars furnished to the defendant at his request.

An indictment under this statute was upheld by the Court of Appeals in *People v. Bogdanoff*.[66] This indictment, simply charging murder without setting out the facts relied on—a bill of particulars being furnished by the district attorney—was held sufficient. The result of the case is somewhat startling on first inspection, since, if the indictment as a document rather than as a process is considered significant, it seems virtually to deny to the defendant his right of indictment as it previously existed in the state. One of the essential features of an

[65]In an attempt to determine the effect of legislation on the number of appeals and reversals, the writer examined the decisions in the New York Court of Appeals for the years indicated. The first period was the time when agitation for the code of criminal precedure commenced. The second and third represent the five years immediately preceding and following the enactment of the code, and the year 1930 was chosen to show the recent trend. The total for the last named year includes memorandum opinions and since they do not indicate the ground of appeal, the number of cases given as involving technicalities may not be inclusive. Such things as failure to state all the elements of the crime with precise accuracy, failure to follow the exact words of a statute, failure to state the time of the offence with sufficient definiteness, duplicity and minor variances have been considered "technicalities" for the purpose of this study. It is interesting to note that a similar tabulation made by the writer with reference to Massachusetts cases showed a marked decrease in the number of cases appealed and reversed following the enactment of comprehensive "reform" legislation in that state.

Years	Appealed Cases	Cases involving technicalities	Reversed on technicalities	% of technieal appeals reversed	% of whole number
1847–51	10	2	0	0	0
1876–80	81	13	1	8	1
1882–86	115	10	1	10	1
1930	49	3	0	0	0

[66]254 N. Y. 16, 171 N. E. 890 (1930). See (1930) 30 COL. L. REV. 1051.

indictment, so New York courts have asserted, is that it should contain a statement of acts constituting an offense charged.[67] In eliminating that feature, the statute resulted, in the opinion of one of the more conservative members of the bench at least, in depriving the defendant of his constitutional rights.[68]

But it is believed that consideration of this case in the light of the historical material already discussed, will lead to the conclusion that it can be defended. The constitutional provision requiring the use of the indictment was evidently intended to secure the process of indictment, i. e., an investigation by the grand jury, rather than to petrify the then existing form of document.[69] If this be true, it seems that as long as such a hearing may be had under the statute to the same extent as under previous legislation, constitutional objections are unfounded. The requirement of a bill of particulars secures to the defendant the means of obtaining all necessary information, and the fact that in New York minutes are kept of proceedings of the grand jury would effectively prevent a substitution of charges by the prosecutor.[70]

However, it should be noted that the *Bogdanoff* case has apparently aroused some opposition among the lower courts of the state.[71] The opinion itself contains a *caveat* to the effect that the decision is not to be construed as judicial approval of the form used,[72] and it is difficult to make an intelligent guess as to what the course of judicial decision in the future will be. From the opinion, it seems probable that in cases where testimony before the grand jury involves a series of crimes, and there may be doubt as to which one is covered by the indictment, a different result may be reached.[73]

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[67]In People v. Dumar, 106 N. Y. 502, 509, 13 N. E. 325 (1887), it is said:

"The indictment, therefore, must charge the crime, and it must also state the act constituting the crime. The omission of these things would necessarily be fatal to the indictment."

See People v. Stark, 136 N. Y. 538, 32 N. E. 1046 (1893); People v. Corbalis, 178 N. Y. 516, 71 N. E. 106 (1904).

[68]See dissenting opinion of Crane, J., in People v. Bogdanoff, *supra* note 66, at 33.

[69]The contention has been made that formalities in the written document were required to show that the grand jury had considered all essential elements of a case. See (1929) 24 ILLINOIS L. REV. 319. However true this may have been historically, in view of the present practice, by which the indictment is prepared by the prosecutor and has little if any relation to what takes place in the grand jury room, it would seem to have little bearing on the validity of the statute in question.

[70]GIL. CR. CODE (1932) CR. PR. sec. 952 t.

[71]See People v. Meehan, 142 Misc. 605, 254 N. Y. Supp. 477 (1931); People v. Lisandrelli, 139 Misc. 129, 249 N. Y. Supp. 55 (1931).

[72]*Supra*, note 67, 31.

[73]*Id.* at 32.

It seems fair to say in conclusion that New York, while preserving the process of indictment, has minimized the importance of the form of the written accusation to the greatest possible extent. Although legislation has aided in prescribing simplified form and in doing away with technical requirements, it has largely been unnecessary in view of the courts' liberal attitude in determining the validity of indictments. There are indications that future activity will be concerned over doing away with the process of indictment in most cases and substituting for it, the information.[74] But that is another and a highly controversial topic.[75] New York's simplified form of indictment as it stands—perhaps as monumental recognition of the trend of judicial decision within the state—seems to be a commendable practice when the cry all over the country is for reform in criminal administration in the direction of simpler and more efficient procedure.

[74]An attempt was made in 1925 to provide for prosecution by information upon written application of the accused but this was held unconstitutional by the Court of Appeals. LAWS, 1925 c. 597; People *ex rel.* Battista v. Christian, 249 N. Y. 314, 164 N. E. 111 (1928). See (1929) 24 ILL. L. REV. 319; (1932) 30 MICH. L. REV. 928. Proposals for adoption of the information in felony cases were made to the Joint Legislative Committee on the Coordination of Civil and Criminal Practice Acts in 1926. REPORT (1926) 22. In 1929 the crime commission recommended a constitutional provision authorizing use of the information upon waiver of indictment by the defendant. REPORT (1929) 54.

[75]Important articles on this problem are: Miller, *Informations or Indictments in Felony Cases* (1924) 8 MINN. L. REV. 379; Moley, *Initiation of Criminal Prosecutions by Indictment or Information* (1931) 29 MICH. L. REV. 403; Morse, *A Survey of the Grand Jury System* (1931) 10 ORE. L. REV. 101, 217, 295; Hall, *Analysis of Criticism of the Grand Jury* (1932) 22 J. CRIM. L. 692; Dession, *From Indictment to Information* (1932) 42 YALE L. J. 163.