

# Examinations by Psychiatrists in Criminal Cases

Edward S. Szukelewicz

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be liable under Section 59-a for that states that "the auto truck or auto tractor and the trailer or semi-trailer shall be deemed one vehicle and the operator \* \* \* shall be deemed the agent of each."<sup>36</sup> In other words, the owner of the truck is constituted the agent of the trailer-owner, while he is driving the vehicle. Furthermore, Section 59-a is titled "Joint liability of separate owners \* \* \* for negligence of operator" as contrasted with Section 59 which is headed "Negligence of operator other than owner attributable to owner." (Italics ours.) Besides, the *Leppard* case proceeded on the theory that liability should not be placed on "one who could not prevent or control the use or operation of his car by withholding permission."<sup>37</sup> It is clear that this contention and argument would not be applicable in trailer cases, for such permission may be withheld by either the truck-owner as to his truck, or the trailer-owner as to his trailer.

In all, Section 59-a of the New York Vehicle and Traffic Law, as part of the legislative scheme to prevent accidents (by making owners more prudent in renting or otherwise loaning their vehicles to others) and to give those injured by moving vehicles a more adequate remedy (extra parties to sue), is a very salutary enactment. It shows the progress of the law and engenders the belief that, if new exigencies occur, the Legislature is on hand to do its duty, and cure any defect by an appropriate remedy.

ALFRED M. ASCIONE.

EXAMINATION BY PSYCHIATRISTS IN CRIMINAL CASES.—Whenever a power of appointment is delegated to or authority conferred upon individuals, nepotism or favoritism will, to a certain degree, be found to prevail as a result of the exercise of the power or authority. The human element to be contended with in public administration is the tendency on the part of the officials to bestow patronage in consideration of family or political relationship rather than in consideration of merit. Such evils have been found to exist in the appointments of lunacy commissions in criminal cases. The Legislature by a recent enactment has endeavored to improve the situation<sup>1</sup> by an act abolishing court-appointed lunacy commissions. Prior to 1936, a statute<sup>2</sup> authorized the judges in criminal cases to appoint lunacy commissions consisting of "three disinterested persons". To alleviate the growing scandals in having unqualified persons appointed as members of a lunacy commission under such a provision, the Legislature

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<sup>36</sup> N. Y. VEHICLE AND TRAFFIC LAW § 59-a.

<sup>37</sup> 225 App. Div. at 165, 232 N. Y. Supp. at 457.

<sup>1</sup> N. Y. Laws 1939, c. 861; N. Y. CODE OF CRIM. PROC. §§ 658-662(d) and 870.

<sup>2</sup> N. Y. Laws 1933, c. 564.

in 1936 passed an Act<sup>3</sup> providing that at least one of the three commissioners be a "qualified psychiatrist" and at least one a lawyer. But the enactment failed to produce the desired results. Party patronage ruled the appointments to lunacy commissions, and extravagance was reaching its peak as the number of lunacy examinations increased.<sup>4</sup>

The new Act<sup>5</sup> has been drafted by Senator Desmond on the theory that to cure effectively the condition in reference to lunacy commissions, the legislation "should assure scientifically accurate examination of sanity in the most expeditious manner at the least cost to the taxpayer."<sup>6</sup> To effectuate this purpose the Act provides:

- (a) for the elimination of court-appointed lunacy commissions;<sup>7</sup>
- (b) for examination by psychiatrists employed in public hospitals;<sup>8</sup>
- (c) for the restriction of psychiatric examinations to determination of sanity at time of the trial;<sup>9</sup>
- (d) for completely restating and making flexible the provisions regarding sanity examination procedure in the minor courts.<sup>10</sup>

For the purposes of this discussion the Act will be considered under these four divisions.

## I.

Wherever democracy prevails there will be found constitutional provisions which accord to an individual charged with the commission

<sup>3</sup> N. Y. Laws 1936, c. 460.

<sup>4</sup> See Desmond, *New York Smashes the Lunacy Commission "Racket"* (1939) 96 AM. J. OF PSYCHIATRY.

Lunacy Commission Expenditures and Appointments  
in New York City from 1930-1938 inclusive.

County	Expenditures	Members
Kings	\$1,093,900	4,264
New York	456,339	2,038
Bronx	182,580	721
Richmond	2,100	8
Queens	—	—

Thus, from 1930-1938, inclusive, New York City spent \$1,734,899 on 7,031 lunacy commission appointments.

<sup>5</sup> N. Y. CODE OF CRIM. PROC. §§ 658-662(d) and § 870.

<sup>6</sup> Desmond, *loc. cit. supra* note 4.

<sup>7</sup> N. Y. CODE OF CRIM. PROC. § 659.

<sup>8</sup> *Id.* §§ 659-660.

<sup>9</sup> *Id.* § 658.

<sup>10</sup> *Id.* § 870.

of a crime the right to a trial by jury<sup>11</sup>—the right to hear the accusation against him and the right not to be penalized for his social transgressions unless found guilty, by his peers, beyond a reasonable doubt.<sup>12</sup> However, it would be clearly inhuman and unjust to place an accused person on trial and pass judgment upon him where such a person is so mentally diseased, at the time of the trial, as to impair sufficiently his reasoning faculties so that he is rendered incapable of understanding the proceeding or making his defense.<sup>13</sup> It is upon this principle that the present Act<sup>14</sup> and its predecessor legislation have been predicated.<sup>15</sup>

The new Act provides that, if at any time before final judgment the court, having jurisdiction over a defendant indicted for *any crime*, reasonably believes that the defendant is so insane as to be incapable of understanding the charge, indictment or proceedings, or of making his defense, or if the defendant makes a plea of insanity to the indictment, the court upon its own motion, or that of the prosecutor, or the defendant, *may in its discretion*<sup>16</sup> order the examination of such a defendant to determine the question of his sanity.<sup>17</sup> It further provides that the examination be made in the following manner: in New York City, the director of the division of psychiatry in the City Department of Hospitals, upon the request of a court, must cause an examination to be made by two qualified psychiatrists,<sup>18</sup> designated from the staff of the division.<sup>19</sup> No fees will be received by the psychiatrists, for

<sup>11</sup> N. Y. CONST. art. I, § 2.

<sup>12</sup> *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2 (1910); *People v. Barker*, 153 N. Y. 111, 47 N. E. 31 (1897).

<sup>13</sup> *People v. Nyhan*, 171 N. Y. Supp. 466 (1918). See *Freeman v. People*, 4 Denio 9, 19 (N. Y. 1847) (where it is stated that Blackstone once wrote “\* \* \* and if, after judgment, he becomes of non sane memory execution shall be stayed, for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution”); N. Y. PENAL LAW § 1120 (which is declaratory of the common law, provides: “\* \* \* A person cannot be tried, sentenced to any punishment or punished for a crime while he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense”).

<sup>14</sup> N. Y. LAWS 1939, c. 861; N. Y. CODE OF CRIM. PROC. §§ 658–662(d) and 870.

<sup>15</sup> See *People v. Whitman*, 149 Misc. 159, 266 N. Y. Supp. 844 (1933) (where Collins, J., exhaustively reviews the statutory and case law relating to the question of the sanity of a defendant at the time of the trial).

<sup>16</sup> Under the repealed Act it was held in *People v. McElvaine*, 125 N. Y. 596, 26 N. E. 929 (1891), that where the court is satisfied, from its own observation and the information at hand, that there is no proper ground for questioning the defendant's sanity, then the defendant is not entitled to demand, as a matter of right, an examination of his present mental condition.

<sup>17</sup> N. Y. CODE OF CRIM. PROC. § 658.

<sup>18</sup> Of whom the director may be one. In New York City, the examining psychiatrists will come from Bellevue Hospital. N. Y. CODE OF CRIM. PROC. § 661 (provides that “Before commencing his duties hereunder each psychiatrist designated to make an examination ordered by the court shall take the oath prescribed by the civil practice act to be taken by referees \* \* \*”).

<sup>19</sup> N. Y. CODE OF CRIM. PROC. § 659.

the work performed by them will be a part of their regular duties as members of the staff of the city hospital.<sup>20</sup> This eliminates the former expenditures incurred in paying fees to members of lunacy commissions who in most instances were not even psychiatrists. However, because of the unavailability of staff psychiatrists in other parts of the state, the procedure slightly differs in places other than New York City. Outside of New York City, the superintendent of a hospital supported out of the funds of the state or any political subdivision thereof, having psychiatric service and being certified by the state commissioner of mental hygiene as having adequate facilities for such an examination, must direct such an examination to be made, by designating from the staff of such hospital two qualified psychiatrists<sup>21</sup> to make the same.<sup>22</sup> Thus, under the present law the judges will have no choice in selecting the examiners, the matter being left entirely to the judgment of the hospital superintendent or, in New York City, the director of the division of psychiatry.<sup>23</sup>

Under the repealed Act a court, feeling that a formal inquiry into the sanity of a defendant was necessary, could appoint one of two types of commissions. One of these was a commission composed of a lawyer, psychiatrist and some third person, usually a layman.<sup>24</sup> Under a commission of this type, formal hearings, with counsel representing both sides, the receiving of testimony in accordance with the rules of evidence, and any necessary medical examinations were had. The second type of a commission consisted of two physicians, who had at least five years' experience in actual practice, and one of whom was a qualified psychiatrist, and contemplated purely medical examinations, which did not depend on the taking of formal evidence, but were based almost entirely on psychiatric clinical diagnosis.<sup>25</sup> The former type of a commission, however, was the one most frequently

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<sup>20</sup> *Id.* § 662(c) (Notice that the statute limits the payment of fees to psychiatrists outside of New York City to reasonable traveling expenses "and a fee of ten dollars for each examination of the defendant but not exceeding fifty dollars in fees in any one case").

<sup>21</sup> Of whom he may be one. Under the former Act the finding of two of the three commissioners was sufficient. Now, where only two psychiatrists are to be appointed to make the inquiry, it is provided that if they disagree in their findings the proceedings against the defendant may be resumed or the court may request the Superintendent of Hospitals, or the director of the Division of Psychiatry in New York City, to appoint a third psychiatrist to examine the defendant and submit a report to the court.

<sup>22</sup> N. Y. CODE OF CRIM. PROC. § 659 ("\* \* \* or if two such qualified psychiatrists cannot be designated from the staff of the hospital, the superintendent may designate any qualified psychiatrist in the state").

<sup>23</sup> However, the Act does not usurp the functions of the court. Although it does deprive the courts of the power to appoint persons to examine a defendant as to his sanity, yet the report of the psychiatrists is purely advisory. The court still has the right to disagree with the conclusions of the psychiatrists, in which case the criminal proceedings against the defendant are resumed. See Desmond, *loc. cit. supra* note 4.

<sup>24</sup> N. Y. LAWS 1936, c. 460, § 658.

<sup>25</sup> N. Y. CODE OF CRIM. PROC. § 870.

employed. The new Act, however, provides but for one form of commission, which is free to determine for itself which course of procedure it will follow, and it may elect to pursue the elements of both former methods.<sup>26</sup>

It undoubtedly was the intention of the Legislature, although not clearly expressed, to assure to a defendant a scientific procedure in determining his sanity and to avoid the obstacles usually presented in having formal hearings with stenographers taking notes, with both sides being represented by counsel and the defendant's counsel urging the defendant not to answer certain questions, all of which tended to prevent a proper determination of the defendant's state of mind.<sup>27</sup> Nevertheless, in contravention of this intention, it was recently held that such formal hearings should be continued under the new Act, and that the courts will continue to place at the disposal of the psychiatrists all the facilities of the court incident to such hearings, including clerks, attaches and stenographers.<sup>28</sup>

## II.

Immediately after the new Act took effect a question was suggested as to the *modus operandi* to be pursued under the Act.<sup>29</sup> The old statute authorized the county court to commit a defendant for an informal *observation* "as an aid" in determining whether "sufficient and satisfactory proof" existed to warrant it in believing the defendant insane and accordingly making or denying an order for a formal lunacy proceeding.<sup>30</sup> Because the repealing Act eliminates the phrases quoted in the preceding sentence and merely provides for a formal examination,<sup>31</sup> the question posed is whether the new Act intended

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<sup>26</sup> *People v. Pershaec*, 172 Misc. 324, 328, 15 N. Y. S. (2d) 215, 221 (1939).

<sup>27</sup> *Desmond, loc. cit. supra* note 4.

<sup>28</sup> *People v. Pershaec*, 172 Misc. 324, 327, 15 N. Y. S. (2d) 215, 220 (1939).

However, it is not to be taken that the psychiatrists are not to gather any information, at all, concerning the defendant. It is only that they are not to be hampered by any rules of evidence or by counsel either for the People or the defense. Although no counsel is to interfere with the psychiatrists, the interests of the defendant and the state would, nevertheless, be sufficiently protected, for the Act provides that the court may not commit a defendant as insane until the district attorney and counsel for the defendant have been accorded an opportunity to be heard. The psychiatrists are also given the power of subpoena and are authorized to examine witnesses and receive such other information as may aid them in making a finding. Indeed, such powers are essential to any adequate inquiry as to defendant's mental state. Before such a fact can be properly determined, the psychiatrist must, in many cases, have information as to the defendant's heredity, early environment, conditions in his family, sociological background, previous medical history, and many other facts. See N. Y. CODE OF CRIM. PROC. § 661.

<sup>29</sup> *People v. Pershaec*, 172 Misc. 324, 333, 15 N. Y. S. (2d) 215, 225 (1939).

<sup>30</sup> N. Y. LAWS 1936, c. 460, § 658.

<sup>31</sup> N. Y. CODE OF CRIM. PROC. § 660 ("The psychiatrists so designated shall forthwith examine the defendant. Examinations may be made in the place where the defendant is detained, or, upon recommendation of said superintendent or director the court may commit the defendant for a reasonable period

to limit the court in the first instance to the making of orders calling for elaborate psychiatric examinations only, thereby depriving the court of the power to commit for preliminary hospital examination. In the light of the trend of decisions<sup>32</sup> and statutory enactments which establish the rule that procedural enactments must be construed as intending to aid and not hamper the courts in their exercise of sound discretion, it would be a strained interpretation to hold that the Act abrogates the court's power to direct an informal examination as an aid preliminary to its determination whether a special proceeding "*de lunatico inquirendo*" should be ordered.<sup>33</sup> Indeed, to hold otherwise would be to close our eyes to the prevailing practice in the county courts, where during a trial the defendant's counsel, at times, orally informs the court that the defendant's acts manifest insanity, or pleads insanity with a specification for the appointment of a commission, or, at times, the district attorney, entertaining a doubt as to the defendant's sanity, informs the court of the apparent abnormality of the accused. In such cases, upon such casual information it would be unreasonable for the court in "precipitately concluding" that there is reasonable ground for ordering a formal lunacy inquisition.<sup>34</sup> Moreover, to order formal examinations freely requiring the members of hospital staffs to act as referees, would be to interfere with the performance of their ordinary duties and to overtax the hospital facilities, or to require an unwarranted increase in their personnel.<sup>35</sup> Thus, the ineluctable conclusion is that the Legislature could not have intended to abrogate the power to order a preliminary examination as inherent in the court or as given to it by the Mental Hygiene Law.<sup>36</sup>

### III.

Whenever a court orders a formal proceeding "*de lunatico inquirendo*", the psychiatrists are limited under this Act, just as they have been under the former Act, to make their findings with reference

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for observation and examination to such hospital as may be designated by such superintendent or director \* \* \*").

<sup>32</sup> *People v. McElvaine*, 125 N. Y. 596, 26 N. E. 929 (1891); *People v. Whitman*, 149 Misc. 159, 266 N. Y. Supp. 844 (1933).

<sup>33</sup> *People v. Pershaec*, 172 Misc. 324, 332, 15 N. Y. S. (2d) 215, 224 (1939).

<sup>34</sup> *Id.* at 334, 15 N. Y. S. (2d) at 226.

<sup>35</sup> This would entail an additional expenditure, which the Act seeks to curtail. See *Desmond, loc. cit. supra* note 4.

<sup>36</sup> N. Y. MENTAL HYGIENE LAW § 81, subd. 5. N. Y. CODE OF CRIM. PROC. § 662(d) seemingly to the contrary, notwithstanding. See *People v. Pershaec*, 172 Misc. 324, 335, 15 N. Y. S. (2d) 215, 227 (1939) (Even if after a preliminary examination is had and it is determined that further examination by a commission is necessary, no time would have been lost, for the findings as a result of the hospital examination could be fully utilized by the designated commission. Indeed, "even a casual clinical examination of the defendant aids the designating hospital authority in selecting those members of his staff best equipped by experience and specialization for the particular case").

to the prisoner's sanity as the term is understood in *medical science*,<sup>37</sup> *i.e.*, to determine his ability to appreciate the nature of the trial and to make his defense; and are not to determine the accused's sanity in the *legal sense*, *i.e.*, sanity touching on the question of criminal responsibility, or the capacity to know the nature of one's act and its wrongfulness.<sup>38</sup> If the Act called for the determination of the defendant's sanity at the time of the commission of the crime, then the Legislature would have been sanctioning the usurpation by psychopathology of the powers of the jury and consequently the Act would have been unconstitutional.<sup>39</sup> A defendant has the constitutional right to a jury trial on all the issues of the case, and his mental capacity to commit the crime is one of the essential elements of the crime (to wit, the *mens rea*), upon which a defendant is entitled to a jury verdict and is not to be bound by the determination of some commission.<sup>40</sup>

Thus, we see that the Act was not intended to eliminate the classic "battle of experts". The evils of bought "expert" testimony, and the partisan nature of the expert's services, and the unsoundness of the use of hypothetical questions calculated to support the questioner's side of the case will still continue.<sup>41</sup> As long as the right of the accused to summon in his behalf any witness—a right peculiar to the common law, and one which ought to be cherished—continues, we shall be confronted with the "battle of experts" problem.<sup>42</sup>

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<sup>37</sup> See *People v. Nyhan*, 171 N. Y. Supp. 466 (1918). "There is a distinction between insanity as the term is understood in medical science and insanity as the term is understood in legal science, so as to relieve a defendant from criminal responsibility. A person may be insane as that term is ordinarily understood, and still be responsible for the commission of a crime. The word 'insane' as employed in the statute does not mean criminal irresponsibility, but so mentally diseased as to impair his reasoning faculties sufficiently to render it inhuman and unjust to place him upon trial." In that case it was held that a police officer, indicted for the murder of his wife, who had hallucinations of hearing and fixed delusions of persecution in connection with the crime of which he was accused, is incapable of appreciating the proceedings of a trial and making his defense, and should be committed to a hospital until he becomes sane, and then placed on trial.

<sup>38</sup> N. Y. CODE OF CRIM. PROC. § 662 ("The report of the psychiatrist made pursuant to this section shall not be received in evidence upon the trial of the defendant but shall be filed by the court in the office of the clerk of the court where it shall be subject to inspection only on an order of the court or a justice thereof").

<sup>39</sup> *State v. Lange*, 168 La. 958, 123 So. 639 (1929); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931). See *People v. Nyhan*, 171 N. Y. Supp. 466 (1918) (Where under the former Act, which authorized the lunacy commissions to determine the sanity of the defendant at the time of the commission of the crime as well as at the time of the trial, it was held that the provision did not refer to the criminal responsibility of the prisoner, but to the condition of his mind and reason with reference to his ability to understand the proceedings and make his defense).

<sup>40</sup> *State v. Lange*, 168 La. 958, 123 So. 639 (1929).

<sup>41</sup> *Weihofen, An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial* (1935) 2 LAW & CONTEMP. PROB. 419, 420.

<sup>42</sup> *Ibid.* (This problem "is not peculiar to the field of psychiatry, but permeates the entire legal system wherever expert testimony is employed").



Undoubtedly, it would have been a welcomed feature of the Act had it required the psychiatrist's report, finding the defendant insane at the time of the trial, to be binding on the jury even with reference to the defendant's mental responsibility for the crime charged, so as to *nolle prosequere* the indictment and fully discharge him upon his regaining his mental health;<sup>43</sup> but if the psychiatrists found the defendant sane such report would have no evidentiary value. In cases where a defendant is found insane at the time of the trial, and if the examinations were not made too late after the commission of the act charged, it is not a too remote circumstance to consider the insanity, subsequent to the commission of the offense, from which its existence at the time of the offense may be inferred, inasmuch as a condition of mental disease is, more or less, continuous and does not change appreciably within a short time.<sup>44</sup> To dismiss the indictment in such a case would, besides being a blessing to the congested courts, add a further "virtue of economy" to the statute.<sup>45</sup>

#### IV.

Upon first reading the provisions of the Act it appears to be applicable to the inferior courts<sup>46</sup> and giving it a literal construction, it seems as if a drastic innovation in the prevailing practice and a disruption of established procedure was intended to be effected by it. However, upon a reflective reading in the light of established principles, it is realized that the Legislature had no such revolutionary intent. The Act provides that "If at any time it shall appear to a court having jurisdiction of a defendant charged with a felony or a misdemeanor *but not under indictment therefor* or charged with an *offense not a crime*",<sup>47</sup> that the defendant is incapable of understanding the nature of a proceeding or of making his defense, the court may stay the proceedings and order a formal examination of the defendant.<sup>48</sup> Undoubtedly, this provision referring to the "not under indictment" type of cases is inapplicable to Courts of Special Sessions,

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<sup>43</sup> *Id.* at 435. Although the Act states that after a person, found insane at the time of the trial, recovers his sanity he must be brought to trial *or legally discharged*, yet it has been held under the repealed statute, which had a similar provision, that the only effect of the proceeding, determining the defendant insane at the trial, was to suspend the trial until the defendant had become sane, and that it was error for the court to dispose of the indictment upon receiving the psychiatrist's report finding the defendant insane. See N. Y. CODE OF CRIM. PROC. § 662(a); see also *People ex rel. Mullen v. Coler*, 61 App. Div. 538, 70 N. Y. Supp. 639 (2d Dept. 1910); *People v. Whitman*, 149 Misc. 159, 266 N. Y. Supp. 844 (1933).

<sup>44</sup> 1 WIGMORE, EVIDENCE (2d ed. 1923) § 227; *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275 (1893).

<sup>45</sup> Note (1936) 16 B. U. L. REV. 204, 215. But see *People v. Whitman*, 149 Misc. 159, 166, 266 N. Y. Supp. 844, 852 (1933).

<sup>46</sup> N. Y. CODE OF CRIM. PROC. § 870.

<sup>47</sup> " \* \* \* other than a traffic infraction as defined by the Vehicle & Traffic Law." *Ibid.*

<sup>48</sup> *Ibid.*

because an information, which is equivalent to an indictment, is a condition precedent to Special Sessions jurisdiction.<sup>49</sup> In other words, a defendant cannot be within its jurisdiction unless he has been *held* for Special Sessions.<sup>50</sup> But, it is applicable to that part of the Magistrate's Court, where the magistrate, acting as a "committing officer", has jurisdiction over the person of the defendant "charged with a felony" pending the grand jury's return of a true bill against him.<sup>51</sup> Thus, by a liberal construction of the statute, we would confer upon a magistrate, and outside of New York City, upon a justice of the peace, the power, *in felony cases*, not only to order formal lunacy inquisitions, but also to stay a criminal proceeding from the time of the making of such order.<sup>52</sup> The rhetorical question has been asked: "Could the Legislature possibly have had any such intention?"<sup>53</sup> Indeed, to pose the question is to answer it. The result of such a construction would be an extension of a magistrate's power into felony jurisdiction. This would be an usurpation of the constitutional jurisdiction of the trial courts.<sup>54</sup> The Magistrate's Courts, being inferior courts of limited jurisdiction, are empowered, in criminal cases, to exercise only the jurisdiction of a *committing* magistrate, who must hold a defendant for trial or grand jury if a *prima facie* case exists.<sup>55</sup> Although the State Constitution<sup>56</sup> suggests the possibility that the Legislature could extend the province of the inferior courts so as to vest in them a general felony jurisdiction as now exercised by the trial courts, the Legislature must, at least, specifically say so in definite language to effect such a serious change.<sup>57</sup> Thus, as a matter of "safe determination" a court of original jurisdiction would hold that the Legislature did not intend to confer such felony jurisdiction on

<sup>49</sup> *People v. Pershaec*, 172 Misc. 324, 339, 15 N. Y. S. (2d) 215, 230 (1939); see also *People v. Kraft*, 229 App. Div. 281, 242 N. Y. Supp. 348 (3d Dept. 1930).

<sup>50</sup> *People ex rel. Dembinsky v. Fox*, 182 App. Div. 642, 168 N. Y. Supp. 1008 (1st Dept. 1918).

<sup>51</sup> N. Y. CODE OF CRIM. PROC. § 208. See *People ex rel. Bungart v. Wells*, 57 App. Div. 140, 68 N. Y. S. 59 (2d Dept. 1907).

<sup>52</sup> *People v. Pershaec*, 172 Misc. 324, 340, 15 N. Y. S. (2d) 215, 231 (1939) (If such was the real intention of the legislature it would necessarily "follow that in 'infamous crimes', such as murder in the first degree, robbery, kidnapping, burglary, etc., it could possibly have the extreme effect of staying all further proceedings, including even those of the grand jury, at least, until the report of a commission designated by a director of psychiatry is received, and then, assuming that he had the power, the magistrate could confirm, commit and stay further proceedings, or reject their report \* \* \*").

<sup>53</sup> *Ibid.*

<sup>54</sup> *People ex rel. Moore v. Warden of the City Prison*, 150 App. Div. 644, 135 N. Y. Supp. 883 (1st Dept. 1912).

<sup>55</sup> N. Y. INF. CRIM. CTS. ACT §§ 130-133; *People v. Citarelli*, 247 App. Div. 53, 286 N. Y. Supp. 734 (1st Dept. 1936); *People v. Freer*, 171 Misc. 478, 12 N. Y. S. (2d) 858 (1939).

<sup>56</sup> N. Y. CONST. art. VI, § 18 ("The Legislature shall not hereafter confer upon any inferior or local court of its creation \* \* \* any greater jurisdiction \* \* \* than is conferred upon county courts by or under this article").

<sup>57</sup> *People v. Pershaec*, 172 Misc. 324, 342, 15 N. Y. S. (2d) 215, 233 (1939).

the Magistrate's Courts, but rather intended to have that provision<sup>58</sup> apply only to those courts which possess jurisdiction over the felony as well as the personal or custodial jurisdiction of the defendant.<sup>59</sup>

Still, in another instance the statute states, rather clearly, that where a defendant is "charged with an offense not a crime", the court having jurisdiction over the defendant (*i.e.*, the Magistrate's Court) may order a psychiatric inquiry, if necessary.<sup>60</sup> This provision injects a unique feature into the Magistrate's Court in bestowing upon it the power to order "*de lunatico inquirendo*" proceedings, a right formerly exercised only by "courts of superior jurisdiction".<sup>61</sup> Under the repealed Act, in cases of misdemeanors and lesser offenses, where the accused showed signs of *dementia*, the practice in the Magistrate's Courts was to commit him for an informal observation under the Mental Hygiene Law,<sup>62</sup> and the hospital did the rest.<sup>63</sup> In all probability, as a matter of expediency, the old well-established practice of committing a person, "charged with an offense not a crime", for hospitalization under the Mental Hygiene Law<sup>64</sup> would be continued, inasmuch as under the new Act it is not incumbent upon the magistrates to order a formal lunacy inquisition, "as the only authorized method."<sup>65</sup>

Thus, as gathered from the foregoing discussion, the Desmond Act has not abolished completely the procedure in lunacy investigations as developed under the repealed Act. The authors of the Act intended to cure one glaring defect in the old statute. They have designed the new Act especially to thwart the liberal practice of making unnecessary appointments of lunacy commissions, and thereby to foster economy. However, there was no necessity for repealing the entire former Act. The same purpose could have been effected merely by amending the provision which permitted court-appointed commissions.

EDWARD S. SZUKELEWICZ.

STATUTORY PROHIBITION AGAINST THE CORPORATE RIGHT TO APPEAR IN PERSON.—The uncertainty in reference to a corporation's right to appear in person, gave rise to a demand either for an absolute decision by the New York Court of Appeals or for a statutory enact-

<sup>58</sup> N. Y. CODE CRIM. PROC. § 870 ("If at any time it shall appear to a court having jurisdiction of a defendant charged with a felony \* \* \* but not under indictment therefor \* \* \*").

<sup>59</sup> *People v Pershaec*, 172 Misc. 324, 340, 15 N. Y. S. (2d) 215, 231 (1939).

<sup>60</sup> N. Y. CODE CRIM. PROC. § 870, subd. 1.

<sup>61</sup> *People v Pershaec*, 172 Misc. 324, 346, 15 N. Y. S. (2d) 215, 236 (1939).

<sup>62</sup> N. Y. MENTAL HYGIENE LAW § 81, subd. 5.

<sup>63</sup> N. Y. LAWS 1936, c. 460, § 870.

<sup>64</sup> N. Y. MENTAL HYGIENE LAW § 81, subd. 5.

<sup>65</sup> *People v Pershaec*, 172 Misc. 324, 347, 15 N. Y. S. (2d) 215, 237 (1939).