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EXTRATERRITORIAL LAW ENFORCEMENT IN NEW YORK

W. David Curtiss†

I

INTRODUCTION

In September 1963 an Advisory Committee to Study Certain Municipal Police Problems was established under the auspices of the Office for Local Government of the State of New York.

In announcing the formation of this Advisory Committee, the Commissioner of the Office for Local Government stated:

Some of the laws relating to the powers of policemen to make arrests outside the communities by which they are employed are ambiguous and there is dispute as to how they should be construed.

Many policemen are now permitted by recent laws to live outside of the communities by which they are employed. They may see crimes committed while traveling to or from work in uniform. If they do not make arrests, they are criticized by the public. If they do make arrests outside their regular jurisdictions, there are serious questions as to whether they and their families are fully protected financially in case of injury or death. Also, there may be questions as to whether they would be protected from damage suits arising from such arrest.

Municipalities, too, are concerned as to the liabilities of their taxpayers when their policemen make arrests outside their own communities.¹

The authority of police officers to act beyond the territorial limits of their employing municipalities presents difficult legal problems. This is especially so in a state such as New York which has 62 counties, 62 cities, 554 villages, 932 towns, and 8 special police districts, with each of these local governmental units having a key role to play in the process of law enforcement throughout the state.

The author of this article has served as chairman of the Advisory Committee to Study Certain Municipal Police Problems.² Indeed, the

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¹ Statement by John J. Burns, Commissioner of the New York State Office for Local Government.

² The other members of the Advisory Committee to Study Certain Municipal Police Problems were: Milton Alpert, Counsel, State Office for Local Government; Richard G. Denzer, Counsel, Temporary State Commission on the Revision of the Penal Law and Criminal Code; Paul A. Hughes, Associate Counsel, State Department of Audit and Control; William J. Lloyd, Counsel, Joint Legislative Committee on Municipal Tort Liability; Leo Murin, General Counsel, Workmen's Compensation Board; George A. Murphy, Legislative Representative of the New York State Association of Chiefs of Police; William K. Sanford, Executive Secretary of the Association of Towns of the State of New York; Al Sgaglione, President, Police Conference of New York, Inc.; Herbert H. Smith, Assistant Attorney General, State Department of Law; Donald A. Walsh, Counsel, Conference of Mayors and Other Municipal Officials of the State of New York; and Harold W. Weidner, Counsel, Joint Legislative Committee on Villages. Throughout its deliberations, the Advisory Committee has received invaluable assistance from Charles W. Potter, Associate

article is an outgrowth of the work of the Advisory Committee, with many of the ideas hereafter expressed having derived from the Committee's discussions and deliberations.³ However, the views presented in this article do not necessarily represent the position of the Advisory Committee, but rather reflect the opinions of the writer who is solely responsible for the content of the article.

II

THE REQUIREMENT OF STATE STATUTORY AUTHORIZATION FOR EXTRATERRITORIAL LAW ENFORCEMENT

A. *The General Rule*

The law is generally well settled that a municipality can directly exercise police power beyond its own boundaries only if there is state statutory authorization to do so.⁴

It must be recognized, however, that the exercise of municipal police power may in some cases have only an indirect effect upon persons and property outside the corporate limits. Typical of this proposition are local ordinances which provide that sources of supply of milk, meat and other food products which are located outside the city must be inspected and approved by municipal officials as a condition to obtaining a license to sell these products within the city.

In this connection, the Supreme Court of Minnesota has stated:

The inspection of dairies or dairy herds outside the city limits provided for by this ordinance applies only to those whose milk product it is proposed to sell in the city. . . . This inspection is wholly voluntary on part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is that he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extraterritorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city.⁵

The Supreme Court of Illinois, however, has said to the contrary:

Counsel, State Office for Local Government, who served informally as Counsel to the Committee.

³ See, in this same connection, the author's comments on "Policemen and the Law" made at the Municipal Law Seminar on June 5, 1964, in Albany, New York and published in the proceedings of the Seminar at pages 167-70. See also the report of the Workshop on this same topic published at pages 177-91 of the proceedings. This Seminar was held under the sponsorship of the State Office for Local Government.

⁴ See generally, 1 Antieau, *Municipal Corporation Law* 235-43 (1964); 6 McQuillin, *Municipal Corporations* 562-67 (3d ed. 1949, Supp. 1963); Maddox, *Extraterritorial Powers of Municipalities in the United States* 1-9, 58-73 (1955); Pock, *Consolidating Police Functions in Metropolitan Areas* 1-5, 34-38 (1962); Rhyne, *Municipal Law* 310-29 (1957); Sengstock, *Extraterritorial Powers in the Metropolitan Area* 1-4, 45-55 (1962); 1 Yokley, *Municipal Corporations* 139-40 (1956, Supp. 1959); Anderson, "The Extraterritorial Powers of Cities," 10 *Minn. L. Rev.* 475, 564 (1926); Kneier, "Territorial Jurisdiction of Local Law Enforcement Officers," 9 *N.C.L. Rev.* 283 (1931).

⁵ *State v. Nelson*, 66 *Minn.* 166, 169-70, 68 *N.W.* 1066, 1068 (1896).

It is an inherent limitation upon the powers of a city that they shall operate only within the corporate boundaries of the municipality. Its ordinances can have no extraterritorial effect in the absence of legislation expressly conferring such power upon the corporation. . . . There is no doubt that cities possess the authority to regulate the sale and distribution of milk within their territorial limits. It does not follow, however, that regulation of milk plants beyond such limits may be accomplished by permitting local sales or distribution only on condition that such regulations be complied with.⁶

There is thus conflicting authority regarding the validity of municipal ordinances which have indirect extraterritorial effect.⁷ It is enough here simply to recognize this fact without undertaking to appraise the merits of either position since this article is concerned with the right of a municipal corporation to exercise police power beyond its own borders in a direct and not merely an incidental manner. The basic question under consideration relates to the authority of a policeman⁸ to act in his official capacity beyond the geographical limits of his employing municipality—quite clearly a situation involving the direct exercise of police power across municipal boundaries.⁹

The general rule, then, is that in the absence of state legislative authorization, municipal ordinances can have only local and not extramural application. In view of this fact, it is not surprising that state legislatures have in many instances made specific grants of extraterritorial police power to municipalities within the state.¹⁰

⁶ *Dean Milk Co. v. City of Aurora*, 404 Ill. 331, 335, 88 N.E.2d 827, 830 (1949).

⁷ See *Tenny v. Sainsbury*, 7 App. Div. 2d 514, 184 N.Y.S.2d 185 (4th Dep't 1959); *Lang's Creamery, Inc. v. City of Niagara Falls*, 224 App. Div. 483, 231 N.Y. Supp. 368 (4th Dep't 1928), aff'd, 251 N.Y. 343, 167 N.E. 464 (1929); Note, 36 Mich. L. Rev. 848 (1938); authorities cited note 4 supra.

⁸ See N.Y. Code Crim. Proc. §§ 154 (who are peace officers), 154-a (certain peace officers designated as police officers).

Section 154-a provides as follows:

As used in sections one hundred seventy-seven and one hundred eighty-a of this chapter the following named peace officers shall also be known as police officers: any member of a duly organized police force or department of any county, city, town, village, municipality, authority, police district, or any member of the state police or a sheriff, under-sheriff or deputy sheriff, other than a special deputy sheriff.

In this same connection, it should be noted that members of the New York State police have general state-wide jurisdiction except that "they shall not exercise their powers within the limits of any city to suppress rioting and disorder except by direction of the governor or upon the request of the mayor of the city with the approval of the governor." N.Y. Executive Law § 223.

⁹ With respect to certain cases in which the courts of two or more counties have concurrent jurisdiction of criminal prosecutions, see, *inter alia*, the following sections of the N.Y. Code Crim. Proc.: §§ 134 (when a crime is committed partly in one county and partly in another), 135 (when a crime is committed on the boundary of two or more counties, or within five hundred yards thereof), 135-a (jurisdiction over offenses committed on bridges and in tunnels connecting boroughs in the city of New York), 136 (jurisdiction of crime on board of vessel), 136-a (jurisdiction over the Hudson River and over the New York Bay between Staten Island and Long Island), 137 (of crime committed in the state on board of any railway train, etc.).

¹⁰ For a compilation of state statutes involving extraterritorial police powers, see Sengstock, *supra* note 4, at 52-54.

It must be recognized, however, that any such delegation of extraterritorial power is subject to certain constitutional limitations. In discussing this matter, Professor Antieau states:

Where extraterritorial police power is granted or necessarily implied, it has ordinarily been strictly limited. And extramural powers will readily be invalidated by the courts where such action is not reasonably necessary to protect the public health, safety, morals, or general welfare, or where it is but a subterfuge to advantage unfairly local economic interests. There is some possibility, too, that extraterritorial exercise of the police power by a municipal corporation will be ruled unconstitutional as permitting government of the people in the area by officials whom they have not chosen and whom they cannot control.¹¹

With respect to the point last mentioned, it is arguable that where a state delegates extraterritorial police power to a municipality, "individuals without its boundaries cannot complain; in theory they are being controlled, not by their neighbors' representatives, but by the state through its functionaries."¹²

In any event, the validity of any particular delegation of extramural police power will stand or fall in the light of these constitutional considerations.

B. *The New York Law*

Under certain circumstances, New York statutory law authorizes the exercise of municipal police power beyond corporate boundaries, thereby enabling a local law enforcement officer to act in his official capacity outside the geographical limits of his employing municipality. A compilation of some of the more important of these statutory provisions follows.

1. Intrastate Close Pursuit

A village policeman¹³ may not in his capacity as a peace officer make an arrest without a warrant outside the village limits for an offense committed outside the village limits.¹⁴

Assume, however, that a village policeman sees a crime committed

¹¹ 1 Antieau, *supra* note 4, at 243. See also Sengstock, *supra* note 4, at 48-51.

¹² Note, 41 Harv. L. Rev. 894, 897-98 (1928). See also Anderson, *supra* note 4, at 577-81; and N.Y. Const. art. IX, § 1(b).

¹³ See N.Y. Village Law § 189. The basic principles respecting the limited territorial jurisdiction of village policemen are generally applicable to local law enforcement officers of cities, towns, counties and special police districts.

¹⁴ See the following opinions of the Attorney General of New York: 2 N.Y. Op. Att'y Gen. 534 (1912); N.Y. Op. Att'y Gen. 277 (1930); N.Y. Op. Att'y Gen. (1935), 54 State Dep't 25; and also the opinion of the State Comptroller of New York, Op. State Compt. 64-127 (1964).

The Attorney General has ruled, however, that a village policeman is a peace officer within the terms of § 1897 of the Penal Law and may carry a concealed weapon outside the village limits without a license. 2 N.Y. Op. Att'y Gen. 277 (1930).

within the village and pursues the offender across the village boundaries. If the policeman, in his official capacity, then undertakes to arrest the offender without a warrant outside the village limits, does the added factor of close pursuit make the arrest a lawful one?

The New York law on this point has not been completely clear until as recently as April 16, 1964.

There has been conflicting lower court authority regarding intrastate close pursuit.¹⁵ A 1946 discussion of this question stated:

The ease and speed with which village, city, county and state lines can be crossed by a fleeing criminal demands continuous close cooperation between all law enforcement officers. Immediate and continuous pursuit is often required beyond the jurisdiction of appointment in order to promptly effect an apprehension. . . .

[Then follows a reference to *People v. Averill*,¹⁶ a 1925 county court case in New York, which held that an extraterritorial arrest resulting from close pursuit was lawful.]

There appears to be no Court of Appeals decision on this precise point.¹⁷

In the intervening years since 1946 and up to the present time, the Court of Appeals has not had occasion to deal with this specific problem of intrastate close pursuit.

The question, however, has now been settled by chapter 643 of the Laws of 1964, effective April 16, 1964. This act, recommended by the Advisory Committee to Study Certain Municipal Police Problems, added new section 182-a to the Code of Criminal Procedure, providing as follows:

§ 182-a. Close pursuit within the state by peace officers

When a peace officer is authorized by law to arrest a person without a warrant, or to issue a traffic summons, for a crime or traffic infraction committed within the geographical confines of such officer's employing municipal corporation or police district, he may make such arrest, or issue such summons, in any part of this state outside such geographical confines, provided continuous close pursuit was necessary in order to make such arrest or issue such summons.

As opposed to close pursuit within the state, section 860 of the Code of Criminal Procedure deals with interstate close pursuit. This law

¹⁵ See *Butolph v. Blust*, 41 How. Pr. 481 (N.Y. Sup. Ct. Gen. T. 4th Dep't 1871); *People v. Averill*, 124 Misc. 383, 208 N.Y. Supp. 774 (Madison County Ct. 1925); *People v. Haber*, 20 Misc. 2d 272, 191 N.Y.S.2d 497 (N.Y. Ct. Spec. Sess. App. Pt. 2d Dep't 1959); and *People v. Preble*, 39 Misc. 2d 411, 240 N.Y.S.2d 845 (Police J. Ct. Suffolk County 1963). In addition, see the following opinions of the Attorney General of New York: N.Y. Op. Atty Gen. (1932), 45 State Dep't 646; N.Y. Op. Atty Gen. (1939), 61 State Dep't 47; the opinion of the State Comptroller of New York, Op. State Compt. 64-127 (1964); Note, 28 Texas L. Rev. 862 (1950).

¹⁶ 124 Misc. 383, 208 N.Y. Supp. 774 (Madison County Ct. 1925).

¹⁷ Miller, "Arrest Without a Warrant By a Peace Officer in New York," 21 N.Y.U.L. Rev. 61, 90-91 (1946).

authorizes a peace officer of another state to arrest a person in New York in a close pursuit case on the ground that this person has committed a crime in the other state which is also a crime in New York, provided such other state "has made similar provision for the arrest and custody of persons closely pursued within the territory thereof."

"Similar provision" has been made by Connecticut,¹⁸ Massachusetts,¹⁹ New Jersey,²⁰ Pennsylvania²¹ and Vermont²²—the five states which adjoin New York.

In this connection, the Attorney General of New York has ruled that since a traffic infraction is not a crime, a New York State police officer may not pursue a motor vehicle operator into Connecticut, Massachusetts, New Jersey, Pennsylvania or Vermont and arrest him there for having committed a traffic infraction in New York.²³

2. Section 186 of the Code of Criminal Procedure provides that if a person under arrest escapes, he may be retaken any place in the state by the individual from whose custody he escaped.

3. Section 654 of the County Law authorizes a sheriff to deputize municipal peace officers "for the purpose of authorizing an arrest without a warrant outside the territorial limits of such city, town, village, or special district, when such crime or infraction was committed within such territorial limits in the presence of such peace officer."

4. Execution of Warrants of Arrest

Sections 155 and 156 of the Code of Criminal Procedure govern the execution of warrants of arrest. A warrant issued by any of the judicial officers included in section 155 may be executed by a peace officer anywhere in the state. Under section 156 of the Code, a warrant of arrest issued by any other magistrate, including a justice of the peace, may be executed throughout the county; and if such a warrant is indorsed as provided for in section 156, a peace officer may execute it in any other county in the state.²⁴

The same rules which apply to the execution of a warrant of arrest govern the service of a bench warrant except that a bench warrant does not require indorsement in order to be served in another county.²⁵

¹⁸ Conn. Gen. Stat. Rev. §§ 54-156 (1958) (limited to felony cases).

¹⁹ Mass. Gen. Laws Ann. ch. 276, §§ 10A-D (1956) (limited to felony cases).

²⁰ N.J. Rev. Stat. §§ 2A:155-1 to -7 (1951) (limited to felony and high misdemeanor cases).

²¹ Pa. Stat. Ann. tit. 19, §§ 14-19 (1964) (limited to Pennsylvania indictable offense cases).

²² Vt. Stat. Ann. tit. 13, §§ 5041-45 (1958) (limited to felony cases).

²³ N.Y. Op. Att'y Gen. 125 (1953). See also note 47 *infra*.

²⁴ See *County of Orleans v. Winchester*, 63 Hun 636, 18 N.Y. Supp. 668 (Sup. Ct. 5th Dep't 1892); N.Y. Op. Att'y Gen. (1932), 45 State Dep't 326; N.Y. Op. Att'y Gen. (1932), 45 State Dep't 474; N.Y. Op. Att'y Gen. 93 (1934); N.Y. Code Crim. Proc. § 162 (prisoner carried from county to city). But see N.Y. Const. art. VI, § 1(c).

²⁵ N.Y. Code Crim. Proc. §§ 304, 478.

5. Members of the police department of a city of the second class have "in every other part of the state, in criminal matters all the powers of constables and any warrant for search or arrest issued by any magistrate of the state may be executed by them in any part of the state according to the tenor thereof without indorsement."²⁶

6. Authorized Municipal Cooperation

The New York State Legislature has authorized various types of municipal cooperation in the field of police protection.²⁷ In many cases, these statutory authorizations for municipal cooperation, either expressly or by necessary implication, extend the territorial jurisdiction of the local law enforcement officers involved.

The following are examples of permissible intergovernmental arrangements:

(a) Town policemen and village policemen may under certain circumstances be transferred to other towns or villages in the same county.²⁸

(b) A village may in some cases contract to supply police protection to another village.²⁹

(c) Section 209-f of the General Municipal Law authorizes the governor in certain cases to mobilize local police forces for duty throughout the state. The statute further provides that the police officers thus assigned shall have "the same powers, duties, rights, privileges and immunities as if they were performing their duties in the civil or political subdivision in or by which they are normally employed."

(d) A village or town in a county having a population of 85,000 or more persons may under some circumstances obtain police aid from another village or town in the county.³⁰

(e) A town and a village may under certain conditions operate a joint police department.³¹

(f) The Defense Emergency Act provides that members of civil defense forces who are performing civil defense services anywhere in the state shall in certain cases possess "the same powers, duties, immunities and privileges they would ordinarily possess if performing their

²⁶ N.Y. Second Class Cities Law § 142. See also N.Y. Op. Att'y Gen. (1932), 45 State Dep't 474.

²⁷ See Joint Legislative Committee on Metropolitan Areas Study, *Municipal Cooperation, A Digest of the Law of New York Permitting Intergovernmental Service Arrangements Among Municipalities of the State* (rev. ed. 1963). The material relating to police protection is found at pages 69-73. See also N.Y. Const. art. IX, § 1(c); N.Y. Sess. Laws 1964, ch. 205, §§ 11(5)-(6).

²⁸ N.Y. Town Law § 153; N.Y. Village Law §§ 188-d, 199-p.

²⁹ N.Y. Village Law §§ 89(24-a), 188-a. See also N.Y. Munic. Law §§ 119-m to -o; and Op. State Compt. 237 (1963).

³⁰ N.Y. Munic. Law § 209-m.

³¹ N.Y. Munic. Law § 121-a. See also N.Y. Unconsol. Laws § 5811 (McKinney 1949, Supp. 1964).

duties in the jurisdiction in which normally employed or rendering services."³²

7. Certain Municipal Charter Provisions

An examination of the charters of a number of New York State cities discloses recurring use of the same or comparable terminology relating to the extraterritorial exercise of municipal police power.

The charter of the City of Albany is typical in this regard. The relevant provisions of the Albany charter³³ state:

The members of the police force of the said city shall possess in every part of the State of New York, all the common law and statutory powers of constables, except for the service of civil process; and any warrant for search or arrest, issued by any magistrate of the State of New York, may be executed in any part of the State by any member of the police force of said city, without any indorsement of said warrant, and according to the terms thereof;³⁴

The legislature thus authorized Albany city policemen to exercise the powers of constables³⁵ anywhere in the state. This express grant of extraterritorial police power, however, was not made by general legislation applicable to cities and city policemen throughout the state; rather, the delegation of power was made by special legislation enacting the charter of the City of Albany and was thus limited to that city alone. Does this fact have legal significance in so far as the effectiveness of the grant of extraterritorial power is concerned? Or, to state the question another way, do acts of the legislature consisting of municipal charter provisions have the same force and effect as statutes enacted generally by the legislature?³⁶

In answer to this question, one authority states:

[T]he word "charter," when used in connection with a municipal corporation, consists of the creative act and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise. Apart from those emanating from state constitutions, all charters are legislative enactments conferring the governmental powers of the state upon its local agencies³⁷

New York is in accord with this position.³⁸

³² N.Y. Unconsol. Laws § 9137 (McKinney 1961, Supp. 1964).

³³ N.Y. Sess. Laws 1870, ch. 77, § 10, as amended.

³⁴ For comparable provisions in a county charter, see the Charter of Suffolk County, N.Y. Sess. Laws 1958, ch. 278, § 1208.

³⁵ For a discussion of the powers of constables, see Morrison, *A Guide For Constables—New York* (1955).

³⁶ See 3 Antieau, *supra* note 4, at 426.

³⁷ 2 McQuillin, *supra* note 4, at 466.

³⁸ See, e.g., *Lane v. Johnson*, 283 N.Y. 244, 28 N.E.2d 705 (1940); *People v. Kane*, 43 App. Div. 472, 61 N.Y. Supp. 195 (2d Dep't 1899), *aff'd*, 161 N.Y. 380, 55 N.E. 946 (1900); *Neddo v. New York*, 194 Misc. 379, 85 N.Y.S.2d 54 (Ct. Cl. 1948), *aff'd*, 275 App. Div. 492, 90 N.Y.S.2d 650 (3d Dep't), *aff'd*, 300 N.Y. 533, 89 N.E.2d 253 (1949); *LaGuardia v. Smith*, 176 Misc. 482, 27 N.Y.S.2d 321 (Sup. Ct. N.Y. County 1941), *aff'd*, 262 App. Div. 708, 27 N.Y.S.2d 992 (1st Dep't), *aff'd*, 288 N.Y. 1, 41 N.E.2d 153 (1942).

The fact, then, that a grant of extraterritorial police power is made to a specific city by special legislation enacting that city's charter gives such special legislation status equivalent to any other type of statute enacted generally by the legislature. However, the validity of any such delegation of extraterritorial power still remains to be determined in accordance with the constitutional considerations mentioned earlier in this article.³⁹

III

ARREST BY AN OFFICER COMPARED WITH ARREST BY A PRIVATE PERSON

Assume that P is a peace officer employed by Village A. In the absence of applicable state statutory authorization, P cannot, in his official capacity, make an arrest without a warrant outside the territorial limits of Village A. And, if he does not act as a peace officer, he is unable to enjoy the protective safeguards of section 177 of the Code of Criminal Procedure which enumerates the cases in which an arrest may be made by an officer without a warrant.⁴⁰

New York, however, recognizes the validity of a citizen's arrest in certain cases.⁴¹ Thus, if P, the village policeman, sees a crime committed outside the corporate limits, there is no doubt that he can then and there make a lawful citizen's arrest of the offender because he is clearly acting within the terms of section 183 (1) of the Code of Criminal Procedure which permits a private person to arrest another "for a crime, com-

³⁹ See notes 11-12 *supra* and accompanying text.

⁴⁰ Section 177. A peace officer may, without a warrant, arrest a person.

1. For a crime, committed or attempted in his presence, or where a police officer as enumerated in section one hundred fifty-four-a of the code of criminal procedure, has reasonable grounds for believing that a crime is being committed in his presence.

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code.

Compare N.Y. Code Crim. Proc. § 180-a; *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).

For additional cases in which under some circumstances an arrest by a peace officer without a warrant is authorized, see N.Y. Code Crim. Proc. §§ 890 (vagrancy), 894 (vagrancy); N.Y. Vehicle and Traffic Law §§ 602 (leaving scene of accident without reporting and leaving scene of injury to certain animals without reporting), 1193 (drunken driving coupled with an accident).

⁴¹ N.Y. Code Crim. Proc. § 183 provides: A private person may arrest another

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence.

See also N.Y. Code Crim. Proc. § 895 (vagrancy); *People v. Foster*, 10 N.Y.2d 99, 176 N.E.2d 397, 217 N.Y.S.2d 596 (1961), reargument denied, 11 N.Y.2d 888, 227 N.Y.S.2d 1025, cert. denied, 371 U.S. 881 (1962).

mited or attempted in his presence."⁴² In the words of Chief Judge Desmond: "A private person like a police officer can arrest another 'for a crime committed or attempted in his presence.' The jurisdiction of a policeman and of a private person is in this instance the same."⁴³

Does this similarity extend to a search without a warrant incident to a lawful arrest? Granted that a search incident to a lawful arrest by an officer is permissible,⁴⁴ is this equally true in the case of a citizen's arrest?

In *United States v. Viale*,⁴⁵ a federal criminal prosecution involving the application of New York law on this point, the United States Court of Appeals of the Second Circuit stated:

The rationale that justifies searches incident to lawful arrests—as outlined in *United States v. Rabinowitz*, 339 U.S. 56, 60-61, 70 S. Ct. 430, 94 L. Ed. 653—would seem to apply with equal force whether the arrest is made by an officer or a private citizen. If the arrests were valid under § 183, the searches incidental thereto were valid also.⁴⁶

An officer's arrest and a citizen's arrest are thus on the same footing as far as any incidental search is concerned. In other respects, however, there are differences between them.

For example, although a private person may arrest a motorist whom he sees speeding in violation of law,⁴⁷ he (unlike an officer) is not permitted to exceed the speed limit in pursuing and arresting the offender.⁴⁸ Then, too, although criminal sanctions may be imposed under some circumstances for resisting an officer in the performance of his duty⁴⁹ as

⁴² See N.Y. Op. Att'y Gen. (1935), 54 State Dep't 25; N.Y. Op. State Compt. 64-127 (1964).

Before making an arrest, a private person "must inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the crime, or when he is arrested on pursuit immediately after its commission." N.Y. Code Crim. Proc. § 184. And a private person who has arrested another "must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer." N.Y. Code Crim. Proc. § 185.

⁴³ *People v. Foster*, supra note 41, at 102, 176 N.E.2d at 398, 217 N.Y.S.2d at 598.

⁴⁴ See, e.g., *People v. Lane*, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961). Compare N.Y. Code Crim. Proc. § 180-a; *People v. Rivera*, supra note 40.

⁴⁵ 312 F.2d 595 (2d Cir.), cert. denied, 373 U.S. 903 (1963).

⁴⁶ *United States v. Viale*, supra note 45, at 600; accord, *People v. Trimarco*, 41 Misc. 2d 775, 245 N.Y.S.2d 795 (Sup. Ct. N.Y. County 1963). But see, *People v. Alberta*, 37 Misc. 2d 847, 237 N.Y.S.2d 51 (Westchester County Ct. 1962).

⁴⁷ A traffic infraction is deemed a crime for purposes of a citizen's arrest under N.Y. Code Crim. Proc. § 183(1). See *Sutton v. Evans*, 6 Misc. 2d 952, 160 N.Y.S.2d 250 (Sup. Ct. N.Y. County), rev'd, 4 App. Div. 2d 580, 168 N.Y.S.2d 112 (1st Dep't 1957), appeal dismissed conditionally, 7 N.Y.2d 741, 162 N.E.2d 734, 193 N.Y.S.2d 647 (1959). A traffic infraction is likewise deemed a crime for purposes of arrest by an officer without a warrant pursuant to N.Y. Code Crim. Proc. § 177. See N.Y. Vehicle and Traffic Law § 155.

⁴⁸ See *People v. Nagell*, 23 Misc. 2d 452, 206 N.Y.S.2d 654 (J.P. Ct. Albany County 1960).

⁴⁹ N.Y. Pen. Law §§ 242(5), 1825, 1851. With respect to cases in which the use of force to make an arrest is authorized, see N.Y. Code Crim. Proc. §§ 174-75, 178; N.Y. Pen. Law §§ 246(1)-(2).

well as for refusing to aid an officer in making an arrest,⁵⁰ there are not comparable sanctions applicable to cases of arrest by private persons.

There is an additional reason why the citizen's arrest is unable to fill the gap in law enforcement resulting from territorial limitations on the authority of policemen to act in their official capacity. This reason relates to the restrictive character of section 183 of the Code of Criminal Procedure.⁵¹ In authorizing a private person to arrest another only "for a crime, committed or attempted in his presence" and "when the person arrested has committed a felony, although not in his presence," section 183 limits the use of a citizen's arrest to cases involving the actual commission of crime by the individual arrested. By the same token, section 183 precludes the use of a citizen's arrest in cases characterized by the "reasonable appearance" of criminal activity, although these are situations in which an officer may sometimes intervene without a warrant.⁵²

Thus, for example, assume that P, the peace officer employed by Village A, arrests D without a warrant in adjoining City B under circumstances where a felony has been committed and he has reasonable cause for believing D to have committed it. But assume, further, that D was not in fact the felon. In the absence of state statutory authorization for such an extraterritorial arrest, P could not, in his capacity as a village police officer, arrest D in the adjoining city. And a citizen's arrest in this case would be clearly beyond the scope of section 183 and thus illegal, thereby subjecting P to personal tort liability.⁵³

While an unlawful arrest, whether made by a peace officer or a private person, may subject the arrester to possible civil liability for damages and even perhaps to criminal prosecution, it should be noted that an unlawful arrest does not in itself invalidate subsequent judicial proceedings to determine the guilt or innocence of the person arrested. In this connection, the court stated in *Rose v. McKean*:⁵⁴

[S]ince the Magistrate had jurisdiction of the subject matter and the petitioner-defendant was physically before him, the manner in which the arrest was made is immaterial in determining the court's jurisdiction to proceed. The general rule has been that it is no defense to a criminal prosecution that the defendant was brought before the court by an illegal arrest . . .

While an unlawful arrest is an invasion of a person's constitutional rights under a democracy, it has been the policy of the law to protect the citizen from that violation of his rights by affording an action for damages for

⁵⁰ N.Y. Code Crim. Proc. §§ 104, 163, 169, 897; N.Y. Pen. Law § 1848.

⁵¹ See note 41 *supra*.

⁵² See N.Y. Code Crim. Proc. § 177, quoted *supra* note 40.

⁵³ See, e.g., *Doherty v. Lester*, 4 Misc. 2d 741, 159 N.Y.S.2d 219 (Sup. Ct. N.Y. County 1957).

⁵⁴ 190 Misc. 982, 76 N.Y.S.2d 391 (Sup. Ct. Bronx County 1948).

unlawful arrest and providing that an unlawful arrest is a crime. (Penal Law, § 1846). To permit the legality of an arrest to be considered in determining the jurisdiction of a court to hear evidence of the commission of a crime would inject an unnecessary impediment in the administration of criminal justice.⁵⁶

There are competing considerations of public policy respecting the wisdom of restricting as opposed to expanding the use of the citizen's arrest.⁵⁶ Without undertaking to assess the merits of these considerations, one basic proposition regarding extraterritorial law enforcement in this state is evident. This proposition is that the combined operative effect of sections 177 and 183 of the Code of Criminal Procedure does not solve the jurisdictional problems involved in the exercise of police power across municipal boundaries.

IV

CHAPTER 886 OF THE LAWS OF 1962

Extraterritorial law enforcement in New York involves not only the question of municipal police jurisdiction but also the related issue of the financial benefits and liabilities of the peace officers and municipalities connected with the exercise of police power beyond corporate limits.

In this latter connection, chapter 886 of the Laws of 1962⁵⁷ is significant. This law, which became effective on July 1, 1963, provides as follows:

Section 1. Whenever a police officer of any duly constituted police force or police department in the state dies, or is injured or disabled from performing his duties as a police officer as a result of injuries received while in the lawful exercise of his police powers anywhere in the state, such police officer and his dependants shall be accorded the same benefits he or they would receive had he been acting within the geographical confines of his employing municipality at the time of injury or death. Any such death, injury or disability occurring outside the employing municipality shall be deemed to have been sustained in the course of employment for purposes of all benefits receivable, provided such police officer was actually in the lawful exercise of his police powers at the time of injury or death.

§2. It shall be deemed a lawful exercise of police powers within the meaning of this act for a police officer:

(a) to transport a prisoner from the place of arrest to a place of confinement, as provided for by section one hundred sixty-two of the code of criminal procedure;

⁵⁶ *Id.* at 983-84, 76 N.Y.S.2d at 392-93. See the discussion of this subject, with citation of authorities, in *People v. Preble*, 39 Misc. 2d 411, 415-18, 240 N.Y.S.2d 845, 850-52 (Police J. Ct. Suffolk County 1963); *People v. Diamond*, 41 Misc. 2d 35, 244 N.Y.S.2d 901 (Sup. Ct. App. T. 2d Dep't 1963).

⁵⁶ Unlike New York, California, for example, permits a private person to arrest another: "3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." Cal. Pen. Code § 837. But see *Enright v. Gibson*, 219 Ill. 550, 76 N.E. 689 (1906).

⁵⁷ N.Y. Unconsol. Laws §§ 5701-03 (McKinney 1949, Supp. 1964).

(b) to retake a rescued or escaped prisoner or one who is attempting to escape;

(c) to deliver a material witness pursuant to the provisions of section six hundred eighteen-a of the code of criminal procedure;

(d) to serve a subpoena or court order or other lawful process upon a witness or party to a court action or proceeding;

(e) to follow, in hot pursuit, a person who has committed a crime or offense or who has violated a local law or ordinance;

(f) to effectuate an arrest pursuant to a warrant;

(g) to effectuate an arrest without a warrant in any case where such arrest is specifically authorized by law.

§3. Nothing in this act shall be deemed to:

(a) require the extension of any benefits to a police officer who at the time of his injury, death, or disability, is acting for compensation on behalf of anyone other than the police force or department by which he is employed;

(b) require the extension of any benefits to a police officer employed by a police force or department which, by charter, ordinance, rule or regulation expressly prohibits the activity giving rise to the injury, disability or death, whether such charter, ordinance, rule or regulation is now in force or is hereafter enacted or promulgated.

§4. This act shall take effect July first, nineteen hundred sixty-three.

As conceived by its sponsors, the basic purpose of this law is to provide financial protection to a police officer and his family when he is killed or injured in line of duty outside the geographical area of his employment. The statute undertakes to achieve this result by providing in substance that if a policeman is killed or injured while in the lawful exercise of police powers outside the territorial limits of his employing municipality, he is entitled to the same benefits he would have received had he been acting within the geographical confines of his employing municipality at the time of his death or injury.

Soon after its enactment, however, certain questions arose regarding the construction of the new legislation. In an attempt to resolve these questions and generally to improve and increase the effectiveness of chapter 886, the Advisory Committee to Study Certain Municipal Police Problems recommended the following changes in the statute:

1. The law should be amended clearly to include policemen of county police departments and of police districts.
2. It should be amended to provide that disablement need not occur as the result of an injury. For example, the General Municipal Law, §207-c, provides benefits to policemen when they are taken sick as a result of the performance of their duties.
3. The law should be amended to provide that death, injuries or disablement can be the result of either the lawful exercise of police powers or the performance of police duties. The term "police powers" would not always embrace the duties of a policeman.
4. The law is now limited to situations where the policeman acts within the State of New York. It should be broadened to cover situations

where the policeman must act either within or outside the State. For example, it is necessary, under certain circumstances, for a policeman to follow a person into another state in close pursuit and also to return to this State persons charged with crimes pursuant to the provisions of the Uniform Criminal Extradition Act.

5. The title of the law and the second sentence of §1 indicates that the death, injury or disability must occur "outside the employing municipality." It is possible that a policeman might be injured outside the employing municipality, but die in his own municipality as the result of such injury. Also, it would be very difficult to establish whether an illness actually did or did not occur outside the employing municipality.
6. The opening sentence of §2 of the law should be amended to refer to "police duties" as well as to police powers and should clearly indicate that such powers and duties, which are enumerated in §2, are merely illustrative and not all-inclusive.
7. Sub-paragraph "(e)" of §2 should be amended to delete reference to offenses and violations of local laws and ordinances. Such offenses and violations are not always crimes or infractions for which close pursuit should be authorized. Such sub-paragraph should be amended to refer to "close pursuit" instead of "hot pursuit"; also to indicate that such pursuit must be within the State and in relation to following persons who have committed either a crime or a traffic infraction.
8. A new sub-paragraph should be added in relation to following persons into another state, in close pursuit, in order to make an arrest pursuant to the provisions of §860 of the Code of Criminal Procedure.
9. Another sub-paragraph should be added to §2 to cover situations where the police officer is required to return to this State, pursuant to the provisions of the Uniform Criminal Extradition Act, a person charged in this State with a crime.
10. Sub-paragraph "(a)" of §3 should be amended to indicate that the employer of the police officer is the municipal corporation or police district and not the police force or department.
11. Sub-paragraph "(b)" of §3 should be amended to delete the present language and changed to read as follows:

"§3. Nothing in this act shall be deemed to: . . .

"b. Increase the powers or jurisdiction of any police officer."

Some municipalities have construed chapter 886 as having increased the jurisdiction of their police officers and have adopted very restrictive ordinances, rules or regulations which do not permit their policemen to exercise the normal police powers of a police officer outside the geographical confines of his employing municipal corporation or police district.

It is believed that the new language of sub-paragraph "(b)", which is consistent with (1) the present title of chapter 886, (2) the present provisions of §§1 and 2 thereof and (3) the statements in the legislative memorandum supporting the bill which became chapter 886, will relieve the fears of municipal officers and will result in fewer local restrictions applicable to their policemen. The new provision might also lead to the repeal, by some municipalities, of some of the existing restrictions recently adopted pursuant to the present sub-paragraph "(b)". We believe that the local police departments can adequately regulate the outside service of members of their police forces by reasonable rules and regulations.

These recommendations were incorporated in a bill which was passed by the 1964 Legislature.⁵⁸ The bill, however, was disapproved by the Governor.⁵⁹ In his veto message, the Governor stated, in part:

. . . I am constrained to withhold my approval because of certain features of the bill. Principal among these, is that the bill would repeal the power which employing municipalities now have to limit the authority of their policemen to take certain action outside the territorial limits of the municipality. Since the bill imposes liability upon municipalities for many acts of their policemen committed outside the municipality, it is not clear that the locality should be completely deprived of the power to limit the conduct of its police officers when outside the municipality.⁶⁰

Although the Advisory Committee has not as yet had an opportunity to consider and evaluate the Governor's suggestions, it will, of course, do so as it renews its efforts to find satisfactory ways to clarify and improve the language of chapter 886 of the Laws of 1962 or otherwise accomplish the objective of this legislation.

⁵⁸ (1964) Sen. Int. No. 3530, Pr. No. 3891 (Senator Edward J. Speno). This bill, together with an explanatory memorandum thereon setting forth the recommendations in the same form as they appear in this article, were drafted by a subcommittee of the Advisory Committee appointed for such purpose.

⁵⁹ See Governor's Veto Message No. 305 (April 23, 1964).

⁶⁰ *Ibid.*