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PROCEEDINGS IN A MAGISTRATE'S COURT UNDER THE LAWS OF NEW YORK

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SECTION 146 of the New York Code of Criminal Procedure defines a magistrate as an officer having power to issue a warrant for the arrest of a person charged with a crime. This broad definition embraces the judges of the Supreme Court, the County Courts and General Sessions of the County of New York, as well as a number of local courts of limited jurisdiction authorized by law to act in criminal matters. It likewise includes the mayors and recorders of cities.[1]

The term "magistrate" will be used here, however, in its restricted sense, as a judicial officer of what is technically known as an inferior court exercising criminal jurisdiction. The historical background of the office will be reviewed in a limited way, after which the magistrate's judicial powers will be discussed with special reference to the Penal Law and the Code of Criminal Procedure of the State of New York and the New York City Criminal Courts Act.

In *People ex rel. Pringle v. Conway*[2] the court made the following comment in reference to the Magistrates' Courts:

"These courts are of enormous importance. It is there that the first step is taken after apprehension of a prisoner that may ultimately lead by intermediate steps to his punishment by imprisonment or even death. The magistrates are vested with broad responsibilities. Their powers are extensive; their judgment must be keen to protect in one case the rights of a prisoner; in the other the rights of the public, which could be grievously harmed by the wrongful and unjustifiable discharge of a prisoner after presentation of evidence justifying his being held."[3]

The Magistrates' Courts of the City of New York are organized under an act of the legislature formerly known as the Inferior Criminal Courts Act of the City of New York.[4] The title of this act has since been changed. It is now known as The New York City Criminal Courts Act and governs both the Magistrates' Courts and the Court of Special Sessions of New York City. Many provisions of the Code of Criminal Procedure apply to both courts.

HISTORY OF THE OFFICE

The office of magistrate is far from being a modern creation. It has long roots extending deep into the past. To study an institution independ-

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1. N.Y. Code Cr. Pro. § 147.
2. 121 Misc. 620, 202 N.Y. Supp. 104 (Sup. Ct., Queens Co. 1923).
3. Id. at 621, 202 N.Y. Supp. at 105.
4. Laws of New York 1910, Ch. 659.

ently of its historical background yields a colorless and inadequate picture. An institution's origin, growth and development contribute meaning and significance to what it is today. These factors are inseparable from it, as birth and growth are inseparable from the present life of an individual.

W. Bruce Cobb, in his scholarly treatise on the Inferior Criminal Courts Act, as that act was known when he published his work in 1925, correctly points out that the office of magistrate "coincides, at least so far as the criminal side of the functions of a justice of the peace are concerned, with that office in historical origin."[5] The same observation applies to the office of justice of the Court of Special Sessions.

To trace the office of magistrate to its origin, therefore, we must consider the history of the office of justice of the peace, observing its initial character and the gradual development and enlargement of the criminal jurisdiction attached to it. This course carries us six centuries back into the history of English law, for the office had been known to the common law of England for a century and a half before Columbus discovered America.

These officers were originally mere conservators of the peace, exercising no judicial function. Their powers were enlarged from time to time, however, until they constituted a very important agency in the administration of local affairs in England, performing a great variety of duties connected with the support of the poor, the repair of highways, the imposition of parochial rates and other local affairs. They seem to have been invested with judicial powers for the first time by the statute 34 Edw. III, Ch. 1, which gave them power to try felonies, but only when two or more justices acted together. So, it is said by Blackstone, they then acquired the honorable appellation of justices.[6]

The historian Trevelyan in his *History of England* makes the following illuminating comment on the subject:

"In the reign of Edward III an addition was made to the state machinery, significant of much. Keepers or justices of the peace were set up in every county to help the central power to govern. Like the coroners before them, they were not bureaucrats, but independent country gentlemen. As typical of the rising class of knights and smaller gentry, the justices of the peace took over more and more of the work previously done by that great man, the sheriff, or by the judges on circuit. The 'J.P.s' seemed to strike root in the shire and grow as a native plant, equally popular with their neighbors and with the King's Council, between whom it was their task to interpret. For four hundred years their powers continued to increase, both in variety of function and in personal authority, till in the eighteenth century they were in a sense

5. Cobb, Inferior Criminal Courts Act 118 (1925).

6. See People ex rel. Lawrence v. Mann, 97 N.Y. 530, 533-534 (1885); Wenzler v. People, 58 N.Y. 516, 521, 522 (1874); People ex rel. Burby v. Howland, 17 App. Div. 165, 45 N.Y.S. 347, 349 (3d Dep't 1897), aff'd, 155 N.Y. 270, 49 N.E. 775 (1898). See also 31 American Jurisprudence § 2, 708; 35 Corpus Juris 448, 449, 450.

more powerful than the central government itself. This would not have happened if they had not responded to the needs and character of the English over a long period of time. According to Maitland, the respect in which the English hold the law was generated not a little by this system of 'amateur justice.' For the magistrate who expounded and enforced the law for ordinary people in ordinary cases may not have known much law, but he knew his neighbors and was known to them"[7]

At the beginning of the sixteenth century we find developing in England the germs of what is today a familiar function of a magistrate sitting in his committing capacity, viz., the preliminary examination. This proceeding before the justice of the peace developed slowly. Ever since the institution of these officers in the reign of Edward III, the duty of seeing to the arrest of suspected persons had been passing out of the hands of the sheriff into the hands of the justices. It was for the justices to admit the prisoner to bail, if by law he was entitled to bail, or to commit him to prison. Then the acts of 1554 and 1555 directed the justices to examine the prisoner and his accusers, to put the examination into writing, and send it to the court before which the prisoner was to stand trial.

Maitland, in his *Constitutional History of England,* points out, however, a basic difference in the role played by a justice of the peace in the conduct of a preliminary examination then and the role of a committing magistrate today. He says:

"However, we must not suppose that this examination was very like that to which we are now accustomed. The object of it is not to hold an impartial inquiry into the guilt or innocence of the prisoner, and to set him free if there is no case against him, but rather to question him and to get up the case against him; the justice of the peace here plays the part rather of a public prosecutor than of a judge."[8]

Another development of this period was that it became quite customary for the constables to make arrests pursuant to warrants issued by the justices. In the course of time their scope was widened, so that often the first step in the prosecution was an application to a justice of the peace for a warrant of arrest of a suspected person.

The office of justice of the peace was brought to this country by the English colonists. From the earliest colonial period it has existed here. By the code known as the "Duke's Laws" for the government of the colony of New York, promulgated in 1665, justices of the peace were commissioned for the towns in the province with the same powers as in England.

In the revision of the laws of 1788 in New York, when its legislature declared that none of the statutes of England should operate or be considered laws in this state, the provisions of the several English statutes on the subject of the proceedings against vagrants and disorderly persons

7. 1 Trevelyan, History of England bk. 2, c. 4, pp. 265, 266 (3d ed. reissue, 1952).
8. Maitland, Constitutional History of England, 233 (1st ed. 1920 5th reprint).

were embodied in the act of February, 1788, for apprehending and punishing disorderly persons. When the Revised Statutes were adopted in 1833, the substance of the former provisions of law were incorporated with some extensions as to the class of persons embraced therein, so as to include common gamblers, rope dancers, showmen, etc.[9]

In 1798, a police court was established in the city of New York to be held by any one of the special justices of the peace to be commissioned by the governor. The act declared that the chancellor, the justices of the supreme court, the mayor or recorder, or any one of the aldermen, might do any act therein or which they deemed requisite to be done as conservators of the peace.[10]

Although the office of police justice in New York City was abolished by Chapter 601 of the Laws of 1895, it is a fact of more than historical interest that the jurisdiction of these judicial officers passed substantially unimpaired to the magistrates who replaced them. In this connection, in the *Matter of Deuel v. Gaynor*[11], Clarke, J., said:

"While it is true that the former police justices and the former Court of Special Sessions were abolished and two new courts created, to wit, the City Magistrates' Courts and the Court of Special Sessions, yet the great body of the law applicable to the two former courts, except as changed or modified or as inconsistent with the act of 1895, was continued and made applicable thereto."[12]

Section 102 of the New York City Criminal Courts Act, relating to the general jurisdiction of the magistrates, contains the following provision:

"The chief city magistrate and the city magistrates of the city of New York are magistrates within the meaning of the provisions of the code of criminal procedure and the penal law, and the city magistrates' courts are police courts within the meaning of the provisions of the code of criminal procedure and the penal law. The chief city magistrate and the city magistrates have all the powers and jurisdiction possessed by city magistrates of the city of New York on the first day of April, nineteen hundred and ten."

THE MAGISTRATE'S JUDICIAL POWERS

Classification

We now pass to an examination of the magistrate's judicial powers. These will be discussed under three main headings in accordance with

9. Duffy v. People, 6 Hill (N.Y.) 75, 78 (1843).

10. See appendix to 3 Daly (N.Y.) 547, 553, 554 (1871) where there is an opinion written by Daly, Ch. J., upon the power of judges of the court of common pleas for the city and county of New York to act as justices of the peace within that county, in answer to an inquiry from a Virginia court.

11. 141 App. Div. 630, 126 N.Y. Supp. 112 (1st Dep't 1910).

12. Id. at 634, 126 N.Y. Supp. at 115. See also People ex rel. Dembinsky v. Fox, 182 App. Div. 642, 168 N.Y. Supp. 1008 (1st Dep't 1918) dealing with history of the Court of Special Sessions, a closely related subject.

the three separate and distinct judicial capacities in which a magistrate acts. They are:

1. As a committing magistrate;
2. As a court of special sessions;
3. As a magistrate exercising summary jurisdiction with respect to the offense charged.

As A Committing Magistrate

All crimes, in other words, all felonies and misdemeanors, from murder to a comparatively inconsequential charge in the latter category, come before the magistrate for preliminary examination in his committing capacity, unless the grand jury first indicts or it is one of the misdemeanors specified by law which he may try on consent as a court of special sessions and he so tries it. Due to the large number and variety of misdemeanors which may be thus tried by a magistrate sitting as a court of special sessions pursuant to sections 130 and 131 of the New York City Criminal Courts Act, the assumption of jurisdiction as a court of special sessions is familiar procedure in the Magistrates' Courts of the City of New York, particularly in Municipal Term. However, if the misdemeanor charged is not one on the list set forth in section 130 of that act, the magistrate may sit in his committing capacity only. If the case justifies it, he must hold the defendant for trial in the Court of Special Sessions.

The provisions of Chapter VII, sections 188-221b of the Code of Criminal Procedure must be carefully observed in the conduct of preliminary examinations. An historical note preceding the chapter states:

"The purpose of this chapter was to prevent the abuses under former provisions whereby the defendant was not always informed of his rights, and whereby his preliminary examination, unlimited by time, was frequently delayed until sufficient evidence could be amassed against him to warrant the magistrate to commit him. See Report of Commissioners on Practice and Pleadings, p. 84, submitted December 31, 1849."

When the defendant is arraigned, the magistrate must "immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had," and must allow the defendant a reasonable time to send for counsel. The examination must be completed at one session unless the magistrate, for good cause shown, adjourn it. The adjournment cannot be for more than two days at each time, unless by consent or on motion of the defendant.[13]

Sections 196-204, inclusive, relate to the conduct of the preliminary

13. N.Y. Code Cr. Pro. §§ 188, 189 and 191. See also N.Y.C. Criminal Courts Act § 115.

hearing itself. When the examination of the witnesses on the part of the People is closed, the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him (stating to him the nature thereof); that the statement is designed to enable him, if he sees fit, to answer the charge and to explain the facts alleged against him; that he is at liberty to waive making a statement; and that his waiver cannot be used against him on the trial. It is hardly necessary to point out that the waiver here referred to and a waiver of examination are two entirely different matters. When examination is waived, the magistrate holds the defendant to answer without hearing witnesses. When the defendant, during the progress of the hearing, waives his right to make a statement (or makes one, as the case may be), he still has the right to call witnesses on his behalf and have them sworn and examined.

As to the statement taken pursuant to section 198, it must be taken "without oath," in accordance with the express requirement of the statute. The defendant may not be questioned as to guilt or innocence.[14] The section prescribes that the magistrate must put to the defendant the following questions only:

"What is your name and age
Where were you born?
Where do you reside, and how long have you resided there?
What is your business or profession?
Give any explanation you may think proper, of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation."[15]

It has frequently been held that a magistrate is not required to exact the full measure of proof necessary to secure a conviction, but is obliged to hold the accused for trial if there is reasonable ground to believe him guilty. This is undoubtedly the law.[16] Sufficient cause for believing the defendant guilty, however, must be based on legal evidence.[17] An information may be filed for any offense disclosed by the papers, though

14. People v. Cascia, 191 App. Div. 376, 181 N.Y. Supp. 855 (2d Dep't 1920).

15. It is believed that serious thought should be given to a revision of section 198, for several reasons. 1. The Magistrate's request for "any explanation you may think proper," etc., should be stated in simpler language. The word "exculpation" is not suited to the vocabulary of the average defendant. 2. A statement of defendant made "without oath" is likely to be ineffective as an answer to the testimony of witnesses who have been sworn, regardless of the merits of its content. 3. Confining the magistrate to "the following questions only" (with but one that concerns the merits) impedes a complete inquiry and is disadvantageous to a defendant who through ignorance, timidity or lack of fluency, requires the assistance of further questioning to enable him to present fully his version of the facts.

16. People ex rel. Rao v. Warden of City Prison, 170 Misc. 834, 11 N.Y.S. 2d 63, (Sup. Ct., Queens Co. 1939); People ex rel. Giallarenzi v. Munro, 150 Misc. 41, 268 N.Y. Supp. 404, (Sup. Ct. Onondaga Co. 1934).

17. People v. Weiss, 147 Misc. 595, 261 N.Y. Supp. 646 (Mag. Ct. 1932).

one with which the defendant was not specifically charged before the examining magistrate. In the case of *People on complaint of McGovern v. Weisbard*[18] it was held that where the information charged larceny by false pretenses, but the testimony showed that defendant committed another crime, defendant could be held to answer on the latter charge. It is sometimes said that if a prima facie case is made out by the People, the magistrate is bound to hold him to answer. This cannot be the law, however, since it would deprive sections 198 and 201, under which defendant is accorded the right to make a statement and produce witnesses on his behalf, of any real purpose. While a preliminary examination is not intended to usurp the function of a trial court, it is intended to provide a satisfactory means for a realistic appraisal of the merits of a case.[19]

A word should be said at this point concerning the arraignment of defendants before magistrates on short affidavits in the absence of complainants. This practice is authorized by section 107 of the New York City Criminal Courts Act in cases where the charge is a felony or assault in the third degree as defined in subdivision 2 of section 244 of the Penal Law (vehicular assault). Where the officer is unable at the time of arraignment to produce the defendant, either by reason of physical injury or disability or owing to temporary absence, or that the evidence is not complete, and he presents an affidavit to such effect, the magistrate may, in his discretion, hold the defendant to bail, if the offense be a bailable one, or in default of bail, commit the defendant to the city prison for a period not to exceed forty-eight hours, or for a longer time by the consent of the defendant. But the magistrate may, in the case of personal injury, where the complainant is under medical care or is confined to a hospital, adjourn the hearing in any case from time to time to await the result of such injuries on the affidavit of a regularly licensed physician, or in the case of a hospital, on the certificate of a physician of such hospital.

As a matter of practice, where the injuries necessitate hospitalization for a considerable period, the magistrate occasionally goes to the hospital, takes the information, and holds the arraignment and hearing there. The purpose of this section is to prevent the defeat of the proceeding in cases where a complainant or a material witness can not or does not appear when the prisoner is first arraigned. Before the enactment of this statute, where a sufficient information could not be presented on arraignment, the

18. 139 Misc. 385, 248 N.Y.S. 399, (Mag. Ct. 1931). See also Matter of Paul, 94 N.Y. 497, 503 (1884); St. Lawrence County v. Goldberg, 175 App. Div. 88; 161 N.Y. Supp. 641 (3d Dep't 1917); People v. Hamilton, 183 App. Div. 55, 170 N.Y. Supp. 705 (1st Dep't 1918), aff'd, 230 N.Y. 577, 130 N.E. 900 (1920).

19. People on complaint of Adler v. Bieber, 100 N.Y.S. 2nd 821, (Mag. Ct. 1950).

defendant was entitled to a prompt discharge.[20] The section has been liberally construed in cases where the administration of justice requires several adjournments of not more than forty-eight hours each in order to enable the District Attorney to bring his evidence to completion and where he has a reasonable prospect of doing so, even though there be no physical injury to complainant. Very serious cases arise at times, where the interests of justice require such action even over the objection of defendant's counsel. If the defendant is not on bail and counsel wishes to test the propriety of the magistrate's action, he may do so by way of a writ of habeas corpus.

A preliminary examination may be broken off and begun *de novo* either before the same or another magistrate at a later date. Such a hearing being merely an inquiry and not a trial, there is no double jeopardy involved. A case will not be resubmitted to the magistrate for taking further proofs where he has once held the accused for trial, although there may be a resubmission where he has discharged the accused on examination.[21] The finding by the magistrate that there is reasonable and probable cause to hold the accused is conclusive on the Court of Special Sessions, and that court, having jurisdiction, must proceed to trial.[22]

As a Court of Special Sessions

Reference has been made above to Section 130 of the New York City Criminal Courts Act which contains a list of many misdemeanors which may be tried by a city magistrate by consent as a court of special sessions. When the magistrate thus presides, the court in which he sits becomes in every respect a court of special sessions, with all of the powers and jurisdiction as to taking of plea, trial and sentence possessed by that court.[23] An appeal is to the Appellate Division of the Supreme Court in the appropriate judicial department.

Section 131 of the Act lays down in detail the procedure which must be followed when a magistrate proceeds to the holding of a court of special sessions. Since its provisions are jurisdictional, they must be scrupulously adhered to. The procedure is as follows:

1. The defendant shall be advised that he has the right to be tried by

20. People ex rel. Persch v. Flynn, 64 Misc. 278, 118 N.Y. Supp. 532 (Sup. Ct., N.Y. Co. 1909).

21. People v. Doria, 30 N.Y. Cr. Rep. 222, (Spec. Sess. 1913). See also People v. Dillon, 197 N.Y. 254, 90 N.E. 820 (1910); People v. Steiger, 154 Misc. 538, 277 N.Y. Supp. 602 (Ct. Gen. Sess. 1935).

22. People v. Doria, supra note 21.

23. People ex rel. Dembinsky v. Fox, 182 App. Div. 642; 168 N.Y. Supp. 1008 (1st Dep't 1918).

the Court of Special Sessions provided for in articles two and three of the Act.

2. The defendant may at any time before the court hears any testimony upon the trial demand to be tried by the Court of Special Sessions provided for in articles two and three of the Act, or the District Attorney or the legal representative of a department of the state or city in charge of the prosecution, at any time before the court hears any witness to give evidence upon the trial, may demand that the trial be held in the Court of Special Sessions as provided in articles two and three of the Act, or the magistrate may, on his own motion, before any witness is heard to give evidence upon the trial, direct that the trial be held in the Court of Special Sessions as provided in articles two and three. In any such instance the city magistrate shall sit as a magistrate, and if the defendant shall not waive examination, shall proceed to examine the case, and as the evidence warrants, either discharge the defendant or hold the defendant to answer for trial before the Court of Special Sessions as provided in articles two and three.

3. In every other case, the plea of the defendant shall be taken and the action tried and determined in such Court of Special Sessions held by a city magistrate and the city magistrate shall exercise with regard thereto all the powers and jurisdiction of the Court of Special Sessions provided for in articles two and three of the Act.

4. After conviction or a plea of guilty, if sentence be postponed for any reason, sentence may be imposed by a court of special sessions held by the same or any other magistrate or by the magistrate presiding in the probation court.[24]

The violation of any provision of any code, rule or order enacted or issued by any department, bureau, board or commission of the State or of the City of New York comes within this jurisdictional field. So do violations of the Labor Law, of the Multiple Dwellings Law, of provisions of the Administrative Code of the City of New York and of local laws and ordinances thereof punishable as misdemeanors. Misdemeanors enumerated in article eighty-eight of the Penal Law entitled "Gambling" and those enumerated in the Alcoholic Beverage Control Law are likewise triable by a magistrate holding a court of special sessions. The same is true of misdemeanors under the Vehicle and Traffic Law, including such important ones as driving while intoxicated and leaving the scene of an accident. Still others are enumerated in section 130 of the New York City Criminal Courts Act.

24. The section, as now worded, is from former section 131 which was repealed by Laws of 1946, c. 924. The present section became effective Apr. 22, 1946.

AS A MAGISTRATE WITH SUMMARY JURISDICTION OF THE OFFENSE CHARGED

Under this heading are included all cases where the magistrate sits in his capacity as such, with plenary power of trial and final disposition. All of the offenses respecting which he thus exercises summary jurisdiction are less than crimes. In other words, they are neither felonies nor misdemeanors.

A convenient classification is as follows:

1. Traffic infractions;
2. Violations of corporation ordinances and municipal by-laws where not expressly declared by law to be misdemeanors;
3. Disorderly conduct (except under sections 720, 721 and 726 of the penal law, which concern misdemeanors);
4. Disorderly persons;
5. Vagrancy;
6. Wayward minors;
7. Public intoxication.

TRAFFIC INFRACTIONS

The Vehicle and Traffic Law in article 1, section 2, subdivision 29, defines a traffic infraction as the "violation of any provision of this chapter, or of any local law or ordinance governing or regulating traffic, where a penalty or other punishment is prescribed and which is not expressly declared by this chapter to be a misdemeanor or a felony." "A traffic infraction," the section continues, "is not a crime, and the penalty or punishment imposed therefor shall not be deemed for any purpose a penal or criminal penalty or punishment, and shall not affect or impair the credibility as a witness, or otherwise, of any person convicted thereof."

Sec. 102a of the New York City Criminal Courts Act provides that "A city magistrate shall have exclusive jurisdiction to hear and determine any complaint alleging a violation of any provision of law, rule or regulation relating to vehicular or pedestiran traffic." In the case of *People v. Oboler*[25] it was held that this section does not divest the Court of Special Sessions of jurisdiction over violations of the Vehicle and Traffic Law which by provisions of that statute are misdemeanors.

DISORDERLY CONDUCT

Most of the disorderly conduct cases are heard by the magistrates upon complaints charging violations of section 722 of the Penal Law. This statute is a lengthy one setting forth in eleven subdivisions (the twelfth relates exclusively to evidence) various acts constituting the offense of disorderly conduct. "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned," says

25. 276 App. Div. 908, 94 N.Y.S. 2d 57 (2d Dep't 1950).

the statute, "commits any of the following acts, shall be deemed to have committed the offense of disorderly conduct."

It is clear from the language of the statute, as well as from the reported cases construing same, that it is not necessary to show that the act in question actually resulted in a breach of the peace. If it was calculated to and likely to produce such a result, that is sufficient. The test is whether defendant's behavior at the time, in the place and under the circumstances prevailing, led to or was reasonably likely to lead to disorder or public disturbance. The act complained of must be more than bad manners; it must be substantial.[26]

The act must be public in character. In *People v. Monnier*[27] the Court of Appeals held that one who called a woman on the telephone and applied to her foul epithets which were overheard only by the telephone operator was not guilty of disorderly conduct.

The case of *People v. Perry*,[28] decided by the Court of Appeals in 1934 is of particular interest on this point. The episode, a physical altercation, upon which the charge of disorderly conduct was founded, occurred in a public restaurant at four o'clock in the morning. The door was locked, the place was closed for the night and it was not fully lighted. So it was not then open to the public. The only person present, other than those engaged in the altercation, was a cook employed in the restaurant. There was no one in the adjacent street save three witnesses for the People who saw the occurrence. It appeared from their testimony that they were not annoyed or disturbed. No inappropriate language was heard. The court reached the conclusion that "the acts of the appellants, as described by the People's witnesses, cannot reasonably be held to have tended in the undisputed circumstances to such a disturbance of the tranquility of the People of the State as to have constituted 'disorderly conduct' in violation of the Penal Law."[29] Therefore, the judgments of conviction were reversed and the information was dismissed.

Later, in *People v. Oczko*,[30] the Court of Appeals reversed the conviction of a husband for disorderly conduct based upon his wife's testimony that he had assaulted her in their apartment and addressed her in vile language, there being no evidence that anyone else was present. The same court reached the same conclusion in *People v. McCauliff*,[31] a like case involving a husband and wife while alone in their apartment. In

26. People v. Nixon, 248 N.Y. 182, 161 N.E. 463 (1928); People v. Reid, 180 Misc. 289, 40 N.Y.S. 2d 793 (Co. Ct. Madison Co. 1943).

27. 280 N.Y. 77, 19 N.E. 2d 789 (1939).

28. 265 N.Y. 362, 193 N.E. 175 (1934).

29. Id. at 365, 193 N.E. at 177.

30. 272 N.Y. 604, 5 N.E. 2d 353 (1936).

31. 267 N.Y. 581, 196 N.E. 590 (1935).

both of these cases the public aspect was absent. As the court had pointed out in the *Perry* case, "In the orthodox language of an indictment, any criminal act is against the peace and dignity of the People, but not every criminal act is a breach of the peace in the common law sense of the term."[32]

While disorderly conduct is an offense, and not a crime, it is in the nature of a crime and the same rules of law and procedure are to be followed as where the accused is charged with a felony or misdemeanor.[33] The constitutional right of not being twice placed in jeopardy for the same offense is available to the defendant. The swearing of a witness and the giving of any actual testimony begins a trial and places the defendant in jeopardy. Unless a mistrial is stipulated, a magistrate may not, under these circumstances, break off the trial to have it begun *de novo* before himself or another magistrate.[34]

Disorderly Persons

Proceedings respecting disorderly persons are governed by Title VII, sections 899-913 of the Code of Criminal Procedure. This offense is not to be confused with disorderly conduct. Indeed, accurately speaking, it involves a condition, a status, rather than a specific penal offense. Persons who actually abandon their wives or children without adaquate support or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means, are disorderly persons. So are fortune tellers, keepers of bawdy houses, gamesters and habitual criminals. The last-named are dealt with specifically and at length in sections 510-514a of the Code of Criminal Procedure. The statutes relating to the trial and disposition of cases involving alleged disorderly persons must be strictly followed, since proceedings thereunder involve drastic summary action. The offense must be clearly proved.[35]

Section 900 of the Code of Criminal Procedure, relating to the arrest of persons charged with the offense, provides in part as follows:

"Upon complaint on oath, to a magistrate against a person, as being disorderly, the magistrate must issue a warrant, signed by him, with his name of office, requiring a

32. Supra note 28 at 364, 193 N.E. at 177.

33. People v. Gilbert, 12 N.Y.S. 2d 632, (Spec. Sess., App. Pt. 1939). See also People v. Montgomery, 17 N.Y.S. 2d 71 (Co. Ct., Chenango Co. 1940).

34. People v. Brewster, 241 App. Div. 467, 273 N.Y. Supp. 16 (1st Dep't 1934); People v. Goldfarb; 152 App. Div. 870, 138 N.Y. Supp. 62 (1st Dep't 1912) aff'd, 213 N.Y. 664, 107 N.E. 1083 (1914).

35. People v. Melvin, 172 Misc. 1038, 16 N.Y.S. 2d 984 (Spec. Sess. App. Part 1939); People v. Meyer, 124 Misc. 285, 207 N.Y. Supp. 741 (Co. Ct., Erie Co. 1925). See also People v. Schenkel, 140 Misc. 843, 252 N.Y.S. 415 (Co. Ct., Saratoga Co. 1931), aff'd, 258 N.Y. 224 179 N.E. 474 (1932).

peace officer to arrest the defendant, and bring him before the magistrate for examination . . ."

The Court of Appeals held in *People v. Phillips*[36] that a magistrate did not have jurisdiction to convict the defendant of being a disorderly person where the offense charged was that he had no visible profession or calling by which to maintain himself. The magistrate could have had jurisdiction by virtue of defendant's gaming, but the police officer who brought him before the magistrate had not first obtained a warrant of arrest upon complaint on oath. The court held that since the proceeding, was in derogation of the common law, the magistrate could acquire jurisdiction only by the process prescribed by section 900.

In the legislative session of 1953, section 900 was amended by adding the following sentence:

"However, where an offense, in violation of subdivision three of section eight hundred ninety-nine, is committed in the presence of a peace officer, said peace officer may arrest the violator without a warrant."[37]

Subdivision three concerns "persons pretending to tell fortunes or where lost or stolen goods may be found . . . ." This constitutes the only exception. In all other cases of alleged violation of section 899, the police officer must obtain a warrant of arrest on complaint on oath, as prescribed by section 900, before arresting the defendant.

VAGRANCY

Title VI of the Code of Criminal Procedure, sections 887-898, governs proceeding respecting vagrants. Section 887 defines what persons are vagrants.

Subdivision 1 of section 887 defines "A person who, not having visible means to maintain himself, lives without employment," as a vagrant. Much caution is required in the practical application of this subdivision. It must not be taken too literally. The statute has reference to those hangers-on of society, ne'er do wells, loafers who stand around street corners and public places without any visible means of employment, persons who refuse to work when employment is available and are apt to become public charges through sheer laziness.[38] A person who lives without employment is not a vagrant, if he has sufficient means belonging to himself or means provided for him in a legitimate way. What constitutes "visible means to maintain himself" is difficult of precise definition or measurement, so every charge of vagrancy under subdivision 1 must be

36. 284 N.Y. 235, 30 N.E. 2d 488 (1940).
37. Laws of 1953, c. 567, eff. July 1, 1953.
38. People v. Sohn, 269 N.Y. 330, 199 N.E. 501 (1936).

fairly and reasonably weighed in accordance with the particular facts presented and in the light of all the circumstances.[39]

Under the statute, a person who is an habitual drunkard, and abandons, neglects and refuses to aid in the support of his family, is a vagrant. A person who has contracted an infectious or other disease in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health, is a vagrant.

Under subdivision 10, a person who has been more than once convicted as a pickpocket, thief, or burglar, and having no visible means of support, is found loitering about the public places specified in the statute, and unable to give a satisfactory explanation of his presence, is a vagrant. While properly authenticated fingerprint records showing previous convictions of the specified crimes are here admissible in evidence to establish presumptively that the defendant is the same person so previously convicted, standing alone, they are not sufficient. Further proof consisting of the original or exemplified copies of the information, conviction, sentence and commitment in the proceedings wherein the previous convictions were had, is necessary to establish that the defendant had been more than once convicted as a pickpocket, thief or burglar.[40] It is clear that the same proof is essential to a conviction under section 898a (summary punishment of professional criminals) where proof is required that the defendant has at some time been convicted of being "a professional thief, burglar, pickpocket, counterfeiter or forger . . . ." Under the express language of that section, the defendant is entitled to a rehearing of the evidence upon a writ of habeas corpus.

Returning to subdivision 10 of section 887, it may be noted that, although pickpockets are usually convicted under section 722, subdivision 6 of the Penal Law (disorderly conduct—jostling) such a conviction has been held to be for disorderly conduct only, and not for pickpocketing and hence does not meet the requirements of subdivision 10 as proof that the defendant had been previously convicted as a pickpocket.[41]

Subdivision 4 of section 887 specifies a number of acts relating to prostitution, the commission of any one of which makes a person subject to adjudication as a vagrant. Section 350 of the Multiple Dwelling Law defines several offenses under the heading of vagrancy, relating to prostitution. That section provides that "the procedure in such cases shall be the same as that provided by law in other cases of vagrancy."

39. People on complaint of Moody v. Johnaken, 196 Misc. 1059, 94 N.Y.S. 2d 102 (City Ct., New Rochelle 1950).

40. People v. Fine and Harris, 140 Misc. 592, 251 N.Y. Supp. 187, (Spec. Sess., App. Pt. 1st Dep't 1931).

41. People v. Zuckerman, 140 Misc. 756, 250 N.Y. Supp. 376 (Spec. Sess., App. Pt. 1st Dep't 1931).

WAYWARD MINORS

Title VII A of the Code of Criminal Procedure contains the sections relating to wayward minor proceedings. These are 913a—913d, inclusive. Section 913a, as amended by chapter 736 of the laws of 1945, defines a wayward minor as follows:

"Any person between the ages of sixteen and twenty-one who either (1) is habitually addicted to the use of drugs or the intemperate use of intoxicating liquors, or (2) habitually associates with dissolute persons, or (3) is found of his or her own free will and knowledge in a house of prostitution, assignation or ill-fame, or (4) habitually associates with thieves, prostitutes, pimps, or procurers, or disorderly persons, or (5) is wilfully disobedient to the reasonable and lawful commands of parent, guardian or other custodian and is morally depraved or is in danger of becoming morally depraved, or (6) who without just cause and without the consent of parents, guardians or other custodians, deserts his or her home or place of abode, and is morally depraved or is in danger of becoming morally depraved, or (7) who so deports himself or herself as to wilfully injure or endanger the morals or health of himself or herself or of others, ..."

Waywardness is not a crime, but a moral delinquency, to be corrected in the interest of the minor and the state. A defendant is not "found guilty" of an offense, but is "adjudged" a wayward minor, which is a status or condition. The charge must be established upon competent evidence upon a hearing. Thus, in the case of *People v. Slater*[42] it was held that a magistrate's adjudication finding defendant to be a wayward minor because of habitually associating with dissolute persons, endangering her morals, could not be sustained where the original and amended returns showed that the magistrate did not take all of the testimony of the witnesses on the hearing.

The defendant is entitled to all the safeguards surrounding trials, especially in view of the fact that adjudication as a wayward minor might result in commitment to a reformative institution for an indeterminate period not to exceed three years.[43] Accordingly, the charge must be established by witnesses who have been sworn and who have given their testimony under oath at the time of the hearing. A plea of guilty may not be taken. In *People ex rel. Peltz v. Brewster*[44] it was held that where the commitment for waywardness was illegal because entered on a plea of guilty, the minor should be unconditionally released in a habeas corpus proceeding.

Section 913c provides that any person adjudged a wayward minor, before commitment to an institution, shall, so far as practicable, be placed on probation for a period not to exceed two years, and in no event

42. 176 Misc. 641, 29 N.Y.S. 2d 164, (Co. Ct., Schoharie Co. 1941).

43. People v. Harris, 132 Misc. 741, 230 N.Y. Supp. 767 (Spec. Sess., App. Pt. 1928). N.Y. Code Cr. Pro., § 913c.

during any part of the last year of his or her minority, subject to the provisions of law applicable to persons placed on probation.

PUBLIC INTOXICATION

In the writer's experience as a city magistrate in the City of New York, covering a period of twenty-three years, he has never had before him a complaint charging public intoxication as a distinct and separate offense, although an allegation of public intoxication is often embraced in a complaint charging some other offense of which a magistrate has summary jurisdiction, usually disorderly conduct.

Section 1221 of the Penal Law, dealing with intoxication in a public place expressly states that it shall not apply to the City of New York. Judge Cobb, in his treatise on the Inferior Criminal Courts Act of the City of New York, makes the following comment:

"By section 88 of this Act, infra, as well as 88*a*, [since renumbered as sections 120 and 121 of the New York City Criminal Courts Act] provision is elaborately made as to commitment of 'persons convicted of public intoxication,' but this supplies no substantive law, but rather implies an offense the existence of which is shrouded in mystery."[45]

Section 121 refers to a future time "When a board of inebriety shall have been appointed in the city of New York and when the said board shall have certified in writing to the mayor that the hospital and industrial colony of the said board is ready to receive inmates . . . ." etc. Since the conditions prescribed in the section have not yet been complied with, we are not concerned with it at the present time.

Section 120 does not expressly state that intoxication in a public place is an offense in the city of New York. It rather implies that this is a fact by providing for the present commitment and punishment of persons convicted thereof. The act is inhibited by penalizing it, thus necessarily implying the offense. Hence we may, with sound reason, apply a well-established canon of statutory construction, viz., that whatever is necessarily implied in a statute is as much a part thereof as if written therein, and conclude that intoxication in a public place is an offense in the city of New York.[46]

BAIL

Fixing bail is an important magisterial function, regardless of which of the three judicial capacities a magistrate may act in at a given time.

44. 232 App. Div. 1, 248 N. Y. Supp. 599 (1st Dep't) aff'd, 256 N.Y. 558, 177 N.E. 139 (1931). See also People ex rel. Deordio v. Palmer, 230 App. Div. 397, 244 N.Y. Supp. 727 (2d Dep't 1930).

45. Cobb, Inferior Criminal Courts Act 160 (1925).

46. Statutes and Statutory Construction, McKinney's Cons. Laws of New York, Book 1, Sec. 75.

Whether a judge of a criminal court should fix bail or parole, or, if he fixes bail, what the amount should be, are questions involving serious judicial responsibility.

Bail, of course, should never be used as a punitive measure. Its sole purpose is to assure the presence of the defendant in court. While the provision of the Federal Constitution against excessive bail does not affect state courts, it may be noted that New York State has a like provision in Article I, section 5 of its constitution.

Section 103 of the New York City Criminal Courts Act provides in part that "The city magistrates in the city of New York shall have the power and jurisdiction to admit to, fix and accept bail before indictment in all cases, *other than those specified in section five hundred fifty-two of the code of criminal procedure,* where a judge of the general sessions in the city of New York or a county judge of any of the counties whose boundary is within the territorial limits of the city of New York has such power; and to admit to, fix and accept bail in cases in which a justice of the supreme court or a county judge has such power under sections eight hundred forty-five and eight hundred forty-six of the code of criminal procedure."

Section 552 of the Code of Criminal Procedure imposes certain important limitations upon the power of a magistrate to fix bail. These limitations apply to all felonies, without exception, and also to certain misdemeanors and offenses enumerated therein. The specified misdemeanors and offenses are as follows:

1. illegally using, carrying or possessing a pistol or other dangerous weapon;
2. making or possessing burglar's instruments;
3. buying or receiving stolen property;
4. unlawful entry of a building;
5. aiding escape from prison;
6. that kind of disorderly conduct defined in subdivisions 6 and 8 of section 722 of the penal law;
7. violations of sections 483, 483*b* and 1140 of the penal law;
8. that kind of sodomy or rape which is designated as a misdemeanor;
9. any violation of any provision of article 22 of the public health law relating to narcotic drugs which is defined as a misdemeanor by section 1751*a* of the penal law.

Subdivision 6 of section 722 of the Penal Law relates to the offense known as "jostling," the section under which pickpockets are usually arrested. Subdivision 8 of the same section concerns loitering in a public place soliciting men for an immoral purpose. Sections 483 and 483b relate to certain crimes against children. Section 1140 covers exposure of the person, a misdemeanor. With respect to all felonies and the misdemeanors and offenses specified in the section, the fingerprints of the defendant must be taken before the magistrate considers fixing bail. If

the defendant be charged with a felony or with any of the misdemeanors or offenses listed, and it appears from his fingerprint record or otherwise that there is reason to believe that he has either been previously convicted of a felony or has been twice convicted of any one of such misdemeanors or offenses or any two of them, the magistrate is without power to fix bail. A prisoner in that position, if he wishes to be admitted to bail, must apply to a justice of the Supreme Court, to a judge of the Court of General Sessions or to a judge of the County Court of the County where the defendant is charged.

Magistrates, of course, differ in length of service and experience, but this observation applies to the judges of any court. The exercise of the bail function is so frequent in the daily work of a magistrate in a very large city, however, that he has ample opportunity to develop wise discretion and sound judgment in the discharge of that responsibility. Section 552, as it now stands, seems to the writer to be an unnecessarily complicated statute, cumbersome in administration, and could be simplified to advantage, at least in its application to the busy courts of New York City, where crowded calendars are the rule, rather than the exception.

Conclusion

To cover completely the office of magistrate and all of the proceedings in magistrates' courts would require a volume. Hence many fields wherein magistrates are authorized by law to act are not dealt with here. Such, for example, are extradition proceedings, proceedings when a defendant appears to be insane or a mental defective, proceedings in relation to drug addicts, probation and commitment powers, proceedings against corporations, compromise of certain crimes by leave of court, search warrants, administrative powers, etc. The impracticability of essaying so much in a paper of this length is obvious. It is hoped, nevertheless, that the writer's treatment of the subject within limits that are feasible will be of interest, not only to law students, but to members of the bar generally, and particularly to the large number of practitioners who only occasionally find themselves confronted with a problem involving the administration of the criminal law.