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The Third Degree

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THE THIRD DEGREE

A GREAT deal has been written and said recently about the third degree. The "third degree" is that misconduct or brutality, or both, used by the police in an effort to extort from a person arrested for crime a confession of his guilt. Such misconduct or brutality is especially reprehensible because the person mistreated is in the power of the police. An admission of guilt so obtained is of no value to the prosecution.[1] Testimony of such misconduct or brutality, though untrue, often has resulted in the acquittal of persons who were known to be guilty.

During my terms as District Attorney of New York County, I heard much of the third degree. A peculiar fact is that it is more talked about than practiced. At least, that was my experience. Whether that is the condition that exists now or not, I cannot say; but I presume that with the same police force which was functioning during the period that I was District Attorney, the conditions are about the same as they were then. But whether it is practiced seldom or often is of little consequence. One case of police brutality is one too many. Anyway, the average person believes it is practiced, and something should be done to correct that common impression.

If the subject were not so serious, it would be amusing to read and hear what is said about it. One suggestion recently was that there should be legislation to compel the police to take the person arrested immediately before the magistrate. It has been overlooked by those who have written and talked about the subject, that there now exist laws against detaining a defendant beyond an unnecessary time before he is taken before the magistrate. But it is one of the defects of government that even intelligent persons are not conversant with the provisions of laws enacted for the benefit of the people.

In that chapter of the Code of Criminal Procedure which relates to the warrant of arrest, it is provided in Section 165 as follows:

[1] Code of Criminal Procedure §395; People v. Doran, 246 N. Y. 409, 159 N. E. 379 (1927); People v. Weiner, 248 N. Y. 118, 161 N. E. 441 (1928); People v. Barbato, 254 N. Y. 170, 172 N. E. 458 (1930).

> "The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

The arresting officer who fails to take a prisoner before a magistrate without unnecessary delay becomes a trespasser *ab initio,* and is liable to an action for damages for false imprisonment.[2]

The legislature decided long ago that this civil liability would not be sufficient to compel the arresting officer to carry out the mandate of the statute, and Section 1844 of the Penal Law (which, by the way, was derived from Section 118 of the old Penal Code) was enacted as follows:

> "A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

It seems that these provisions of the law meet the demand for legislation to the extent of requiring an immediate arraignment.

Since the enactment of some of the so-called Baumes Laws, it has become necessary for the arresting officer first to take his prisoner to a place fixed by the regulations of the Police Department to have the accused fingerprinted.[3] This is to enable the magistrate to act upon the defendant's application for bail. Such action on the part of the police officer would not be regarded as "unnecessary delay" but any action beyond that might be so regarded.

Of course, an arrest may be made after adjournment, even, of the night court, but the prisoner should be taken before the magistrate at the next opening of court.

In the Magistrates Courts, the defendant's rights are safeguarded. The magistrate must immediately inform the defendant of the charge against him, and of his right to the

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[2] Poster v. Began, 9 Misc. 547, 30 N. Y. Supp. 657 (1894); Davis v. Carroll, 172 App. Div. 729, 159 N. Y. Supp. 568 (4th Dept. 1916).

[3] Code of Criminal Procedure §552a.

aid of counsel in every stage of the proceedings, and before further proceedings are had.[4] The magistrate must also allow the defendant a reasonable time to send for counsel and adjourn the examination for that purpose. Upon the request of defendant, the magistrate must require a peace officer to take a message to such counsel as the defendant may name. The officer must without delay and without fee perform that duty.[5]

On appearance of counsel, or after waiting a reasonable time for him, the examination must proceed immediately, unless the defendant waives examination and elects to give bail.[6] The examination must be completed at one session unless the magistrate, for good cause shown, adjourns it, in which event the adjournment cannot be for more than two days at each time, unless by consent or on motion of the defendant.[7] At the examination, the magistrate must, in the first place, read to the defendant the depositions of the witnesses examined on the taking of the information, and, if the defendant requests it, or elects to have the examination, the magistrate must summon for cross-examination the witnesses so examined, if they be in the county. He must also issue subpœnas for additional witnesses on the request of the defendant or the prosecutor.[8]

The witnesses must be examined in the presence of the defendant and may be cross-examined in his behalf.[9]

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 the defendant the nature of the charge; that the statement is designed to enable him, if he see 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.[10]

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[4] *Ibid.* §188.
[5] *Ibid.* §189.
[6] *Ibid.* §190.
[7] *Ibid.* §191.
[8] *Ibid.* §194.
[9] *Ibid.* §195.
[10] Ibid. §§196, 197.

The Code of Criminal Procedure then provides in detail for the making of the statement, questions to be propounded, the manner of reducing it to writing, the reading to the defendant of the questions propounded to him, and the right of the defendant to make such corrections to his answers, until his statement is made conformable to what he declares to be the truth; the certification by the magistrate; the exclusion of witnesses during the hearing; the employment of a stenographer, and the methods of keeping and returning the depositions and other papers.[11]

If the defendant is held and the case is one in which the law permits bail to be given, he may give bail and the magistrate fixes the amount of the bail to be required.[12]

So far, the law provides for the complete protection of the defendant when he is in court. The reason that a statement or confession of a defendant is sought out of court possibly grows out of the provision in Section 196 of the Code of Criminal Procedure that the defendant need not answer questions propounded to him and that his waiver cannot be used against him on the trial.

This is the provision in the present procedure which should be changed in order to protect the one accused of crime against efforts on the part of the police and others to extort from him a confession, if for no other reason.

The law should provide that the defendant should be questioned before the magistrate, and before no one else, as to his connection with the crime of which he is accused; and should provide severe penalties for a violation of such a law; and further provide that an admission or confession made to the police, or any other official, by one accused of crime at any place other than in the presence of a magistrate, should not be used against the person so accused.

To make such provision of the law effective, it also must provide that the defendant should be compelled to answer the questions propounded to him in the presence of the magistrate, or be informed that his failure to make answers might be a fact which could be introduced against him on the trial of the criminal action which may follow. Such a provision

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[11] *Ibid.* §§198-209.

[12] *Ibid.* §210.

would require amendment of the present law and of the Constitution. Article 1, Section 6 of the Constitution of the State of New York provides that no one shall be compelled in any criminal case to be a witness against himself. In the same section, it is provided that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury. Our Court of Appeals has held that the defendant cannot waive this constitutional right as regards indictment.[13]

So it seems that it would be necessary to amend Article 1, Section 6 of the State Constitution to the extent of providing that, on the failure or refusal of the defendant to testify in his own behalf, or to make explanation according to the provisions of the above-quoted sections of the Code of Criminal Procedure, such failure or refusal might be introduced in evidence against him on the trial of the criminal action which may follow his being held by the magistrate.

These provisions would protect the person accused of crime against any violence, against any statements or confessions extorted from him in any way, and would guarantee that the statements that he might make to the magistrate would be the statements that he wished to make. The defendant frequently will not make a statement to the police, or even to the District Attorney, for fear that his statement will not be taken accurately; that only the parts which tend to implicate him will be taken and matters of defense will be omitted. But, under the protection of the court, a defendant, knowing that he must make a statement or else that fact will be brought against him later, will make a statement regarding his implication in the crime or his exoneration of the charge. We know that an innocent person will not refuse to make a statement under such circumstances. The guilty will probably remain silent.

While we are making changes, those sections of the Code of Criminal Procedure relating to the examination should be amended to the extent that, in all felony actions, the testimony of the witnesses accusing the defendant must be taken by the magistrate in the presence of the defendant, giving the defendant the right to cross-examine; and such testimony

[13] People *ex rel.* Battista v. Christian, 249 N. Y. 314, 164 N. E. 111 (1928).

should be taken stenographically and perpetuated for the use of either the defendant or the District Attorney in the subsequent trial of the action. This would protect both the people and the defendant against absconding witnesses. Then, on the trial, provision should be made that the testimony so given by witnesses either before the magistrate, before the grand jury, or in the presence of a representative of the District Attorney when such testimony is taken stenographically, might be read in evidence, in case a witness on the trial attempted to change his testimony; and that the jury should be permitted to determine whether the witness testified falsely on previous hearings or is testifying falsely at the trial.

It will take some time to have the State Constitution amended, assuming that the legislature will be willing to propose amendments. It will take some time to have the statutes amended to carry into effect the State Constitutional amendment or to carry into effect suggestions similar to those I have made above. In the meantime something should be done to protect those accused of crime and to correct the common impression regarding police brutality.

The district attorneys of the state can be of great help in this regard.

During my administration of the office of the District Attorney, every prisoner was apprised of the fact that, if he claimed he had been mistreated by the police, he could apply to the District Attorney and, in the presence of his physician and his lawyer, and of the medical assistant to the District Attorney, accurate photographs would be made of any part of his body which he claimed showed that violence had been practiced against him.

The District Attorney of New York County maintains an up-to-date photographic studio in charge of a skilled photographer, and accurate photographs will be taken of any part of the body of a defendant who claims that he has been beaten or mistreated. No doubt other district attorneys who have not this modern equipment in their offices would arrange for some photographer to take such pictures. Every district attorney has a contingent fund at his disposal out of which he can pay the expenses of taking such photographs.

I remember only two cases, during my administration as District Attorney, in which a person accused of crime availed himself of the offer of the District Attorney, although I know that in about twenty per cent. of the cases brought to trial, the defendant's lawyer made a great noise about the brutality of the police. It is one of the pet tricks of lawyers for the defendant to put the police on trial, rather than the accused.

Then, too, the public should realize the difference between the use of force by the police in making an arrest of a dangerous criminal, or one seeking to escape or resist arrest, and the use of force at the station house or at headquarters, against one who is utterly in the power of the police. No one should blame the police for protecting themselves against dangerous criminals or from using proper force to prevent an escape. No one could approve the action of the police in the use of force against, or any other mistreatment of, a person in their custody at the station house or headquarters.

The real purpose of the Code of Criminal Procedure is to secure an accurate administration of the Penal Law. It is as necessary that the rights of the innocent be protected as that the guilty should be convicted. It is absolutely necessary that a person arrested be protected against any form of brutality. If for no other reason than this, it seems that the Legislature of this State should act speedily in this matter.

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