Fordham Law Review

Volume 5 | Issue 2 Article 7

1936

The Revision of the New York Code of Criminal Procedure—A Tentative Draft of the Chapter on Arrest

LEGISLATION

THE REVISION OF THE NEW YORK CODE OF CRIMINAL PROCEDURE—A TENTATIVE DRAFT OF THE CHAPTER ON ARREST.—During the past few years the Legislature of the State of New York has adopted a definite policy of revision of the law. The chief expression of this policy was in the creation of the Commission on the Administration of Justice in 1931,[1] and many of the recent changes and reforms in the law and its administration have been brought about as a result of the report of that Commission.[2] The criminal law too was the subject of consideration by the Commission, and in order to perform adequately the task of study and revision of the adjective criminal law of the state, a special advisory committee was formed.[3] This Committee has made a thorough study of the New York Code of Criminal Procedure, and is at present engaged in drafting the entire Code anew.[4] To date, eight chapters of the new proposed code have been drawn up in tentative form, and if approved upon more mature consideration, will be offered to the legislature.[5] It is the purpose of this article to consider the more important changes in the law embodied in the first of the proposed chapters, that dealing with arrest.[6]

It is not the plan of the revisers to effect any sweeping and fundamental change in the present system of criminal jurisprudence, since the work is limited to a revision of the procedural, not the substantive, criminal law.[7] It is not

1. The Commission was created by N. Y. Laws 1930, c. 727, continued by N. Y. Laws 1931, c. 186, N. Y. Laws 1932, c. 508, N. Y. Laws 1933, c. 261, "to investigate and collect facts relating to the present administration of justice in the state and report thereon."

2. The report of the Commission is LEGIS. Doc. No. 50 (1934). As a result of the recommendations of the Commission, the Judicial Council was created by N. Y. JUDICIARY LAW (1934) §§ 40-48, and the Law Revision Commission by N. Y. LEGISLATIVE LAW (1934) §§ 70-72. The purpose of these two bodies is to make a continual study of the law and to propose reforms to the legislature. See Legis. (1935) 4 FORDHAM L. REV. 102.

3. LEGIS. Doc. No. 50 (1934) 51. The official title is: Special Committee on the Revision of the Code of Criminal Procedure, and consists of Messrs. Bruce Smith, Chairman, Leonard B. Saxe, Felix C. Benvenga, Louis Fabricant, William E. McDonald, Charles C. Nott, Jr., Timothy N. Pfeiffer and Kenneth M. Spence.

4. The Committee feels that a general redrafting of the Code is necessary. The text has not been generally revised since its passage in 1881, and shows the effect of "partial and hastily conceived amendment." LEGIS. Doc. No. 70 (1935) 5.

5. The chapters in published form are: Arrest, in LEGIS. Doc. No. 70 (1935); Preliminary Examination, in LEGIS. Doc. No. 70 (A) (1935); Methods of Prosecution, Formation, Powers and Duties of the Grand Jury, Finding and Presentation of the Indictment, in LEGIS. Doc. No. 70 (B) (1935); Indictment, Information and Bill of Particulars, Amendment of Indictment, Information and Bill of Particulars, Method of Arraignment, in LEGIS. Doc. No. 70 (C) (1935). The chapters are published in tentative form in order to invite "the full and free comment and criticism of all informed and interested persons." LEGIS. Doc. No. 70 (1935) 3.

6. LEGIS. Doc. No. 70 (1935) §§ 148-189.

7. "Our purpose throughout has been to provide all necessary and proper implements to the public agencies of criminal justice without surrendering any of the basic safeguards which our system of law extends to persons charged with crime." LEGIS. Doc. No. 70 (1935) 7.

difficult, however, to perceive that the underlying policy of the present revision is to tighten the administration of criminal justice. Almost every important change suggested in the draft chapters published to date either gives increased powers to the law enforcement authorities, or whittles down some statutory privilege at present enjoyed by the accused.[8] This is undoubtedly in keeping with the prevailing trend of criminal legislation in the state.[9]

The proposed chapter on arrest consolidates the several chapters of the present Code dealing with the same subject.[10] The general scheme of the law of criminal arrest remains unchanged. The ordinary mode of arrest is by warrant or summons,[11] and provision is made for the exceptional case of arrest without a warrant.[12] The warrant or summons is issued by a magistrate of competent jurisdiction,[13] and the person arrested is brought before the magistrate for examination.[14] The suggested modifications of the law affect particular sections of the present Code.

8. In addition to the changes in the chapter on arrest, hereinafter to be considered, the following changes in other chapters may be noted: (1) Proposed Chapter on Preliminary Examination, §§ 199, 200, 203. It is provided by § 200 that the preliminary statement of a defendant before the magistrate must be under oath. If the defendant refuses to make any statement, § 199 provides that evidence of such refusal may be introduced at the trial. This provision makes a definite inroad upon the presumption of innocence, and conceivably involves a constitutional question of self-incrimination. See People v. Courtney, 94 N. Y. 490 (1884). Section 203 provides that the defendant may be cross-examined on his preliminary statement. (2) Proposed Chapter on Methods of Prosecution § 221, allows any crime to be prosecuted by either information or indictment, when a preliminary examination has been had or waived, thus doing away with the necessity for a grand jury in any case. The proposed change would necessitate an amendment to N. Y. CONST. art. I, § 6. See People *ex rel.* Battista v. Christian, 249 N. Y. 314, 164 N. E. 111 (1928). (3) Proposed Chapter on Formation, Powers and Duties of the Grand Jury § 245, provides that "No indictment shall be set aside or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury." This provision seriously limits the motion to quash an indictment, since sufficiency of evidence is a most frequent ground for the motion. The proposed change likewise requires an amendment to N. Y. CONST. art. I, § 6. See People v. Glen, 173 N. Y. 395, 400, 66 N. E. 112, 114 (1903); People v. Sexton, 187 N. Y. 495, 511, 80 N. E. 396, 401 (1907).

9. The trend is evidenced by the following: N. Y. PENAL LAW (1933) § 1250 (imposing death penalty for kidnapping); N. Y. PENAL LAW (1934) § 982 (slot machines); N. Y. CODE CRIM. PROC. (1935) § 295-l (requiring defendant pleading alibi to furnish bill of particulars); N. Y. PENAL LAW (1935) §§ 1620, 1620-a, 1620-b, 1632, 1632-a, 1633 (perjury and subornation of perjury).

10. The chapters of the present Code covering the subject of arrest are: The Warrant of Arrest [N. Y. CODE CRIM. PROC. (1935) §§ 148-166]; Arrest by an Officer, Under a a Warrant, [*id.* §§ 167-176]; Arrest by an Officer, Without a Warrant, [*id.* §§ 177-182]; Arrest by a Private Person, [*id.* §§ 183-185]; Retaking After an Escape, [*id.* §§ 186, 187].

11. N. Y. CODE CRIM. PROC. (1935) §§ 150, 153; LEGIS. DOC. No. 70 (1935) §§ 150, 155, 157.

12. N. Y. CODE CRIM. PROC. (1881) §§ 177, 179, 183; LEGIS. DOC. No. 70 (1935) §§ 174, 175.

13. N. Y. CODE CRIM. PROC. (1935) §§ 148, 150; LEGIS. DOC. No. 70 (1935) §§ 148, 150.

14. N. Y. CODE CRIM. PROC. (1935) §§ 165, 185; LEGIS. DOC. No. 70 (1935) §§ 188, 189.

Two important changes appear in the proposed sections which define the respective powers of officers and private persons to arrest without a warrant. Proposed Section 174 allows an officer to arrest without a warrant in the following situations: first, when any crime, whether a felony or a misdemeanor, has been committed in his presence; second, when the person arrested has committed a felony, not in the officer's presence; third, where a felony has been committed by someone, and the officer has reasonable ground to suspect that the person arrested has committed it; and fourth, when the officer has reasonable ground to believe that a felony has been committed, and reasonable ground to suspect the person arrested.[15] The section of the Code which is in force today permits an officer to arrest without a warrant only in the first three of these situations.[16] An officer may not arrest without a warrant on mere suspicion of a felony; the commission of the felony must be an established fact before he may proceed.[17] The right to arrest in the fourth situation, *i.e.*, where the officer does not know, but suspects the commission of a felony, is a substantial addition to the powers of an arresting officer, and conforms the law to the actual police practice.[18]

It is difficult to see how the Code section in force today can be strictly complied with by police with any degree of success. In order to make a legal arrest for a felony which was not committed in his presence, the officer must actually know that a felony has been committed by someone, and if none has been committed, the arrest is illegal as a matter of law.[19] It seems to be asking too much to require that the officer have absolute certitude, when the criminal act did not take place in his presence. The proposed section eliminates this difficulty by requiring reasonable, not absolute, certitude.

The policy of the new addition seems sound. A police officer should be free in the exercise of a sound discretion to make an arrest upon reasonable suspicion, without the fear of a suit for false imprisonment or malicious prosecution, the frequent concomitant of illegal arrest. The argument to the contrary is that an officer should not be entrusted with too broad a power, especially in view of the use of "third degree" methods and the public outcry against them.[20] The

15. LEGIS. DOC. No. 70 (1935) 23.

16. N. Y. CODE CRIM. PROC. (1881) § 177. The provision of § 179 that an officer may arrest at night "any person whom he has reasonable cause for believing to have committed a felony . . . although it afterward appear that a felony had been committed, but that the person arrested did not commit it," apparently confers no added power on the arresting officer, since the situation outlined is already covered by § 177 (3).

17. People v. Jakira, 118 Misc. 303, 193 N. Y. Supp. 306 (Gen. Sess. N. Y. C. 1922); see Stearns v. Titus, 193 N. Y. 272, 275, 85 N. E. 1077, 1078 (1908); People v. Hochstim, 36 Misc. 562, 571, 73 N. Y. Supp. 626, 632 (Sup. Ct. 1901), *rev'd on other grounds*, 76 App. Div. 25, 78 N. Y. Supp. 638 (2d Dep't 1902).

18. LEGIS. DOC. No. 70 (1935) 11.

19. Snead v. Bonnoil, 166 N. Y. 325, 59 N. E. 899 (1901); see People v. Hochstim, 36 Misc. 562, 571, 73 N. Y. Supp. 626, 632 (Sup. Ct. 1901). In the case first cited, the arrest was held illegal although a misdemeanor had been committed by the person suspected, and subsequently arrested.

20. Comment (1934) 9 ST. JOHN'S L. REV. 180; Comment (1930) 43 HARV. L. REV. 617. It should be noted, however, that third degree methods may be consequent upon legal as well as illegal arrest.

argument is of great weight, but it must be noted that a person who has been injured by an abuse of the official power of arrest is not without remedy. He may still have his action for malicious prosecution or false imprisonment, on showing that the officer did not act upon reasonable cause.[21]

The rule stated by the proposed section is not new in the law. It has long been established in the English common law that an officer may arrest without a warrant where he has reasonable suspicion of the commission of a felony and reasonable ground to suspect the person arrested.[22] The rule was carried over into the common law of New York,[23] and is at present the rule, either statutory[24] or common-law,[25] in the majority of the states. The same rule is adopted in the Model Code of the American Law Institute.[26] Thus it will be seen that the new provision restores, rather than creates, the power of a peace officer to arrest for reasonable suspicion of a felony.

Proposed Section 175 allows a private person to arrest without a warrant in the following situations: First, where any crime, whether a felony or a mis-

21. Witte v. Haben, 131 Minn. 71, 154 N. W. 662 (1915) (arrest for suspected insanity; no probable cause); Schneider v. Shepherd, 192 Mich. 82, 158 N. W. 182 (1916) (district attorney acting on report of investigators); Allen v. Burns International Detective Agency, 121 Ore. 492, 256 Pac. 197 (1927) (private detective agency); Christiansen v. Weston, 36 Ariz. 200, 284 Pac. 149 (1930) (arrest for supposed insanity; no probable cause).

22. Samuel v. Payne, 1 Doug. 359, 99 Eng. Reprints 230 (K. B. 1780); Hobbs v. Branscomb, 3 Camp. 420, 170 Eng. Reprints 1431 (K. B. 1813); Beckwith v. Philby, 6 B. & C. 635, 108 Eng. Reprints 585 (K. B. 1827); Nicholson v. Hardwick, 5 C. & P. 495, 172 Eng. Reprints 1069 (K. B. 1833). In Beckwith v. Philby, *supra*, Lord Tenterden, C. J., expressed the rule thus: "There is this distinction between a private person and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." 6 B. & C. 635, 638, 108 Eng. Reprints 585, 586 (K. B. 1827).

23. Holley v. Mix, 3 Wend. 350 (N. Y. 1829); Burns v. Erben, 40 N. Y. 463 (1869). The latter case quotes with approval the rule of Beckwith v. Philby, 6 B. & C. 635, 108 Eng. Reprints 585 (K. B. 1827), cited note 22, *supra*.

24. ALA. CODE (1923) § 3263; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4937; ARK. DIG. STAT. (Crawford & Moses, 1921) § 2904; CAL. PEN. CODE (Deering, 1931) § 836; FLA. COMP. GEN. LAWS ANN. (1927) § 8323; GA. CODE (1933) § 27-207; IDAHO CODE ANN. (1932) § 19-603; KY. CODES ANN. (Carroll, 1927) Crim. Prac. § 36; LA. CODE CRIM. PROC. (Dart, 1932) art. 60; MICH. COMP. LAWS (1929) § 17149; MINN. STAT. (Mason, 1927) §§ 10570, 10571; MISS. CODE ANN. (1930) § 1227; MONT. REV. CODE ANN. (Choate, 1921) § 11753; NEV. COMP. LAWS (1929) § 10751; N. C. CODE (1927) § 4544; N. D. COMP. LAWS ANN. (1913) § 10567; OKLA. STAT. ANN. (Harlow, 1931) § 2780; S. D. COMP. LAWS (1929) § 4553; TENN. CODE (Will. Shan. & Harlow, 1932) § 11536; UTAH REV. STAT. ANN. (1933) § 105-13-3.

25. Doering v. State, 49 Ind. 56 (1874); Scott v. Eldridge, 154 Mass. 25, 27 N. E. 677 (1891); State v. Whitley, 183 S. W. 317 (Mo. 1916); Diers v. Mallon, 46 Neb. 121, 64 N. W. 722 (1895); McCarthy v. De Armit, 99 Pa. 63 (1881); Lee v. Jones, 44 R. I. 151, 116 Atl. 201 (1922); Crosswhite v. Barnes, 139 Va. 471, 124 S. E. 242 (1924); State v. Hughlett, 124 Wash. 366, 214 Pac. 841 (1923); Allen v. Lopinsky, 81 W. Va. 13, 94 S. E. 369 (1917).

26. AM. LAW INST. CODE CRIM. PROC. (1930) § 25.

demeanor, has been committed in his presence; and second, where a felony has been committed by someone, not in his presence, and he has reasonable cause to suspect the person arrested.[27] Under the Code as it stands today, a private person may arrest for any crime committed in his presence, but in the case of a felony not committed in his presence, he may arrest only the person who has actually committed the felony.[28] Even though a private person may have acted upon a reasonable suspicion, if the person arrested is in fact innocent of felony, the arrest is illegal as a matter of law.[29] The effect of this rule is that as a practical matter, the power of a private person to arrest is limited to cases of crimes committed in his presence. The risk of probable consequences of an arrest for a crime not committed in the presence is so great as to deter any widespread use of the privilege. Under the proposed rule a private person may arrest for suspicion of a felony, subject to the limitation that a felony has actually been committed by someone. This is a substantial increase in the power of arrest of private individuals. The proposed section confers powers coextensive with those of a peace officer under the present provision of the Code.[30]

The proposed section is in accord with the English common law rule,[31] and with the rule in New York before the Code.[32] A similar rule is followed in the majority of the states,[33] and has been adopted in the Model Code.[34] While the

27. LEGIS. DOC. No. 70 (1935) § 175, ". . . 2. When a felony has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it."

28. N. Y. CODE CRIM. PROC. (1881) § 183, ". . . 2. When the person arrested has committed a felony, although not in his presence."

29. Grinnell v. Weston, 95 App. Div. 454, 88 N. Y. Supp. 781 (1st Dep't 1904); see Johnston v. Bruckheimer, 133 App. Div. 649, 652, 118 N. Y. Supp. 189, 191 (1st Dep't 1909); Gold v. Armer, 140 App. Div. 73, 75, 124 N. Y. Supp. 1069, 1070 (3d Dep't 1910); Wallenstein v. Rosenbaum, 241 App. Div. 374, 376, 272 N. Y. Supp. 346, 348 (1st Dep't 1934); see (1936) 5 FORDHAM L. REV. 362.

30. N. Y. CODE CRIM. PROC. (1881) § 177 (peace officer) and LEGIS. DOC. No. 70 (1935) § 175 (private person) are similar in phraseology except that the former provides that a peace officer may also arrest "when the person arrested has committed a felony." This power, however, is included in the power to arrest "when a felony has in fact been committed."

31. Beckwith v. Philby, 6 B. & C. 635, 108 Eng. Reprints 585 (K. B. 1827); Allen v. Wright, 8 C. & P. 522, 173 Eng. Reprint 602 (K. B. 1838).

32. Holley v. Mix, 3 Wend. 350 (N. Y. 1829); Farnam v. Feeley, 56 N. Y. 451 (1874).

33. ALA. CODE (1923) § 3267; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4938; ARK. DIG. STAT. (Crawford & Moses, 1921) § 2905; CAL. PEN. CODE (Deering, 1931) § 837; GA. CODE (1933) § 27-211 (escape only); IDAHO CODE ANN. (1932) § 19-604; IOWA CODE (1935) § 13469; KY. CODES ANN. (Carroll, 1927) Crim. Prac. § 37; MINN. STAT. (Mason, 1927) § 10573 (also allows arrest where no felony in fact committed); MONT. REV. CODE ANN. (Choate, 1921) § 11754; NEB. COMP. STAT. (1929) § 29-402 (petit larceny or felony); NEV. COMP. LAWS (1929) § 10752; N. C. CODE (1927) § 4543; N. D. COMP. LAWS ANN. (1913) § 10573; OHIO GEN. CODE (Page, 1925) § 13493; OKLA. STAT. ANN. (1931) § 2786; ORE. CODE ANN. (1930) § 13-2116; S. D. COMP. LAWS (1929) § 4559; TENN. CODE (Will. Shan. & Harlow, 1932) § 11541; UTAH REV. STAT. ANN. (1933) § 105-13-4; WYO. REV. STAT. ANN. (Courtright, 1931) § 33-113 (petit larceny or felony); see Davis v. United States, 16 App. D. C. 442, 455 (1900); Doering v. State, 49 Ind. 56, 60 (1874); Dunson v. Baker, 144 La. 167, 80 So. 238 (1918).

34. AM. LAW INST. CODE CRIM. PROC. (1930) § 26.

weight of authority thus favors the proposed rule, the arguments pro and con are more evenly balanced. Police officers are the persons whose proper duty it is to enforce the laws, and private persons should be allowed the privilege only in case of emergency. On the other hand, a denial of the right often leads to a failure of justice. Frequently the person making the arrest does so in defense of his person or property; but perhaps just as often the privilege is used maliciously, or in connection with some purely imaginary injury.

An important change is suggested in regard to the method of arrest under a warrant, by proposed Section 177.[35] In New York, both at common law and under the Code it has been the rule that an officer making an arrest by virtue of a warrant must have the warrant in his actual possession at the time of the arrest,[36] and this is the rule in most jurisdictions.[37] If the arrest is made by several officers, the warrant must be in the possession of one of the arresting officers.[38] This requirement has been handed down from the common law, and its origin seems somewhat obscure.[39] Whatever its origin, it has been a serious handicap in the administration of the criminal law. The only logical reasons for requiring that the arresting officer have possession of the warrant are first, that he may show it to the person arrested as proof of his authority to make the arrest, and second, as notice to the person arrested of the charge against him. But both these purposes may be accomplished after the arrest; they need not be conditions precedent to arrest. The proposed section accomplishes this by requiring that the warrant be shown to the person arrested within a reasonable time after the arrest. The section is evidently adopted from the Model Code.[40]

A number of changes have been made which may be classed as extensions of the magistrate's jurisdiction. The proposed chapter would allow the magistrate to issue either a summons or a warrant for arrest for any crime, in the magistrate's discretion.[41] The magistrate may issue a summons under the present provisions only in certain kinds of misdemeanors.[42] Proposed Sections 152 and 153

35. LEGIS. DOC. No. 70 (1935) 24.

36. N. Y. CODE CRIM. PROC. (1881) § 173; People v. Shanley, 40 Hun 477 (N. Y. 1886) (under Code); Frost v. Thomas, 24 Wend. 418 (N. Y. 1840).

37. ALA. CODE (1923) § 3262; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4941; ARK. DIG. STAT. (Crawford & Moses, 1921) § 2909; CAL. PEN. CODE (Deering, 1931) § 842; IDAHO CODE ANN. (1932) § 19-609; IOWA CODE (1935) § 13471; KY. CODES ANN. (Carroll, 1927) Crim. Prac. § 39; MINN. STAT. (Mason, 1927) § 10568; MONT. REV. CODE ANN. (Choate, 1921) § 11759; NEV. COMP. LAWS (1929) § 10757; N. D. COMP. LAWS ANN. (1913) § 10563; OKLA. STAT. ANN. (1931) § 2776; S. D. COMP. LAWS (1929) § 4549; TENN. CODE (Will. Shan. & Harlow, 1932) § 11537; UTAH REV. STAT. ANN. (1933) § 105-13-10.

38. People v. Durfee, 62 Mich. 487, 29 N. W. 109 (1886); People v. McLean, 68 Mich. 480, 36 N. W. 231 (1888); see Coyles v. Hurtin, 10 Johns. 85 (N. Y. 1813), where it was held that an officer may be constructively present where his deputy is, thus authorizing the deputy to make an arrest when the warrant is not in his possession.

39. Galliard v. Laxton, 2 B. & S. 363, 121 Eng. Reprints 1109 (K. B. 1862); Rex v. Patience, 7 C. & P. 775, 173 Eng. Reprints 338 (K. B. 1837).

40. AM. LAW INST. CODE CRIM. PROC. (1930) § 24.

41. LEGIS. DOC. No. 70 (1935) § 150.

42. N. Y. CODE CRIM. PROC. (1935) §§ 150, 156.

would make the county the unit of the magistrate's jurisdiction for the purpose of issuing and returning warrants, and not the town, as under the present law.[43] Proposed Section 155 provides that a warrant may be executed by any peace officer in the state in all cases, eliminating existing difficulties where the warrant is issued by an inferior magistrate.[44]

Taken together, the present revision accomplishes its purpose of clarifying, and at the same time strengthening the criminal procedure of the state. It should meet with legislative approval.

43. *Id.* §§ 151, 158, 164.

44. *Id.* §§ 153, 155, 156, 157, provide that a warrant issued by an inferior magistrate in one county must be endorsed by magistrates of other counties where it is executed.