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media exercise restraint in the printing and broadcasting of material damaging to a defendant. In the past, the press and radio have had great difficulty in exercising self-restraint and ultimately the United States Supreme Court may have to decide the limits which the Fourteenth Amendment places on the power of the states to provide for adequate safeguards concerning interference with the right of fair trial by news media. As yet the Supreme Court has not reached this question, and until it does, a defendant's hope for a fair trial must rest, after the exhaustion of pre-emptory challenges, on the intuitive judgment of the trial judge.

R. J. D.

THIRD DEGREE ASSAULT NOT EXCUSED BY REASONABLE MISTAKE OF FACT

The defendant in a criminal prosecution for third degree assault asserted a defense of a reasonable mistake of fact. He was charged with actively intervening in the lawful arrest of a youth by two plainclothes policemen, who were engaged in a struggle with the boy. Defendant, arriving at the scene, saw two middle-aged men, undistinguished by their dress, fighting with a young boy, who, crying and with his pants half-off, was struggling to escape his tormentors. Without thought of personal risk, defendant went to the rescue. The intermediate court, one judge dissenting, reversed the conviction. On appeal by permission, *held*, reversed, and information reinstated. The intervention regardless of intent amounted to third degree assault, since the statutory offense does not require mens rea. The mistake of fact, in spite of its reasonableness, does not excuse the act specifically charged, because the needs of an orderly society demand that police officers go unhindered in the pursuit of their duties. *People v. Young*, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962) (per curiam).

Third degree assault has generally been regarded as requiring only a general intent,[1] that is, the intent to perform the physical act of the crime, without any malice attendant upon the performance of the act.[2] The mere fact of an unlawful touching is sufficient to support the charge.[3] This statutory concept of assault is far removed from the common law requirement of *mens rea*, an essential element of the crime. The criminal codification in New York, however, omits the specific intent required in the higher gradations of assault.[4] The Court properly held that in the ordinary, simple assault charge the law

1. N.Y. Penal Law § 244:
Assault in third degree
A person who: 1. Commits an assault, or an assault and battery, not such as is specified in sections two hundred and forty and two hundred and forty-two . . .
Is guilty of assault in the third degree.

2. People (Starvis) v. Rogers, 170 Misc. 609, 10 N.Y.S.2d 722 (City Ct. 1939); 1 Wharton, Criminal Law and Procedure § 338 (12th ed. 1957).

3. See People ex rel. Gow v. Bingham, 57 Misc. 66, 107 N.Y. Supp. 1011 (Sup. Ct. 1907), where the photographing and measuring of a person accused of a crime was held to be third degree assault.

4. See N.Y. Penal Law §§ 240, 242.

requires only a showing that a touching did occur and that subjective intent is not needed.[5]

The instant case then goes a step further and more specifically considers the question—"Does one, who, in good faith, aggressively intervenes in a struggle between a police officer in civilian attire, attempting to arrest lawfully a third person, commit the crime of third degree assault?" Adopting the position of the minority of the Appellate Division and the majority of other states, the Court held that one who goes to the aid of a third person does so at his own risk, having no greater rights than the party he protects.[6] The holding, in this case of first impression, is open to question. It is well established that a mistake of fact will excuse the accused in a prosecution for homicide and for many other serious crimes.[7] The excuse is not a justification; it merely indicates that the accused would have been justified were the facts as he thought them to be. In the instant case, the defendant acted on the basis of a reasonable mistake of fact. The circumstances as presented to him showed a disturbance of the peace. He did what, had the facts been as he thought, would have made him a hero. Instead he becomes a criminal. It seems irrational to allow a reasonable mistake of fact to excuse one using deadly force and not to allow it to one who employs only slight force. The Court, however, believed that a mistake of fact should not excuse a crime where the preservation of order in society demands that police be unhindered in the performance of their duties. The decision resolved itself to a choice between two courses of action—accepting a mistake of fact as an excuse or allowing a stranger no greater defense than that of the party he aids.

In deciding that the demands of an orderly society require that the latter choice be applied, the Court overlooked several facts. First, this man is not a person of whom society demands punishment. Indeed, his actions should be deemed commendable. Second, if the Court believes the conviction will serve as a deterrent, it may well be mistaken. Criminal prosecution will, perhaps, deter intervention between uniformed policemen and third parties but will not deter intervention between ordinary citizens fighting in the streets. Indeed, in the latter situation, orderly society is *served* when one risks his personal well-being to end such a fray. Yet it is just this type of situation that Young thought he faced. The intervenor does not know that the assailant is a policeman. If we are to weigh the relative good to society, let us consider whether infrequent occasion of an intervention by a stranger during a struggle between plainclothes policemen at a time when they are unable to identify themselves and third persons is so great a harm as to merit the prohibiting of every person who might be prompted to aid his fellow man. It would seem that the ordinary street brawl would be more frequent than the occurrence of a case like the one

5. See also People v. Bingham, supra note 3.

6. Griffin v. State, 229 Ala. 482, 158 So. 316 (1934); People v. Young, 12 A.D.2d 262, 269, 210 N.Y.S.2d 358, 365 (1st Dep't 1961).

7. N.Y. Penal Law § 1055(1).

at bar. The present situation is one which, as the precedent in this state suggests, has either never happened before or one that law enforcement agencies have never deemed it worthwhile to prosecute.

The Court also overlooks that this was cast as a *reasonable mistake*, not just a mistake. The courts should have a standard by which to determine whether each particular intervention was indeed innocent or even well-advised under the circumstances. The dissent would remand at this time for a determination of reasonable. The problem which the Court believes it must move to solve, that is, the problem of maintenance of an orderly society, would be as well served by the civil tort law which provides for damages in such instances, without the addition of a criminal record.

This decision leaves the law somewhat unclear. The interests of an innocent intervenor, who mistakenly aids one who is engaged in a fray, where a policeman is not involved, or where a policeman is not making a lawful arrest, suggests the possibilities of muddled interests. Perhaps, the Court had in mind maintaining public respect towards policemen on duty in areas where widespread hostility towards uniformed police officers had resulted in active interference by onlookers where such officers were in the act of making lawful arrests. Such a method of insuring non-intervention by threatened criminal liability, however, is too great a burden to place on one who innocently acts to prevent a breach of the peace.

D. R. K.

DECEDENTS' ESTATES AND TRUSTS

"Attempted Testamentary Trust" Interpreted as Absolute Gift to "Trustee"

Testatrix died in May 1959, leaving a properly executed will dated June 25, 1951, which contained the following provision:

> All the rest, residue and remainder of my property and effects, . . . I hereby give, devise and bequeath to and as the *absolute property* of my friend, Harry T. Gill, of Gloversville, N.Y., whose personal receipt therefor shall be deemed and accepted as sufficient for the discharge of all interests passing hereunder.
>
> The property last herein referred to is to be *received, held, and distributed* in accordance with a letter of instructions accompanying this will, together with possible alterations thereof subsequently to be made either in writing or orally, *and in carrying out my wishes* in such distribution of my estate *I hereby delegate all necessary powers both discretionary and otherwise,* to Harry T. Gill, in whom I hereby place this confidence. (Emphasis added.)

In April 1955 and again in 1956, apparently to effectuate adequate distribution of her property, which she obviously was not prepared to make when she had a lawyer draft her will, testatrix delivered written instructions and orally