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NOTES AND COMMENTS

BAIL PROCEDURE AND WEEKEND ARRAIGNMENT PRACTICE
IN THE CITY COURT OF BUFFALO*

INTRODUCTION

In any court of law, the procedure utilized is a paramount factor in the quality of justice dispensed. Nowhere is this more true than in inferior criminal courts, such as the City Court of Buffalo, which play such a vital role in our American scheme of justice. It is in these busy courts that statutory procedures are put to their most rigorous test because the emphasis is necessarily upon expediency. It sometimes happens that innovations creep into the system, some statutory prescriptions are ignored, others are modified, new practices arise without benefit of statutory authority. Because of these possibilities, periodic examination of the existing practice and comparison with the statutory scheme can aid in improving the quality of justice. It is in this spirit that this study has been undertaken.

While a comprehensive examination of all criminal procedure in Buffalo's City Court would be preferable, exigencies of time and space required that the instant study be limited to two particular areas, namely bail and weekend arraignments. Since these areas are not directly related, they have been separately treated in this report.

Before proceeding to a consideration of the two areas of this study, it is well to first examine generally the statutory framework of our criminal procedure. In New York, uniform regulation of criminal courts is prescribed by our Code of Criminal Procedure, hereinafter referred to as the Code. The present Code was adopted in 1881, and has remained in effect throughout the years with continued piecemeal amendment, but no general revision. As recently as the 1930's, a special

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1. The term "inferior criminal courts" has reference to courts of first instance, of limited jurisdiction, as contrasted to the "superior criminal courts" of general jurisdiction. No deprecatory connotation is intended.
2. To illustrate, there were more than 14,000 arraignments in Buffalo City Court last year, not including traffic violations. CITY COURT OF BUFFALO ANNUAL REPORT, 1957.
3. For a comparative analysis of practice in a wide variety of inferior courts throughout the country, see Note, Metropolitan Criminal Courts of First Instance, 70 HARV. L. REV. 320 (1956).
commission spent more than five years preparing a revised code but the fruits of their efforts were cast upon the seas of oblivion. Needless to say, the present Code is beset with inconsistencies and incongruities which have arisen and been multiplied upon over the years. Particular points of difficulty with the Code will be pointed out subsequently, as various of its sections are considered.

In Buffalo, our City Court is also regulated by the Buffalo City Court Act, enacted in 1909. This act contains only a few criminal procedure provisions, but its jurisdictional provisions are most important. The Court is authorized to sit as a Court of Special Sessions with jurisdiction over all misdemeanors except libel. The Code provides that Courts of Special Sessions shall have jurisdiction over certain specified misdemeanors only, although allowance is made for the expansion of their jurisdiction by special statutes. The Code contains separate procedure for indictable crimes in Part IV, and for Courts of Special Sessions in Part V. It might be reasonably thought that the Part V provisions should apply to the Buffalo City Court when sitting as a Court of Special Sessions whether jurisdiction therefor was obtained from the Code or special statute. However, this becomes a problem because certain sections of the Part V procedures would appear to be limited to the Code-provided jurisdiction. This problem will be further considered in specific instances herein, but it is mentioned here to point out the immediate difficulties encountered at the first examination of the statutes. It should

5. ANNUAL REPORT OF COMMITTEE ON ADMINISTRATION OF JUSTICE IN N.Y., 1939.
6. The Committee Report was passed on to the Judicial Council for further study. 9 REPORT OF THE N.Y. JUDICIAL COUNCIL, 1943, pp. 61-62. It was temporarily shelved there. 10 id., 1944, p. 56. However, the shelving turned out to be permanent and although the matter was reported on the "List of Subjects under Consideration" in every subsequent annual report of the Council, it was still being reported there when the Judicial Council was replaced by the Judicial Conference in 1955. There has been no indication that it is being picked up by the successor Judicial Conference.
7. See, ANNUAL REPORT OF COMMITTEE ON ADMINISTRATION OF JUSTICE IN N.Y., 1939, pp. 10-11, for a good statement of the need for revision of the Code, true then and still true now.
9. Compare the New York City Criminal Courts Act which is nearly self-contained. Separate acts, however, are not necessarily desirable since much is to be said for uniformity of procedure. The Judicial Council, and its successor the Judicial Conference, has long striven for adoption of a uniform City Court Act. See, e.g., 7 REPORT OF THE N.Y. JUDICIAL COUNCIL, 1941, pp. 201-266; 2 REPORT OF THE N.Y. JUDICIAL CONFERENCE, 1957, p. 128.
13. Id. §4 (4).
14. Id. §§133-698.
15. Id. §§699-772; it has been repeatedly held that Parts IV and V of the Code are self-contained and independent of each other. E.g., People ex rel. Commissioners of Public Charities and Correction v. Cullen, 151 N.Y. 54, 45 N.E. 401 (1896).
16. See, e.g., N.Y. CODE CRIM. PROC. §737(2).
be noted that this problem is not limited to Buffalo, since many other Courts of Special Sessions have enlarged jurisdiction by virtue of special statutes.\textsuperscript{17}

It should also be noted at the outset that Buffalo City Court serves a dual function. The judges of the Court sit as committing magistrates\textsuperscript{18} with power to hold arraignments and preliminary examinations to determine if persons accused of indictable crimes should or should not be held for grand jury action.\textsuperscript{19} Court proceedings in this capacity are governed by Part IV of the Code. In addition, as previously mentioned, the City Court sits as a Court of Special Sessions with power to hear and determine all cases of misdemeanors except libel,\textsuperscript{20} and power to summarily dispose of offenses and ordinance violations.\textsuperscript{21} Court proceedings in this capacity are presumably governed by Part V of the Code, although this latter part is not nearly as comprehensive as the Part IV provisions. Hence, it can be seen that the procedure applicable depends in the first instance upon the capacity in which the Court sits.

These then are the statutes, generally, under which City Court practice must be examined. It is now appropriate to proceed to a consideration of the particular areas of this study.

\textbf{PART I: BAIL PROCEDURE}

Most simply stated, criminal bail is a means of keeping an accused person within the control of the court without confining him to jail.\textsuperscript{22} The term is used to denote both the undertaking (that which is given to assure the accused's appearance) and the surety (the one who undertakes to assure the accused's appearance).\textsuperscript{23} The concept of bail is of ancient origin,\textsuperscript{24} and is probably traceable to the early practice of a wrongdoer giving hostages until settlement by duel.\textsuperscript{25} At first the hostages stood in place of the prisoner and were subject to his punishment if he did not appear; later, this practice gave way to the surety only being required to pay a fine upon the non-appearance.\textsuperscript{26} The sureties were looked upon as substitute jailers to whose custody the prisoner was released.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{17} See, \textbf{11 Report of the N.Y. Judicial Council}, 1945, p. 155, for a discussion of jurisdictional problems.
\item \textsuperscript{18} N.Y. Code Crim. Proc. \textsuperscript{147}; N.Y. Sess. Laws, 1909, c. 570, \textsuperscript{65}.
\item \textsuperscript{19} N.Y. Code Crim. Proc. \textsuperscript{145-221}.
\item \textsuperscript{20} \textit{Supra} note 10.
\item \textsuperscript{21} N.Y. Sess. Laws, 1909, c. 570, \textsuperscript{66}.
\item \textsuperscript{22} \textit{Waite, The Problem of Bail, 15 A.B.A.J. 71 (1929)}.
\item \textsuperscript{23} \textit{Cf.}, N.Y. Code Crim. Proc. \textsuperscript{551}, where both meanings are used in one sentence.
\item \textsuperscript{25} \textbf{Holmes, The Common Law} 249-50 (1881).
\item \textsuperscript{26} \textit{Ibid}. See also, \textbf{Desmond, Bail—Ancient and Modern}, 1 \textbf{Buffalo L. Rev.} 245, 246 (1952).
\item \textsuperscript{27} \textbf{2 Pollock & Maitland, History of English Law} 587 (1895).
\end{itemize}
This concept of custody still prevails in England, although in the United States it has been modified by the use of corporate sureties and cash deposits in lieu of bail.\textsuperscript{28} Statutory regulation of bail was instituted in England as early as 1275,\textsuperscript{29} because of the many abuses by the sheriffs.\textsuperscript{30} Today, bail procedure is primarily regulated by statute in most jurisdictions.

In New York, statutory regulation of bail for crimes prosecuted by indictment is found in the first chapter of Title XII of Part IV of the Code of Criminal Procedure.\textsuperscript{31} This chapter is a comprehensive scheme of regulation covering the bail process in considerable detail. For crimes cognizable by Courts of Special Sessions, a few separate bail provisions are contained in Part V of the Code.\textsuperscript{32} In addition an occasional provision is scattered here and there in other parts of the Code.\textsuperscript{33} Specific Code provisions will be discussed in some detail in the various parts of this report as these provisions are compared with the practice found to be in effect in City Court. The various steps in the bail process are treated herein in their logical sequence beginning with the right to bail and culminating with bail forfeitures. This is not to say that the Code provisions necessarily follow any such logical sequence, although they were probably intended to originally. Continued amendment has tended to make section headings misleading and to detract from the organizational scheme,\textsuperscript{34} besides leaving much to be desired in the substance of the provisions. It is the latter point which is of primary concern here, however.

THE "RIGHT TO" AND "AMOUNT OF" BAIL

It has been said that the institution of bail serves two purposes: (1) the ends of justice by guaranteeing appearance and (2) personal liberty in allowing one to be free from physical restraint before he has been found guilty of the crime charged.\textsuperscript{35}

How has New York attempted to strike a balance between these not entirely reconcilable principles? The only reference to bail in the state constitu-
tion in regard to this problem is that "Excessive bail shall not be required..."36 This section has been held to mean that the constitution does not guarantee a right to bail but only that if bail is fixed, it shall not be in an excessive amount.37 This anomaly has been called more apparent than real since in a bail proceeding it must first be determined whether there shall be bail. Only if this is answered in the affirmative does the court then determine the amount of bail, this being constitutionally limited.38 However, the question of whether bail should be granted at all has been answered by statute in many areas. The legislature has also in certain instances determined the maximum amount of bail.39 In New York, before conviction, the defendant has a right to bail if he is charged with a misdemeanor.40 After conviction of a crime not punishable with death or life imprisonment, a defendant who has appealed and obtained a stay of proceedings, has a right to be admitted to bail if the appeal is from a judgment imposing a fine only.41 The areas of discretion in criminal cases, in determining whether there shall be bail are: (1) before conviction if the defendant is charged with a felony;42 (2) in any case, felony or misdemeanor, when the defendant appears for trial;43 (3) after conviction in all cases where there is no express right to bail except where the statute prohibits and declares there shall not be bail.44

It is thus seen that in a particular case, there may be an exercise of discretion in two areas: shall there be bail, and, if so, how much. In many areas the legislature has determined that the defendant has a right to bail and the court has discretion only to fix the amount.

36. N.Y. Const. art. I, §5; The United States Constitution is similarly restrictive. U.S. Const. amend. VIII. In many, if not a majority of the jurisdictions there is a right to bail before conviction in all but a very restricted number of cases. E.g., Mich. Const. art. II, §14:

... all persons shall, before conviction, be bailable, except for murder and treason when the proof is evident or the presumption great.


39. Section 737 (1)(a) provides that the maximum amount of bail for Courts of Special Sessions is to be $500.00. Whether the legislature intended to restrict this to crimes within section 56 and 56-a is not known. The provisions for station-house bail, section 737(2), are so restricted. See discussion infra. The problem therefore is whether Buffalo City Court, which has jurisdiction to hear and determine all charges of misdemeanors, except libel, supra note 10, is permitted to set bail higher than $500.00 for any misdemeanor. An argument could be made that they are so restricted only when the defendant is charged with a section 56 or 56-a misdemeanor. This uncertainty must be rendered certain.

40. N.Y. Code Crim. Proc. §553(1). However, charges of certain crimes are bailable only by a Supreme or County Court Judge. Id. §552. For a criticism of this latter section see Murphy, Proceedings in a Magistrate's Court Under the Laws of New York, 24 Fordham L. Rev. 53, 68-70 (1955-56). The writer there asserts that in a large city the magistrate has ample opportunity to develop wise discretion in the exercise of the bail function.

41. N.Y. Code Crim. Proc. §555(1).

42. Id. §553(2).

43. Id. §§62, 442.

44. Id. §555(2).
When may the court in a discretionary case deny bail and when is bail excessive? In either situation, the exercise of discretion cannot be arbitrary. The propriety of the determination is tested by the writ of habeas corpus. By this writ there is an examination of the legality of the detention. Relief, however, will be granted only to prevent the invasion of a right and not because of a difference of opinion as to the amount of bail. The amount of bail is said to be arbitrary when it is set at a figure greater than is necessary to secure the presence of the person to be bailed.

Of course, the problem is to find the line between an abuse of discretion and a mere difference of opinion. It is not the purpose of this paper to attempt to digest all the cases and come to a conclusion as to when there is an abuse of discretion so as to deny a person his constitutional and statutory rights. In any event, this feat would be impossible. Circumstances in each case are so different that "... no mathematical formulae can be devised ... ."

Bail is not a device for keeping a person accused of crime in jail. It is therefore essential that the judge, in seeking to assure the accused’s later appearance, must make an “informed” guess as to whether bail should be set at all, and if so, in what amount. New York has no statutory guide as to the elements that the judge should consider. Case law, however, has developed criteria that should enter into the “informed” guess as to what amount is necessary to insure the presence of the accused. Some of these are, the nature of the offense charged, the penalty which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of the defendant, his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction.

The conclusion one is compelled to make is that in order to properly exercise discretion, each person must be treated separately to discover the amount

45. People ex rel. Shapiro v. Keeper of City Prison, supra note 37.
47. Stack v. Boyle, 342 U.S. 1, 5 (1951):
   Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is “excessive” ....
48. Desmond, supra note 26, at 248.
49. Fed. R. Crim. P. 46(c) is an example of a statutory guide:
   ... the amount ... shall be such as ... will insure the presence of the defendant, having regard to the nature and circumstances of the offense charge, the weight of evidence against him, the financial ability of the defendant to give bail, and the character of the defendant.
necessary to insure his presence. There should not be a "... blanket bail chiefly ... [dependent upon] the nature of the accusation ... Each defendant stands before the bar of justice as an individual." 51

SEtTING AND TAKING BAI.

A. By the Judge

The authority to allow bail is generally regarded as a judicial or quasi-judicial power. 52 Clearly, it requires a judicial decision for a determination of whether a particular person should be bailed, and, if so, in what amount. In New York, the power to admit to bail is generally limited to judges or magistrates, although certain police officers are also granted the power in limited cases. 53

A main problem in this area concerns the time of setting and taking bail. It has become the practice of Buffalo City Court Judges to admit arrested persons to bail from their homes, at odd hours when Court is not in session. Most judges feel an obligation to do so because of the language of section 165 of the Code to the effect than an arrested person may give bail at any hour of the day or night. 54 This practice includes felony as well as misdemeanor cases, with police record checks being secured with respect to the former as required by Code Section 552-a. Probably the greater need for such practice is in the felony cases, because the police may admit to bail in most misdemeanor cases. It appears to be highly doubtful that the Code requires this practice; even if the Code permits it, there seem to be many objections to its continuance. Section 165 could be fairly interpreted as requiring the setting of bail only after the arrested person has been brought before the magistrate, since the first part of that section is the mandate against the police holding arrested persons unreasonable lengths of time. In Buffalo, regular sessions of magistrate's courts are held for this purpose; it does not seem unreasonable to postpone bail proceedings to such sessions. Especially is this true when it is remembered that the police may take bail in the cases of lesser crimes. Hence, it is arguable that the

51. Stack v. Boyle, 342 U.S. 1, 8, 9 (1951) (concurring opinion).
53. New York Code of Criminal Procedure section 550 is an example of the situation where the power to admit to bail is limited to judges or magistrates. Sections 554 and 737 are the provisions granting police officers the power in limited cases.
54. N.Y. CODE CRIM. PROCE. §165 provides:

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.

Technically, Code section 165 only says "give" bail, apparently presupposing that bail has been set previously at the appearance before the magistrate required by the first part of the section.
Code does not require setting bail at odd hours at the judge's home. Furthermore, this practice has incidental dangers. There is always the risk of a rash judgment because hurriedly made, or made with scimpy information, or based upon an equally hurried police record check. In addition, the at-home bail setting takes place without the defendant's presence. (Usually the attorney arranges things and goes to the judge's home with the sureties. The defendant remains in jail until the judge orders his release.) This prevents the judge from questioning the defendant about matters relevant to the amount of bail, and also precludes the defendant's joining in the undertaking. It is submitted that both of these results are undesirable and should be avoided by a proper court proceeding. Although the Code now allows an undertaking by sureties alone, without the defendant, in the discretion of the magistrate this seems to be undesirable. Since it is the appearance of the defendant that is sought, he should always be required to join in the undertaking. Hence, it is recommended that this practice be discontinued and that all bail proceedings be held in open court at regular sessions with the defendant required to join in the bail undertaking. The innocent defendant should be adequately protected by his right to be brought before a magistrate without unnecessary delay.

When the right to bail and the amount thereof have been determined, the remaining proceedings are generally deemed ministerial. However, in New York only a judge or magistrate is permitted to take the bail, except as police officers may do so in the cases where they may admit to bail. No good reason appears for this limitation, and it seems to place an unnecessary, even undesirable, burden on the judges. They should not be vexed with problems of qualifying sureties or evaluating properties offered in justification, when a clerk could well serve this role and perhaps, with specialized training, even better serve. Hence, it is recommended that a bail clerk be designated for the purpose of taking all bail after it has been fixed in amount by the judges in the various parts.

B. Station-House Bail

Police officers are ordinarily regarded as without authority to admit to bail,

55. See 1 COMP. Ops. 255 (1945) wherein it is stated:
   The magistrate has no jurisdiction in any case until an information has been laid, and he has no authority to fix bail until the defendant has been brought before him and has been informed of the charge against him.

56. See, N.Y. CODE CRIM. PROC. §§568, 581.

57. State v. Charnock, 105 W. Va. 8, 141 S.E. 403 (1928).

58. N.Y. CODE CRIM. PROC. §551.

59. See, Detroit Court Solves Bail Problem, 16 J. AM. JUD. SOC'Y 143, 145 (1933), wherein it is reported that a most effective bail system in the City of Detroit included leaving all ministerial tasks concerning bail in the hands of a clerk.
absent an express statutory authorization, because of the judicial character of that power.\textsuperscript{60} In New York, express provision for police bail has been made in misdemeanor cases, where admission to bail is a matter of right.\textsuperscript{61} In accordance with the Code scheme, separate provisions for police bail are contained in Part IV\textsuperscript{62} and Part V\textsuperscript{63} of the Code. Because of the Buffalo City Court's enlarged jurisdiction,\textsuperscript{64} these separate provisions are especially troublesome here. The Part V provisions in section 737 are expressly limited to the instances of Code-provided jurisdiction as found in Code sections 56 and 56-a. Hence, there is the question of whether Buffalo police must turn to the Part IV provisions in Section 554 in the case of arrests for other crimes, even though all cases will be disposed of in the Buffalo City Court sitting as a Court of Special Sessions. The confusion resulting from an affirmative answer becomes obvious when the provisions of the two separate Code Parts are compared and the differences noted. Such comparison may best be made by breaking the sections into their elements:

(1) \textit{Who takes the bail} — generally, the two sections specify the same officers, except that section 737 includes any desk officer in charge of a station or jail, a category not found in section 554.

(2) \textit{When bail is to be taken} — Section 554 requires bail to be taken from any person arrested for a misdemeanor or offense (with certain exclusions) between the hours of 11:00 A.M. and 8:00 A.M. the next day. Section 737 applies only to arrests for section 56 and 56-a misdemeanors or offenses when a magistrate is not accessible (defined as when he is ill or absent, or it is between 7:00 P.M. and 9:00 A.M.).

(3) \textit{Time for which taken} — Under section 554, bail may be taken only for appearance before a magistrate on the following day, while section 737 permits bail for appearance at a date not more than one week thereafter.

(4) \textit{Kind of bail} — Section 554 permits the taking of a personal undertaking of the defendant with at least one surety. If the charge is an ordinance violation punishable only by a fine, defendant's undertaking may be without surety if secured by deposit, or the police in their discretion may release him without bail on his promise to appear. Section 737 permits only a personal undertaking of the defendant secured by cash deposit, or a written undertaking by a licensed corporate surety.

\textsuperscript{60} Trevathan v. Mutual Life Ins. Co., 166 Ore. 515, 113 P.2d 621 (1941).
\textsuperscript{61} N.Y. Code Crim. Proc. §553(1).
\textsuperscript{62} Id. §554 (4-9).
\textsuperscript{63} Id. §737 (2-4).
\textsuperscript{64} See note 10 supra, and the textual discussion at that point.
(5) **Amount of the bail** — Under section 554 the bail must be $500.00 except where an ordinance violation is charged in which case it must be $100.00 or double the largest fine if that is the only penalty. Section 737 grants the police discretion to vary the bail from $25.00 to $200.00 if the charge is one specified in section 56, and from $5.00 to $100.00 if the charge is an ordinance violation or a misdemeanor specified in section 56-a.

(6) **Disposition of the bail**—In both cases, bail deposits must be taken to the Court and be returned if the defendant appears. However, under section 554 the undertaking runs to the people of the State, whereas it runs to the city under section 737. The consequences regarding forfeitures are treated under separate heading in this study, *infra*.

Hence it can be seen that there are wide variations in these sections. In addition there are duplications and conflicts. Section 554 expressly covers ordinance violations, whereas all such violations are cognizable under section 737 because included in section 56, subdivision 35. The crime of exposure of the person is excluded under section 554 (by the incorporation of section 552 by reference) whereas this crime is cognizable under section 737 because included in section 56, subdivision 31. Clearly, these conflicts would perplex judges and lawyers, let alone the police.

Present practice in Buffalo appears to be to apply section 737 alone, and therefore to grant police bail only in the cases and manner permitted by that section.\(^6^5\) This is certainly a reasonable solution to the problem when it is considered that Part IV is not supposed to apply to Courts of Special Sessions anyway.\(^6^6\) This is hardly adequate however, and the only answer lies in amendment and clarification of the statutes.

It is suggested that section 737 should be amended to extend its coverage to all cases which a Court of Special Sessions has power to hear and determine without regard to the source of a particular court's jurisdiction. The discretionary element in the fixing of the amount of bail should be replaced by a fixed schedule to avoid the possibility of abuses. Time of appearance should be limited to the time of the next regular session of the Court. The kind of bail should remain limited to undertaking with cash deposit or corporate surety. Only with a clearly drawn statute, with specific, detailed provisions, can it be expected that station-house bail will serve a useful purpose.

\(^6^5\) See, BUFFALO POLICE DEPT. DESK LIEUTENANT'S GUIDE, 1956, p. 30.

\(^6^6\) See note 15 *supra*. 

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A. The Undertaking

As has been noted, release on bail in the United States has become pretty much shorn of the concept of friendly custody of sureties. The emphasis has been toward the pecuniary interest; hence, the undertaking of bail takes the form of a contract between the government on one side, and the principal and sureties on the other. Essentially, it is a set of promises that the principal will appear as ordered or, upon default, the sureties will pay to the government a specified sum, the amount of the bail.

In New York, the Code prescribes various forms of the undertaking in different sections, depending upon the court and stage of the proceedings where the bail is granted. Peculiarly enough, under Part IV provisions, the defendant, in the discretion of the magistrate, need not join in the undertaking; however, no such discretion is allowed in the Part V provision. The sureties on the undertaking are required to meet specific qualifications, and must justify to these qualifications by affidavit before the magistrate. However, again, these requirements are found only in Part IV of the Code. Part V provisions require only that the sureties be "approved by the magistrate," with no statutory guides set forth for such approval. It is interesting to note that there is no requirement that the sureties give security, but only that when real property is given as "security" its assessed value must be twice the amount of the bail. It is not clear how real property is given as "security," other than that a lien attaches to any such property specified in the surety's affidavit of

67. See note 28 supra.
68. As was said by Justice Holmes in Leary v. United States, 224 U.S. 567, 575-76 (1912):
   The interest to produce the body of the principal in court is impersonal and wholly pecuniary . . . . [T]he did not matter to the Government what person ultimately felt the loss, as long as it had the obligation it was content to take.
69. La Grotta v. United States, 77 F.2d 673 (8th Cir. 1935).
70. See, e.g., N.Y. CODE CRIM. PROC. §§568, 581, 737.
71. Id. §§568, 581.
72. Id. §737. It has been asserted that this discretion is of practical value in localities where many defendants would have to be held at court, without proper facilities, until bonds could be executed. N.Y. STATE LEGISLATIVE ANNUAL. 1956, p. 23. One might question this, but even if it is a valid reason, it would appear to have greater application in Courts of Special Sessions where traffic is heaviest.
73. N.Y. CODE CRIM. PROC. §569, requires, inter alia, that the sureties be residents, and householders or freeholders, who are worth the amount of bail.
74. Id. §572. The sureties may be examined for sufficiency pursuant to sections 573-75.
75. Id. §737.
76. Id. §569(3).
justification. Presumably, the Court will insist upon justification in the form of real property ownership and thereby acquire security in the form of the lien. However, to justify as to sufficiency the surety must only swear he is worth the amount of the bail. Hence, there results the anomaly that a surety worth the amount of the bail in personal property is sufficient, but one who justifies by real property must be worth twice the amount of the bail. It is suggested that the statute should always require security either in the form of a pledge of personal property or a lien upon real property, and that in either event the valuation thereof need be equal only to the amount of bail.

Professional bondsmen and corporate sureties are subjected to close regulation under the statute. The need for such supervision arose from many instances of abuses by these sureties in the past. However, professional bondsmen are infrequently employed in the local courts, most bonds being furnished by private persons. Therefore, the statutory regulations will not be discussed in detail. Suffice it to note that there are limits placed upon the fees chargeable, and that such bondsmen must be licensed by the superintendent of insurance.

Since the City Court of Buffalo Judges function as committing magistrates and judges of a Court of Special Sessions, they have occasion to grant bail pursuant to provisions of both Part IV and Part V of the Code. The bail form presently in use has been prepared to serve for all purposes. It consists, therefore, of a combined form of the undertakings specified in Code sections 568, 581 and 737, and includes the sureties' affidavit required by section 572, as well as the additional affidavit required by section 554-c, regarding consideration received. The form is adequate as far as it goes, but that is not far enough. It is not suitable for use by professional bondsmen because it requires an affidavit that no consideration has been received. It does not allow for the defendant joining in the undertaking as required by section 737 (1) (a), nor does it permit bail in the form of a personal undertaking of the defendant, with cash deposit instead of sureties, as provided for in section 737 (1) (b). It is recommended that the Court use at least two forms, one each for use in Part IV and Part V proceedings, and that these be so drafted as to provide for all possibilities detailed in those parts.

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77. Id. §556-b. The lien is effective as against innocent third persons only if notice thereof is filed in accordance with Code section 556-c. N.Y. LIEN LAW §246.

78. In actual practice, no bonds are accepted without security. City Court insists upon real property or cash deposit. However, no system is enforced in the Court for filing of the notice of lien; it is simply not done. Hence, real property "security" is of doubtful validity. It should also be remembered that these Part IV provisions do not apply where the Court sits as one of Special Sessions. Here there is no authority for a lien. Apparently, unscrupulous sureties might easily sell their property and disappear if they were so inclined. This situation clearly calls for both administrative and statutory corrective measures to assure the establishment of a valid lien.

79. N.Y. CODE CRIM. PROC. §569 (2).

80. Id. §554-b.

81. See Notes, 26 COLUM. L. REV. 752 (1926), 21 id. 592 (1921).
B. Deposit Instead of Bail

We have seen that in New York, bail consists of an undertaking of surety or sureties and/or an undertaking of the defendant. In some instances, in addition, the undertaking is secured by cash or personal property of the sureties or of the defendant.

The Code contains another provision, not bail, but what is called a "Deposit Instead of Bail." This section provides for the discharge of the defendant when he, or a third person, deposits cash, or specified securities, in an amount equal to that set by the magistrate for purposes of an undertaking. Under the common law, cash could not be accepted as bail or in lieu of it. Therefore, the right to give cash or other securities in lieu of bail is restricted to the instances allowed by statute. The essential difference between bail and the deposit in lieu thereof is that the latter is not accompanied by an undertaking of the defendant or of a third person. However, the purposes of both bail and the deposit in lieu thereof are the same, that is, to release the defendant from imprisonment and at the same time insure the presence of the accused some time in the future. This is accomplished in both instances by a pecuniary loss in the event of the failure to appear at the designated time.

The statute is very limited in application. The State Comptroller has repeatedly concluded that the section is not applicable to Courts of Special Sessions, though there are no reported cases so holding. As before mentioned, Part V of the Code governs the proceedings in the Courts of Special Sessions. Generally, though there are exceptions, "The directions contained in Part IV [wherein is located the "Deposit Instead of Bail" section] for the regulations of proceedings in criminal actions prosecuted by indictment do not apply to the proceedings mentioned in Part V of the Code of Criminal Procedure, unless they are made so to apply by special provision of the statute." This position is particularly strong because of the existence of a somewhat similar provision in Part V of the Code.

85. Moloney v. Nelson, 158 N.Y. 351, 53 N.E. 31 (1899). The court, however, used the presence of section 586 to refute the argument that the promise of indemnification by the principal to the surety was against public policy. The notion was extended and now courts will imply an agreement of indemnification. Badolato v. Molinari, note 83 supra.
86. E.g., 2 Comp. Ops. 414 (1946); 1 id. 368 (1945).
87. E.g., Code section 177 concerning arrests without a warrant. This provision, though located in part IV, is applicable to prosecutions other than by indictment. People v. Glennon, 175 N.Y. 45, 67 N.E. 125 (1903); Stearns v. Titus, 193 N.Y. 272, 85 N.E. 1077 (1908).
One should not presume that the legislature has adopted overlapping provisions although in some instances the horrendous condition of the Code does force this conclusion. This section is of course applicable when the judge is sitting as a committing magistrate as distinguished from the situation when sitting as a judge of the Court of Special Sessions.

There are other unanswered problems in regard to a deposit instead of bail. One of particular concern is, if the defendant offers the deposit, must it be accepted? The Code contains no provision that a further order of Court is necessary or permitted. Rather, it is provided that "... at any time after an order admitting him to bail, instead of giving bail, [the defendant] ... may deposit ... the sum mentioned in the order of commitment ...." The discretion therefore would seem to be with the accused. Because no further order is necessary, or provided for, we conclude that the deposit must be accepted and "... the defendant ... forthwith ... discharged from custody.".

Who becomes the custodian once the deposit has been made (to any of a number of persons)? The statute does not expressly answer this question nor has it been considered by any of our courts. Section 588 of the Code provides, in certain circumstances not here pertinent, that the money deposited he refunded by the County Treasurer. Section 589 provides that the County Treasurer must apply the money deposited for the payment of a fine, the surplus being refunded to the defendant. Section 596 states that the County Treasurer with whom the money is deposited may apply it for the use of the county if the defendant fails to appear. The State Comptroller has properly said that these sections "... indicate beyond any question that the custody of the fund should be with the County Treasurer ...."

It is readily seen that the statute as presently worded is restrictive and not free from ambiguity. The present practice is that the deposit instead of bail is not used. The County Treasurer, the magistrate, the clerks, the wardens or keeper in charge, all designated to receive the deposit, do not so do.

90. Thus the recognition for the division into parts IV and V, in regard to forfeiture of the "cash bail." On forfeiture, the section 586 bail goes to the County while the section 737 bail goes to the City. See, 2 Comp. Ops. 146 (1946).  
91. E.g., the overlapping provisions of station-house bail as provided in sections 554 (4-8) and 737 (2-4).  
92. 9 ST. DEPT. RPTS. 456, 458 (1916); 1 COMP. OPS. 368 (1945).  
93. N.Y. CODE CRIM. PROC. §586 (1).  
94. Id. §586 (2). In 2 COMP. OPS. 219 (1946) it was said: Upon being admitted to bail, the defendant may at once deposit the cash ... No order of the judge can limit the right of the defendant to make a deposit with any of the officers designated in section 586 of the Code of Criminal Procedure.  
95. 9 ST. DEPT. RPTS. 456, 458 (1916).
However, one should not be too hasty to criticize. While a mere deposit may permit the defendant to secure his release more easily, it may not serve as a satisfactory inducement for his appearance. There cannot be much question that pecuniary loss provides a strong incentive for the surety to see to it that the defendant is present at the designated time—certainly a stronger incentive than is upon the defendant to appear at the risk of the loss of his own deposit. Before a wise decision can be made as to the utility of the deposit procedure, a study must be made to determine whether a deposit by the accused without surety is as sufficient as an undertaking with surety. This can be done only in the areas which employ the cash deposit procedure.

C. Release Without Bail

The practice has developed, both in the City Court of Buffalo and in County Court, of releasing a defendant upon his own recognizance in lieu of bail. This release is often termed "parole." While this is not strictly speaking a "kind of bail," as this part of the report is entitled, it is treated here because it is a kind of release analogous to bail.

There appears to be no statutory authorization for this practice and its origin is obscure. Provision is made in Code section 554 (9) for release, in the custody of his parent, of a child under sixteen charged with juvenile delinquency, either by the police or by a judge or by both; also, section 554 (6) allows the police to parole any arrested person in certain limited cases. However, there is no general authorization for release of adult defendants, outside of New York City.

In spite of the lack of statutory authority therefor, there appears to be a great deal of merit in this practice. It permits the release of arrested persons with firm community ties who are good "risks" but who otherwise would be incarcerated because unable to raise bail. It is believed that this practice should obtain, in non-felony cases at least, in the discretion of the judge; accordingly, statutory authorization should be provided. However, it is to be noted in this regard that jumping bail is a separate crime; therefore, as a precaution, it should also be made a crime for failure to appear after parole.

96. Section 737 of the Code presents the same type of problem in Courts of Special Sessions. This section permits the defendant to be released upon his undertaking only secured by a deposit. This section, too, is not being used in the City Court of Buffalo.

97. In McNair's Petition, 324 Pa. 48, 187 Atl. 498 (1936), it was held to be no abuse of discretion for a magistrate to release without bail even though no statute authorized such release. The court thought the practice was not to be recommended or encouraged, but noted that no statute made it mandatory to require bail.

98. See, New York City Criminal Courts Act §103.


CONSOLIDATED BAIL BONDS

It is often necessary for a defendant to obtain separate bail at different stages of the prosecution. Section 577-b of the Code, enacted to alleviate this duplication, provides that it is permissible for the official taking bail to accept a single consolidated bail bond for the defendant's appearance both before the magistrate and before any court in which the crime or offense with which he is charged is triable.101

At present, the defendant has to give separate bail before being held to answer and after being held to answer; the latter, however, being a single consolidated bond for appearance both before and after indictment.102 The disadvantage of the present situation is that non-corporate sureties sometimes pull out when a second undertaking is necessary because generally the County Judge sets bail at a different figure, leading the surety to believe that something is wrong.103 On the other side, the argument against use of a consolidated bond for all stages of the criminal proceedings is that the risk of flight perceptively increases after one has been held to answer and therefore there should be a new undertaking with a fresh evaluation of the amount of bail necessary to insure the presence of the defendant. This argument is not very convincing. If it was extended to its reasonable conclusion, a consolidated bond would not be used for the appearance of the defendant both before and after indictment. Is not the risk of flight greater after indictment than before indictment? The real impediment to the use of the consolidated bond is the remnants of distrust of inferior court judges. This distrust is not well founded. In large cities the magistrate quickly develops much experience in setting bail through the many cases he handles.104 It is however essential, and we urge, that cooperation be had between the office of the district attorney and the judges of City Court. If this was obtained there would be no obstacle to an advantageous use of a consolidated bail bond.105

FORFEITURE

The last topic under consideration is that of forfeiture of bail when the

101. The section further provides that before a consolidated bond can be used the form must be approved by the superintendent of insurance of the State of New York.

102. Prior to the use of this consolidated bond it was necessary to give a bond to appear before the magistrate, another after being held to answer before indictment, and a third after indictment.

103. When the defendant has been held to answer, the magistrate so holding may set the bail. N.Y. CODE CRIM. PROC. §§557-59. This is not the practice locally however. After the defendant has been held to answer, bail is generally obtained from the County Judge.

104. Cf. note 40 supra.

105. If it is decided that a cash deposit in lieu of bail is a good thing, there is no reason for not using a "consolidated cash deposit" also, a deposit which would be applicable for all stages of the proceedings.
defendant fails to appear. Sections 593-98 govern forfeiture of bail, and cash
deposits in lieu thereof, in actions regulated by part IV of the Code (actions pros-
ecuted by indictment). Sections 738-40 similarly govern forfeiture of bail in actions
regulated by part V of the Code (actions which the City Court of Buffalo has
jurisdiction to hear and determine as a Court of Special Sessions).106

At the outset, it might be wise to delineate some of the general principles and
problems that will be discussed. As before mentioned, bail may be given when the
defendant is charged with an indictable crime, or with a crime which the City
Court of Buffalo has jurisdiction to hear and determine. Bail may consist of an
undertaking of surety without deposit. Bail may consist of the undertaking of the
defendant with deposit. Bail may consist of the undertaking of surety with deposit.
Finally, the defendant may be released when there is given a deposit in lieu of
bail. As a general working rule, it might be stated that the proceeds resulting from
the enforcement of a forfeiture inure to the benefit of people of the State of New
York if the crime is one governed by part IV proceedings. If, however, the crime
is one within the jurisdiction of the City Court of Buffalo as a Court of Special
Sessions, the proceeds from the forfeiture are to be paid to the City.

This simple division however, is rendered more fluid by the provisions of
section 554 of the Code in relation to station-house bail, and also by section 586
of the Code permitting a deposit in lieu of bail. This latter section also raises the
question of whether an undertaking secured by a deposit is to be treated the same
as a deposit in lieu of an undertaking. This last problem is in reference to enforce-
ment and disposition.

Section 554 (4) of the Code permits, in certain instances, station-house bail
when the defendant is charged with a misdemeanor or violation of a corporate
ordinance over which the City Court of Buffalo has jurisdiction to hear and deter-
mine. Bail pursuant to this section is taken by an undertaking of the defendant
and a surety; the surety justifying under oath or by a deposit of money or personal
property. However, in some circumstances, bail may constitute the undertaking of
the defendant alone secured by cash or personal property.107 In both situations, if
the defendant fails to comply with the conditions of the undertaking, the amount
of bail forfeited is to be paid to the people of the State of New York.108

106. It is this division of the Code that leads to the necessary conclusion that
the sections which have different provisions are not contradictory. E.g., a deposit
in lieu of bail is in the custody of the County Treasurer. See discussion on this
topic, supra. The custodian of a deposit securing an undertaking in a Court of
Special Sessions, is the Court. 2 COMP. OPS. 414 (1946). Upon forfeiture of the
deposit in lieu of bail, the proceeds are applied to the use of the County by the
County Treasurer. N.Y. CODE CRIM. PROC. §596. The proceeds of the deposit as
security belong to the City upon forfeiture. Id. §703. See also 2 COMP. OPS. 146
(1946).
107. N.Y. CODE CRIM. PROC. §554 (7).
108. Id. §554 (8-a).
It is significant to note that when there is a forfeiture pursuant to Section 738 in an action which the City Court of Buffalo has jurisdiction to hear and determine, the amount of bail forfeited is to be paid to the City.\textsuperscript{109} We thus have this curious result: station-house bail taken pursuant to Section 554 (4) of the Code when forfeited is payable to the State, even though the offense or misdemeanor is one over which the City Court of Buffalo has jurisdiction as a Court of Special Sessions, and even though the amount of the undertaking, if taken by a magistrate, would be paid to the City of Buffalo, upon forfeiture. It is obvious that this glaring incongruity must be rectified.

A cash deposit in lieu of bail, when declared forfeited, is applied by the County Treasurer to the use of the County.\textsuperscript{110} No further action is necessary.\textsuperscript{111} It would seem that this is to be differentiated from the station-house bail section when the undertaking is accompanied with a deposit of cash or personal property. The latter is expressly made payable to the State. Section 595 would govern the method of forfeiture. A judgment would be procured by the district attorney and it would appear that the proper method of enforcing the judgment would be to execute upon the deposit.\textsuperscript{112}

In actions over which the Courts of Special Sessions have jurisdiction, bail when taken by the judge, may consist of the undertaking of the defendant and surety, or the undertaking of the defendant only accompanied by a deposit of cash or personal property.\textsuperscript{113} If a magistrate is not accessible, and the defendant is charged with any one of a number of specified crimes, then the defendant may be released at the station-house upon a personal undertaking and “cash bail” or upon execution of undertakings by corporate surety and the defendant.\textsuperscript{114} Whatever the form of the bail, upon failure to comply with the conditions of the undertaking,
payment is to be made to the City of Buffalo when the crime is committed within
the City.115

If the defendant fails to appear and the bail consisted of the undertaking of
surety, the financial officer of the City commences an action for the recovery on the
undertaking.116 It is further provided that if the bail consisted of the personal
undertaking of the defendant with a cash deposit, the judge shall pay the cash to
the financial officer of the City.117 If the defendant has secured his personal under-
taking with a deposit of personal property, it appears that the proper procedure
would be to obtain a judgment and then execute upon the security.118

We have thus seen that upon forfeiture of bail in actions which the City
Court does not have jurisdiction to hear and determine, the promise is to pay the
people of the State of New York in the event of forfeiture. However, if there is a
forfeiture in lieu of bail the deposit is to be retained by the County Treasurer. If
the defendant is charged with a crime or offense which the City Court has juris-
diction to hear and determine, the amount recovered upon forfeiture is payable
to the City of Buffalo (with the anomalous situation of station-house bail pursuant
to Section 554, where although the Court of Special Sessions has jurisdiction, the
judgment is apparently obtained by the district attorney pursuant to Section 595
and the amount is recovered on behalf of the people of the State of New York).

The practice in the City Court is to pay the proceeds to the City if the
undertaking is secured with a cash deposit. (There is no use made of the provi-
sion permitting the acceptance of a deposit of personal property.) However, if
the undertaking is without deposit, no action is taken to enforce the forfeiture.
It is urged that the district attorney obtain judgment pursuant to section 595 of
the Code when the undertaking is to pay the people of the State of New York.
It is further urged that the City, pursuant to section 738 of the Code, collect the
amount due on forfeited undertakings which are payable to the City of Buffalo.

CONCLUSION

It is not feasible to catalog all suggestions made in the course of this paper,
in any event each has meaning only in the context of its discussion. However, it is
possible to make a few general observations. In many areas, the practice in the
City Court deviates from the mandates of the Code. If the test for the success of
the bail system is appearance of the defendants, the system is working, for we are

115. Id. §738. Formerly section 739 of the Code provided that the proceeds
were to go to the County. This section was repealed by Laws of 1944, chapter 777.
116. Id. §738.
117. Id. §738 (1). Note the similarity to the forfeiture of a cash deposit in
lieu of bail. Id. §596.
118. 2 Comp. Ops. 571 (1946).
informed that there are very few forfeitures. But bail serves another function. It is
to allow the defendant, presumed to be innocent until proven guilty, to be released
from jail. Whether the practice is working from this latter point of view, we do
not know. Records are just not available to determine such things as percentage of
persons who secure their release by posting bail.\footnote{119} One should not be hasty in
criticizing the Court, however. The Code is not a product of good draftsmanship.
The result of this is that the Code sections present in many areas almost insoluble
problems of statutory construction and interpretation. This has been caused to a
large extent by continued piecemeal amendment without adequate integration of
changes, which has extended over the seventy-seven years of the Code's existence.
There is needed a revision of the Code in its entirety, not only to achieve integra-
tion, but also to reassess the desirability of the procedures in the light of present
day perspectives. For this reason, the suggestions made herein deliberately have not
been presented in the form of detailed amendments to the existing statutes.

\footnote{119} Chief Judge Ryan is acutely aware of the inadequate, antiquated record
system presently in use in the City Court. There is not much he can do however,
for funds simply are not appropriated. We strongly urge the adoption of a
central record system and appropriation of the necessary funds. It is essential to
a well-functioning court.
NOTES AND COMMENTS

PART II: WEEKEND ARRAIGNMENT PRACTICE IN THE CITY COURT OF BUFFALO**

PRESENT PRACTICE

Section 165 of the Code requires that all arrested persons be taken before a magistrate "without unnecessary delay." The judges of the City Court of Buffalo are magistrates vested with the powers and jurisdiction of that office. The Buffalo City Court Act requires Saturday and Sunday session at which the judge must sit as a magistrate. Hence, it would appear that persons arrested on weekends must be brought before the judge, sitting as a magistrate, at these weekend sessions.

This is currently being done. However, under present practice, no arraignments or examinations are held at these sessions. Rather, the defendant is brought before the judge, told of the crime with which he is charged, and his right to counsel, bail is set if the crime is bailable, and the case is adjourned until Monday, with the defendant being committed to Erie County Jail if bail is not given. This system has the advantage of postponing the examination until a time when counsel is more readily available to the defendant, while at the same time removing him from the custody of the police. In addition, neither the arresting officer nor the complainant, if one other than the arresting officer, is required to be present. Hence, where the arrest was made without a warrant, the judge has no formal information before him at these sessions. Lack of an information raises serious questions as to the jurisdiction of the judge to commit the defendant to jail upon adjournment.

THE STATUTORY SCHEME

A person may be arrested either upon a warrant of arrest or, in particular circumstances only, without a warrant.

The Code prescribes the method of obtaining a warrant: It is obligatory to

**The present weekend practice, as herein described, was modified prior to the publication of this report. The warrant clerk's office at City Court is now open at weekend sessions for the purpose of preparing informations before arraignment. Observation of the effects of this change indicates that section affidavits (discussed infra in this report) are being liberally used. When used, these affidavits are sworn to before a commissioner of deeds rather than the magistrate, and do not assure that the essential elements of the crime will be alleged. These points should be reconsidered after reading this report.

120. N.Y. Sess. Laws 1909, c. 570, §65. See also N.Y. CODE CRIM. PROC. §147 (2).
121. N.Y. Sess. Laws 1909, c. 570, §68.
123. Id. §177.
lay an information before a magistrate; there must be an examination of the informant and the prosecutor; depositions must be taken. A warrant shall then be issued only if the judge is satisfied from the depositions that the crime complained of has been committed and that there is reasonable cause to believe that the accused has committed it.

Where an accused has been arrested without a warrant, the Code is strangely silent and contains no express requirement that there be an information, examination or depositions. Nevertheless, it has been held by sound reasoning that before a magistrate may commit the accused it is necessary that there be an information, for this is the foundation of his jurisdiction.

Thus, it is seen that the same general procedure must be followed before an accused may be committed by a magistrate whether the defendant was arrested with or without a warrant.

Once the defendant is brought before the magistrate pursuant to section 165 of the Code, the magistrate must inform him of the charge against him and of his right to counsel and, after waiting a reasonable time for counsel to appear, the magistrate must proceed to examine the case either discharging the accused or holding him to answer the charge depending upon whether it appears that a crime has been committed and that there is reasonable cause to believe that the defendant committed it. While the magistrate may adjourn the examination upon good cause shown, it would appear that he must commit the defendant (upon such adjournment) in lieu of bail or discharge him if there is no information at least sufficient to allege all the essential elements constituting a crime.

124. Id. §145.
125. Id. §148.
126. Ibid.
127. Id. §150 (2). Under the Buffalo practice, the Judge only issues the warrant. All prior steps are delegated to a warrant clerk pursuant to the Buffalo City Court Act. N.Y. Sess. Laws 1909, c. 570, §11.
128. People ex rel. Farley v. Crane, 94 App. Div. 397, 88 N.Y. Supp. 343 (1st Dep’t 1904) (felony); People v. Scott, 3 N.Y.2d 148, 164 N.Y.S.2d 707 (1957) (misdemeanor). In the Crane case, 94 App. Div. at 400, 88 N.Y. Supp. at 346, it was said:
   If the examination . . . is to be adjourned, and he [defendant] is to be committed pending the examination, it is manifest that a proper information in writing must be filed with the magistrate to give him jurisdiction to issue the commitment.
129. N.Y. CODE CRIM. PROC. §188.
130. Id. §189.
131. Id. §190.
132. Id. §207.
133. Id. §208.
134. Id. §191.
135. Id. §192.
In view of the statutory scheme leading to an immediate examination of the charge, or an adjournment therefor, it would appear to be entirely improper to return the accused to police custody pending full arraignment on Monday.\textsuperscript{137} It is fair to suggest that a prime purpose of section 165 is to prevent so-called police abuse by removing the accused from their custody.\textsuperscript{138} This section would be rendered meaningless if the accused was returned to the police. It is clear that non-compliance with section 165 of the Code renders those responsible liable for false imprisonment, even though the arrest was proper, and they are liable ab initio.\textsuperscript{139} It would be absurd to suggest that failure to lay an information before the magistrate is an excuse for failure to bring the accused before the magistrate.\textsuperscript{140} Thus, it would appear that the Buffalo City Court sitting on a weekend may adjourn examination of the accused to the following Monday, and commit him in lieu of bail, absent any other statutory provision, only if a proper information has been laid before the magistrate.

**AN INFORMATION: DUE PROCESS AND STATUTORY REQUIREMENTS**

Having determined that an information is required, the obvious question becomes: "What is an information?" This question is not easily answered.\textsuperscript{141}

Constitutionally speaking, the minimum of due process would seem to require that the defendant be charged with the commission of a crime.\textsuperscript{142} However, due

\textsuperscript{137} But cf. Davis v. Carroll, 172 App. Div. 729, 159 N.Y. Supp. 568 (4th Dept 1916), wherein the court stated that the police must bring the accused before a magistrate to obtain "instructions" even though the magistrate could not investigate the crime. It is submitted that this case is no authority for the proposition that the magistrate could return the accused to the custody of the police.

\textsuperscript{138} As an example, in New York State illegal detention is a fact to be considered in determining the voluntariness of a confession obtained during that period. People v. Alex, 285 N.Y. 192, 192 N.E. 289 (1935).


\textsuperscript{140} People v. Snyder, 297 N.Y. 81, 74 N.E.2d 657 (1947); People v. Lovello, 1 N.Y.2d 436, 154 N.Y.S.2d 8 (1956).

\textsuperscript{141} As long ago as 1906, and it is just as true today, the Court of Appeals said in People ex rel. Livingston v. Wyatt, 186 N.Y. 383, 390, 79 N.E. 330, 333 (1906):

There is some confusion in the authorities as to what an information really is . . . The statute itself [Code of Criminal Procedure] is not free from doubt upon the subject.

\textsuperscript{142} It has been held that there may be no punishment for a crime without a sufficient accusation and that notice of the true nature of the charge is the first and most universally recognized requirement of due process. Albrecht v. United States, 273 U.S. 1 (1927); Smith v. O'Grady, 312 U.S. 329 (1941). The reasoning of these cases should be equally applicable to any deprivation of liberty, whether a commitment pending a hearing or upon conviction.
process does not require that the information after a lawful arrest without warrant be made under oath,143 nor upon legally competent evidence.144

Under New York law, it has been stated that the information must contain enough facts to show that the complainant has reasonable grounds to believe that a crime has been committed by some person named or designated.145 It must amount to a deposition, or other evidence not oral, tending to show that the prisoner has committed the crime.146 It must be made upon oath "... for otherwise as unfounded accusation could be set on foot and an investigation instituted upon unsupported assertion without any proof whatever .... Malice, civil actions, business rivalry, speculation or curiosity might be the sole foundation for a useless and oppressive proceeding."147 While it would appear that the information may be made upon information and belief, it is clear that the source of information and the grounds for belief must be set forth.148 It is also clear that the accused must be discharged if the information does not, upon its face, make out the commission of a crime, and show with depositions reasonable grounds to believe that the accused committed it.149

Hence, it may be concluded that a sufficient information, whatever its form, must be made upon oath and must contain operative facts constituting a crime and showing grounds to believe defendant committed the crime, together with all sources of information and belief when the facts are not within the affiant's personal knowledge, absent any other statutory provision.

OTHER STATUTORY PROVISION — SECTION 145-A OF THE CODE

It has been pointed out previously that generally the same procedures are

143. At common law an information was not required to be verified. See e.g., Weeks v. United States, 216 Fed. 292 (2d Cir. 1914); State v. Kyle, 166 Mo. 287, 65 S.W. 763 (1901).

The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the fourteenth amendment.

See also, Costello v. United States, 350 U.S. 359 (1956).

145. People ex rel. Livingston v. Wyatt, supra note 141.

146. People ex rel. Farley v. Crane, supra note 128.

147. People ex rel. Livingston v. Wyatt, supra note 141 at 391, 79 N.E. at 333. While this case referred to an information necessary to secure a warrant of arrest, it was said in People v. Scott, 3 N.Y.2d 148, 152, 164 N.Y.S.2d 707, 710 (1957):

In our opinion the same reasons of policy which we stated in People ex rel. Livingston v. Wyatt, ... require verification of an information when used as a pleading.

148. The Court of Appeals in People v. Belcher, 302 N.Y. 529, 532, 99 N.E.2d 874, 875 (1951) stated:

We held [in People v. Bertram, 302 N.Y. 526, 99 N.E.2d 873 (1951)] ... an information defective when alleged to be on information and belief ... when founded upon mere hearsay, if supporting depositions under oath are not furnished.

to be followed whether the defendant is arrested with or without a warrant, although this is not a constitutional mandate. These procedures require depositions to accompany an information made upon information and belief, whereas an affidavit based upon personal knowledge would itself perform the functions of both an information and deposition.\textsuperscript{150} As previously noted, these requirements obtain absent any other statutory provision.

Other statutory provision is found in section 145-a of the Code. It is there provided that persons accused of a felony (or certain misdemeanors such as third degree assault) may be arraigned upon a short affidavit of the officer having the defendant in custody, where the complainant is absent or injured, or when the evidence is not complete. While this section, by its terms, is applicable only to the City of Buffalo, apparently it has been little used and there are no known cases of record interpreting it, nor is its language free from ambiguity. Hence, its meaning must be gleaned from deduction in light of the previously described statutory and constitutional requirements.

Since this section obviously contemplates an affidavit based upon information and belief in the absence of depositions by a complainant, it would dispense with the need for depositions where an affidavit-information is laid before the magistrate under its authority. However, this section, in light of the constitutional requirements, could not be construed to dispense with the need that the information allege all the elements constituting a crime. This interpretation will serve a useful purpose. If the affidavit on its face does not allege the necessary criminal elements, the defendant will be discharged. At the same time, if it is sufficient on its face, the defendant may be committed (or bailed) and the examination postponed for the prescribed period in order to obtain the presence or deposition of the complainant.

Support for this interpretation of section 145-a is found in the interpretation given to section 107 of the New York City Criminal Courts Act, from which the former section is obviously drawn. Under the latter section, such affidavits are required to be made by the arresting officer, sworn to before the magistrate, and contain a description of the acts committed by the defendant.\textsuperscript{151}

Section 145-a curiously contains no requirement that the complainant's absence be justified in order to permit use of the short affidavit. Hence, it would appear that this section could be utilized in case of weekend arrests where the complainant does not appear; however, to prevent abuse, it should be limited to justifiable absences. Proper use of this section would insure that an arrested person would not be committed without adequate accusation of the commission of a crime. At the same time, it would permit the commitment of a properly accused

\textsuperscript{150} People \textit{ex rel.} Livingston v. Wyatt, supra note 141.

\textsuperscript{151} Per letter of Chief Magistrate Murtagh of New York City Magistrates Courts, dated February 6, 1958, enclosing a copy of a sample affidavit used there. See also, 9 BENDER'S Forms, CONSOLIDATED LAWS, No. 5050 (1953).
person pending adjournment of the examination until a time when counsel is more readily available.

Section 145-a, by its terms, applies only to the City of Buffalo. Hence, it is suggested that this section be repealed, and be reenacted as part of the Buffalo City Court Act where it properly belongs, and at the same time, be redrafted to eliminate the ambiguities discussed.

CONCLUSION

Under the principles previously considered, the present weekend practice of committing arrested persons without an information is clearly invalid. Either a formal information, supported by depositions where not made on actual knowledge, or a short affidavit under section 145-a without depositions, must be laid before the magistrate when the prisoner is brought before him. In either case the magistrate must be satisfied that allegations constituting a crime have been made, and he may then commit the defendant pending adjournment for an examination.

Therefore, it is submitted that at least proper section 145-a affidavits should be utilized at all weekend arraignments on a felony charge. There should be little problem with respect to misdemeanors, because arrest without a warrant in such cases is only valid where the crime was committed in the presence of the arresting officer.152 Hence, such officer can swear to the information on actual knowledge and there is no need to invoke section 145-a to dispense with supporting depositions. In the rare instance where the officer merely holds the defendant in custody upon an arrest without a warrant by a private person,153 then section 145-a can be utilized only in the limited cases named therein. In other such cases, depositions of the arresting persons would be necessary.

It should be pointed out however, that ordinary procedure utilizing a formal information together with depositions where necessary, is primary and preferable. Section 145-a affidavits constitute an exception to normal procedure. Therefore, it is recommended that use of section 145-a not be abused.

It is suggested that not only should the examination of a person accused of a felony be postponed to a time when counsel is more readily available, but in addition, it should not be possible for an accused to waive his right to an examination at a weekend arraignment.154 Likewise, persons accused of a misdemeanor should not be permitted to enter a plea at these weekend sessions. Therefore, the Buffalo City Court Act should be amended to so provide.

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152. N.Y. CODE CRIM. PROC. §177 (1).
153. Id. §§183 (1), 185.
154. Waiver of the preliminary examination is permitted under section 190 of the Code of Criminal Procedure.