QUESTIONING PRISONERS IN CUSTODY.

Two of the most fruitful sources of miscarriages of justice are (1) Identification parades, and (2) Confessions obtained from prisoners in custody. With regard to police identification parades little need be said at this time, but as to confessions obtained by questioning prisoners in custody a good deal can be said. The danger of obtaining evidence in this form must be apparent to everyone, but it has remained for the Supreme Court of Canada to show just how subtle are its dangers. There is the recent case of *Rex* v. *Sankey*,[1] in which that Court in giving judgment said:

> We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police, which was put in evidence against him, is most unsatisfactory. That statement, put in writing by the police officer, was obtained only upon a fourth questioning to which the accused was subjected following his arrest. Three previous attempts to lead him to talk had apparently proved abortive—Why? We are left to surmise. The accused, a young Indian, could neither read nor write. No particulars are vouchsafed as to what transpired at any of the three previous interviews, and but meagre details are given of the process by which the written statement ultimately signed by the appellant was obtained.

A similar attitude of mind is evidenced in the Court of Criminal Appeal in England, where the cases of *Rex* v. *Grayson*[2] and *Rex* v. *Pilley*[3] have been decided.

Notwithstanding the plain and unmistakable words found in these decisions of the highest courts, we are still faced with a continuation of the same practices as in the past. It must be self evident to any person who attends a regular criminal assize that the large number of confessions which are classed as "voluntary" have been extracted from prisoners by means of questioning and questioning and more questioning, until sufficient evidence has, in the opinion of those interested, been obtained. It is not an uncommon thing to find more than one such "confession" in one case, and the circumstances under which all the questionings are made rarely, if ever, appear.

[1] [1927] S.C.R. 440.
[2] 16 Cr. App. Rep. 7.
[3] 16 Cr. App. Rep. 138.

Unquestionably the whole subject is not altogether free from difficulties, but it is interesting to note how the matter has been approached in older countries. A memorandum has been issued by the Home Office in England for the guidance of the police as a manual of practice in regard to questioning prisoners. It reads:

Memorandum approved by His Majesty's Judges of the King's Bench Division.

The following rules which have been approved by His Majesty's Judges of the King's Bench Division, are circulated for the information and guidance of the Police. The first four were formulated by His Majesty's Judges in 1922. The others have been added to deal with points on which doubts have, since that date, arisen as to the proper interpretation of the law.

(1) When a police officer is endeavoring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks useful information can be obtained.

(2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions, or any further questions as the case may be.

(3) Persons in custody should not be questioned without the usual caution being first administered.

(4) If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the two last words of the usual caution should be omitted, and that the caution should end with the words "be given in evidence".

(5) The caution to be administered to a prisoner when he is formally charged should therefore be in the following words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent man making a statement which might assist to clear him of the charge.

(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such case he should be cautioned as soon as possible.

(7) A prisoner making a voluntary statement must not be cross-examined, and no question should be put to him about it, except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour, without saying whether it was morning or evening, and has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

(8) When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person

charged desires to make a statement in reply, the usual caution should be administered.

(9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him, and he had been invited to make any corrections he may wish.

In Canada no such memorandum exists, and unless the present abuses are checked it will result in either one or two things—(1) The excluding of all confessions as undependable, or (2) An increase in the number of miscarriages of justice. Both of these results would have a disastrous effect and it is only by taking a middle course that we may hope for some improvement. Perhaps the desired end could be gained by making statutory, as an amendment to sec. 685, the very words of the Judges of the Supreme Court of Canada in the *Sankey* case (*supra*) as they appear in [1927] S.C.R. at p. 441, lines 22 to 26. These would read somewhat as follows in statutory form:

685(2) The burden of proof that the admission or confession or other statement was made freely and voluntarily shall not be discharged merely by proof that the giving of the statement was preceded by the customary warning, nor by an expression of opinion on oath by the police officer who obtained it that it was made freely and voluntarily."

A. E. Popple.

Edmonton.