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Prosecuting Attorney: Legal Aspects of the Office

Newman F. Baker

THE PROSECUTING ATTORNEY: LEGAL ASPECTS OF THE OFFICE

NEWMAN F. BAKER*

A number of studies, descriptive and analytical, dealing with the office of prosecuting attorney in the United States have been presented to the readers of this Journal by Mr. Earl H. De Long and the writer. Not only have the constitutions and statutes relating to the office been examined but its administration has been studied both in its metropolitan and rural environments. The relations between the prosecuting attorney and the attorney-general of the state were discussed and considerable attention was given to the distractions which beset every prosecuting attorney due to the fact that he is a political office holder and is hampered in criminal law enforcement by the wide range of his official duties, quasi-criminal and civil. At this time it seems advisable to consider some of the judicial decisions directly involving the office but the task of sifting the thousands of cases in the field is one of great difficulty. Interesting cases are legion as each criminal appeal involves the work of some prosecuting attorney and many appellate briefs contain somewhere a claim of error predicated upon the conduct of those engaged in presenting the State's case at the trial. An attempt to cover all of the problems, with references only to the leading decisions, would be entirely too voluminous to justify its publication in article form. Moreover, it would run the risk of becoming tiresome to all except those specially interested in the subject. So the present study is limited to a few of the major legal problems of the office and an effort has been made to search for outstanding decisions of great importance. In many instances we let the court speak for itself, believing that the words of the court would be more interesting than a paraphrase could be. Moreover, in selecting both topics and decisions relating thereto, our desire is to amplify by use of legal materials the articles on the prosecuting attorney which have heretofore been published.

Liability for Malicious Prosecution

As we have seen[1] the initiation of criminal prosecution is a

*Professor of Law, Northwestern University School of Law.

[1]Baker, "The Prosecutor—Initiation of Prosecution," 23 J. Crim. L. 770 (Jan.-Feb., 1933).

matter resting in the uncontrolled discretion of the prosecuting attorney. To prosecute or not to prosecute? The answer rests upon his individual desires, dependent upon his personal character, remotely affected by the force of public opinion, but not subject to legal control except in the extreme instances of official misconduct. Suppose a prosecutor deliberately goes before a grand jury and obtains, as he usually can, an indictment charging a perfectly innocent citizen with crime? Is there some redress to the injured party through civil suit? On this question there is no agreement in the decisions and as usual, where the courts cannot agree, there is a good argument upon both sides of the question.

The matter was well presented in the case of *Watts* v. *Gerking*[2] *et al.* The complaint alleged the institution of a judicial proceeding against the plaintiff, the want of probable cause, malice, the termination of the proceedings in favor of the present plaintiff, and that plaintiff ascertained damages in the sum of $50,000. The defendant filed a separate demurrer simply stating that he was prosecuting attorney for the district of Amatilla County, Oregon, and the issue of law was whether an action for malicious prosecutions based upon his official acts would lie against a prosecutor. The demurrer was sustained and the Supreme Court of Oregon affirmed the decision of the lower court. In the opinion the Court, quoting from a Pennsylvania case,[3] said:

> "The district attorney is a quasi-judicial officer. He represents the Commonwealth and the Commonwealth demands no victims. It seeks justice only—equal and impartial justice—and it is as much the duty of the district attorney to see that no innocent man suffers as to see that no guilty man escapes."

Nevertheless, it was stated that an action for malicious prosecution is not a "favorite of the law" as *public policy* requires that public officers be protected and there is a clear presumption that every criminal cause is instituted only for purposes of justice. The power conferred upon district attorneys is not purely ministerial. "Their discretion is limited; but that, as a necessity, they do possess a discretion, is indisputable. In nearly every instance, they alone determine when, how, and whom to prosecute or sue in the name of the state."[4] Since successful prosecution depends upon the exercise of this discretion it would seriously hamper the cause of the state if the prosecutor, in

[2]111 Ore. 641, 228 Pac. 135, 318, 34 A. L. R. 1489 (1924).
[3]*Commonwealth* v. *Nicely*, 130 Pa. 261, 270, 18 Atl. 737, 738 (1889).
[4]See *Farrar* v. *Steele*, 31 La. Ann. 640 (1879).

determining whether or not to prosecute, is "charged with notice that he may have to defend an action for malicious prosecution in case of a failure to convict." There is good reason to hold that the prosecutor should be entitled to the same immunity accorded in these cases to the judge or to the grand jury.

However, though it decided against the complaining citizen, the court wanted it understood that its decision was not willingly made to favor corrupt prosecutors and in the conclusion of the opinion the court said:[5]

> "In reaching a decision we are confronted with a determination that concerns public policy. We are face to face with a law-enforcing problem. Criminal law does not enforce itself. It demands the assistance of valid evidence and fearless officials to put it in execution. Because of their tendency to obstruct the administration of justice, it is the policy of the law to discourage actions for malicious prosecution.
>
> "We do not know, nor do we intimate, that either the plaintiff or the district attorney has been guilty of an offense. Our observations have reference to the charge contained in the complaint.
>
> "We have seen that the district attorney owes as great a duty to protect the innocent as to prosecute the guilty. It is hard to conceive of a greater wrong than that of knowingly, falsely, and maliciously accusing an innocent man of the commission of a crime. A good name, good repute as a citizen, is reckoned as a thing of priceless value. The right to liberty and happiness is rated high. The law of criminal procedure is not a public invitation for a district attorney or anyone else to attack the reputation of citizens at the expense of the taxpayer. . . . A corrupt district attorney, who would resort to subornation of perjury for the purpose of fastening a crime upon an innocent man, should and would be hurled from power by an aroused public conscience. The public policy of the state affords ample protection to the innocent, and a prosecutor's endeavors should not be weakened by backfires in the nature of malicious prosecution.
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> "After mature deliberation upon the facts contained in the record before us, and in consideration of the policy of the state in the matter of enforcement of criminal statutes, we hold that the demurrer should be sustained. It follows that our former

[5] 111 Ore. at p. 669.

decision should be set aside, our opinion recalled, and the judgment of the lower court affirmed. It is so ordered."

In a special concurring opinion Chief Justice McBride said:

"I think public policy dictates rather that one citizen should suffer some financial loss than that the district attorneys of the state should be harassed by actions, to defend which might require a large portion of their time, to which the public has a right, and a large portion of the emolument prescribed by law as compensation for their services, and that it is better, on the whole, that redress be offered by prosecutions for misconduct in office, than that the results above indicated should be made possible. On this sole ground I concur with Justice Brown in his opinion."

Both Justices Burnett and Rand, however, dissented, the latter stating:

"There is but one legal ground upon which any argument can be advanced in support of the nonliability of the defendant in the instant case. That is on the principle that the law will rather suffer a private mischief than a public inconvenience. That principle is an exception to the well-recognized rule that there is no wrong without a remedy, and is founded wholly upon principles of public policy and convenience. But the rule ought not to be applied here, for the complaint not only alleges the presence of malice and want of probate cause, but also the additional element that the criminal charge upon which the plaintiff was prosecuted was not only perferred by the defendant himself, but was made by him with knowledge upon his part at the time that he was making a false charge, and that the plaintiff was innocent of the crime he was charging him with. It therefore appears from the allegations of the complaint, which are now admitted to be true, that the defendant falsely charged the plaintiff with the commission of a criminal offense. These allegations charge the defendant with the doing of an act in a manner which the early common-law judges term as 'falso et malitiose.' The term imports not only the making of a false charge maliciously, but the making of it wickedly. As the defendant was a prosecuting officer, if the act had been done either ignorantly or rashly, for doing it, the law might hold him excusable. But as the act was done wickedly, with full knowledge of its falsity, the doing of the act, in law, was neither justifiable nor excusable, and the

> defendant ought to be compelled to answer for the consequences of his wrongful act. Public policy, as has frequently been held, is, at most, a vague and uncertain guide, and was designated by Burroughs, J., as 'an unruly horse pursuing us, and when once you get astride of it, you never know where it will carry you.' *Richardson* v. *Mellish*, 2 Bing. 229, 130 Eng. Reprint, 294. To contend, under any proper conception of sound public policy, that any prosecuting officer has the privilege of bringing a person into court and charging him with and prosecuting him for a crime which he knows him to be innocent of, without being answerable for the damages caused thereby, upon the theory that the public good will be best subserved thereby, is a proposition too monstrous to be debated in a court of justice; for it must be obvious to any reasonable mind that this would place in the hands of an unscrupulous officer powers which are not consistent with good government or the welfare of society."

We have quoted at length from this decision because it squarely presents two opposing points of view upon this matter of the abuse of the office of prosecutor. Though the dissenting judge declared the idea to be "monstrous" there are other cases which support the idea that the prosecutor is not liable for malicious prosecution[6] and this view probably merits our approval as conducive to fearless prosecution of suspected offenders. But some support to the contrary view may be taken from *Leong Yau* v. *Carden*,[7] where the court overruled a demurrer to a complaint for malicious prosecution upon the theory that it is the duty of the prosecutor to prosecute only those whom he thinks may be guilty and *he exceeds his jurisdiction and loses his immunity* when he deliberately prosecutes from malice and without cause. Do we want unhampered freedom of public officials with occasional cases of injustice, or suffocating control in order that none may be unfairly treated? This is an age-old problem of government incapable of solution by general rule.

[6]See *Griffith* v. *Slinkard*, 146 Ind. 117, 44 N. E. 1001 (1896); *Yaselli* v. *Goff*, 12 F. (2d) 396 (C. C. A. 2d, 1926), affd. 275 U. S. 503; *Smith* v. *Parman*, 101 Kan. 115, 165 Pac. 663 (1917); *Semmes* v. *Collins*, 120 Miss. 265, 82 So. 145 (1919); *Arnold* v. *Hubble*, 18 Ky. L. Rep. 947, 38 S. W. 1041 (1897); *Anderson* v. *Rohrer*, 3 F. Supp. 367 (D. C. Fla. 1933) and note in 25 J. Crim. L. 118 (May-June, 1934) by S. A. Perlstein and note by W. J. M. in 73 U. of Pa. L. R. 300 (1925).

[7]23 Hawaii 362 (1916). See, also, *Carpenter* v. *Sibley*, 153 Cal. 215, 94 Pac. 879 (1908); *Parker* v. *Huntington*, 2 Gray (Mass.) 124 (1854); 38 Harv. L. Rev. 262 (December, 1924); *Skeffington* v. *Eylward*, 97 Minn. 244, 105 N. W. 636 (1906).

The Quasi-Judicial Character of the Office

The status of the American prosecutor is discussed in the Wisconsin case, *State* v. *Peterson.*[8] In that case the question concerned the granting of a new trial upon the claim that there was error in permitting private counsel, not regularly appointed by the court, to participate in the case. It appeared that a private attorney greatly assisted the regular prosecutor during the trial. This man sat at the prosecutor's table while the jury was being drawn. Afterward he occupied the prosecutor's office and assisted in questioning prospective witnesses for the State and, in general, consulted with the prosecutor during the prosecution of the case. For all his activities he was paid by private parties interested in the State's case. The decision was that a new trial should be granted. The court said:[9]

> "In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person. Our scheme of government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant. . . .
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> "The conclusion reached is that material aid given to the district attorney in the preparation for trial or in the trial of a criminal case, by a private attorney who is paid for such aid by private parties, invalidates the conviction.
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> "This conclusion does not mean that a district attorney may not consult with parties interested in the prosecution of criminal cases, nor with attorneys who are under pay investigating the facts involved in the criminal prosecution. But it does mean that attorneys cannot be employed by private parties for the purpose of prosecuting criminal cases whether the services are

[8] 195 Wis. 351, 218 N. W. 367 (1928). See *Wilson* v. *Co. of Marshall,* 257 Ill. App. 220 (1929).

[9] 195 Wis. at p. 356.

rendered in the court room in the trial of the case or in the office preparing the case for trial.

"This conclusion does not prevent the district attorney from fully investigating every alleged offense against the public. It is his duty to interview all whom he has reason to believe may know any fact material to any criminal prosecution whether the person interviewed be an attorney retained by those interested in the prosecution or any other witnesses. This conclusion does not absolve any citizen from the duty of informing the district attorney of the facts known to him with reference to any violation of the law, whether such citizen is a layman or a member of the bar representing those interested in the prosecution.

"In his investigation of any alleged offense the district attorney must of necessity consult those who know the facts—the parties who may have been wronged and their attorneys, if they have employed them. In all such cases the district attorney acts in a *quasi*-judicial capacity and determines what course should be pursued in view of the facts disclosed by his investigation. It is only when the prosecuting officer shares his *quasi*-judicial functions and permits the attorney employed and paid by private parties to participate in determining what shall be done with reference to the commencement of a criminal prosecution, or with reference to the manner in which the prosecution shall be conducted, that the case comes within the condemnation of the rule which is here applied."

In *Application of Bentine*[10] the petitioner had been convicted of having carnally known and abused a female of sixteen years in violation of the Wisconsin statutes. He applied for the writ of *habeas corpus* upon the ground that the statute under which he was convicted was passed without consideration of existing statutes and by mistake, and that its provisions are inconsistent with other statutes. He claimed that "district attorneys are administrative officers, that one who finds favor with the district attorney could be prosecuted by him for fornication, whereas another guilty of the same act might be prosecuted for rape." He also stated that if the questioned statute is valid it would make the "inclination and disposition" of the district attorney "whose zeal in prosecution inevitably results in bias, 'the palladium of the inherent personal rights of equality guaranteed by the provisions of the state and federal constitutions'."

The Supreme Court held that the writ must be denied and took

[10]181 Wis. 579, 196 N. W. 213 (1923).

occasion to point out that to say the district attorney is an administrative officer is a fallacy. He is a *quasi*-judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and doubtfully guilty.

It said:[11]

> "The office of district attorney is a constitutional office. It is held as a public trust, and the incumbent is charged with grave responsibilities calling for the exercise of learning in the law and sound judgment. The duties of the office should be discharged vigorously and without fear or favor. At the same time they should be discharged fairly; so discharged that persons accused of crime will not be deprived of their constitutional rights. Before filing the information it is the duty of the district attorney to make full examination of all the facts and circumstances connected with the case, and it is not to be presumed that his decision will be influenced by any personal bias or excessive zeal."

There are numerous decisions which contain the oft-quoted statement that the prosecuting attorney's position in *quasi*-judicial and many of these are based upon questions arising from the acts of self-constituted assistants to the prosecutor. In *Radford* v. *State*[12] the conviction of the plaintiff in error was held void because the information was signed "Claude Hendon, County Attorney, by McClain Taylor, Assistant," whereas Taylor had never been legally made assistant county attorney, the court stating:[13]

> "We know of no rule of law whereby a public officer may delegate power or authority involving official discretion or responsibility except as prescribed by the statute. The law has very carefully guarded the administration of public justice from any interested or unauthorized intermeddling. The county attorney is a very responsible officer, selected by the people and vested with a wide personal discretion, intrusted to him as a minister of justice. There are many reasons why a power of this kind should be confined to the prosecuting officer. He is expected to be impartial in abstaining from prosecuting, as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned."[14]

[11] 181 Wis. at p. 587.
[12] 23 Okla. Cr. Rep. 407, 215 Pac. 218 (1923).
[13] 23 Okla. Cr. Rep. at p. 410 (quoting from the McGarrah case, *infra*).
[14] Another case of the same effect may be found in *McGarrah* v. *State*, 10

Being the representative of the people in criminal proceedings the prosecutor naturally must appear in magistrates' courts and participate in preliminary proceedings although it has been held that this duty does not extend to proceedings involving violation of municipal ordinances."[15] Questions concerning the duty of the prosecutor to appear and represent the state at preliminary hearings and at administrative proceedings often arise. An interesting case came up in New York twelve years ago,[16] in which it appeared that the Society for the Prevention of Crime was urging a *mandamus* that their attorney as sole prosecutor be permitted to prosecute in the Magistrates' Court two persons for illegal acts alleged to have occurred at one of the race tracks in the county of Queens. The court denied the writ saying:[17]

> As to the legal necessity for the presence of the district attorney at hearings in the Magistrate's Court as the prosecuting officer of the county, I have failed to find any law which imposes on the district attorney any specific duty to so attend in a Magistrate's Court at such hearing. There has grown up, however. the custom, especially in the counties included in the city of New York, of the district attorney's office being represented at such hearings, or, as appears in the instant case, an arrangement between the present district attorney and the magistrates that in all important matters, if not represented at the preliminary hearing of an important matter, the magistrate shall order an adjournment, until the district attorney may be present or represented.
>
> "The necessity for such a custom is obvious. The value to the people in the presentation by the district attorney of evidence at the preliminary hearing is incalculable. But if he does not appear, and counsel for complainant *is* present and the magistrate elects to proceed with the hearing, such action would be entirely proper, and a magistrate could avail himself of prosecutor's counsel to present the case.
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> "The district attorney is more than a prosecuting officer. He is a *quasi*-judicial officer. He has a broad discretion in the handling of all criminal matters in his county. He has even the right

Okla. Cr. Rep. 21, 133 Pac. 260 (1913). See also *Johns* v. *State,* 15 Okla. Cr. Rep. 630, 179 Pac. 941 (1919).

[15]*State ex rel. Vannatter* v. *McDonald,* 100 Neb. 332, 166 N. W. 95 (1916).

[16]*People ex rel. Pringle* v. *Conway,* 121 Misc. Rep. 620, 202 N. Y. S. 104 (1923).

[17]202 N. Y. S. at p. 105.

during an examination pending before a magistrate to summarily present the case to a grand jury, in effect taking the matter out of the hands of the magistrate, and seeking an indictment before the inquiry is concluded or the magistrate has decided whether the prisoner should be held or discharged. Subsequently to the preliminary hearings and in the proceedings in criminal actions that would follow, the district attorney has exclusive right to appear and prosecute."

Fixing the limits to the prosecuting zeal of this *quasi*-judicial officer has given the courts a great deal of trouble. One of the best statements is found in *Brower* v. *State*[18] where it was said:

"It is well established in this and other courts that a prosecuting attorney in a criminal case represents the public; that he is a *quasi*-judicial officer charged as much with the duty of seeing that no innocent man suffers as of seeing that no guilty man escapes. It is his duty to see that nothing but competent evidence is submitted to the jury and it is a grave breach of duty to seek by innuendo or artifice to procure a conviction by injecting into the case any material facts of conclusions not based upon the evidence adduced at the trial."

It is true that the prosecutor should not be a "persecutor" and being the representative of the public in a *quasi*-judicial capacity it should be his duty to see that innocent persons are not convicted. In reality, however, the practice seems to be all too common for the prosecutor to push *all* indictments to the best of his ability and in some cases where there are strong indications of guilt he may use foul means as well as fair. This attitude evidently is recognized by the Illinois Supreme Court in *People* v. *Dean*[19] where the court said:

"Counsel say that the State's attorney, well knowing the evidence was improper and illegal, offered it, and the court, knowing the evidence to be of that character, did not exclude it without objection by counsel, and the result was that the defendant did not receive a fair and impartial trial. It is true that a State's attorney is an officer of the court charged with the administration of the law, and it is neither his duty nor his privilege to attempt to secure convictions by unlawful means. There may be cases where the evidence is close and unfair advantages are

[18] 26 Okla. Cr. Rep. 49, 221 Pac. 1050 (1924 Okla.).

[19] 308 Ill. 74, 78, 139 N. E. 37 (1923). See *Berger* v. *U. S.*, 293 U. S. 552, 55 S. Ct. 629 (1934) and note 26 J. Crim. L. 276 (July, 1935).

taken of a defendant of such a nature that a judgment or conviction should not stand, and the court will consider errors notwithstanding the failure to make objection. (*People* v. *Gardiner*, 303 Ill. 204.) In this case practically no objection was interposed by counsel for the defendant, and the court at one time expressed surprise that objection had not been made before. The defendant employed counsel of his own selection, and the rule applies that the court will not reverse a judgment which is manifestly and unquestionably right, because counsel did not try the case as well as he should have done. (*People* v. *Anderson*, 239 Ill. 168; *People* v. *Barnes*, 270 *id.* 574.) Whether all the evidence now objected to was competent or not will not be considered, because it could not have affected the result."

Occasionally, however, there is a reversal because of excessive zeal in prosecution as in the case of *Griffin* v. *United States*[20] where it appeared that certain newspapers fell into the hands of the jury in a criminal case which newspapers contained stories on the front pages stating that the prosecuting attorney said that five of the defendants had offered to make a "clean breast" of their part of the conspirary and turn State's evidence and that the prosecutor declared that he had a written confession of three of the defendants in addition to two who had pleaded guilty. The court said:[21]

"The zeal of the young man in prosecuting those whom he believed to be guilty is commendable. He frankly and manfully assumed the responsibility for the statement, which was doubtless made without improper motives. Yet, proper administration of justice demands that those accused of crime have a fair trial, which was impossible after the jury had read reports of the damaging confession. Whatever chances of acquittal the defendants had at the beginning of the trial vanished at the publication of those reports."

There are many judicial opinions which might be cited to show that in the general conduct of the trial the prosecutor is expected to be fair and impartial in prosecuting his evidence and in examining cross-examining witnesses. He should not try to exclude competent evidence brought in by the defense nor should he endeavor to introduce incompetent evidence himself. He should not browbeat witnesses and threaten to have them arrested for perjury if their testi-

[20]295 Fed. 437 (C. C. A. 3rd, 1924).
[21]295 Fed. at p. 440.

mony does not suit him nor should he be allowed to ask insulting, impertinent, or insinuating questions tending to hold defense witnesses in contempt. And, of course, attempts to tamper with defense witnesses or to secure admissions from them by fraud are erroneous.[22] The prosecutor, according to the Judges, should be a good sportsman and should seek to fairly present the State's case and thereafter be content. Actually, he nearly always becomes an ardent advocate of the State's case and criminal cases tend to become the same "contest in wits" commonly found in civil cases. Moreover, unfairness in prosecution does not always mean reversal, as shown by the *Dean* case above, and the conduct of the prosecutor is judged upon appeal along with the general question of guilt or innocence of the defendant.

Argument of Counsel

More claims of error seem to be based upon the misleading or inflammatory arguments to the jury than are based upon any other types of misconduct in the prosecution of criminal cases. As stated by the Supreme Court of Kentucky in *Baily* v. *Commonwealth*[23] the duty of the prosecutor is not to persecute and he should always be interested in "securing that the truth and the right shall prevail," and to this end he should not travel outside of the record or discuss matters not presented therein for the purpose of securing a conviction since he is not a witness and is only authorized to discuss the proven facts and circumstances and then to array them "in such fashion as comports with legitimate deduction." However, it has been held that it is not error for the prosecutor to urge upon the jury the necessity for harsh punishment with its deterring effect and the prosecutor is not compelled to "withhold his views touching the extent of the punishment which he in good faith believes the enormity of the crime merits."

Moreover, in argument the prosecutor is accorded considerable latitude in his references to the defendant and the offense supposed

[22]See *Skaggs* v. *State*, 88 Ark. 62, 113 S. W. 346, 16 Ann. Cas. 622 (1908); *State* v. *Irwin*, 9 Ida. 35, 71 Pac. 608, 60 L. R. A. 716 (1903); *People* v. *Jacobs*, 243 Ill. 580, 90 N. E. 1092 (1910); *Commonwealth* v. *Tripp*, 157 Mass. 514, 32 N. E. 905 (1893); *State* v. *Roby*, 128 Minn. 187, 150 N. W. 793, Ann. Cas. 1915 D 360 (1915); *People* v. *Gibson*, 218 N. Y. 70, 112 N. E. 730, Ann. Cas. 1918 B 509 (1916); *Moore* v. *State*, 45 Tex. Cr. Rep. 234, 75 S. W. 497, 108 Am. S. R. 952, 67 L. R. A. 499 (1903); *Hillen* v. *People*, 59 Colo. 280, 149 Pac. 250 (1915); *State* v. *Griffin*, 100 S. C. 331, 84 S. E. 876 (1915); *O'Donnell* v. *People*, 110 Ill. App. 250, aff'd. 211 Ill. 158, 71 N. E. 842 (1904); *Gandy* v. *State*, 24 Neb. 716, 40 N. W. 302 (1888); *State* v. *Russell*, 83 Wis. 330, 53 N. W. 441 (1892); *People* v. *Reilly*, 224 N. Y. 90, 120 N. E. 113 (1918); *People* v. *Freeman*, 203 N. Y. 267, 96 N. E. 413 (1911).

[23]193 Ky. 687, 237 S. W. 415 (1922).

to have been committed, as long as there is some evidence to justify his remarks. As stated in *People* v. *Dear*:[24]

> "He denounced the defendants as murderers because they were so proved by the evidence and the witness as a perjurer because his testimony was shown to be untrue. It is within the scope of a proper and fair argument to denounce a defendant as guilty of the crime charged and a witness as guilty of perjury where an inference of such guilt may be fairly inferred from the facts and circumstances shown by the evidence."

It is difficult to draw up rules from reported decisions giving the limitations upon the prosecutor's argument. Conduct which might be reversible error in a close case may be found to be "harmless error" in a case where guilt is clearly shown by the evidence,[25] and the only so-called rule which we can follow is simply this: when the prosecutor has a clear and convincing case he may shout for blood, play upon the jury's passions, show extreme prejudice and exhibit general vindictiveness and get away with it. On the other hand, if the evidence is more evenly balanced, the appellate court may be searching for a reversible error and fasten upon the prosecutor's zeal in prosecution as a convenient peg upon which to hang a reversal. Appellate courts hesitate to base a reversal upon the evidence as they do not want to admit an invasion of the fact-finding-duties of the jury. They prefer to find a "legal" basis for reversal and misconduct by the prosecutor is made to order to serve as an excuse for granting a new trial.

Consider the case of *Allen* v. *State*[26] where the plaintiff in error claimed improper conduct upon the part of the prosecutor. The plaintiff in error was correct and the conduct of the prosecutor was very bad, indeed. During the trial he bullied the defendant, played upon the passions of the jury, and introduced politics into the case. He made such pleas as, "Go home and look your dear wife in the face. When you speak to her and she says, 'John, what did you do in the face of such testimony?' . . . You do not have any doubt of his guilt." But upon review of the case, while admitting that the argument was erroneous as being an appeal to the passion and prejudice of the individual members of the jury, the conviction was affirmed. The court said:[27]

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[24]286 Ill. 142, 154, 121 N. E. 615 (1918).

[25]See Baker "Reversible Error in Homicide Cases," 23 J. Crim. L. 28 (May-June, 1932).

[26]13 Okla. Cr. Rep. 395, 164 Pac. 1002 (1917). See also *State* v. *Brand*, 124 Minn. 408, 145 N. W. 39 (1914).

[27]13 Okla. Cr. Rep. at p. 399.

"It is not every species of improper argument that justifies this court in reversing a judgment of conviction. The argument may be improper, but the proof of guilt may also be so overwhelming that it is evident that upon a second trial an impartial and intelligent jury could arrive at no honest conclusion except that of guilt. That is the situation in this case. The proof upon the part of the state when considered in connection with the evidence of the defendant is so convincing and conclusive that it is readily to be seen that a verdict of guilty of murder was the only logical conclusion that an intelligent jury could have arrived at in this case. It would be an imposition upon the law-abiding citizens of this state and an unjust burden upon the tax-paying public to reverse this judgment because of these alleged errors in the argument where no request was made to have the trial court withdraw the remarks from the consideration of the jury . . .

"We hold, therefore, that where the guilt of the appellant is clearly established, and there is no good reason to believe that upon a second trial an intelligent and honest jury could or would with reason and propriety arrive at any other verdict than that of guilt, a new trial will not be granted except for fundamental error."

What is *fundamental* error? That depends upon the views of the particular reviewing court, and an error declared to be fundamental and reversible in one case may be found harmless by the same court in another case. And no rule may be relied upon as a guide to the limits to which the prosecutor may go as he argues his case at trial.

As an illustration of the foregoing idea, let us examine the conduct of various prosecuting attorneys in a few recent cases where *reversals* have been granted in part at least because such conduct was thought to be prejudicial to a fair trial.

1. Robbery. Prosecutor referred to defendants as "hustlers of women."
2. Murder. Prosecutor made disrespectful remarks about defendant's wife.
3. Robbery. Prosecutor pointed to sheaf of papers and referred to it as defendant's criminal record about which he could not speak because defendant did not take the stand.
4. Arson. Prosecutor said, "I hope that you will put the fear of the law—not of God, because men like this do not fear God—into these men."

5. Rape. Prosecutor referred to defendant as "human gorilla," "a slobbering wild boar," "mad dog," etc.
6. Larceny. Prosecutor said: "I have my reasons and I have better reasons probably than you have" for believing the defendant guilty.
7. Prohibition. Prosecutor said, "This little still Cleveland Reeves was operating in that community could raise more hell than you could imagine."
8. Prohibition. Prosecutor said, "You must deal with a negro in the light of the fact that he is a negro."
9. Manslaughter. Prosecutor referred in dramatic manner to the assassination of President McKinley and indulged in lengthy speech against all assassins.
10. Seduction. Prosecutor had prosecuting witness exhibit her young infant to the jury.
11. Murder. Prosecutor said, "No more, men of the jury, no longer will Earl Williams [deceased] work in the mine, no more can he go home to his father and mother or sister," (turning to father and mother of deceased, while mother was weeping).
12. Assault. Prosecutor said, "Under our present system of coddling criminals he will get out in half the time you give him," and "he is a greater criminal than Macbeth."
13. Larceny. Prosecutor said, "If there is a member of this jury who is a member of any sect, organization or clan whose purpose or design is the more rigid enforcement of the law . . . you have an opportunity to demonstrate your sincerity to the teaching or doctrine."
14. Assault to Rape. Prosecutor stated that the brother of prosecuting witness should or could have killed defendant but that, instead, he demonstrated his confidence in a court of law by not doing so and that the jury should justify that confidence by convicting the defendant.
15. Incest. Prosecutor said, "John Henard [father of prosecuting witness] is to be commended for bringing this case into court instead of taking the law into his own hands as you, gentlemen of the jury, or I would have done."
16. Rape. Prosecutor said that if the girl's father had been alive the defendant's life would not be safe.
17. Confidence game. Prosecutor said, "Chicago crooks come down here, jumping on us poor innocent boys."

18. Murder. Prosecutor said, "Over there is a seducer and if you convict him and make a mistake, the Court of Appeals or Supreme Court will correct it; and if you acquit him, that is the end of it."
19. Rape. Prosecutor said that when he prosecuted anyone it was because he was convinced of his guilt.
20. Rape. Prosecutor said, "I do not come here to try a case unless the defendant is guilty."
21. Murder. Prosecutor said that the court would set aside the verdict if it was wrong.
22. Rape. Prosecutor stated that according to defendant's own testimony he had intercourse with prosecuting witness in a cemetery which branded him as the meanest man in the world.
23. Confidence Game. Prosecutor declared that "if defendant got away with this anything might happen. I do know that only a few years ago, because of the failure of justice that the Court House in Cincinnati was wrecked by an outraged public." (Also referred to a riot in Omaha.)
24. Conspiracy. Prosecutor referred to "boodle prosecutions in New York City." Also he declared that defense exceptions were made "to get error into the record."
25. Robbery. Prosecutor called defendant's counsel a liar.
26. Murder. On cross-examination a defense witness stated that she raised canary birds. Prosecutor at once interjected the query, "Canary or jail?"
27. Arson. Prosecutor said, "Jew fire-bugs cannot commit arson and get away with it in this community."
28. Assault with Intent to Rob. Prosecutor referred to "these gun men."
29. Murder. Prosecutor referred to deceased as one of five fatherless children. Mother now declared to be without support.
30. Arson. Prosecutor remarked, "Now what kind of a racket do you call that?"

But do not take these thirty reversals and expect to find a key to the rules governing the prosecutor's conduct. In more than half of these cases the evidence was very close and in some the appellate court evidently thought the facts even favored the defendant. Moreover, in many of the cases there were other errors present which may have been more important than the prosecutor's conduct in bringing about the determination to reverse. Some of these were erroneous

instructions, judge leaving the court room during trial, errors in admitting testimony, excessive punishment, misjoinder of counts, refusal of trial court to grant continuance, and the like. We have no way of knowing just how important was the prosecutor's conduct in these cases. As is well known, where a court is ready to reverse in any event it may desire to lecture the prosecutor and thus make a lengthy discussion of his remarks in argument, whereas in another case it may pass over the remarks entirely. Let us see the effect of similar conduct in cases *affirmed.*

1. Destruction of property. Prosecutor berated defendant as a "pampered son, a spoiled child, a bully," etc.
2. Rape. Prosecutor stated that he could not stand before the jury unless convinced of defendant's guilt and said he would "throw his books into the river if the jury did not convict."
3. Murder. Prosecutor declared that a conviction for manslaughter was insufficient as the pardon board would "turn him loose in two years, and that is not enough."
4. Murder. Prosecutor argued against life sentences because "weak-kneed governors and prison commissioners" turn them out on the community.
5. Murder. Prosecutor said "the people of ..... county demand the extreme penalty."
6. Incest. Prosecutor referred in moving terms to the "longing eyes of a little infant brought into the world by the heinous act of defendant."
7. Murder. Prosecutor made use of a bloody hammer and a "wisp of mother's hair."
8. Manslaughter. Prosecutor argued that the children of deceased were entitled to jury's sympathy.
9. Murder. Prosecutor said that when the jurymen were "called to the bar of justice, where all are called, you can say to him [deceased] 'Jack, you wasn't in ..... county when we tried that case, but we as twelve honest men represented you.'"
10. Seduction. Prosecutor said, "If you believe the defendant's testimony turn him loose. Then go home and try to face your wives and your virtuous children, if you have any."
11. Extortion. Prosecutor referred to a letter as a "Black Hand letter."
12. Conspiracy. Prosecutor recited "The Star Spangled Banner."

13. Murder. Prosecutor said, "If you let this defendant go, there will be more still, cold forms in cemeteries."
14. Assault. Prosecutor stated, "the morality of ..... county is at stake in this case. . . . Thousands of people are anxiously awaiting for your verdict of your unbiased judgment on this evidence of guilt."
15. Rape. Prosecutor called defendant a moral leper and a "Hun."
16. Aggravated assault. Prosecutor declared that in his judgment no more brutal or dastardly attack had ever been made.
17. Rape. Prosecutor said, "The act this young man perpetrated upon that girl has sentenced her throughout her lifetime to that awful skeleton which will always hang in her closet."
18. Rape. Prosecutor commented upon the enormity of the crime, the defendant being a "Minister of the Gospel."
19. Conspiracy. Prosecutor called upon the jury to end the rule of the dagger and stiletto and the "invisible power behind these defendants."
20. Rape. Prosecutor declared if defendant were turned loose "our wives and sisters and daughters would be in danger of such assaults by the defendant."
21. Murder. Prosecutor said, "You men know the terror stricken women in this community about that time . . . and you cannot stop it unless you render a verdict that will be a warning to others of defendant's ilk."
22. Murder. Prosecutor declared that if jury acquitted in this case then "there would be no use in filing an information against anyone."
23. Murder. Prosecutor exhibited deceased's clothing full of bullet holes and declared that if every man guilty of murder in the past ten years had been convicted "this case would not be here today."
24. Robbery. Prosecutor denounced defendant as adulteress and perjurer and as she wept said, "Weep some more and try to befuddle the jury with crocodile tears."
25. Rape. Prosecutor declared he could not go into the other crimes committed by the defendant because the law forbade it.
26. Robbery. Prosecutor called defendants "hoodlums and hold-up men" and referred to defendants' lawyers as "shysters."

27. Perjury. Prosecutor declared, "that automobile stealing has been made a pastime in this county, an outdoor sport."
28. Murder. Prosecutor informed the jury that the only way to stop "this breed" was by hanging.
29. Murder. Prosecutor said, "Give him a life sentence and you take the chance of his being pardoned by the Governor."
30. Murder. Prosecutor referred to the applause given to him at the opening as the "spontaneous outburst of the honest hearts of the people of this county, your friends and neighbors."

In all these cases the decisions referred to the prosecutors' conduct as erroneous but nevertheless affirmed, evidently not considering the errors to be "fundamental." Most of the cases showed rather conclusively that the defendant was guilty and there was little to warrant a new trial. And in many the trial judge had sustained objections by defense counsel and had cautioned the prosecutor. It is true that upon review the defense is likely to exaggerate the damage caused by the use of such language in addressing the jury and usually bloodthirsty appeals by the prosecutor are accompanied by passionate appeal for sympathy by defense counsel. Moreover, "jurors are usually men of practical judgment and discrimination and intemperate language in argument is quite as likely to prejudice the advocate's cause as to help it."[28]

Unfortunately, excessive zeal by the prosecutor generally is displayed in the closely contested case where the evidence of the State is in itself insufficient to secure conviction. To get his verdict the prosecutor is inclined to bring extra pressure to bear upon the jury. When we keep in mind the disposition of such cases by appellate courts we are forced to conclude that such tactics often are unsound. The prosecutor should reserve his passionate oratory and theatrical display for the cases where it is safe to say that "it could not have affected the result." Slight error is generally reversible error if it is sufficient to tip the scales of justice in the close case and this is particularly true where, in addition to a general finding of guilt, the jury assesses the punishment.

Nolle Prosequi

In 1924 Hon. Homer S. Cummings, then State's Attorney of Fairfield county, Connecticut, and the present Attorney General of the

[28] *State* v. *Bernstein*, 148 Minn. 301, 309, 181 N. W. 947 (1921). From Judge Oscar Hallam's dissent. "By such a course [vituperation], in the long run, he throws away much of his strength, because his violent and reprehensible language betrays his bias and finally weakens his influence with the jury." J. Vann in *People* v. *Fielding*, 158 N. Y. 542, 547, 53 N. E. 497, 498 (1899).

United States, attracted wide attention by asking the court to enter a *nolle prosequi* in the case of *State* v. *Israel.* The prosecution grew out of the murder of the Rev. Hubert Dahme in the city of Bridgport, February 14. Father Dahme was a well known and influential citizen with many friends and since he was shot down in cold blood on a street close to the business center of the city, the case aroused much excitement in the city. Israel was charged in the city court with the murder and was bound over to the Superior Court upon a finding of probable cause. The coroner made his investigation and came to the conclusion that the accused was guilty, and as a result the case came to Mr. Cummings to prosecute. In a statement of twenty-five printed pages in length the prosecutor showed how he had minutely analyzed the evidence and, after carefully considering the stories of all possible witnesses, he concluded to enter a *nolle prosequi.* This statement was printed in the Journal of Criminal Law and Criminology[29] with a comment by Hon. William M. Maltbie who said:

> "His statement is interesting because of the nature of the case; it is valuable because of the methods followed by him in analyzing the evidence, because of the suggestions it contains for other prosecutors, but more because of its splendid exemplification of that cardinal principle which our Code of Ethics states, as follows: 'The primary duty of a lawyer exercising the office of public prosecutor is not to convict but to see that justice is done,' and which the state's attorney himself puts in these words: 'It goes without saying that it is just as important for a state's attorney to use the great powers of his office to protect the innocent as it is to convict the guilty.'"

With this opinion the court concurred and the *nolle prosequi* was accepted. The statement was made as follows:[30] "The court cannot help but feel that after the care that has been expended by those who are well qualified and the careful and exhaustive review of the case and the statements that are made, that the recommendation of the state's attorney is one that should be approved and carried out." It might be mentioned that the prosecutor in Connecticut may enter a *nolle prosequi* virtually at his own discretion in cases which he thinks should not be prosecuted and the statement of reasons therefor was only an explanation of his action. Certainly, if Mr. Cummings' account is accurately stated, it would have been a foolish waste of time and money to go on with the trial when an experienced lawyer felt

[29] 15 J. Crim. L. 406 (November, 1924).
[30] 15 J. Crim. L. at p. 434.

certain that all available State's evidence would be insufficient to secure a conviction.

But, unfortunately, this important weapon may be misused as well as used. There is nothing to prevent a prosecutor from entering a *nolle prosequi* in some case not so thoroughly investigated, and there is little to prevent its use in cases where guilt may readily be apparent. The statement is made in the Illinois Crime Survey:[31]

> "The state's attorney has the unquestioned power prior to the impaneling of the jury to enter a *nolle prosequi,* and attempts to regulate it by law in other states have proved futile. The judge is not a prosecutor, and it is manifestly impossible for him to obtain results in a case which the state's attorney will not prosecute. The judge could refuse to strike cases from the docket, but they would never result in convictions if the state's attorney was unable or unwilling to proceed. The judge can not refuse to dismiss for the want of prosecution, where the defendant demands a trial, and due diligence has not been used to obtain the necessary witnesses for the prosecution. So far the responsibility is that of the state's attorney. Without adequate preparation and vigorous action on his part the prosecution is doomed to failure. The attitude of the judge may stimulate the prosecutor to greater activities, but that is all that he can do to decrease the eliminations by the formal and informal *nolle prosequi.*"

One of the most interesting cases dealing with the prosecutor's right to enter a *nolle prosequi* was that of *People ex rel. Hoyne* v. *Newcomer.*[32] In that case the respondent was a judge of the Municipal Court of Chicago who had about 400 cases for violation of the Sunday liquor law pending in his court. The relator, State's Attorney Hoyne of Cook County, proposed to enter a *nolle prosequi* in every one of these cases. The judge refused to allow this to be done because the cases had not been thoroughly investigated and this particular case was selected for a test case, the prosecutor filing his *nolle prosequi* and the judge refusing to enter it. The Supreme Court of Illinois denied the petition for a mandamus commanding Judge Newcomer to enter of record this *nolle prosequi.*

The prosecutor testified that he refused to prosecute because of the attitude of the people generally in Chicago as shown by jury verdicts in like cases prosecuted by his predecessor; that he viewed the prosecutions with suspicion because they were instituted without con-

[31] P. 206.
[32] 284 Ill. 315, 120 N. E. 244 (1918).

sulting him; that he did not believe the cases were started in good faith. He alleged as a conclusion of law that the relator, by virtue of his office as State's Attorney of Cook County, had an absolute right to enter a *nolle prosequi* in any criminal case and that the court acts in a purely ministerial capacity in entering the *nolle prosequi* and discharging the defendant. He claimed that as State's Attorney he possessed all the powers possessed by an Attorney General in England, that the court was not responsible in any manner for an abuse of the power, that there was no requirement of law that he should investigate the facts of any case and no power in the court to require him to give grounds and reasons for his action.

In holding against the relator the court summarized the decisions on the subject quite generally and concluded:

> "It will be seen that there is no uniformity of decision as to practice on the power of the State's attorney to enter a *nolle prosequi* without the consent of the court, and the rule that he has absolute power in that respect is not general, although, perhaps, the numerical weight of authority is in favor of such a rule in the absence of a statute, where the entry is made before the trial begins. (12 Cyc. 375; I Bishop's New Crim. Proc. sec. 396; Wharton's Crim. Pl. & Pr. sec. 838.) In some States it has been deemed essential to the public interest to limit the power of the State's attorney by statute and in others the limitation has resulted from the practice of the courts, while in others the general power has been declared with limitations upon its exercise. . . ."
>
> "The disastrous consequences of endowing a State's attorney with absolute and unlimited power to enter a *nolle prosequi* in all prosecutions of a certain class of crimes and leaving the people to the remedy of a prosecution against him for malfeasance in office are apparent. . . . If a State's attorney has absolute and uncontrolled power to enter a *nolle prosequi* upon his official responsibility in one case, of course he has the same power in two, three or four hundred, as in this instance; but we regard it as essential to the due administration of justice and the protection of the people by the enforcement of criminal laws that he should not have such power but the consent and approval of the court should be required."

It would appear that the court has control of its records and its action cannot be controlled except where it is called upon to exercise a mere ministerial duty. It is clear as a general proposition that the court may not refuse the entry of a *nolle prosequi* in any case merely

because it disagrees with the prosecutor as to its desirability. But to refuse on the ground that beyond doubt the prosecutor is not acting within the authority vested in him, has not made investigation, has acted in collusion with the accused, or is oppressively using his power is not inconsistent with the cases.[33] But when all is said and done the trial judge cannot prosecute and from a practical standpoint the prosecutor's power to summarily end a prosecution is not denied. In one year 1,560 cases in Chicago were dropped—either *nolle prossed,* stricken off with leave to reinstate, or dismissed for want of prosecution—[34] and there is no record of any refusal to cooperate upon the part of the court. As stated in the decision of *Commonwealth* v. *Hughes*:[35] "prosecution by indictment is a litigation in which the State is plaintiff or complainant, and is represented by the Commonwealth's Attorney. The judge does not represent the State, any more than he does the defendant in the prosecution." Another court declares that the trial court is powerless to proceed with a prosecution against the wishes of the prosecutor as an attempt to do so "would result in an unseemly wrangle between the court and the district attorney, which should, if possible, be avoided."[36]

The National Commission on Law Observance and Enforcement had this to say:[37]

> "At common law exercise of this power is beyond control of courts, and American courts have in general adopted the common law in this respect. As one court puts it, the power is 'absolute.' The prosecutor 'is not even required to give a reason for his dismissal.' In some States by statute reasons are required to be put on file and in some by statute or long judicial practice leave of court must be had.[38] But in practice, with the

[33]See the comment on this decision in 13 Ill. L. Rev. 706 (April, 1919) also the annotation in 17 Mich. L. Rev. 186 (December, 1918).

[34]Illinois Crime Survey, Table 4, "Cases Disposed of in Trial Court," p. 207.

[35]153 Ky. 34, 37, 154 S. W. 399 (1913).

[36]*People ex rel. Attorney General* v. *District Court,* 23 Colo. 466, 469, 48 Pac. 500 (1897); see also *State* v. *Smith,* 49 N. H. 155, 6 Am. Rep. 480 (1870). On the subject of the absolute power of the prosecution to enter a *nolle pros.* see *Regina* v. *Allen,* 1 Best & S. 850 (1862); *United States* v. *Woody,* 2 F. (2d) 262 (1924).

[37]Report on Prosecution, p. 19.

[38]The Model Code of Criminal Procedure, sec. 305 reads: *"Dismissal of prosecution by indictment or information.* The court either on the application of the prosecuting attorney or on its own motion may in its discretion for good cause order that a prosecution by indictment or information be dismissed. The order for dismissal shall be entered on the minutes with the reasons therefor . . . ."

Fourteen states have statutes attempting to abolish the entry of a *nolle prosequi.* In four states prosecutors shall not dismiss an indictment except

crowded dockets of the modern city, these checks have been applied perfunctorily and are achieving little or nothing. In origin a public check on private prosecutions, when private prosecutions came to an end and all prosecutions became public or official it ceased to be a check and became an additional mitigating or dispensing device. In practice in most of our large cities it is a mode of disposing of criminal causes without trial and without review on grounds nowhere recorded and quite unascertainable. When the number of prosecutions instituted each year has become enormous and beyond the possibilities of proper trial, the power of *nolle prosequi,* as a means of selecting those to be tried, makes the prosecutor the real arbiter of what laws shall be enforced and against whom, while the attention of the public is drawn rather to the small percentage of offenders who go through the courts. Thus the blame for nonenforcement may easily be misplaced. Habitual defenders of criminals have learned to take advantage of this power. Where exercised by assistants under no responsible organization it lends itself to the quiet choking off of prosecutions under political influence. It is an anomaly that the powers and discretion of the judge with respect to the small percentage of prosecutions which ever come before him should be so thoroughly hedged about with restrictions,[39] while his power and discretion of the prosecuting attorney with respect to disposition of the great majority of initiated prosecutions should remain so absolute."

Immunity Agreements[39a]

In the article dealing with Initiation of Prosecution[40] we dealt

by order of court upon motion and in twelve others the consent of the court is necessary. Such legislation, however, has proved fruitless and the use of the *nolle prosequi* in these states is very similar to its use in other states which have no legislation upon the subject. If the prosecutor decides that his case should not be prosecuted that ends the matter.

The New York County Lawyers Association through its Committee on Criminal Courts and Procedure recently recommended (1934):

"Requiring the district attorney to obtain the consent of the court, upon motion made in writing, setting out reasons to the exercise of his right to *nolle pross* an indictment or information or to accept a guilty plea to a lesser offense than that charged will no doubt serve, in some measure, to check the careless, if not corrupt, attitude of many prosecutors toward the disposition of cases in these ways. More effective in this respect would be the exercise of a vigorous supervision by the courts or by some administrative agency, created for that purpose. The proposal, however, is approved as tending to a desirable end."

[39]See Cartwright, "Present But Taking No Part," 10 Ill. L. Rev. 537 (March, 1916).

[39a]For a criticism of this term see IV Wigmore "Evidence" (2d) §2281.

[40]Baker, "The Prosecutor—Initiation of Prosecution," 23 J. Crim. L. 786-792 (Jan.-Feb., 1933).

with the subject of immunity promises made by the prosecutor to persons suspected or accused of criminal offenses. There, we discussed this topic along with the general subject of the prosecutor's discretion in bringing criminal cases to trial. In this article we are dealing with a variety of legal topics having to do with the office of prosecuting attorney, relying largely upon the reported decisions bearing upon his office. Something should be said concerning the legality of immunity promises although there may be some slight repetition.

A recent decision having to do with immunity agreements is that of *State* v. *Ward*[41] which was decided upon the following facts: In 1925 fourteen indictments were returned against the defendant for violation of the West Virginia banking laws. It was agreed between the defendant's counsel and the prosecuting attorney *with the approval of the court* that if the defendant should plead guilty to one indictment and aid the commissioners to liquidate the accounts of the bank, he would be discharged from the other thirteen indictments. Both parties carried out the agreement, the defendant was sentenced to ten years imprisonment and the other indictments were *nolle prossed.* After some time served the defendant obtained his release on good behavior. An indictment was later presented containing the same charges that appeared in one of the dismissed indictments. The lower court ruled against the defendant's special plea based upon the above agreement. This ruling was reversed upon appeal upon the theory that an agreement approved by the court between a prosecuting attorney and an accused not to prosecute should be upheld when the accused has fulfilled his part of the agreement.

The decision in this case presents the constantly recurring question of the justification of such a procedure on the part of prosecuting attorneys or courts or both. Whatever the ethics may be the practice has met general approval due to long usage and the plain necessities of successful criminal prosecution. It has long been found useful in the detection and punishment of crime to resort to aid and information obtained from the criminals themselves,[42] and that necessity certainly has not diminished now that many crimes are committed by highly organized groups. As a result countless cases arise in which

[41]112 W. Va. 552, 165 S. E. 803 (1932). See comment by Samuel Nicosia in 24 J. Crim. L. 600 (Sept.-Oct., 1933). This comment, written for the writer's "Recent Criminal Cases," has been followed extensively in this section. See also 46 Harv. L. Rev. 714 (February, 1933); 17 Minn. L. R. 437 (March, 1933); 39 W. Va. L. Q. 264 (April, 1933).

[42]1 Wharton "Criminal Law" (12th ed. 1932) sec. 401; *Rex* v. *Rudd,* 1 Cowp. 331, 98 Eng. Rep. 1114 (1875); *Camron* v. *State,* 32 Tex. Cr. Rep. 180, 22 S. W. 682 (1893).

an agreement is made between the prosecuting attorney and accused whereby criminal prosecution is dismissed in return for aid given to the state by the accused. In the most common of these cases an accessory turns state witness against his co-defendants.[43] Often the defendant pleads guilty to one or more indictments in consideration that other indictments be dismissed.[44] And the prosecuting attorney may agree to dismiss the original felony charges in an indictment if the defendant will plead guilty to a lesser offense.[45] In one case the indictment against the accused was dismissed in order to make his wife a competent witness against the other defendants.[46]

In practice the condonation and compromise of criminal cases is quite frequent,[47] and, admittedly, such a course offers a premium to treachery and sometimes permits the more guilty to escape. Yet it tends to break up criminal combinations and to lead to the punishment of those who might otherwise escape. Courts generally agree that the accused who has advanced information to aid the state should be given some protection. In any event, it would seem that the courts and the prosecution are bound in honor, at least under some circumstances, to carry out the understanding whereby a witness testifies and admits, in so doing, his own turpitude.[48]

Assuming, then, that the practice of awarding immunity to criminals may be justified to some extent, it remains to determine which of several methods is the most expedient and effective in accomplishing the ends of the prosecution but at the same time safeguarding the public. In this respect the authorities are in conflict. At the present time, three methods generally are used: *first*, the enforcement of the agreement between the prosecutor and the defendant made with the approval of the court;[49] *second*, agreements between prosecutor and defendant without the knowledge of the court;[50] and *third*, judicial

[43]*People* v. *Bogolowski*, 326 Ill. 253, 157 N. E. 181 (1927); *Nickelson* v. *Wilson*, 1 Hun 615, reversed in 60 N. Y. 362 (1875); *Lowe* v. *State*, 111 Md. 1, 73 Atl. 637, 24 L. R. A. (N. S.) 439, 18 A. & E. Ann. Cas. 744 (1909); *Camron* v. *State*, 32 Tex. Cr. Rep. 180, 22 S. W. 682, 40 Am. St. Rep. 763 (1893).

[44]*State* v. *Kiewel*, 166 Minn. 302, 207 N. W. 646 (1926); *State* v. *Lopez*, 19 Mo. 255 (1853); *State* v. *Keep*, 85 Ore. 265, 166 Pac. 936 (1917).

[45]Rep. of Sub-Committee on Statistics of Crime Commission of N. Y. State, p. 8 (1927). See Illinois Crime Survey, pp. 81, 82.

[46]*Rios* v. *State*, 39 Tex. Cr. Rep. 675, 47 S. W. 987 (1898).

[47]J. Miller, "The Compromise of Criminal Cases," 1 So. Cal. L. Rev. 1 (Nov., 1927).

[48]*United States* v. *Lee*, 4 McLean 103, Fed. Case No. 15, 588 (1846); *People* v. *Whipple*, 9 Cow. 707 (N. Y. 1826); *Commonwealth* v. *St. John*, 173 Mass. 566, 54 N. E. 254, 73 Am. St. Rep. 321 (1899).

[49]*Wight* v. *Rindskoff*, 43 Wis. 344 (1877); *State* v. *Moody*, 69 N. C. 529 (1873); *State* v. *Graham*, 41 N. J. L. 15, 32 Am. Rep. 174 (1879); *Scribner* v. *State*, 9 Okla. Cr. 465, 132 Pac. 933 (1913); Penal Code of Cal., secs. 1385, 1386 (1931); Ore. Code Ann. (1930) 13-1501.

[50]*People* v. *Bogolowski supra*, note 43; *Camron* v. *State*, *supra*, note 43; *Kansas* v. *Finch*, 128 Kan. 665, 280 Pac. 910, 66 A. L. R. 1369 (1929).

recommendation to the chief executive that a pardon be granted.[51]

Many courts favor the third method and hold that such an agreement creates merely an "equitable right to a pardon, which the court will recommend but cannot effect,"[52] but certain objections to this method present themselves. First, there is the expense and delay of trial, appeal and review by the executive. Second, the necessary uncertainty accompanying a plea for executive clemency militates against a willingness on the part of the defendant to agree to any deal with the prosecution. On the other hand, the granting of immunity upon the uncontrolled responsibility of the prosecutor is a questionable practice and subject to grave abuses. It is a weapon which *may* produce good results but the weapon is an extraordinarily dangerous one as its use is secret, it opens the prosecutor's door to the "fixer," and it welcomes the play of outside influences upon criminal prosecution. Our conclusion is that the method followed in the *Ward* case, where the agreement was approved by the court, is not subject to these objections. On the contrary the combination of prosecutor and judge, the former with the intimate knowledge of the merits and necessities of the case, the latter with the power to curb an abuse of his prerogative is a complementary one. And the criminal, assured of a greater certainty that the agreement will be enforced, will, in all probability, be less reluctant to enter into such an agreement. Whatever may be our conclusion from a theoretical point of view we doubt whether court control over immunity agreements can prove much more effective than court control over the *nolle prosequi.* Whether the charge is made heavy or light, and indeed, whether any charge will be pressed at all is a question for the prosecutor in the exercise of his "sound discretion," and efforts to control this discretion have proved abortive.

The case of *Kansas* v. *Finch*[53] presented a most interesting question concerning an immunity promise made by the Attorney General of Kansas. Finch had informed the Attorney General about the illegal operation of an alcoholic still and had been promised immunity from prosecution. Information of the still's operation was conveyed to the sheriff and local county prosecutor as a result of which one Brown was arrested and pleaded guilty, but in so doing, implicated Finch, claiming that Finch was a partner in the operation of the still. Finch was prosecuted by the county prosecutor over the objection of the

[51] *United States* v. *Ford* [Whiskey Cases], 99 U. S. 594, 25 L. Ed. 399 (1879); *State* v. *Graham. supra,* note 49; *State* v. *Lyon,* 81 N. C. 600 (1879); *Lowe* v. *State, supra,* note 43; *State* v. *Lopez, supra,* note 44.

[52] See *State* v. *Kiewel,* 166 Minn. 302. 207 N. W. 646 (1926); Note, 24 L. R. A. (N. S.) 439 (1910); *Commonwealth* v. *St. John, supra* note 49; Whiskey Cases, *supra* note 51; Jensen, "The Pardoning Power in the United States," 37-43 (1922).

[53] 128 Kan. 665, 280 Pac. 910, 66 A. L. R. 1369 (1929).

Attorney General who moved to dismiss the action. Upon appeal by Finch, who was convicted below, the Supreme Court held that it was within the sound discretion of the Attorney General whether he would grant immunity to Finch upon whose information Brown had been convicted. The judgment was reversed, and the cause remanded with instructions to dismiss the case. The decision discussed at great length the relations between the Attorney General and local prosecutors, holding that the attorney general of a state "is its principal law officer. His authority is coextensive with the public legal affairs of the whole community." This seems to be the first and only time that this particular problem has been presented in a court of record and it is unlikely to occur again. Generally, the Attorney General is in no position to grant immunity and his influence, whenever used, is directed toward pushing prosecution rather than securing its dismissal. Moreover, the danger of abuse under this ruling, in case the political party of the state organization differs from that of the prosecutor, is quite apparent.

The whole problem of immunity grants is of great interest and importance. Unfortunately, it has been studied very little as it has been considered a matter resting solely within the prosecutor's realm of discretion. As the weight of this enormous power becomes common knowledge we may expect a series of experimental statutes designed to limit its use. But since immunity "baths" usually are secret as compared with the *nolle prosequi* there is small hope for the creation of a workable legislative device to control it.

Disbarment or Suspension

The statutes and constitutional provisions of the various states having to do with the impeachment or removal of the prosecutor from office have been considered in an earlier article.[54] Since this article is limited largely to judicial decisions concerning the office, it is our purpose here to consider only the cases where prosecutors have been charged with misconduct in violation of their oath of office or against good morals, with disbarment or suspension from practice as the penalty sought. This in time may become more effective as a means of removal than the statutory methods.

The case of *In re Jones*[55] held that an intentional misrepresentation of fact by a State's attorney for the purpose of securing a certificate of fidelity in office, which was a prerequisite to the payment of his salary, was sufficient cause for his disbarment. The prosecutor

[54]De Long and Baker, "The Prosecuting Attorney: Provisions of Law Organizing the Office." 23 J. Crim. L. 953-957 (March-April, 1933).

[55]70 Vt. 71, 39 Atl. 1087 (1897).

contended that since his misconduct related to his duties as State's attorney the court had no jurisdiction over him in regard thereto. The court's answer was:[56]

> "While acting in the county court in the prosecution of cases in which the state was a party, and in all his relations to parties, counsel, and court, in such prosecutions, he was also acting in his official capacity as an attorney of this court, and under the obligations assumed by him when he became such attorney. Notwithstanding he might be liable to impeachment, or might be rejected by the voters, if a candidate for re-election, his conduct, when acting in a private or other capacity was open to investigation by this court, and if found to be such that the court, to protect itself and the public, and to keep the administration of justice pure, ought to withdraw the protection and credit under the law which it accorded him by admitting him to the office of an attorney at law and solicitor in chancery, it is, beyond question, the right and duty of this court to deal with him as justice demands. It may suspend or disbar him."

There have been numerous instances of disbarment of prosecutors who were receiving money for refusing to prosecute. Such a case is found in *People ex rel. Colorado Bar Association* v. *Anglim*[57] where the district attorney had been taking sums of money from saloon keepers and gamblers in exchange for his agreement not to prosecute. Moreover, he had refused to prosecute another case unless the prosecuting witness paid him a sum of money—thus adding to his income "coming and going." The court found ample cause to disbar him which was tantamount to his removal.[58] In deciding *In re Lyons*[59] the court found a situation where a United States district attorney had a secret partner who was regularly defending persons in the United States District Court and dividing fees with the district attorney and it held that he should be disbarred from practice, on "common principles of honesty and morality."[60] In the case of *In re Simpson*[61] it appeared that the defendant while acting as State's attorney had wilfully failed to prosecute violations of the liquor law

[56]70 Vt. at p. 86.

[57]33 Colo. 40, 78 Pac. 687 (1904).

[58]Other "graft" cases where convictions were obtained are: *In re* Simpson. 79 Okla. 305, 192 Pac. 1097 (1920); *In re Voss*, 11 N. D. 540, 90 N. W. 15 (1902); *State* v. *Hays*, 64 W. Va. 45, 61 S. E. 355 (1908). See *In re* Norris, 60 Kan. 649, 57 Pac. 528 (1889); *People ex rel. Stead* v. *Phipps*, 261 Ill. 576. 104 N. E. 144 (1914).

[59]162 Mo. App. 688, 145 S. W. 844 (1912).

[60]See Dickens' Case, 67 Pa. 177. 5 Am. Rep. 420 (1870); *In re* Henderson, 88 Tenn. 539, 13 S. W. 413 (1890).

[61]9 N. D. 379, 83 N. W. 541 (1900).

and had lost or destroyed the files and records in regard thereto. He was disbarred under the North Dakota statute.[62]

In re Cowdery[63] was a case wherein the court held that "the fidelity which a city attorney owed to the city and county existed after the expiration of the term of office, so that his acceptance of money from persons interested, in consideration of his agreement not to represent the city in pending appeals inaugurated during his term of office warranting his suspension for six months." While a county prosecutor was not involved, the decision undoubtedly would have been the same. Another case resulting in suspension, but not disbarment, was *In re McCowan.*[64] The prosecutor, while addressing the grand jury, had made unwarranted references to the judge of the superior court in "harsh and extreme language." Occasionally there will be evidence of gross ignorance of his duties rather than bad faith. but disbarment seldom follows.[65] There is one case, however, where the court declared that the prosecutor should be reprimanded, saying:[66]

> "Disbarment means professional excommunication and death. It means to loose the moorings and turn a life adrift, and should be resorted to only when it is apparent that the interest of the community, the integrity of the courts, or the honor of the profession imperatively demands it and neither of these conditions prevail in the instant case."[67]

In 1922 Joseph C. Pelletier, District Attorney for the Suffolk District, Massachusetts, was removed from office[68] as the result of an information filed by the Attorney General under the Massachusetts Statutes authorizing such procedure,[69] and imposing upon the Supreme Judicial Court the duty of removing a district attorney "if sufficient cause is shown therefor and it appears that the public good so requires." The charges lodged against Pelletier make a rather complete list of things a prosecuting attorney should not do in office. He was charged with conspiracy with another member of the Massachu-

[62]Rev. Code N. D., sec. 433, subd. 1.
[63]69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545 (1886).
[64]175 Cal. 51, 170 Pac. 1100 (1917).
[65]For an example see *In re Baum,* 32 Ida. 676, 186 Pac. 927 (1920). The court stated it to be a well settled rule that charges of official misconduct (while not a criminal proceeding) must be established "by a clear and undoubted preponderance of the evidence."
[66]*In re* Sitton. 72 Okla. 13, 14, 177 Pac. 555 (1918).
[67]See Maginnis's Case, 269 Pa. 186, 112 Atl. 555 (1921); *People ex rel. Hutchinson* v. *Heckman,* 294 Ill. 471, 128 N. E. 484 (1920).
[68]*Attorney General* v. *Pelletier,* 240 Mass. 264, 134 N. E. 407 (1922).
[69]G. L. Mass. (1932) ch. 211. sec. 4.

setts bar to extort money from various business concerns by making groundless threats of criminal prosecution; he had caused others to abandon civil suits and claims for damages and settle with his co-conspirator by threats of criminal prosecution; he had misused his power as prosecutor to obtain indictments of innocent people in order to extort money from their relatives; he helped his co-conspirator collect his fees by making threats of criminal prosecution; he used his official position to further blackmail schemes; he used the *nolle prosequi* in other cases, motivated by "improper motives and because of sinister influences"; and to cap the climax, after the above charges were made he made a public speech relating to his candidacy for mayor of the City of Boston, and therein he incited his listeners to crime and promised immunity from criminal prosecution.

In removing Pelletier the court said "the findings make clear beyond doubt that the respondent is unfit to hold longer the office of district attorney . . . official corruption is sufficient cause for the removal of a district attorney. When private favoritism and personal aggrandizement are placed above principles of obvious justice and considerations of the general welfare by a district attorney, the public good requires that he be removed."

It is interesting to note that another very similar case[70] had resulted in the removal of District Attorney Nathan A. Tufts of Massachusetts from office less than a year preceding Pelletier's removal. The charges against Tufts indicated a most distressing misuse of his official position and the Supreme Judicial Court removed him without hesitation, saying:[71]

> "The powers of a district attorney under our laws are very extensive. They affect to a high degree the liberty of the individual, the good order of society, and the safety of the community. His natural influence with the grand jury, and the confidence commonly reposed in his recommendations by judges, afford to the unscrupulous, the weak or the wicked incumbent of the office vast opportunity to oppress the innocent and to shield the guilty, to trouble his enemies and to protect his friends; and to make the interest of the public subservient to his personal desires, his individual ambitions and his private advantage. The authority vested in him by law to refuse on his own judgment alone to prosecute a complaint or indictment enables him to end any criminal proceeding without appeal and without the approval of

[70] *Attorney General* v. *Tufts*, 239 Mass. 458, 131 N. E. 573, 132 N. E. 322 (1921).

[71] 239 Mass. at p. 489.

another official. Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order. Profound learning and unusual intellectual acumen, although eminently desirable, are less essential. A district attorney cannot treat that office as his selfish affair. It is a public trust. The office is not private property, but is to be held and administered wholly in the interests of the people at large and with an eye single to their welfare."

In concluding its opinion the court declared[72] that "full weight has been given to the fact that a district attorney is constantly prosecuting criminals and those charged with crime. Hatred and malice against him can readily be engendered and nourished. He is a conspicuous mark for attack from the vicious, the depraved and the mendacious. These and other related factors naturally and inevitably lead to exacting scrutiny of accusations of corruption or maladministration in his office. Denunciations of wrongdoing against him are met by all the presumptions of uprightness and rectitude which commonly characterize the conduct of men in public station." And this note of caution is well taken. No public officer has more opportunity to stir up hatred and venom in the honest pursuit of his official duties than the prosecuting attorney. Groundless charges based upon personal ill-will are easily made against him and every presumption should be made in his favor.

Once the full extent of the forces of the prosecuting attorney is generally acknowledged we may expect an avalanche of legislative attempts to safeguard the public by creating legal checks upon the discretion of the office holder. Such laws would be futile in securing protection unless stringent enough to handicap the efficient prosecutor in carrying out his work.[73] A far better control may be found in the courts themselves. Throughout this examination of a number of decisions dealing with the office there has appeared a surprisingly high moral standard set for the office by the appellate courts. Problems of malicious prosecution, conduct of counsel, the *nolle prosequi*, immunity agreements, and disbarment cannot be solved by legislation. But a full recognition of the *quasi*-judicial functions of the office, with a more careful supervision by non-political, unfettered judges will serve as sufficient check upon venal and corrupt prosecuting attorneys, leaving the honest and efficient officials in full possession of their discretionary powers.

[72] *Ibid.* at p. 538.
[73] Crawford, "The Prosecuting Attorney's Attitude," 5 Mo. Bar J. 138 (1934).