

TOO MUCH EXPECTED OF CRIMINAL JUDGES.

The scope of a criminal judge's authority is much narrower and more restricted than is generally supposed. Nor is it ordinarily understood how few are his really efficient powers in criminal proceedings and to what extent the exercise of these is subject to control, obstruction, capricious uncertainty and even absolute nullification by the conduct and will of the other officials associated with him for the enforcement of the criminal law. His efforts may be more or less, or even completely, thwarted, his action hampered, and his effectiveness quashed, whenever incapacity, indifference, or dishonesty dominates those offices and agencies which are the necessary and indispensable adjuncts and auxiliaries of a criminal court. Without the honest co-operation of these instrumentalities, he is in a large measure impotent, and his best exertions unavailing. It is true that society has a right to expect, and properly so, that the judges of our higher courts of criminal jurisdiction shall set the standards, create the atmosphere, and with dignity and in good faith, represent the well-reasoned and settled convictions of their respective communities towards the enforcement of penal laws and the punishment of crime. But it must be borne in mind, as I have intimated, that the effective field of their activities and duties, as fixed by law and long practice, is closely circumscribed; and, that alone and unaided, they are almost utterly powerless to punish crime effectively, and thus vindicate the supremacy of the law. The only function of their office which they may exercise independently and untrammelled is the imposition of the sentence, and this may, very properly I admit, always be the subject of executive revision.

It is no part of the duties of a superior criminal judge of his own motion, to institute prosecutions for crime. He has no more effective authority in this behalf than any other citizen; nor has he, by virtue of his office, the power to bring offenders into his court; nor any instrumentality in the mechanism of his

court by which unaided he can do this. Professor John Chipman Gray, one of the most profound of American jurists, in his recent book, "The Nature and Sources of the Law," in which he deals with some of the fundamental concepts of Anglo-American jurisprudence, says, "The essence of a judge's office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily in affairs, is not to act *sua sponte*, but is to determine cases which are presented to him." It is true that in charging his grand juries in regular sessions a judge may direct or request them to investigate certain alleged infractions of the law. He has also the power to convene his grand jury in extraordinary session and to direct them to inquire into such matters as he thinks proper; but he has no power to instruct or to compel them to find an indictment against any particular person. While this power to order investigation by the grand jury may at first blush be thought to be capable of very effective use on the part of the judge, owing to the great respect which juries generally entertain for any recommendations from that high office, it must be borne in mind that the work of the grand jury is done almost entirely (and properly so) in the presence and under the direction of the state's attorney. From this it results that in a large measure the indictments found are simply ratifications of his recommendations. This is one of the many tremendous powers of the state's attorney, to the great necessity for the responsible and conscientious exercise of which I shall later refer. This one power, as compared with what the judge may accomplish by charging the grand jury, is in practical effectiveness as infinity to zero. In the whole machinery provided by American jurisprudence for the enforcement of penal laws, the state's attorney (in Maine called the county attorney) has far and away the greatest power, the most effective control and consequently the greatest responsibility. It may be worth while to take a brief survey of the principal agencies employed to enforce the laws against crime, examine their respective functions and compare their relative powers and capacities. We have already referred to the influence of the state's attorney in the grand jury room. Let us continue the inquiry further in respect to his official powers and authority.

There is no part of the state's attorney's power over criminal

prosecutions so absolute, so uncontrolled by the judge, as his right and privilege to enter a *nolle prosequi* at his pleasure in any prosecution. This power he may exercise, regardless of the judge or any other official, at any stage of a case, except while it is actually before a jury, even after verdict and up to the very moment of sentence. This right is a long-established and firmly fixed principle in English and American criminal jurisprudence. Mr. Bishop, a well-recognized authority on criminal law, in speaking of it says: "In England the Attorney-General alone, without interference from the court, the private person prosecuting, or the defendant, has the power of *nolle prosequi*." In referring to the practice in American courts, he further says: "The functions of the English Attorney-General are committed to a prosecuting officer" * * * to whom "the power of *nolle prosequi* commonly pertains; to be exercised, as in England, *free from judicial control*." As early as 1804, in a Massachusetts case (2 Mass. 174), Chief Justice Parsons in commenting on the judge's want of control in respect to entering a *nolle prosequi* said, "I observe in the bar, the *nolle prosequi* is alleged to have been entered by the advice of the Court of Common Pleas. Certainly, the court are not legally competent to give any advice on this subject. The power of entering a *nolle prosequi* is to be exercised at the discretion of the attorney who prosecutes for the government, and for its exercise he alone is responsible."

Besides this exceedingly great power he has a very effective authority to determine whether or not prosecutions shall be instituted at all. Apart from his almost absolute domination of the grand jury, it is a practice, and a most proper and salutary one, too, for complainants and officers of the peace to consult him on the advisability of swearing out complaints, except in case of inconsequential misdemeanors, such as intoxication, petty larceny and the like. In every case thus referred to him his determination as to whether a complaint shall be issued and a prosecution undertaken is final. No one would expect to prosecute successfully a case for the state when its own attorney is opposed to the proceeding or even indifferent as to the outcome.

Again, our constitutions are extremely solicitous of the personal liberty of the state's citizens. Liberal provisions are made

for giving bail. The accused is thus set free. Whether he shall ever come into court to answer to the proceedings against him depends entirely upon whether he will choose to appear voluntarily; and if he does not, whether his sureties will elect to produce him. Whether his bail will be anxious to produce him will depend upon how well satisfied they are that their civil liability will be enforced. The state of their minds upon this question will depend upon whether the state's attorney will, as a part of the fixed policy of his office, prosecute forfeitures of bail vigorously and relentlessly. The control of suits in *scire facias* against bail, in the state of Maine, as to whether such actions shall be begun and be effectively carried through the courts, is almost entirely in the hands of the county attorney and is a most powerful adjunct to the effective and successful administration of his office. Our statute says, "When a person under recognizance in a criminal case, fails to perform its condition, his default shall be recorded, and process shall be issued against such of the *comisors* as the prosecuting officer directs." If the imposition of sentence is the judge's principal function and sphere of activity (which is true), it is entirely apparent that he should not be charged with inaction and inefficiency if no convicts are presented to him for sentence. A bailed prisoner may never be brought into court.

I have said that the power of the judge in imposing sentence is unhampered. In strict law this is so, but in practical experience he may be compelled to waive or modify his better judgment. When an important sentence is to be imposed it is the unvarying custom for the state's attorney and the judge to confer. This is absolutely necessary when the conviction is by plea of guilty, for the judge generally knows nothing of the facts concerning the offense or the offender, while the state's attorney knows or is presumed to know all about both. Again, there may be offences of frequent, repeated and continuous occurrence against certain statutes (for example, those prohibiting the unlawful sale of intoxicating liquors), for the punishment of which offences it may be desirable to establish something like an uniformity of treatment; or to change methods and to increase penalties which have previously been in vogue. If the judge would act at all, such are the peculiar powers of the county attor-

ney that the judge is necessarily and entirely dependent upon him to present offenders convicted and ready for sentence. There must be mutual understanding and harmonious action between the two officials in order to insure the best results in court. It is entirely conceivable that the judge might call the county attorney into his chambers and say to him that he thinks heavier penalties (for instance, more imprisonment and less fines) should be meted out to a certain class of offenders, that public sentiment demands this; and, that his judgment approves more drastic punishment than fines alone. The county attorney may reply that he does not believe in that kind of sentence for this class of offences; that better results can be accomplished by fines than by imprisonment; that, if this policy of fining for the violation of what by many is regarded only as a sumptuary regulation is generally adopted by the court, the grand jury will at once refuse to indict and the traverse jury will not convict; and, finally, that such a course will result in financial loss to the county and effect no diminution in the prevalence of this offence. The judge is entirely satisfied that, if he attempts to pursue a policy to which the county attorney is opposed, he will not only not have his support and assistance; but, on the contrary, if not openly antagonized and blocked by him, will, at least, be handicapped by his apathy and indifference. He realizes what a demoralizing effect the knowledge of such an antagonism between the principal officers of the court would have when known and understood by the law breakers and their attorneys, who are always keenly sensitive to judicial conditions and quick to scent every situation favorable to them. What is the judge to do? Shall he have an open rupture with the most important functionary of his court, arouse his active opposition, and create a degrading sensation (something always to be deplored and avoided in a criminal court)? He has a large number of cases on his docket. Most of the respondents are out on bail. He takes his seat on the bench regularly every morning ready to do the work of the term. The county attorney is there, but does no business except to call up a few inconsequential matters. This goes on for several days, while the real business of the term is untouched. The judge has a jury and numerous court officers on his hands in attendance to

do the term's business, whose wages are costing the county a large daily sum. He again calls in his county attorney and inquires why there is nothing done. His only satisfaction is in the answer that the criminal lawyers have been notified to bring in their clients, but have not done so. No effort is made by the state's attorney to default bail, to issue capiases to bring in the respondents or to pursue the sureties in *scire facias* for their liability upon their recognizances. It becomes perfectly clear to the judge that the attorney for the state has determined that the work of the term shall not be done unless the kind of sentence which he demands is imposed. Might not the judge under such circumstances be justified in coming to the conclusion that it would be better to yield, stop the expense to the county, dispose of the term's work, and get the best results he can, rather than to allow the expense to accumulate and accomplish nothing?

It is not a fanciful stretch of the imagination or unconceivable, as I have said, for a county attorney to pursue such a course, as I have described; and thus to coerce and dragoon a judge into accepting an alternative as the lesser of two evils. In this manner the judge's own peculiar province, wherein he is supposed to be supreme, may be invaded. This further illustrates the varied and powerful means of control at the command of the county attorney and emphasizes the prime necessity for first rate ability and conscientious regard for the honest discharge of the duty which inherently appertains to that office.

I think I have said enough to draw attention to the numerous powers and the absolutely unhampered and effective control over criminal prosecutions which the law and practice of American courts attach to the office of the state's attorney. His duties pertain to two departments of the government. So far as he is an officer of the court and represents the cause of the state therein, he is a judicial officer. So far as his activities are directed to the detection of crime and the execution and enforcement of the law his functions are executive. Whether criminal proceedings shall be instituted at all, whether those proceedings, when started, shall be followed up until a complaint or indictment is actually entered in a court of appropriate jurisdiction; whether when so entered the persons therein accused shall be prosecuted at the

bar to conviction or acquittal; and whether, even after a verdict of guilty has been reached, the respondent shall be presented to the judge for sentence rest entirely and absolutely in the discretion and under the will of the state's attorney.

But, in spite of this tremendous official absolutism, the entire responsibility for the effective administration of penal laws does not properly belong to the attorney for the state. While it is true that the judge can make no positively concrete and substantial contribution to the enforcement of criminal law until the offender has been actually apprehended and brought into court, convicted either by plea of guilty or verdict of the jury, and motion has been made by the state's attorney for imposition of sentence (and he may change his mind and enter a *nolle prosequi* while the clerk is passing up the papers to the judge), still there are other public officers whose vigilant and honest services are an essential prerequisite to an effective discharge of duty by the government's attorney. I refer to our executive functionaries, such as sheriffs, their deputies, marshals, policemen, constables, and those whose special duties are to keep close watch for all violations of the law. Our county attorneys are not expected to act as detectives or policemen any more than is the judge, though they often render great assistance in ferreting out crime and apprehending offenders; but they are entitled to and should receive thorough and intelligent service and assistance from these executive officers. The best endeavors of the state's attorneys may be thwarted and their official effectiveness much marred and impaired by the stupidity, dishonesty or indifference of those who should be the first to detect crime and the most helpful coadjutors of the state's attorney in prosecuting it. These executive officers come into actual and immediate contact with the criminals. That much depends upon their intelligence, vigilance and honesty is apparent. The governor of the state, the mayors of our cities, the sheriffs of our counties, as executive heads, can set standards, establish policies, promulgate general rules, and insist upon honesty and efficiency in their subordinates; but very much will depend upon the character and capability of the men who actually do the initial work of detecting the law-breaker and procuring the evidence of his crime. The mechanism, therefore, for vindi-

cating our penal laws, that is for discovering, repressing and punishing crime consists principally of three distinct agencies,—the executive officers already enumerated, the state's attorney and the court, made up of judge and jury.

It might be worth while to refer to the important function of juries in the administration of the criminal law and see how the best intentions of a judge may be thwarted by mistake, perversity, or malfeasance on the part of juries. By the constitution of this state, and the same is true of most jurisdictions of this country, no person can be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury, and he is also, by the same authority, entitled to trial by a traverse or petit jury of twelve, whose absolute unanimity is necessary to a conviction. By the statutes of this state, appeals lie from all inferior courts to higher courts where trial by a traverse jury may be had. In other words, no person can be convicted in this state of even the most petty offence, if he avails himself of his right of appeal, unless each of twelve traverse jurors is convinced of his guilt beyond a reasonable doubt; and no person can even be put on trial for the commission of any of the higher or more serious offences until at least twelve members of the grand jury have concurred in preferring an indictment against him. Thus, if the grand jury does not indict, the accused must go free and the judge obtains no power or jurisdiction whatever over him. If, when the accused is put on trial before a traverse jury, a single jurymen declines to assent to a verdict of guilty, whatever may be his motive for so doing, the respondent cannot be sentenced by the judge,—his guilt has not been legally established. As a result there are many chances for the accused to escape on account of these two juries and the other hazards of a trial, before he reaches the judge for sentence, even when the county attorney is prosecuting vigorously and in good faith.

Generally speaking, juries, both grand and petit, in this state, are honest and conscientious and may be relied upon faithfully to discharge their duties. Sometimes in case of a sumptuary, unpopular, or otherwise offensive law (as has occasionally been the case whenever our law against the sale of intoxicating liquors has been honestly and consistently enforced by our

sheriffs), grand juries will refuse to indict and petit juries decline to convict those accused of its violation. It is, however, a rare exception when Maine jurors do not approach the discharge of their duty with honest and conscientious purpose.

It sometimes happens that executive officers corruptly collude with offenders and allow them to furnish substitutes to be arrested, taken before court and vicariously to receive such sentence as may be awarded. If the sentence is a fine, the money with which to pay it is furnished by the protected and favored criminal. If it is imprisonment, then the substitute is paid good wages for the time he "does" in jail. It is interesting to see with what ingenuity rum sellers select and manipulate these proxies. The following are some of their favorite "dummies": the wasted victims of consumption exhibiting the pallor and emaciation of the last stages of that terrible disease; old men and women, shattered by disease and tottering with the infirmity of age; women in advanced pregnancy; penniless widows with numerous small children, employed to "put out the stuff"; young boys and girls, even;—in short, anybody or anything so wretchedly conditioned that no humane judge could sentence them either directly to jail or imprison them for not paying a fine. These miserable creatures are about the only kind of respondents brought into court when there is a "fake" enforcement of this law. Sometimes one of these most pitiable tools will be offered for sentence on a plea of guilty at the first of the term as a "feeler" to find out what the attitude and temper of the court is. I recall one instance where a young man with no record, in the last stages of consumption and suffering with a weak heart (his illness, not having been discovered by me) was brought into court for this purpose. Pleas of guilty in three cases were entered for him by his attorney. Both fines and jail sentences were imposed. He was committed to jail. Within ten days from that time I saw the announcement of his death in the morning paper. The ideal "dummy" is one so wretched that the judge will not imprison him for any reason. In such case, his employer saves both his fine and jail wages.

Such are some, but by no means all, of the potentially available and favoring contingencies, obstructions and checkmates

that lie along the pathway of the law-breaker, which begins with his crime and terminates with a motion for sentence. My initial thesis was and is that the uninformed are likely to exact too much from the judge in the practical administration of the criminal law. I would not minimize his powers, duties, and responsibilities. Much, very much depends upon him, as I said at the beginning, but alone and unaided he is circumscribed and impotent to a degree not appreciated by those unfamiliar with the mechanism of our criminal procedure.

I think I have said quite enough to suggest the imperative necessity of having for our county attorneys not politicians nor callow striplings in the law, but sober, honorable, conscientious and skilful lawyers. The community can infinitely well afford to pay for such talent. The executive officers also should be men of character, capability and zeal. Not until men of such qualities shall be found in those offices and integrity and learning adorn the judge's seat and all three of these agencies shall combine in mutual and sympathetic effort to enforce the laws and repress crime,—and not till then,—shall we have anything approaching ideal results in our criminal courts. No one of these agencies alone can accomplish much,—no two in combined effort can reach more than a measurable degree of success,—but against the *bona fide* union of the three in earnest and persistent effort, no crime, however bold and audacious or clandestine and insidious, can long victoriously and defiantly prevail.

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