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Criminal Law--Fair Trial--Duty of Prosecutor to Refrain from Over-Zealous Advocacy (People v. Fishgold, 71 N.Y.S.2d 830 (1947))

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The privilege of conducting horse races for stakes exists at common law and though rendered illegal, except as specially authorized, a license to conduct horse racing does not create a privilege, but merely removes the statutory bar to exercising that privilege.[13] A license is no more than "a permission to exercise a pre-existing right which has been subject to regulation in the interest of the public welfare." [14] The granting of a license to promote the public good, in and of itself, makes neither the purpose a public one nor the license a franchise. Nor does it place the licensee under an obligation to the public by making his enterprise a public one.[15]

Plaintiff had no common law right to enter the race track, since the defendant had an absolute right of exclusion (except as noted heretofore), nor did the legislature create a right of entry for the plaintiff.[16]

The principal case follows the traditional New York view. As to other jurisdictions, the common law rule is subject to the abrogating statutes which have been passed by the respective legislatures.

J. P. M.

CRIMINAL LAW—FAIR TRIAL—DUTY OF PROSECUTOR TO REFRAIN FROM OVER-ZEALOUS ADVOCACY.—The defendant makes an application for a new trial after having been found guilty of murder in the first degree and sentenced to death. His conviction was affirmed by the Court of Appeals. At a later date the sentence was commuted by Governor Dewey to life imprisonment. Apparently, the prosecuting attorney had been led to believe that the defendant had been previously convicted of a number of other crimes. The prejudicial effect of questioning the defendant on this mistaken information was not mitigated by the denials of the accused. *Held,* motion for a new trial granted. *People v. Fishgold,* — Misc. —, 71 N. Y. S. 2d 830 (1947).

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." [1] Generally it is up to the trial judge to decide to what extent the district attorney may cross-examine a witness as to matters that may discredit him,[2] but

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[13] Corrigan v. Coney Island Jockey Club, 2 Misc. 512, 22 N. Y. Supp. 394 (Sup. Ct. 1893).

[14] Madden v. Queens County Jockey Club, 296 N. Y. 249, 255, 72 N. E. 2d 697, 699 (1947).

[15] Cases cited note 2 *supra.*

[16] N. Y. CIVIL RIGHTS LAW § 40. This statute pertains only to discrimination based upon creed, color, race or national origin.

[1] Canons of Professional Ethics, American Bar Association, Canon V.

[2] *Cf.* Friedel v. Board of Regents, 296 N. Y. 347, 73 N. E. 2d 545 (1947); La Beau v. The People, 34 N. Y. 223, 33 How. Pr. (N. Y. 1866).

he may do so only on relevant facts. In a murder case the defendant goes upon the stand at a distinct disadvantage, as a juror looks upon his words with distrust and suspicion, for it is only natural for him to give evidence favorable to himself.[3] A jury need not take the word of any witness as the truth [4] and in the case of such a defendant, they are more inclined to disbelieve than to accredit. This puts the prosecuting attorney at an advantage and it becomes his duty as a "quasi-judicial officer," representing the people of the state, to act impartially in the interest of justice and not merely as a partisan in the action. It becomes his duty to see that the accused is not prejudiced by incompetent evidence.[5] This view is upheld in all American jurisdictions.

The jury puts implicit faith in a district attorney; much more so than in an attorney for a private litigant. They realize the facilities for fact-finding at his disposal, and base their implicit faith upon that premise. An unscrupulous public prosecutor might fortify a weak case with the use of collateral questioning, merely implying and not proving his points. He must remember that he has no duty to secure a conviction. His duty is to seek justice and to that end he should not ask incompetent questions for the purpose of prejudicing the defendant in the jury's eyes.[6] The Supreme Court of South Dakota recently [7] reiterated this universal doctrine and gave a new trial to a defendant, as to whose guilt the court was satisfied,[8] but because the prosecuting attorney by asking irrelevant questions had excited the passion of the jury and inflamed their prejudices against the accused, a new trial had to be given.

The prosecutor, in a criminal case, must hold himself under proper restraint and should never go beyond the evidence or the bounds of reasonable moderation.[9] He must at all times remember that he represents the public interests and that this imposes upon him the duty of exercising the restraint that goes with his high office. Under no circumstance must he let any personal consideration tempt him to procure a conviction at all hazards by vituperation of the defendant. When the district attorney oversteps the line of moderation required of him, it becomes the duty of the court to protect the defendant in his fundamental right to a *fair trial*.[10]

H. J. F.

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[3] The People v. Crapo, 76 N. Y. 288 (1879).

[4] 3 WIGMORE, EVIDENCE § 981 (3d ed. 1940).

[5] Taliaferro v. United States, 47 F. 2d 699 (C. C. A. 9th 1931); *see* The People v. Nuzzo, 294 N. Y. 227, 232, 62 N. E. 2d 47, 49 (1945); People v. Carter, 327 Ill. 223, 158 N. E. 436 (1927).

[6] State v. Haney, 222 Minn. 124, 23 N. W. 2d 369 (1946); Todd v. State, — Okla. Cr. —, 172 P. 2d 345 (1946); People v. Sheffield, 108 Cal. App. 721, 293 P. 72 (1930); People v. Carter, 327 Ill. 223, 158 N. W. 436 (1927); Commonwealth v. Meyers, 290 Pa. 573, 139 Atl. 374 (1927).

[7] State v. Thompson, — S. D. —, 24 N. W. 2d 10 (1946).

[8] *Ibid.*

[9] People v. Fielding, 158 N. Y. 542, 53 N. E. 497 (1899).

[10] A fair trial is a legal trial conducted in substantial conformity to law