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Criminal Law: Remarks of District Attorney in final plea as prejudicial error

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not only during one instant personnel but throughout the history of law in Wisconsin.

The rule providing for the inclusion of personal property can in no wise affect the situation, except possibly to urge the imperativeness of a change to the rule against remoteness of vesting. Now, the rule must either be against suspension of alienation as to both real and personal property, or against remoteness of vesting as to both. Both are included in the same section of the statutes and logic alone suffices to establish this conclusion.

Will of Smith,[14] decided in 1922, would seem to dispel any thought of Wisconsin being influenced, at least immediately, by *Matter of Wilcox*. Here the court, again inferentially, declared that the policy of the state was against suspension of alienation only and supported itself by the decisions noted previously.

However, even supreme courts are not endowed with the aura of infallibility. The New York court reversed itself (but as to real and personal property alike) and as the better reasoning seems to lie with Justice Cassoday's dissent in *Becker v. Chester, supra,* it would not be surprising to see the Supreme Court of Wisconsin reverse its stand when the proper case is presented. The amendment to section 230.14 which included personal property in the "perpetuity" statute should act more or less as a wedge in presenting the opposite view for the court's perusal. However, in the absence of additional legislation, it *seems* that whatever stand is taken, the rule will have to be applied both to real and to personal property alike.

J. O'B.

Criminal Law: Remarks of District Attorney in final plea as prejudicial error.—In the instant case[1] the defendant, a barber in the city of Superior, was indicted for taking indecent liberties with little girls lured into his shop by promises of candy and small amounts of money. The district attorney in final argument to the jury made two statements which are the basis for this appeal to the Supreme Court: "The defendant is sending little girls down the primrose path to hell, oustide of the indecent liberties involved in this case"; and "Defendant's counsel has said that there was another way of handling this case, and I say the only other way was to kill him."

The Supreme Court in its review of the case speaks of the general rule as follows:

> Considerable latitude must be permitted in oral argument, and much is left to the discretion of the trial judge to determine whether an improper statement was made under such circumstances that it might be excused, mitigated, or even justified.

However in this case, the remarks as quoted were held to be prejudicial error, notwithstanding the fact that the trial judge directed the jury to disregard them. In Justice Stevens' opinion we find:

> The district attorney represents the commonwealth, a commonwealth which seeks justice only. It is as much the duty of the district attorney to see that no

[14] 176 Wis. 494, 186 N. W. 180.

[1] O'Neil v. State, 207 N. W. (Wis.) 280.

innocent man suffers as it is to see that no guilty man escapes. The defendant was entitled to a trial upon the evidence produced, unaffected by statements of extrinsic fact or extraneous considerations, such as those presented by the statements of the district attorney, to which objection was made. District attorneys are charged with the duty of vigorously prosecuting those who are guilty of crime. Zeal in the prosecution of offenders is always to be commended. The zeal and fidelity with which they perform their duties will determine in a large measure the degree of protection which organized society gives to its individual members. But the district attorney who permits his zeal to secure convictions, causing him to disregard his duty "as a sworn minister of justice," not only wrongs the defendant, he impedes the administration of criminal justice, and brings the administration of criminal law into disrepute.

In *Sullivan v. Catlin*,[2] cited in the case under comment, the Supreme Court held, that the trial court must call counsel to order at the outset, and the mere sustaining of objections without fitting rebuke is no adequate remedy for the evil, as the rule is that the rights of the defendant may be protected by a prompt, vigorous, and sharp reprimand of the trial judge, coupled with instruction to the jury to disregard the prejudicial error.

In reviewing the cases the rule in regard to this matter is stated in varying degrees. In *Fertig v. State*[3] we find:

> So long as the district attorney keeps within the record, the field allowed for argument is broad and it is not reversible error for him to assume the truth of the state's evidence, and reasoning from that to say with the utmost freedom what it tends to prove, and that it convinces him and should convince the jurors as well, of the guilt of the accused, or even to charge, in express terms, that the accused is guilty.

The rule is slightly modified in *Hofer v. State*:[4]

> The expression by the state's attorney of personal conviction of the guilt of the accused, as established by the evidence, though not to be commended, is held not to be reversible error.

And in *Meyers v. State*,[5] a prosecution where the evidence indicated a very brutal murder by the defendant of his wife, it was held not to be prejudicial error for the district attorney to characterize in these words: ". . . . these isn't any of the crimes the Huns have committed any more atrocious than the crime this man committed." In the review by the Supreme Court, Justice Vinje writes:

> Exception is taken to the language by the defendant on the ground that it asserts him not only guilty, but to be guilty of a most heinous crime. The jury will understand that the district attorney's declaration of guilt was based upon the evidence before them, and they were instructed by the court that if they found him guilty, such finding must be based upon the evidence. Whether or not the district attorney

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[2] 107 Wis. 291; 124 N. W. 295.
[3] 100 Wis. 301; 75 N. W. 960.
[4] 130 Wis. 576; 110 N. W. 391.
[5] 176 Wis. 184; 185 N. W. 520.

properly characterized the nature of the crime committed by the defendant, if guilty, is a matter upon which the judgment of men may well differ.

It appears that the holdings of the instant case and that of the *Meyers* case clash to some degree. It is true that the statement, "the only other way to handle this matter was to kill him," is sensational, but likewise is the statement about the crimes of the Huns. Such statement coupled with a direct accusation of the defendant, alleging defendant's guilt, would seem, under the rule of the *O'Neil* case, to be prejudicial error. It appears that the Supreme Court, in the instant case, is taking a precautionary measure to keep the zeal of the district attorney within bounds, and is seeking to impress upon the minds of those officers that the zeal for justice, rather than the zeal for conviction, should actuate their conduct throughout criminal prosecutions and particularly in their closing arguments to the jury.

LAWSON ADAMS

Jury—Impairment of right—Provision for determination of necessity for taking private property held unconstitutional.—A procedure which has been consistently followed in condemnation proceedings by the City of Milwaukee for eighty-seven years was given its death blow by the Wisconsin Supreme Court in granting a writ of prohibition in the case of *State ex rel. Allis v. Wiesner et al.*[1] The bone of contention was the determination of the question of necessity in the exercise by the municipality of the power of eminent domain. At common law this was, and in several states still is, considered a question for the legislature[2] and the usual method was by the appointment of a commission or similar inquisitorial body. Under the Village Charter[3] granted by the Territorial Legislature in 1838 the determination of necessity was left with the Village Board of Trustees. By the City Charter[4] granted by the Territorial Legislature in 1846 this question was left to the Common Council. Consequently it is not surprising to note that in the first draft of the Wisconsin Constitution in 1846 no mention was made of the determination of the question of necessity in condemnation proceedings. However, an amendment[5] was offered which was adopted and became section 2 of Article XI of the Wisconsin Constitution. It reads: "No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury." During the argument upon the amendment no doubt was left as to the end desired. The whole object of it was to restrain municipal corporations from taking property at their discretion as they had done theretofore.

In attempted compliance with the Constitution the City Charter granted by the State Legislature in 1852 provided for the appointment

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[1] 187 Wis. 384, 204 N. W. 589.

[2] Eminent Domain, 20 C. J. 624, *State ex rel Baltzel v. Stewart* 74 Wis. 620 (629), 43 N. W. 947, 6 L.R.A. 394, *Wisconsin Water Co. v. Winans*, 85 Wis. 26 (39), 54 N. W. 1003, 39 Am.S.R. 813, 20 L.R.A. 662.

[3] Sec. 8, Act 56 Territorial Legislature passed Jan. 18, 1838.

[4] Act to Incorporate the City of Milwaukee, passed Jan 31, 1846.

[5] Journal of Constitutional Convention, 1848, p. 478.