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# Attorney General - Common Law Powers - Power to Nol. Pros. Criminal Procedure

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# RECENT CASES

ATTORNEY GENERAL – COMMON LAW POWERS – POWER TO NOL. PROS. CRIMINAL PROCEEDING. – The Attorney General, intervening at the request of the states attorney, applied for a writ of mandamus to require the trial court to vacate its order denying his motion of *nolle prosequi* and to set aside all proceedings subsequent to such order. The Supreme Court of Illinois granted the writ, *holding* that the Attorney General's motion represented an exercise of his common law power, retained under the Illinois Constitution, to nol. pros. an indictment at any stage before impanelling of a jury. *People* ex rel. *Castle v. Daniels*, 132 N.E.2d 507 (Ill. 1956).

In most states the Attorney General has all the powers and duties given to the officer with that title under common law unless restricted by statute.[1] In a minority of jurisdictions, including North Dakota, the powers of the Attorney General are solely statutory.[2] Illinois courts have said that since his office is constitutionally created as a part of the executive department, neither the legislature nor the courts can deprive him of authority, although they may add thereto.[3] Among the powers of the Attorney General at common law was the right to *nolle prosequi* an indictment at all stages of a criminal prosecution before the jury was impanelled or before the trial of the case.[4] This power was not subject to review by either trial or appellate courts.[5] An exception to this rule was that the action could not be capricious or vexatious.[6] The instant case would not come within this exception.[7]

In some jurisdictions the Attorney General may supersede the states attorney and conduct such criminal prosecutions as he sees fit.[8] But in Illinois and other jurisdictions the Attorney General cannot supplant or control the duties of the states attorney although he may intervene in prosecutions.[9] The office of states attorney, unlike that of the Attorney General, carries only those duties and powers prescribed by statute.[10] Among the duties of the states

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1. See State v. Karston, 208 Ark. 703, 187 S.W.2d 327 (1945); Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915); State v. Robinson, 101 Minn. 277, 112 N.W. 269 (1907); State v. Public Service Co., 283 P.2d 594 (Mont. 1955). Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 Baylor L. Rev. 1 (1955).

2. See N. D. Rev. Code § 1-0106 (1943) "In this state there is no common law in any case where the law is declared by the code." See Ford Motor Co. v. Dept. of Treasury of State of Indiana, 323 U. S. 459 (1944); Shute v. Frohmiller, 53 Ariz. 483, 90 P.2d 998 (1939); Cosson v. Bradshaw, 160 Iowa 296, 141 N.W. 1062 (1939).

3. Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915).

4. See Regina v. Allen, 1 Best & S. 850, 121 Eng. Rep. 929 (1862).

5. See Regina v. Allen, *supra*.

6. King v. Webb, 3 Burr 1468, 97 Eng. Rep. 931 (1764).

7. *Cf.* People *ex rel.* Elliot v. Govelli, 415 Ill. 79, 112 N.E.2d 156 (1953).

8. See State v. Finch, 128 Kan. 665, 280 Pac. 910 (1929); State v. Robinson, 101 Minn. 277, 112 N.W. 269 (1907); Appeal of Margiotti, 365 Pa. 330, 75 A.2d 465 (1950); see also 60 Yale L. J. 559 (1951) (This result has its roots in the fact that at common law the attorney general could supersede prosecuting attorneys, but it should be noted that the present relationship between attorney general and local prosecuting attorney is quite different from that which existed in eighteenth century England. In England public prosecutors were appointed by the attorney general, now they are elected officials.)

9. People v. Flynn, 375 Ill. 366, 31 N.E.2d 591 (1940); State v. Ehrlick, 64 W. Va. 700 64 S.E. 935, 936 (1909) (dictum); Lawless, *The Relationship Between the Attorney General and the State's Attorney in Illinois*, 1949 U. Ill. L. Forum 507. (It should be noted that power to 'intervene' is simply the power to act in conjunction with district attorneys; power to 'supersede' is the power to dismiss the district attorney from that proceeding entirely.)

10. Withee v. Lane Fisheries Co., 120 Me. 121, 113 Atl. 22, 23 (1921) (dictum); Capitol Stages v. State, 157 Miss. 576, 128 So. 759, 763 (1921) (dictum).

attorney is the prosecution of all criminal cases within his county.[11] It has been clearly held that a states attorney can nol. pros. only with the consent of the court, and that the court's discretion in this regard will not be reviewed by mandamus.[12] In the instant case the state's attorney had been unsuccessful in an attempt to nol. pros. He then requested the Attorney General to etner the case and move to nol. pros. the indictment.

A West Virginia case, *Denham v. Robinson*,[13] faced with an identical situation denied the power of the prosecuting attorney and the Attorney General to nol. pros. without the consent of the court holding that where the Attorney General undertakes to exercise or control powers and duties of the prosecuting attorneys, he is limited by the same rules of practice that control them. It is submitted that the latter case forms the more logical rule. The states attorney, who can nol. pros. only with consent of the trial court, should not be allowed to do indirectly, that which he cannot do directly.

CECIL E. REINKE.

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — ENJOINING TESTIMONY OF FEDERAL OFFICER IN STATE PROSECUTION. — Plaintiff sued in a federal district court to enjoin a federal narcotics agent from testifying against him in a state prosecution for violation of its narcotics law as to evidence determined in a prior federal criminal prosecution to have been illegally obtained. The former prosecution had been dismissed on motion of the government because of the inadmissability of the evidence. The Court of Appeals affirmed the denial by the lower court of the relief sought. On certiorari the Supreme Court, with four judges dissenting, reversed the ruling of the Court of Appeals and *held* that the agent was subject to injunction. *Rea v. United States*, 350 U. S. 214 (1956).

Since *Weeks v. United States*[1] federal courts have denied admission to illegally obtained evidence.[2] Prior to that case it was admissable.[3] This prohibition, however, does not bar all illegally obtained evidence. If the evidence was not obtained by federal officers, but by strangers[4] or state officers,[5] it may be admitted. Where it was obtained by federal officers through an illegal search and seizure of a third person's property it may also be admitted.[6] The objection to the evidence must be made promptly upon discovery of the fact that it was obtained by illegal means, or else the right to object is deemed to

11. Ill. Ann Stat. c. 14 § 5 (1951). "The duty of each state's attorney shall be to commence and prosecute all . . . indictments . . . in any court of record in his county in which the people of the state or county may be concerned."
12. People *ex rel.* Hoyne v. Newcomer, 284 Ill. 315, 120 N.E. 244 (1918).
13. 72 W. Va. 243, 77 S.E. 970 (1913).

1. 232 U. S. 383 (1914).
2. See Amos v. United States, 255 U. S. 313 (1921); Gouled v. United States, 255 U. S. 298 (1921); Silverthrone Lumber Co. v. United States, 251 U. S. 385 (1920).
3. Adams v. New York, 192 U. S. 585 (1904); Hardesty v. United States, 164 Fed. 420 (6th Cir. 1908).
4. Burdeau v. McDowell, 256 U. S. 465 (1920); see Pederson v. United States, 271 Fed. 187 (2d Cir. 1921).
5. Weeks v. United States, 232 U. S. 383 (1914); Rice v. United States, 251 Fed. 778 (1st Cir. 1918); United States v. O'Dowd, 273 Fed. 600 (N. D. Ohio 1921); United States v. Burnside, 273 Fed. 603 (W. D. Wis. 1921).
6. Anderson v. United States, 273 Fed. 20 (8th Cir. 1921); Haywood v. United States, 268 Fed. 795 (7th Cir. 1920), *cert. denied*, 256 U. S. 689 (1921); Tsuie Shee v. Backus, 243 Fed. 551 (9th Cir. 1917).