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PRACTICE AND PROCEDURE — REVERSAL ON CONFESSION OF ERROR BY PROSECUTOR — On appeal accused assigned as error the failure of the trial court to sustain his motion for a directed verdict of not guilty. The prosecutor, convinced by facts dehors the record of the innocence of the accused, confessed error. *Held*, confession of error does not per se justify reversal; the court must find error in the record. *Parlton v. United States*, (App. D. C. 1935) 75 F. (2d) 772.

The control of a public prosecutor over the commencement and termination of criminal proceedings presents a large problem. It is generally held that mandamus will not lie to compel the prosecutor to institute proceedings¹ and that the mode of conducting a suit once begun will not be dictated by the court.² To hold otherwise would tend to merge the functions of court and prosecutor, a result to be avoided under the doctrine of separation of powers. As to the right of the

¹ Ann. Cas. 1912B 754 and note; but see at 755.

² Ann Cas. 1912B 756.

prosecutor to nol. pros. prior to verdict, some courts follow ancient English precedent and hold the right absolute while others vary in their requirements regarding the concurrence of the court and the accused, depending on the stage of the proceedings and the purpose of the dismissal.³ In some jurisdictions it is the practice to reverse on confession of error without any serious independent examination of the question.⁴ Other courts reverse only when they are able to find error in the record, irrespective of what the prosecutor confesses.⁵ According to an intermediate view, it is, or in some cases may be, better practice, though not essential, for the court to examine the merits of the errors confessed.⁶ Those who consider the problem as purely judicial may well urge that after judge and jury have found guilt, no administrative officer should have the power to change the result. The argument is sometimes made that an automatic reversal on confession of error would be objectionable as creating a precedent without proper consideration by the court.⁷ It has also been urged that on grounds of public policy the belated repentance of a small local official, sometimes notoriously weak or worse, should be submitted to judicial scrutiny.⁸ The task of the court would be rendered difficult, however, by the failure of the prosecutor, who is convinced of error, to file a helpful brief.⁹

M. L.

³ See generally 35 L. R. A. 701 (1897).

⁴ *State v. Bailey*, 85 Iowa 713, 50 N. W. 561 (1891); *State v. Hogan*, 85 Iowa 712, 50 N. W. 880 (1891); *State v. Ward*, 36 S. D. 415, 155 N. W. 185 (1915); *Harris v. Commonwealth*, 110 Va. 905, 68 S. E. 834 (1909). See also *Weare v. United States*, 276 U. S. 599, 48 S. Ct. 321 (1928).

⁵ *State v. Waite*, 135 Wash. 667, 238 P. 617 (1925); *State v. Green*, 167 Wash. 266, 9 P. (2d) 62 (1932); *Bindrum v. State*, (Okla. App. 1924) 228 P. 168; *Rush v. State*, (Okla. Cr. 1922) 210 P. 316; *Tucker v. State*, 90 Fla. 59, 105 So. 140 (1925); *State v. Stevens*, 153 N. C. 604, 69 S. E. 11 (1910). Compare with the last case *State v. Thomas Lee*, 91 N. C. 570 (1884), and *State v. Valentine*, 29 N. C. 141 (1846). See also *People v. Mortenson*, 224 Ill. App. 221 (1922).

⁶ See *Gynn v. City & County of Denver*, 92 Colo. 388, 20 P. (2d) 1118 (1933), with which compare *Lawson v. People*, 63 Colo. 270, 165 P. 771 (1917) and *Zancanelli v. People*, 63 Colo. 252, 165 P. 612 (1917). See also *People v. Lewis*, 127 Cal. 207, 59 P. 830 (1899), with which compare *People v. Mooney*, 175 Cal. 666, 166 P. 999 (1917).

⁷ The argument appears in *Rex v. Wilkes*, 4 Burr 2527 at 2551, 98 Eng. Rep. 327 (1770), where it was said that "confessing an error . . . would not do: they must judge it to be error; and their judgment would be a precedent." See also *State v. Green*, 167 Wash. 266, 9 P. (2d) 62 (1932), where the court reasoned that automatic reversal would "establish precedents which would be embarrassing."

⁸ MOLEY, *POLITICS AND CRIMINAL PROSECUTION*, c. 3 ("The American Prosecutor") (1929).

⁹ See, for example, *Ireland v. People*, 1 Colo. App. 126, 27 P. 872 (1891), where the prosecutor furnished neither brief nor argument.