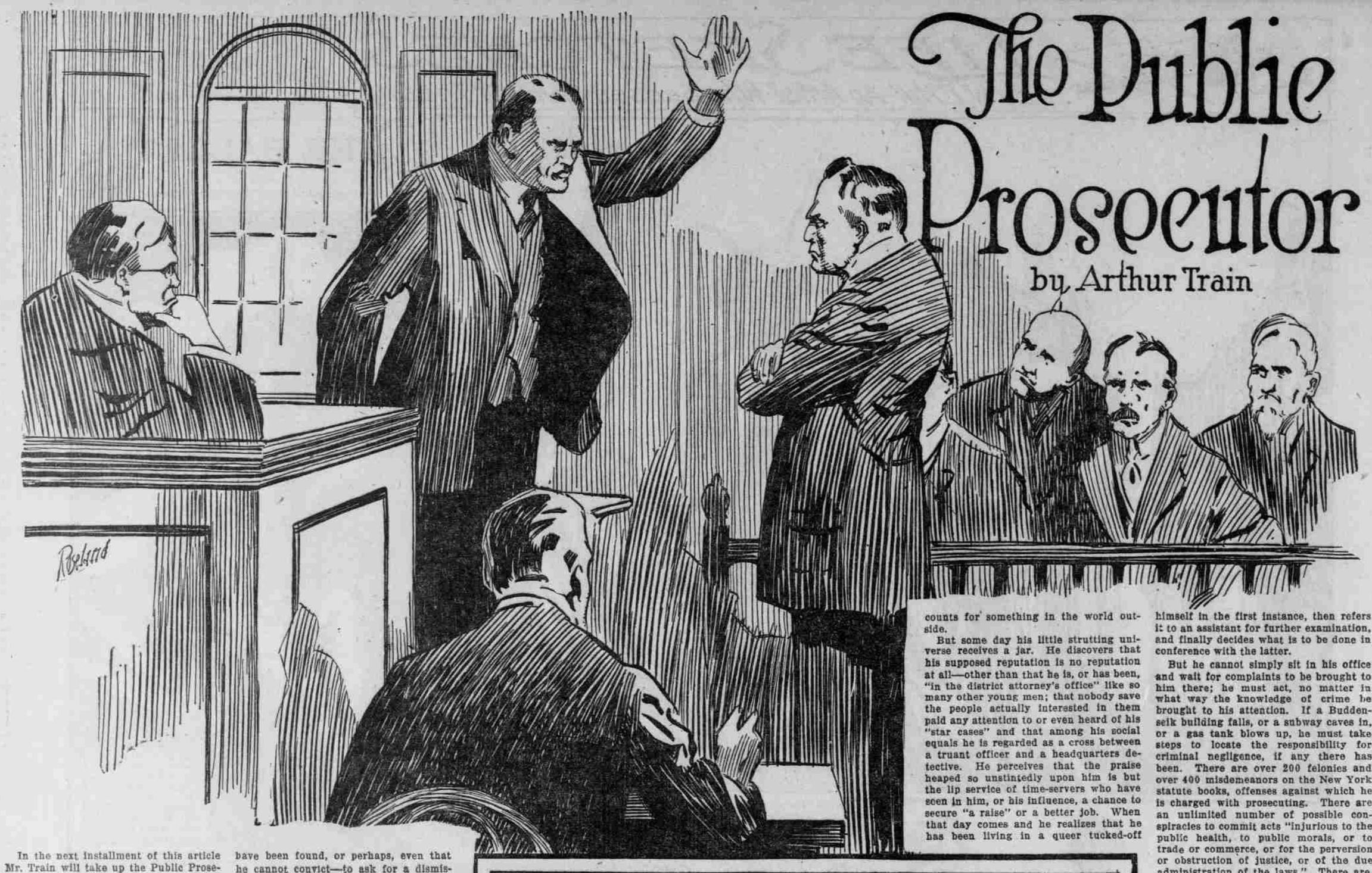

The Public Prosecutor

by Arthur Train

In the next installment of this article Mr. Train will take up the Public Prosecutor and the accused.

Article No. III.

BY ARTHUR TRAIN.

IT IS easy to grumble. Yet the office of district attorney has so vital an influence upon the respect in which our institutions are held that we have a right to hold those who occupy it to a high standard of industry, sobriety and self-restraint. The district attorney does not need to be a great lawyer. One capable law clerk can furnish most of the "dope" for a staff of assistants who rarely open a book—even the penal code. Ninety per cent of the actual work of the office is the exercise of mere common sense. The majority of cases practically "try themselves." The complainant tells his story in more or less his own way, the defendant denies it or "stands pat." The judge charges the jury. They usually convict. There is no real legal or trial ability required. And it goes on, day in, day out—the mills of the courts grinding out convictions, with few acquittals, the year round.

The idea that criminal law is peculiarly difficult or complex is unfounded. There have, it is true, been many hair splitting refinements made by the bench, particularly in the old days when the penalties were so terrible that even judges sought to mitigate the atrocity of the law by giving the defendant another chance when they could. But in our criminal courts today the contest is usually one of fact, not of law. The cases are of the "knock down and drag out" variety. Courtesy, courage, broadmindedness and scrupulous integrity are needed rather than legal ratiocination. It is merely a question of bringing out the evidence, and it is not inconceivable that a substantial percentage of criminal proceedings would be facilitated if the district attorney did not appear at all. One often writhes with mental agony when forced to listen to some youthful deputy blundering well meaningly through a case, interrupting with unnecessary questions just as the witness gets well started on his story, and fighting to exclude evidence that either is so inconsequential that it is better to let it in instead of wasting time in trying to keep it out, or is in fact beneficial to the people's case. Most criminal prosecutions—I mean the ordinary cut and dried police cases—are little more than matters of form. Crank the machine and it goes along of itself. If the district attorney isn't at hand to ask the witness: "Well, and what happened next?" the judge does it for him.

As a matter of fact, the assistant district attorney who, for nearly a generation, was as much a fixture in "Part One" as the jury box itself, was afflicted with a physical ailment that made it almost impossible for him to keep awake except when actually on his feet. He would question a witness and, having done so, sit down while the defense was cross-examining and peacefully doze off until it was time to call the next. Sometimes he would wake up and sometimes wouldn't. But things went along quite all right just the same, and because the jury perceived that he had no personal ax to grind and was a good natured person of generous impulses, they usually found the defendant guilty. Indeed, as I recollect it, the percentage of convictions to cases "tried" by this assistant was the highest in the entire office, yet from a theoretical point of view he was a very bad prosecutor indeed, since a large part of the time he was sojourning in the land of dreams.

There is a natural tendency for the district attorney to substitute himself for the jury, and, on the one hand—if he thinks that the indictment should not have been found, or perhaps, even that he cannot convict—to ask for a dismissal, or, on the other, if the case appeals to him, to strain the ethics of his office a bit to secure a verdict of guilty. A prosecutor, knowing that his intentions are honorable, may quite unconsciously usurp most of the functions of the entire court, become an autocrat, and leave others little or nothing to do. If the judge allows this, the district attorney is apt to become blinded by his own importance, and feel that whatever he may do is justifiable, because he is on the right side. Thus, he may use the authority of his official position improperly to influence the jury or employ methods to trick or embarrass the defense, which do him little credit and tend to reflect upon his office and the whole administration of criminal justice.

The temptation to play fast and loose with a crook who has taken the stand in his own defense or who has had some dullard of the criminal bar assigned to protect him, to fight fire with fire, and to beat the shyster at his own game, is enough to make a young deputy district attorney forget that to preserve the standard of official conduct is more important than to send a burglar to jail. The outrages sometimes committed by youthful (and other) prosecutors in an enthusiastic desire to see that no guilty man shall escape have doubtless caused many a chuckle to Judge Jeffreys and Torquemada on the further side of the Styx. For the district attorney can do in court with comparative immunity things which in a defendant's counsel would bring the judge down upon him like a ton of brick. If he is caught offending it is easy for him to explain that he simply "forgot" or was "honestly mistaken."

Certainly the young assistant district attorney has every advantage—not the least among them being that he can speak his own language and so convey his ideas to the jury—something not always the case with his opponent. And, then, do not the jury already know that the defendant is guilty, because this innocent looking youth, whom the court addresses as "Mr. District Attorney," has told them so? Of course, they do! And they know if they don't convict when they ought the judge will probably read them the riot act and hold them up to public contumely. They are also aware that the grand jury has indicted the defendant, and that presumably he was caught by the police "with the goods" in the first place. The judge can talk until he is black in the face about "presumption of innocence" and "reasonable doubt," but they will take it all in the Pickwickian sense. They continue to be reasonable men even after becoming jurors. They cannot seriously imagine that after the evidence has been sifted from three to six times by different judicial and semi-judicial officials the chances are anything but overwhelmingly against the defendant's innocence.

In the general run of cases, with the ordinary metropolitan jury, the tide is running rapidly against the defendant from the moment he appears at the bar. All the "D. A." has to do is to stand on the bank and see him drawn over the rapids. So great is the prosecutor's influence with most members of a jury panel, who after several weeks of service have come to trust and respect him, that not infrequently the mere expression on his face is enough to lead them to convict. The district attorney and the jury come to feel that they are a sort of "happy family," whose mutual confidence and esteem engenders a sense of "team play," leaving the stranger defendant at a hopeless disadvantage.

All the more, under these circumstances, does good sportsmanship demand that, no matter what tactics the defense pursues, the prosecutor must keep his own armor unsullied—and play absolutely fair. Frequently this is hard work. When some artificial rule excludes a piece of vital and conclusive hearsay evidence—that the defendant was seen immediately after the homicide carrying a smoking pistol, for example—it may well seem at the moment justifiable to get the fact before the jury by hook or by crook. And there are a thousand ways of doing this—in the opening address, which the court says is "not evidence," but which the jury is apt either to accept in lieu of it or to confuse with it; by innuendo in the asking of question "proper" or "improper"; through the mouth of an impulsive but disingenuous "cop" who just can't help blurting it forth, although it be immediately "stricken out" by the judge; or, if the devil has been busy, by simply saying it yourself so that the jury can hear you.

But there are even more subtle ways to carve the entrails of a defendant, particularly if he takes the stand as a witness in his own behalf. One of these is by questioning him as to his "record." You may ask him almost anything you like. Anyhow, you are permitted under the guise of "testing his credibility" to accuse him of every crime on the calendar merely by having him deny each one of them seriatim. You are "bound by these answers," of course. That is just another of the law's little ironies. For, if you look and talk like a gentleman, the jury assume that you wouldn't have asked the question if the charge were not true. Whatever he says, they believe he did it. His "No" is worth nothing against your presumptive honesty. Thus, if you ask a defendant questions which are not based on known and provable fact you may be, in effect, bearing false witness against him in a most dastardly way.

Nine times out of ten — perhaps 99 times out of a hundred—no harm results, but the hundredth time somebody is knifed in the back—that unfair and unjust question is what turns the scale in the jury's mind against him. They are probably going to think him a good deal worse than he really is, anyway. Do not increase the presumption, heavy enough against him already, by smearing him with mud that is not his.

When all is said and done, unless the young attorney sets an example of just dealing, high integrity and sincerity, his years of service—his best years—will be thrown away. For in that example—the good deed shining "in a naughty world"—amid the sordid surroundings of crime and poverty, of coarse brutality and cynicism — lies his greatest opportunity for public service. At first he is exhilarated by the consciousness of his own supposed intellectual and social superiority. Court officers, policemen, detectives and office hirelings pat him on the back, flatter him and try to induce him to believe that he is the cleverest trial lawyer, the most astute prosecutor, the most eloquent orator of the decade. He is, in fact, a big fish in a pool of not inconsiderable size. He dreams of a political career, or, at the least, of an office crowded with wealthy and influential clients drawn there by his reputation as a prosecutor. He is blinded by blarney, stultified by sycophancy. He eagerly searches the columns of the papers for his name, and feeds out "stories" to the boys in the press room. He really believes that because he is a more or less important figure in the tiny world of turnkeys, cops and cheap politicians he corner, devoting aimself to much that really has little connection with the practice of his profession, and really offers more of advantage to the novelist than to the lawyer, in a circle whose standard of refinement is that of a Harlem River park, and whose ideal of social life is a Coney island picnic given by an east side benevolent association—when, in a word, he sees his job as really it is, and his burst bubble of pride turns in his hands ea dead sea fruit—then, if he has not the satisfaction of knowing that he has lived up to his own standard of what a gentleman should be, his time has been worse than lost.

The district attorney has a variety of duties connected with the administration of justice of most of which the publisc is unaware, or, at any rate, unmindful. Besides being the grand jury's adviser, he is obliged to report in writing to the governor on all cases in which applications for pardon have been made, looks after extradition matters, is charged with passing on the financial responsibility of bondsmen and has to take part in the inquiries conducted into the sanity of defendants before and after conviction. Most of these things are done for him by trained and qualified assistants.

His chief task, however, is to hear and determine the merits of the complaints made to him by aggrieved citizens.

If these are of the routine variety the complaints are relegated to the magistrates' courts and are looked after by the deputies. If they are unusual, either in the importance of the offence to the community, the standing or influence of the accused, or in the fact that the offense is one outside the scope of the criminal law as commonly construed or applied, the district attorney goes over the matter himself in the first instance, then refers it to an assistant for further examination, and finally decides what is to be done in conference with the latter.

But he cannot simply sit in his office and wait for complaints to be brought to him there; he must act, no matter in what way the knowledge of crime be brought to his attention. If a Buddenseik building falls, or a subway caves in, or a gas tank blows up, he must take steps to locate the responsibility for criminal negligence, if any there has been. There are over 200 felonies and over 400 misdemeanors on the New York statute books, offenses against which he is charged with prosecuting. There are an unlimited number of possible conspiracies to commit acts "injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws." There are, in fact, so many statutes and ordinances that there is hardly anybody who does not violate some one of them every day of his life.

There are laws governing the conduct of places of public amusement, factory labor, Sunday observance, fancy dress balls, ice cutting, funerals, every conceivable trade and occupation, every aspect of human activity, from pulling teeth to planting oysters, for whose enforcement he may be held responsible.

Law making has become a national indoor sport, and it is one of the worst things we do. Our legislative harvest is upward of 15,000 statutes per annum. During a recent period of only five years there were passed over 62,000 laws, state and federal, which required for their interpretation 65,000 decisions of courts of last resort, filling 630 volumes. Each state contributed its share.

We seem to have a curious idea that we can make ourselves good by making it a crime to be bad. But we do not really intend that the laws shall be enforced. They are only in the nature of moral window dressing. We hire a man to enforce them, but we expect him to use a wide discretion about how he does it, and if we do not like what he does we are annoyed and feel that he is taking advantage of us.

Added to the multiplicity of criminal statutes is the fact that human nature is not only fallible but that a large percentage of political office holders and their hired subordinates are morons. No one can administer an office with a hundred employes without all sorts of mistakes being made without his knowledge, for which he technically is responsible and for which the district attorney might, with some color of propriety, initiate a prosecution.

There is no public office so well run that some basis of fact could not be found apparently to justify an official investigation, even including that of the district attorney himself, who usually does the investigating. There are abuses in high office and low; bribery and corruption in officialdom and in business, and sharp practice everywhere. Probably there will be for a long time to come. Besides there are thousands of acts which in their nature are morally just as reprehensible as those which the law stigmatizes as crimes, but which are outside the statutes.

Crimes are those acts only which have been regarded by our lawmakers as sufficiently dangerous or harmful to society to be forbidden under penalty. An act may be highly immoral or wrong, may, in fact, be a grievous sin, and yet not a crime. A misdemeanor may be much more heinous than a felony. Crimes are not crimes merely because they are wrong, but because the state has enjoined them. You can allow a baby to be run over by a motor when you could have saved it by stretching out your hand, and be guilty of no crime whatever; or you can let your neighbor die in agony without telephoning for a doctor or going to his assistance. You can be the meanest sort of a mean swindler, and yet be beyond the reach of the law, which is highly inadequate to punish commercial or financial fraud. And the poor are forever with us, always being taken advantage of by reason of their inability to protect themselves.

"So I returned and considered all the oppressions that are done under the sun—and behold the tears of such as were oppressed, and they had no comforters; and on the side of the oppressors there was power; but they had no comforter."

(In the final installment of this article Mr. Train will discuss "The Public Prosecutor and His Difficulties.")

Typical Court Scene.