

2 FEDERAL JUDGES UPBRAID MEROLA

Ruling in Damage Suit Plea, They Say Pretrial Remarks Affect the Defendant

By ARNOLD H. LUBASCH

A stern warning was issued yesterday by two Federal judges who declared that prosecutors who made improper statements about criminal cases could be vulnerable to damage suits for violating the rights of defendants.

"The time has come," the judges said, "for prosecutors to realize that failure to conduct themselves within the law and in accordance with the constitutional rights of those accused of crime, and held to be innocent until proven guilty, may subject them to suit in a Federal court for the damages caused by their disregard of the law."

The warning grew out of a damage suit by six defendants in a loan-sharking case who sued District Attorney Mario Merola of the Bronx and two of his assistants because the prosecutors had told reporters at the time of the arrests in 1974 that the defendants were linked to the Mafia.

This suit was dismissed by Judge Charles L. Brieant Jr. in Federal District Court here last year on the ground that "the doctrine of prosecutorial immunity" protected the prosecutors from damage suits even though the reference to Mafia links might have breached the State Bar Association's code of professional responsibility.

Ruling on an appeal from the decision, the United States

Continued on Page 36, Column 5

Court of Appeals for the Second Circuit decided yesterday that the damage suit could be dismissed as "premature" because the criminal charges were still pending against the defendants in the Bronx loan-sharking case.

But the Appeals Court did not rule out a reinstatement of the damage suit after the criminal case had been completed, according to the decision by Judges J. Edward Lumbard, John J. Gibbons and Murray I. Gurfein.

Mr. Merola said "it would not be proper for me to comment" on the decision at this time.

The strongly worded warning on immunity came from Judge Lumbard who wrote an opinion with the concurrence of Judge Gibbons, asserting that "the shield of absolute immunity is today unavailable to a public prosecutor who acts beyond the scope of his official duties and who knows or reasonably should know that his actions will deprive a criminal defendant of his constitutionally protected liberties."

"It is, of course, well settled," Judge Lumbard said, "that a prosecutor is 'closed with judicial immunity' from suit for actions taken in his official capacity, including civil suits for money damages brought under the Civil Rights Act.

"This immunity does not, however, protect the prosecutor against responsibility for his acts when they are clearly beyond the proper exercise of his authority and exceed any possible construction of the power granted to his office."

In a separate statement, Judge Gurfein said that "I am unhappy that I cannot join in the excellent homily of my colleagues on prosecutorial verbo-

sity and its dangers."

Judge Gurfein explained his view that this was not "the time or place for an advisory opinion" because the court had decided to dismiss the damage suit as premature at this time.

According to Judge Lumbard, however, he and Judge Gibbons believed that "there are good reasons why a Federal Appellate Court should express an opinion on this question at this time." They stressed the importance of "the question of prosecutorial immunity from accountability for public statements prejudicial to a defendant's right to a fair trial."

The previous decision by Judge Brieant had said "it would seem that the prosecutor should enjoy some right of free speech so as to permit him to account through the media to the voting public for his stewardship of his important public trust."

The defendants in the loan-sharking case were identified as James Martin, Angelo Leonard, Carmine Lavia, Ronald Darienzo, Bruce Doak and Carmine Apuzzo.