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# CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

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## VALIDITY OF THE APPOINTMENT OF A SPECIAL PROSECUTOR IN A CRIMINAL PROCEEDING

Michael Moretti, a Chicago police officer on the staff of the State's Attorney of Cook County, was arrested on charges of shooting and killing two youths in the aftermath of a tavern brawl.<sup>1</sup> The State's Attorney disqualified himself as prosecutor in the case because he was expected to testify as a witness.<sup>2</sup> The Criminal Court of Cook County thereupon appointed a prominent Chicago attorney, Harold Smith, as special prosecutor.

While Michael Moretti was awaiting trial upon a murder indictment, the special prosecutor presented a petition to the Criminal Court alleging that Moretti's three brothers had attempted by bribes and threats to influence the testimony of the wounded youth who was to be the state's principal witness. The petition requested instructions from the court regarding the bribery matter and the court entered a general order directing Smith to proceed with a prosecution against the Moretti brothers for bribery. Their subsequent conviction was affirmed by the Illinois Supreme Court.<sup>3</sup>

Defendants' principal contention was that the appointment of special prosecutor Smith did not conform to the Illinois State's Attorney Statute<sup>4</sup> and hence any indictment procured by him was void.<sup>5</sup> Under this statute the court may appoint a special prosecutor whenever the State's Attorney "is sick or absent or unable to attend, or is interested in any cause or proceeding . . . which . . . is . . . pending . . . ."

Since neither the petition nor the court's order specified that the State's Attorney was sick, absent, or interested in the alleged crime, the defendants argued that the court had no jurisdiction; and that even assuming jurisdiction, no reason existed for the removal of the regular officer.<sup>6</sup> The supreme court, however, upheld the appointment saying, "the court knew of the disqualification of the State's Attorney in the *Michael Moretti* case and could in the exercise of its judicial discretion determine that justice could be best served by disqualifying him in prosecuting members of Michael Moretti's family."<sup>7</sup>

In Illinois, jurisdiction to decide whether a proper case for appointment exists may be acquired in several ways. A petition by a citizen<sup>8</sup> or by the officer disqualified<sup>9</sup> has been held sufficient. A majority<sup>10</sup> of jurisdictions

1. Convicted of murder in *People v. Moretti*, No. 51C 1823, Criminal Court of Cook County (1952).

2. For a discussion of disqualification see Note, 29 J. CRIM. L. & CRIMINOLOGY (1939).

3. *People v. Thomas Moretti*, 349 Ill. App. 67, 109 N.E.2d 915 (1952).

4. ILL. REV. STAT. c. 14 §6 (1953). Declared constitutional in *Tearney v. Harding*, 335 Ill. 123, 166 N.E. 526 (1929).

5. *People v. Thomas Moretti*, 415 Ill. 398, 114 N.E.2d 337 (1953).

6. Brief for Appellants, p. 19-26., *People v. Thomas Moretti*, 415 Ill. 398, 114 N.E.2d 337 (1953).

7. *Supra* note 5, at 403, 114 N.E.2d at 339.

8. *People v. Northup*, 184 Ill. App. 638 (1914).

9. *Lavin v. Board of Commissioners*, 245 Ill. 496, 92 N.E. 291 (1910).

10. *Palaez v. State*, 107 Fla. 50, 144 So. 364 (1932); *State v. Henderson*, 123 Ohio St. 474, 175 N.E. 865 (1931); *Nance v. State*, 41 Okla. Cr. 379, 273 Pac. 369 (1929); *State*

appear to agree that in the interest of justice an inherent power exists apart from statute which enables a court to appoint a substitute when the regular officer is disqualified or absent.<sup>11</sup> In *Wilson v. County of Marshall*,<sup>12</sup> the county board, after disqualification of the regular prosecutor, had employed special attorneys in a criminal proceeding not yet initiated. The State's Attorney Statute was not applicable because by its terms it refers only to pending cases. The appointments, however, were held valid by virtue of the court's inherent power.<sup>13</sup> Thus Illinois follows the majority and treats the statute as being non-exclusive and merely declaratory of the common law.

Returning to the defendants' contentions, it becomes clear that the specific statutory reasons for removal need not be incorporated in a petition for a court to acquire jurisdiction. The statute merely says that when certain circumstances are present, the court may appoint a special State's Attorney. It is silent as to how these circumstances are to be brought to the court's attention. The court had inherent power to designate Smith special prosecutor even if a petition were never presented. Moreover, a petition bringing the facts to the court's attention and requesting instructions was submitted by special prosecutor Smith. Smith as a citizen had the power to invoke the court's jurisdiction.

The supreme court, however, upheld the validity of the appointment on a different theory. The court reasoned that the appointment was within the jurisdiction of the court by means of a causal connection since the brothers were interfering with the prosecution of the *Michael Moretti* case.<sup>14</sup> This in effect is a holding that they are really part of the same case and that the State's Attorney's petition in the *Michael Moretti* case also disqualified him in the bribery case.

However, this analysis seems tenuous in that there are actually different cases with different defendants charged with different crimes. Even if the brothers were interfering with the court's order in the *Michael Moretti* case, the core of defendants' argument is that the regular State's Attorney could deal with this interference. Thus most of defendants' contentions are directed at the propriety of the appointment which the court's causal connection theory does not answer since it is only an unnecessary attempt to find jurisdiction which exists inherently.

It is submitted that a sounder approach would be to apply the de facto doctrine,<sup>15</sup> which may be illustrated by the following Illinois cases. In *Lavin v. Board of Commissioners*,<sup>16</sup> a citizen sought to enjoin payment to a special attorney appointed to investigate election frauds, alleging that the elected State's Attorney could have performed such duties. Since the appoint-

v. Gauthier, 113 Ore. 279, 231 Pac. 141 (1924); State v. Jones, 306 Mo. 437, 268 S.W. 83 (1924).

11. Other states rely on implied legislative sanction to appoint in such a situation. State v. Criminal Court of Marion County, 214 Ind. 551, 15 N.E.2d 1020 (1934).

12. 257 Ill. App. 220 (1930).

13. *Id.* at 225.

14. People v. Thomas Moretti, 415 Ill. 398, 403, 114 N.E.2d 337, 339, (1952).

15. Illinois: People v. Bangs, 25 Ill. 184 (1860); People v. Lycan, 314 Ill. 590, 115 N.E. 595 (1924), along with certain other jurisdictions, has previously recognized this doctrine, McDowell v. United States, 159 U.S. 596 (1895); State v. Hayes, 127 Conn. 543, 18 A.2d 895 (1941); Walker v. State, 93 Fla. 1096, 113 So. 96 (1927). Some States which do not, in effect accomplish nearly the same result by means of a strong presumption that a special prosecutor has been legally appointed. Turner v. State, 89 Tenn. 547, 15 S.W. 838 (1891). For an extended discussion see CONSTANTINEAU, PUBLIC OFFICERS AND THE DE FACTO DOCTRINE §405 (1910).

16. See note 9 *supra*.