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Abstracts of Recent Cases

ment was made by a court of competent jurisdiction it was held not subject to collateral attack, even if erroneous. This view was reinforced in *People v. Newsome*,[17] where the special prosecutor was declared at least a de facto (acting) officer upon assumption of his duties. His standing could be attacked only in a direct, e.g. quo warranto proceeding.[18] In *United States v. Lindsley*[19] the defendant, whose conviction was affirmed by the Illinois Supreme Court,[20] petitioned the United States District Court for a writ of habeas corpus. His claim was that the indictment and judgment were void because Mann, a special prosecutor, was not a resident of the county as allegedly required by the constitution. The court said, "When Mann accepted the appointment and entered upon the performance of his duties as special State's Attorney he became such officer de facto. A person actually performing the duties of an officer under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned."[21]

These cases show that an appointment can be attacked only if made by a court without jurisdiction and not upon an error which occurs in the exercise of the court's discretion. The jurisdiction in the instant case cannot be doubted under either a theory of the court's inherent power[22] or upon reception of a petition by a citizen (Smith).[23] Moreover, an attack can be made only in a direct proceeding and even then only by a party with sufficient standing.[24] Only the state or the officer deposed has the necessary standing. One whose interest is solely that of the general public, such as one prosecuted by a special prosecutor, has no such standing.

The wisdom of this doctrine is apparent. The defendants are pressing a technicality by claiming the man who guided their conviction was erroneously appointed. It should make no difference who prosecutes them. The claim does not go to the merits of their guilt or innocence. The defendants were fairly tried by a prosecutor who had to follow rules of evidence and court procedure. Moreover, had notice of the appointment been sent to the State's Attorney and had he filed a petition similar to the one in the *Michael Moretti* case the appointment undoubtedly would have been approved as a matter of course.

The court's involved method of finding jurisdiction seems to refute the simpler one that an inherent power to appoint exists or that a citizen's petition is sufficient. By not holding that collateral attack is impossible, the court seems to invite such attack. It is suggested that use of the de facto doctrine would forestall such undesirable contentions and seems preferable to stretching to find a causal connection.

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Juvenile Court Proceeding Not A Criminal Prosecution and Therefore Not A Basis For Plea Of Double Jeopardy—Under the California Welfare & Institutions Code defendant was charged with burglary, made a ward of the juvenile court, and confined to an institution for fifteen months. On his

17. 291 Ill. 11, 125 N.E. 735 (1920).
18. *Id.* at 15, 125 N.E. at 737.
19. 148 F.2d 22 (7th Cir.), *cert. denied*, 325 U.S. 858 (1945).
20. People v. Doss, 384 Ill. 400, 51 N.E.2d 517 (1943).
21. United States v. Lindsley, 148 F.2d 22, 23 (7th Cir.), *cert. denied*, 325 U.S. 858 (1945).
22. Wilson v. County of Marshall, 257 Ill. App. 220 (1930).
23. See note 8 *supra*
24. People v. Newsome, 291 Ill. 11, 125 N.E. 735 (1920).

release he was prosecuted for the same offense and sentenced to the penitentiary by the superior court. On appeal held, no double jeopardy. *People* v. *Silverstein,* 262 P.2d 656 (Cal. 1953). The juvenile court is not penal in nature; it is designed to rehabilitate and avoid placing the stigma of "ex-con" on youthful offenders. Since the juvenile court proceeding was not a criminal prosecution, the plea of double jeopardy falls of its own weight.

Subsequently Discovered Evidence Cannot Be Considered In Habeas Corpus Proceedings—In 1926 petitioner was convicted of murder and sentenced to life imprisonment. Sometime after the state supreme court had affirmed the conviction another person, in a dying declaration, confessed the slaying. Largely on the basis of this evidence petitioner brought habeas corpus proceedings to test the legality of his sentence. The Iowa Supreme Court affirmed the denial of the petition. *Gibson* v. *Lainson,* 60 N.W.2d 797 (1953). The court, in adhering to the rule that after-discovered evidence is not to be considered in habeas corpus proceedings, suggests that petitioner's only recourse is by way of executive clemency.

Testimony Before Grand Jury Not Waiver Of Self-Incrimination Privilege As To Same Matter In Subsequent Trial—Defendant was subpoenaed to appear before a federal grand jury which was investigating one Valentino. She answered questions without asserting her privilege. (In another proceeding she was convicted of perjuring herself as to certain questions before the grand jury and sentenced to 10 years imprisonment). In the subsequent trial of Valentino defendant claimed the privilege and refused to answer the same or similar questions propounded to her in the grand jury action. The district court said defendant had waived the privilege and found her guilty of contempt. On appeal held, reversed. *In re Neff,* 206 F.2d 149 (3rd Cir. 1953). The rule is clear that a person who has waived the privilege in one trial or proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding. "The privilege attached to the witness in each particular case in which he may be called on to testify . . ." The government, however, sought to circumvent this rule by asserting that the grand jury investigation and the subsequent trial were only successive phases of a single proceeding so that the defendant's waiver in the former carried through to the latter. Pointing out that the grand jury is not a judicial tribunal but is merely an appendage of the courts to serve as an accusing body, the third circuit overruled the government's contention. While this particular question had never been presented before to a federal appellate court, the court here based its decision on several state decisions which reached the same conclusions under similar state constitutional provisions.

Coercion Is A Defense To All Crimes Other Than Killing Innocent Persons—Defendant admitted the robbery in question but pleaded not guilty because of duress. The evidence showed that two accomplices had threatened to "blow defendant's head off" and kill his wife and child if he refused to carry out their instructions. One of these men stood behind defendant with a shotgun while the robbery took place. The trial court refused to submit the question of duress to the jury. Held reversed, *State* v. *St. Clair,* 262 S.W.2d 25 (Mo. 1953). While this case was one of first impression for the Missouri Supreme Court it adopted the prevailing rule that duress may excuse lesser crimes than taking the life of an innocent person. The court believed that

there was sufficient evidence here to show present, imminent, and impending coercion of such a nature as to induce a reasonable apprehension of death or serious bodily injury if the act was not done.

Police Officer's Attempt To Coerce Confession Gives Rise To Claim Under Federal Civil Rights Act—In district court petitioner alleged that four Chicago police officers deprived him of civil rights by unlawfully entering his home, searching his belongings, arresting him and taking him to the station where he was threatened, intimidated, and beaten for 155 hours. At no time during the attempt to get him to confess to alleged crimes was the petitioner charged with a specific crime or arraigned before any judge or magistrate. The district court dismissed for failure to state a claim under the Civil Rights Act. 42 U.S.C.A. § 1983. The Seventh Circuit reversed holding that while the alleged deprivation must be under "color of law" a cause of action may nevertheless be stated without using the particular words—"color of law"—to describe the factual situation. *Geach* v. *Moynahan,* 207 F.2d 714 (7th Cir. 1953). The court reiterates the Supreme Court's holdings that under "color of law" means mere "pretense of law", *Screws* v. *United States,* 325 U.S. 91 (1945); and that "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States* v. *Classic,* 313 U.S. 299 (1941). With these interpretations in mind the court concluded that the complaint clearly alleged that defendants' actions were "under color of law."

Evidence Unlawfully Seized By State Or Local Officers May Be Used In Federal Prosecution—In *United States* v. *Haywood,* 208 F.2d 156 (7th Cir. 1953) and *United States* v. *One* 1948 *Cadillac,* 115 F. Supp. 723 (D.N.J. 1953) the proposition was reaffirmed that evidence illegally seized by local officials does not bar the evidence on a federal prosecution where the local officers have acted independently of the federal government. However, where the state and federal officers cooperate actively or where there is a general understanding and common practice that the latter may adopt and prosecute in the federal courts offenses which the former discover, then the illegally seized evidence may properly be suppressed in the federal courts as though the federal officers had made the illegal search and seizure themselves. Both cases make clear that the burden of establishing cooperative activity is on the defendant and that this burden is a heavy one to sustain. In the *Cadillac* case, evidence that locally investigated narcotic cases were frequently turned over and prosecuted by federal authorities was insufficient to show an express or implied plan or common understanding. Likewise, in the *Haywood* case, defendant failed to sustain his burden by pointing out that he was turned over to federal authorities the day after his arrest. Also of no avail was a Chicago newspaper statement that "It is no secret that state . . . and (federal) authorities cooperate in the enforcement of the narcotic laws." The court in the *Haywood* case also indicated that the defendant must not only prove a working agreement or understanding but also that the local officers agreed to make unlawful searches with the intent of giving the illegally seized evidence to federal authorities. If this is more than dictum the burden becomes unsustainable.