

1958

Abstracts of Recent Cases

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Abstracts of Recent Cases, 48 J. Crim. L. Criminology & Police Sci. 541 (1957-1958)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

prosecute is the same as when he is merely absent or his office vacant, the rationale supporting the court's inherent power of appointment is considered applicable to both situations.

This inherent power of the court has generally been codified by statutes. The usual statute provides for the appointment of a special prosecutor when the regular prosecutor is "absent, sick, disqualified or interested" in the proceeding.⁵¹ However, the language of such statutes does not expressly include the prosecutor's refusal to act as grounds for the appointment of a special prosecutor. Furthermore, it has been held that a court's power to appoint is limited to the causes specified in the statute.⁵² On the other hand, some courts have held that an appointment can be made under the authority of such statutes when the prosecutor refuses or fails to act.⁵³ Appointments under these

statutes have been made on either of two theories: that courts are not limited to the enumerated causes or that the prosecutor's refusal to perform is equivalent to self-disqualification. The general acceptance of these theories would considerably broaden the statutes and make them available to circumvent a corrupt prosecutor.

A few statutes expressly provide for the appointment of a special prosecutor when the prosecutor fails or refuses to perform.⁵⁴ In addition, a small group of states have enacted statutes which, while their language is rather vague, might allow the appointment of a special prosecutor in this situation.⁵⁵

Assuming the existence of the statutory or inherent power of the courts to appoint a special prosecutor when the prosecutor refuses to act, there are, nevertheless, several obstacles to securing such an appointment. A special prosecutor is usually appointed either at the request of the regular prosecutor when the latter declares himself disqualified or upon the court's own motion.⁵⁶ However, it has been held that a citizen may petition for such an appointment.⁵⁷ Since the

(1913) (whether properly absent or not); *Spaulding v. State*, 61 Neb. s89, 85 N.W. 80 (1901) (refusal to prosecute).

⁵¹ See, e.g., ALA. CODE tit. 13, §235 (1940) (refusal, absence, interest); N.M. STAT. ANN. §§5-3-4, 5-3-30 (1953) (failure, neglect, refusal); N.D. REV. CODE §11-1606 (1943) (absence, or refusal); OHIO REV. CODE §309.05 (1953) (neglect or misconduct); PA. STAT. ANN. tit. 16, §7710 (1956) (refusal); TENN. CONST. art. 6, §5 (refusal); UTAH CONST. art. 8, §10 (refusal).

⁵² See, e.g., KY. REV. STAT. §432.210 (1953) (prosecutor who takes a bribe or withholds evidence); MINN. STAT. §388.12 (1949) (discretion of judge); MONT. REV. CODE ANN. §16-1126 (1947) (to serve ends of justice); W. VA. CODE ANN. §404 (1955) (improper in opinion of court); WYO. COMP. STAT. ANN. §27-608 (1945) (public interest requires appointment).

⁵³ See, e.g., *People v. Moretti*, 415 Ill. 398; 114 N.E.2d 337 (1953); *Wilson v. County of Marshall*, 257 Ill. App. 220 (1930); *State v. Jones*, 306 Mo. 437, 268 S.W. 83 (1924).

⁵⁴ See, e.g., *People v. Northup*, 184 Ill. App. 638 (1914) (to investigate vote frauds during election in which prosecutor was elected); *Lake County Property Owners Ass'n v. Holovachka*, 233 Ind. 509, 120 N.E.2d 263, 121 N.E.2d 721 (1954) (to investigate irregular activities of prosecutor). It might be advisable to allow a citizen to engage a private attorney to challenge the prosecutors failure to act on his complaint. Such action seems to be contemplated by PA. STAT. ANN. tit. 16, §7710 (1956) which authorizes the court to hear the complaint and appoint a private counsel if it is a proper case for prosecution. Such a statute might be effectively employed by various civic organizations with the desire and funds to take action where the prosecutor fails. See also Comment, 65 YALE L. R. 209 (1955), for a discussion of private prosecution as a remedy for the prosecutor's failure to act.

⁵¹ See, e.g., ARIZ. REV. STAT. §11-534 (West 1956) (absence); ARK. STAT. ANN. §24-117 (1947) (failure to attend); CAL. ANN. CODES (GOVERNMENT) §26542 (West 1954) (deputy in case of vacancy); CONN. GEN. STAT. §7612 (1949) (absent or disqualified); DEL. CODE ANN. tit. 29, §2503 (1953) (absence); FLA. STAT. ANN. §27.16 (district attorney), §32.17 (solicitor) (1941) (vacancy); GA. CODE ANN. §24-2013 (1933) (disqualified); IDAHO CODE ANN. §31-2603 (1948) (absent or relation); ILL. REV. STAT. c. 14, §6 (1955) (absence, sickness, interest); IND. ANN. STAT. §49-2505 (1951) (failure to attend); IOWA CODE ANN. §336.3 (1949) (absence, sickness, disability); KAN. GEN. STAT. §10-715 (1949) (vacancy); LA. REV. STAT. §15-311 (1950) (interest or absence); ME. REV. STAT. c. 89, §120, 121 (1954) (absent or vacant); MD. ANN. CODE GEN. LAWS art. 10, §41 (1951) (absent or vacant); MICH. STAT. ANN. §5.758 (1935) (absent); MISS. CODE ANN. §3924 (1942) (absent or disqualified); MO. ANN. STAT. §56.110, 56.120 (Vernon 1949) (interested or sickness); NEB. REV. STAT. §23-205 (1943) (absence, sickness, disability); NEV. COMP. LAWS. §2075 (1929) (absent or disqualified); N.H. REV. STAT. ANN. §7-33 (1955) (absent); N.J. REV. STAT. §2-182-9 (1937) (absent); N.M. STAT. ANN. §17-1-14 (1953) (interest); N.Y. COUNTY LAW §701 (disqualified); N.C. GEN. STAT. §7-43.3 (1952) (absence); OHIO REV. CODE §309.04 (1953) (vacancy, sickness, disability); OKLA. STAT. ANN. tit. 19, §202 (1956) (absence); ORE. REV. STAT. §8.710 (1955) (absence or interest); PA. STAT. ANN. tit. 16, §1404 (1956) (vacancy); S.C. CONST. art. 5, §29 (1952) (failure to attend); S.D. CODE §12.1304 (1939) (absence or interest); TENN. CODE ANN. §8-706 (1955) (absent or disqualified); TEX. CODE CRIM. PROC. ANN. art. 31 (1954) (failure to attend); VT. REV. STAT. §455 (1947) (assistant to perform in absence); UTAH CODE ANN. §67-7-11 (1953) (absent or disqualified); VA. CODE ANN. §19-4 (1950) (absence, sickness, interest); WASH. REV. CODE §36.27.030 (1951) (absence, sickness, interest); WIS. STAT. §59.44 (1955) (absence, sickness, interest).

⁵² See, e.g., *Mahaffey v. Territory*, 11 Okla. 213, 66 Pac. 342 (1901) (limited by statute to vacancy, absence, or inability to attend); *State v. Heaton*, 21 Wash. 59, 56 Pac. 843 (1899) (limited by statute to failure to attend).

⁵³ See, e.g., *Mizell v. State*, 184 Ala. 16, 63 So. 1000

grand jury is composed of private citizens, it would appear that such a body should be able to request the appointment of a special prosecutor if the regular prosecutor refused to prosecute an indictment. But a private citizen appears to have no right to demand the appointment of a special prosecutor or to appeal the court's refusal to appoint, since such an appointment has been held to be within the complete discretion of the trial judge.⁵⁸

Another problem involved in obtaining the appointment of a special prosecutor is the tendency of the court to construe their replacement power, whether statutory or inherent, very narrowly.⁵⁹ Perhaps one reason for this limitation is the attitude of certain judges that active participation in suppressing organized crime would destroy their usefulness as impartial judges.⁶⁰ Furthermore, the courts may be reluctant to question the discretion of the prosecutor, since the latter has always been allowed wide discretion in his selection of crimes or criminals to prosecute.⁶¹ Because of this discretion, it is difficult to determine when he has actually failed or refused to perform his duties. The courts are no doubt correct in protecting the prosecutor from replacement by a special prosecutor merely because a citizen disagrees with his direction of a case. However,

⁵⁸ See Lake County Property Owners Association v. Holovachka, 233 Ind. 509, 120 N.E.2d 263, 121 N.E.2d 721 (1954). The association sought the appointment of a special prosecutor to investigate certain acts of the regular prosecuting attorney prior to his election to office and to initiate prosecutions if any of those acts were crimes. The court held that such an appointment must be left to the discretion of the trial judge. They further held that since the association "had no right of action to begin with, . . . (it) could have no right to appeal."

⁵⁹ See, e.g., Gray v. District Court, 42 Colo. 298, 94 Pac. 287 (1908), where the court held partial motives were not grounds for replacement as long as the prosecutor was not corrupt. In Pippin v. State, 34 Tenn. 43 (1854) appointment of a special prosecutor was sought under a "failure and refusal" statute on the grounds of the prosecutor's incompetence. The court held incompetency was not satisfactory grounds under the statute. In Commonwealth v. Dawson, 3 Pa. Dist. 603 (1894), the court illustrated its reluctance to act by describing the replacement power as "extraordinary" and to be used only where "circumstances imperatively demand."

⁶⁰ See Senate Special Committee To Investigate Organized Crime in Interstate Commerce, *Final Report*, S. REP. NO. 725, 82d Cong., 1st Sess. 47 (1951), where Judge Goodenough of Kenton County, Kentucky, when asked about possible "inspiration" of the grand jury replied, "Now my conduct, of necessity, must be restricted. I am a judge, sir."

⁶¹ Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770 (1933).

the prosecutor is amply protected from excessive interference by the requirement that a full judicial hearing be conducted before his disqualification and replacement.⁶²

Even if an appointment of a special prosecutor can be obtained, he will have a rather limited scope of authority. The special prosecutor appointed under the inherent power of the court is apparently limited to conducting the proceedings in a particular case.⁶³ The statutes which allow appointment when the prosecutor refuses or fails to act also seem to contemplate a single prosecution.⁶⁴ Nevertheless, the appointment of a special prosecutor is not restricted to a case pending before the court but may be made for the purpose of investigating the circumstances of a complaint.⁶⁵ However, there is no express statutory authority or judicial precedent for the appointment of a special prosecutor to make a general investigation of crime in a given area. But the special prosecutor does have all the powers of the regular prosecutor for the case at hand, including the ability to appear before the grand jury.⁶⁶

The combination of special prosecutor and grand jury would be a powerful instrument of law enforcement within a community. The grand jury's wide investigatory powers could be employed to discover particular violations requiring prosecution. If the regular prosecutor refused to act upon this information, a special prosecutor could be appointed to conduct the proceedings.

While there are certain difficulties in securing the

⁶² See, e.g., *State ex rel. Spencer v. Criminal Court* 214 Ind. 551, 15 N.E.2d 1020, 16 N.E.2d 888 (1938); *State ex rel. Ilvedson v. District Court*, 70 N.D. 17, 291 N.W. 620 (1940); *Miffin v. Arnett*, 153 Okla., 47, 4 P.2d 732 (1931).

⁶³ See, e.g., *Dukes v. State*, 11 Ind. 556 (1858) (appointed "to conduct the prosecution of a criminal"); *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750 (1887) (appointed to "prosecute the action . . . for the time being and for the case at hand"). See also note 50 *supra*.

⁶⁴ See, e.g., N.D. REV. CODE §11-1606 (1943), which provides for appointment for "that proceeding" and grants the special prosecutor the prosecutor's usual powers "for the purpose of that action." PA. STAT. ANN. tit. 16, §7710 (1956) allows appointment for a "proper case" and an "entire proceeding."

⁶⁵ See, e.g., *People v. Northrup*, 184 Ill. App. 638 (1914); *Lake County Property Owners Ass'n v. Holovachka*, 233 Ind. 509, 120 N.E.2d 263, 121 N.E.2d 721 (1954); *State ex rel. Thomas v. Henderson*, 123 Ohio St. 474, 175 N.E. 865 (1931).

⁶⁶ See, e.g., *State v. Miller*, 132 Iowa 587, 109 N.W. 1087 (1906) (may go before grand jury to present case for which he was appointed); *State ex rel. Thomas v. Henderson*, 123 Ohio St. 474, 175 N.E. 865 (1931) (may aid and advise grand jury).

appointment of a special prosecutor and the scope of his authority is limited, the convictions he obtains are relatively safe from collateral attacks because of a generally accepted *de facto* doctrine.⁶⁷ Under this doctrine the acts of a special prosecutor appointed by a court of competent jurisdiction and performed under color of title are valid against the attack of both the public and other parties of interest.⁶⁸

Summary

At the present time both judicial precedent and a majority of the statutes fail to provide clearly and adequately for the appointment of a special prosecutor when the regular prosecutor fails or refuses to act. However, the courts apparently have the inherent power to make such an appointment. But in order to make the appointment of a special prosecutor generally available, this court

⁶⁷ See CONSTANTINEAU, PUBLIC OFFICERS AND THE DEFACIO DOCTRINE §405 (1910).

⁶⁸ See, e.g., *McDowell v. United States*, 159 U.S. 596 (1895); *United States ex rel. Doss v. Lindsley*, 148 F.2d 22 (7th Cir.), cert. denied 325 U.S. 858 (1945); *State v. Hays*, 127 Conn. 543, 18 A.2d 895 (1941); *Lavin v. Board of Comm'rs*, 245 Ill. 496, 92 N.E. 291 (1910).

power should be clarified by statute. Such statutes should expressly provide that a group of citizens, and in particular a grand jury, may petition the court for the appointment of a special prosecutor. Furthermore, the power of appointment should not be left to the complete discretion of the trial judge but should be appealable for abuse of this discretion. In addition, the scope of authority of the special prosecutor should be broadened by statute. The court should be authorized to appoint a special prosecutor to make general investigations in a certain area and for a given period of time rather than for a single case only. The increased availability and authority of the special prosecutor under such statutes would not interfere with the authority of the regular prosecutor, since a full judicial hearing should continue to be necessary in order to disqualify and replace him.

In some instances, the attorney general, who need not fear local pressures, can most effectively supersede a corrupt local prosecutor. In others, the special prosecutor, because of his knowledge of local conditions, would be the most effective replacement for the corrupt prosecutor. For this reason, both methods of circumvention should be available.

ABSTRACTS OF RECENT CASES

Private Counsel Can Represent Complaining Witness in Criminal Proceeding—The defendant was charged with the crime of assault and battery. At the trial, the complaining witness was represented by private counsel, who admitted that he was in no way connected with the city solicitor's office, the office prosecuting the charge. Over objection, the trial judge allowed the private counsel to be present during the course of the trial. The Court of Appeals of Ohio affirmed the defendant's conviction and held that there had been no error in permitting the complaining witness to be represented by private counsel, and said that even if it was improper, the error was not prejudicial to the defendant. *State v. Ray*, 143 N.E.2d 484 (Ohio, 1957).

The defendant contended that in the prosecution of a criminal case in a municipal court, the state may be represented only by the city solicitor of the municipal corporation, and that private counsel may not assist the person filing the charges of the criminal offense. In rejecting the defendant's

contention, the court noted that, historically, criminal prosecutions at common law were generally carried on by private individuals interested in having the accused convicted, and not by a public official. The court said, however, that although this practice is now carried on only to a limited extent in some of the inferior courts of this country, it could find no statutory or constitutional reason for prohibiting the appearance of private counsel in present day criminal proceedings, especially in courts of limited jurisdiction. Moreover, the court stated that "both the public and individual litigants in such courts are sure to be mutually benefited by the services rendered by private counsel." Only if the conduct of private counsel prevented the defendant from having a fair trial would there be grounds for reversal, the court said.

Comment by Attorney to Jury Indicating Personal Knowledge of Perjury Prejudicial—During a trial for first degree murder the defendant's wife,