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THE EFFECT OF AN UNCONSTITUTIONAL STATUTE
IN THE LAW OF PUBLIC OFFICERS

EFFECT ON OFFICIAL STATUS

By OLIVER P. FIELD*

The effect of an unconstitutional statute becomes of importance at two points in the law of public officers (1) in connection with official status, relating largely to the doctrines concerning de facto officers, (2) in connection with the liability of officers for action or nonaction under an invalid statute. The first of these points of contact between the two fields will be the subject of this study.

Three situations may arise with respect to the invalidity of a statute, in the law of public officers. First, the statute creating an office may be defective. Second, the statute creating the office may be valid, but the law providing for filling it may be unconstitutional. Third, the statutes creating, as well as providing for the filling of an office may be valid, but the statute authorizing the officer to perform some particular function may be invalid. The first and second of these situations will be considered in the treatment of official status.

I

ATTACK BY PERSONS IN AN OFFICIAL CAPACITY

1. Quo Warranto by the Attorney General or some Official Representative of the State.—The rule is well settled that the attorney general may file an information in the nature of quo warranto and thus institute proceedings to test the constitutionality of the statute under which an incumbent claims to hold an office. Thus, it has been held that an officer appointed by the governor when he should have been elected by the people, the statute having prescribed the former mode of filling the office, may be ejected from office by a judgment of ouster in quo warranto proceedings.†

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†This is one of a series of articles on the effect of an unconstitutional statute written as a Sterling Fellow, Yale University School of Law, under the direction of Professor Walter F. Dodd. The writer is also indebted to Professor Edwin M. Borchard for suggestions as to the form and content of this study.
†The second of these problems is the subject of an article in 77 Univ. of Pa. L. Rev. 155.
‡People v. Raymond, (1868) 37 N. Y. 428.
This is true whether the statute creating the office itself is unconstitutional, or whether the statute providing the method of filling the office is invalid. An officer not possessed of the constitutional qualifications for an office may be ousted by quo warranto proceedings, and thus although no person is waiting, ready to take over the duties of the office at the time.

Quo warranto will lie against an officer on the ground that the statute creating the office is unconstitutional even though the existence of a municipality is involved in the same proceeding. This also applies to a case involving annexation of territory to a municipality by virtue of an invalid statute, the judgment in such a case being that the officer be ousted from office, or that the city be ousted from exercising any governmental power over the territory unconstitutionally annexed.

Where the existence of a municipality is questioned the court is likely to be more slow to declare the statute unconstitutional than if the existence of the office, or the validity of the method of filling the office, alone is at stake. The tendency of the courts to preserve the legal status of governmental units is well illustrated by the case of *State ex rel. Strimple v. McBride* in which one of the circuit courts of Ohio held that the state was barred from assailing the existence of a municipality by proceedings instituted by a prosecuting attorney on behalf of the state, because the statute of limitations had run against the action. The statute contained no reference to the state, but was a typical statute preventing attack on the corporate existence of the municipality after the lapse of a specified number of years. The court interpreted the statute to be as effective against attack by the state through quo warranto as against attack by an individual.

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5 State ex rel. Attorney General v. Gleason, (1868) 12 Fla. 190; State ex rel. Attorney General v Porter, (1840) 1 Ala. 388, disqualification case, but incumbent resigned before judgment of ouster could be given, so withheld.


7 Attorney General v. Crane, (1886) 60 Mich. 373; State ex rel. Attorney General v. Cincinnati, (1870) 20 Oh. St. 18; Same v. Cincinnati, (1895) 52 Oh. St. 419, 40 N. E. 508.

8 (1897) 7 Oh. Cir. Dec. 522.
The proceedings by the state must, however, be directed against the officer whose title to the office is in question, and the attorney general will not be permitted, under the guise of quo warranto against officer X to test the title of officer Y, even though Y appointed X to the office, and Y is alleged to hold office by virtue of an invalid statute.  

The officer whose title is being assailed will be permitted to perform the functions of the office pending the outcome of the proceedings, and the court will refuse to grant an injunction forbidding him to perform his official functions, on the theory that his acts will nevertheless be valid as to third persons, and also, on the ground that quo warranto is not intended to paralyze the business of government, but is designed to oust persons from offices to which they are not legally entitled.

The fact that nobody stands ready to carry on the functions of an office is, as previously indicated, not a sufficient reason for declining to give a judgment of ouster. The court may, however, in such a case delay the execution of the judgment in order that provision may be made for carrying on the work connected with a particular office or group of offices. An Ohio case illustrates the discretion possessed by courts in this matter, the court there granting a stay of three months in which the executive and legislative authorities might provide for the government of cities of the class of Cleveland, the ouster in the case being against the members of what was virtually the governing board of the city

The de facto doctrine has no application to cases in which an official representative of the state challenges title to an office on the ground of unconstitutionality, that doctrine being reserved for cases in which title is challenged by private parties acting in their own behalf, or, in some cases, acting as voluntary representatives of the state in asking a court to permit the filing of an information of quo warranto in the name of the state. The state may always assail the validity of a statute creating an office or providing the method whereby incumbents are to be placed therein, subject only to such restrictions as the state may have imposed upon itself by means of statutes of limitations. The state has an interest

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in ousting from office all persons claiming title thereto if such claims are not founded on valid statutes.

2. Contests between Rival Claimants to an Office.—It not infrequently happens that two or more persons claim title to the same office. In such a case the party not in possession of the office may proceed (a) by asking the court for permission to file an information in the nature of quo warranto in the name of the state, seeking thereby to oust the present incumbent of the office, or (b) by asking the court to issue a writ of mandamus commanding the incumbent to deliver to the petitioner the books, papers, and possession of the office. If, on the other hand, the incumbent wishes to take the initiative he may ask that an injunction be issued forbidding the rival claimant from taking any steps to obtain the office. The use of mandamus and injunction to try title to office is in many states narrowly restricted, but in some states they are available to test title when an unconstitutional statute is involved.

(a) Permission has been granted in a number of cases to file an information in the nature of quo warranto in order that the conflicting claims of persons asserting a right to hold an office may be determined. If, in such a case, the statute creating the office which the defendant holds is unconstitutional a judgment of ouster will be granted. The same result will follow if the statute providing the method for filling the office is invalid. Where two persons claim to be the rightful holders of a judgeship, each claiming office under separate statutes, an information in the nature of quo warranto by one of the claimants is a proper method whereby to test the validity of the statute under which defendant asserts title. One Ohio case takes a position contrary to that just stated, holding that an official representative of the state alone can try title in quo warranto proceedings.

In McCall v Webb the defendant was permitted to deny the legality of his own office on the ground that if the statute creating the office was invalid plaintiff could not ask the defendant

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13State ex rel. Reemelin v. Smith, (1891) 48 Oh. St. 211, 26 N. E. 1069
16(1899) 125 N. C. 243, 34 S. E. 430.
be ousted from it, nor could he demand possession of a non-existent office.

A type of case not strictly within the scope of this section, but sufficiently analogous to warrant consideration at this point, is that in which one officer attempts to obtain the ouster of the holder of another office. For example, in Hinze v. People ex rel. Halbert\textsuperscript{17} the mayor of a city filed a petition seeking the removal from office of a police commissioner because of the alleged unconstitutionality of the statute creating the office. A judgment of ouster was rendered. State v. Butler\textsuperscript{18} presented a somewhat similar situation. In that case a county attorney filed an information to test the warrant whereby a special prosecutor for liquor cases held office. The statute creating the office of special prosecutor was declared invalid and ouster granted. In both of these cases the controversy partook of the nature of a private dispute between officials. In neither of them did the relator act as the official representative of the state in the same manner as the attorney general does in quo warranto cases. The form of the action was that of quo warranto, but the moving force in the entire proceeding was the resentment of one official against attempts to encroach upon the functions of his office by the creation of a new office.

Sometimes disputes arise between persons admittedly the rightful holders of their respective offices as to the functions to be performed by each of them. If a statute conferring the performance of given functions on one of the officers is unconstitutional he may, at the relation of the holder of another office claiming the power to perform the functions in question, be ousted in quo warranto proceedings, from the exercise of the particular duties in dispute. The controversy in such a case is not over title to office but rather as to the function to be performed by the particular officer.

It is clear from the foregoing cases that the courts are quite ready to permit the use of quo warranto by one of two persons claiming title to an office, or asserting that the defendant is performing functions which rightfully appertain to the petitioner's office.

(b) Incumbents of existing offices are sometimes unwilling to surrender the books and papers of the office to their successors,
or to persons asserting that they hold an office which supersedes the one in which the former is situated. In such a case mandamus may be invoked to compel the surrender of the books in dispute. If the defendant succeeds in his attack on the validity of the statute creating the office to which the petitioner lays claim, or if the statute changing the method of selecting incumbents to the office is invalid, the petition will be denied. "If the law under which he claims is unconstitutional, he has no standing." In Matter of Brenner it was held that the old officer could defend against a suit to obtain the books and papers of the office by showing that the certificate of the claimant had been granted in accordance with an invalid statute. The court said, in this case, that the petitioner must, in order to succeed in such a suit, show a good title to the office.

This rule, that plaintiff in a suit to obtain possession of an office must, in order to succeed, show a good title to it, is well established. It is not sufficient that defendant's title is defective. In passing upon the claim to an office the court may consider the validity of acts performed by other officers than those directly involved in the suit. To illustrate, in Pratt v. Breckenridge the plaintiff offered as evidence of his title a certificate of election issued by a board of election commissioners. The defendant assailed the validity of the statute creating the board, and the court sustained his position. The board having been created by an invalid law it followed that the certificate issued to plaintiff did not constitute prima facie evidence of title. Therefore, plaintiff failed to establish his case and defendant was left in possession of the office, although in this case he held it by virtue of a prior decision of this same board, the board having later reversed its decision in a contested election, giving to the plaintiff the certificate of election. This indirect method of assailing the validity of the statute creating the board is at variance with the rule forbidding such attack, in quo warranto cases.

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21 (1902) 170 N. W. 185, 63 N. E. 118. In Davidson v Hinc, (1908) 151 Mich. 294, 115 N. W 246, mandamus was denied in a petition to compel defendants to turn over the fire and police records to the petitioner, the latter claiming to be members of a bureau of public safety. The statute creating the bureau was declared invalid.

22 (1901) 112 Ky. 1, 65 S. W. 136. On contesting an election, see Adsit v. Ozmun, (1891) 84 Mich. 420, 48 N. W 21, mandamus to compel counting of votes, petitioner claiming to have been elected.

23 See ex rel. Herron v. Smith, (1886) 44 Oh. St. 348, where relator,
The case of *People ex rel. Stuckhart v. Knopf* presented the question whether the old assessor could defend against a petition for a mandamus compelling him to surrender books and papers to a person claiming to be a newly elected assessor, by showing that he had already delivered the books to another person, believed by him to be the rightful holder of the new office which was thought to have superseded that of assessor. The petition was denied because the statute creating the new office was sustained. What the result would have been had the law been held invalid is difficult to know.

The constitutionality of a statute conferring upon the governor the power to fill an office by appointment may be challenged by the person entrusted with the function of approving the official bond of the appointee. In such a case the petition for mandamus to compel the approval will be denied if the statute is declared unconstitutional. This type of case does not involve a dispute between rivals for an office, but illustrates that an officer may justify the refusal to perform an act upon the ground that it is thrust upon him by an invalid statute, and also that title to office may be challenged by officers made defendants in mandamus proceedings on a board superseded by a newly created office, sought in quo warranto to oust members of the new board because some of the members of the state senate voting for the statute creating the new board were not de jure members of the senate. The court held that the members in question were at least de facto senators, and therefore refused to grant ouster. See also, supra, note 8. On the status of members of the state legislature, see the discussion in *Parker v. State ex rel. Powell*, (1892) 133 Ind. 178, 32 N. E. 836 and *Sherrill v. O'Brien*, (1907) 188 N. Y. 185, 81 N. E. 124. In the case last cited the court said, concerning the effect of an unconstitutional statute: "An act of the legislature, if invalid, as violating the constitution, is invalid from the time of its enactment, not merely from the declaration of its character by the courts. But though the appointment or election of a public officer may be illegal, it is elementary law that his official acts while he is an actual incumbent of the office are valid and binding on the public and on third parties." 188 N. Y at 212. The court said that admission by one of the houses of the legislature constituted a member a de jure member, because the houses of the legislature were judges of their own elections.

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24*(1900) 183 Ill. 410, 56 N. E. 155.

25*State ex rel. Geake v. Fox*, (1901) 158 Ind. 126, 56 N. E. 893.

26This is not the rule when property rights are affected by the refusal of an officer to take action enjoined upon him unless the statute turns out to be invalid when brought to a test. See for a consideration of this problem, Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability for Official Action and Nonaction*, 77 Univ. of Pa. L. Rev. 155.
mandamus proceedings which seek to compel recognition by them of the petitioner's title.

The courts of some states will not interfere by mandamus in disputes between subordinates and superior officers in which subordinates challenge the validity of acts performed by superiors on the ground that authority to perform them is derived from an invalid statute. The much cited case of Lang v The Mayor of Bayonne\(^{27}\) involved this point. In that case a police officer had been removed from the city police force by a newly created board of police commissioners. The policeman petitioned for a writ of mandamus to compel his restoration to the force by the mayor, alleging in his petition that inasmuch as the statute creating the office of police commissioner was unconstitutional the control of the force was, as it had been prior to the pretended enactment of the statute in question, still in the hands of the mayor. The petition was denied on the ground that the commissioners were de facto officers and that as to the public, including petitioner, their acts were binding. A similar decision is that of Carland v. Commissioners of Custer County,\(^{28}\) collateral attack being denied in that case to an officer who had been removed by the board of commissioners, the claim being, upon the part of the appellant, that the statute creating and filling the office of commissioner was unconstitutional.

(c) Injunction may be resorted to by the present holder of an office to prevent persons elected to a new office established by an unconstitutional statute, from assuming to perform the functions of the new office.\(^{29}\) In the majority of cases however the initiative is taken by the new officer by means of quo warranto or mandamus, and in only a few cases has the old officer sought equitable relief against threatened intrusion into office, or against the establishment of a new office threatening to supersede an old one.\(^{30}\)


\(^{29}\)Malone v. Williams, (1907) 118 Tenn. 390, 103 S. W. 798.

\(^{30}\)Watson v. McGrath, (1904) 111 La. 1097 36 So. 204. In this case the injunction was denied because the statute was held constitutional. Relative to the effect of an invalid statute the court said, at p. 1098: "A statute may be constitutional only in part, or with regard to certain persons or things, or up to a certain point of its operation, and in other respects unconstitutional. The rule is to let it have operation within the scope of its constitutionality if the legislative intent
In summary of the cases reviewed in this section it may be said that the courts are quite lenient in permitting the constitutionality of statutes purporting to create an office or to provide a method of filling it, to be raised in contests between rival claimants, or between the holders of two different offices. This leniency does not extend to cases in which inferior officers attempt to dispute the constitutional basis of their superiors' position.

With the exception of this last group of cases the courts do not apply the de facto doctrine in these contests. There are dicta to be found in many of the cases reviewed in this section, which state that the acts of officers selected in accordance with an unconstitutional statute are valid as to the public. Attack being permitted under the circumstances presented in these cases renders such statements unnecessary, and they are for that reason to be regarded as dicta and nothing more. Some of them are in accord with the decision of the Long Case, holding that there may be a de facto officer even though the office which he purports to hold is created by an unconstitutional statute.

II

ATTACK BY PERSONS ACTING IN AN INDIVIDUAL CAPACITY

Thus far cases have been considered in which officers acting on behalf of the state, or acting in their official capacity to protect their own office, or persons claiming to be rightful holders of an office, have challenged by quo warranto, mandamus, or injunction the constitutional basis of some other officer or office. The next problem to be considered is in what cases may a private citizen acting in his own behalf, or seeking to act, of his own volition, in the name of the state, challenge the title of an officer?

1. Quo Warranto.—In the absence of statute private citizens will usually not be permitted to file an information in the nature of quo warranto, and statutes permitting this are not common, although they are to be found in some of the states. Some to that effect is clear and unmistakable." And again, "Because the Legislature desired that this appointee should have the office during the whole unexpired term, and so provided, is no reason for denying to him the right to hold it at least for the term which the legislature had clear constitutional authority to give it to him."
states by statute permit individual voters to contest the election of a candidate to office.\textsuperscript{32}

2. Tax Cases.—(a) Taxpayers will often succeed in testing by injunction the constitutionality of a statute authorizing the levy of a tax,\textsuperscript{33} but if the collection of a tax is sought to be restrained on the ground that the officer levying the tax, or collecting it, holds office by virtue of an invalid statute the court is likely to make use of the de facto doctrine to defeat him.\textsuperscript{34} Here, as in the cases involving the corporate existence of a municipal corporation, public policy should cause the courts to utilize the de facto doctrine to uphold the validity of an officer's status if the statutes authorizing the tax are constitutional, and if the office is one which could have been created under the constitution. The taxpayer should not be allowed to escape his share of the burden of supporting the financial structure of the government just because one of the officers engaged in the administration of the tax laws holds office by appointment, when for example he should have been chosen by popular election, the legislature having mistaken the rule of constitutional law on the point. If the activity is one which could otherwise have been authorized, so that the taxpayer will in the long run be compelled to contribute to its support anyway, the fact that the officer's title is defective should not be sufficient to permit him to disrupt the financial administration of the particular governmental unit that may be involved. Particularly should this be the case if injunctive relief is not sought immediately upon the taking of office by someone not entitled thereto, or immediately upon the attempt to exercise the functions of an office created by an unconstitutional statute.\textsuperscript{35}

was held constitutional, but the court proceeded to consider the merits of the case which was instituted by a petition by a taxpayer for permission to file an information in the nature of quo warranto. Mo. Rev. Stat. 1919, sec. 2066 (providing that an information of quo warranto may be filed by the attorney general or prosecuting attorney "at the relation of any person desiring to prosecute the same.""

\textsuperscript{32}See for example, Brown v. Smallwood, (1915) 130 Minn. 492, 153 N. W. 953.


\textsuperscript{35}Ayeridge v. Town Commissioners of Social Circle, (1878) 60 Ga. 404.
In Chicago & Northwestern Ry. v. Langlade County38 an action was brought by the railway company to set aside a tax levy because the statute under which the county had been organized was invalid. For this reason, it was argued, the officers of the county had not even a de facto status, and consequently no obligation to pay the tax rested upon the company. The statute was held to be constitutional but the court said that if it had been unconstitutional the county officers would nevertheless have been de facto officers, and as such their acts would have been valid as to the railway company. While it is true that in this case the court had the added weight of the argument supporting de facto municipal corporations under such circumstances, there is no reason why the same rule should not be applied in cases where the existence of an office, or the validity of the statute providing for choosing its incumbents, is questioned on the ground of unconstitutionality, the existence of a municipal unit not being involved.

(b) May a taxpayer resist an action by the tax collector or municipality on the ground that the board or officer levying the tax occupied an office created by an invalid statute, or, the office being validly created, chosen to fill it in accordance with a statute suffering from a similar defect?

State ex rel. City of St. Paul v. District Court of Ramsey County37 presented a case in which two boards attempted to carry on the same functions at the same time. One of them was declared without authority and its members ousted from office. Subsequent to the ouster of the members of the board which had been created by an unconstitutional act the city brought an action to enforce payment of an assessment for local improvements made under the direction and orders of this board. The defense was that the law creating the office being unconstitutional there could be no office to fill, because the de facto doctrine applies to officers and not to offices. The court supported this contention, deciding that the assessments in question should be set aside. The court stressed the fact that the object of the statute was an unconstitutional one, that the defect was not one of form, but of substance, and observed that for that reason it was "as inoperative as if it had never been passed." The earlier case of Burt v. Winona & St. Peter R. R. Co.,38 to be discussed in detail in another

38(1883) 56 Wis. 614, 14 N. W 844.
37(1898) 72 Minn. 226, 75 N. W 224.
38(1884) 31 Minn. 472, 18 N. W 283.
section, was both limited and distinguished limited to its particular facts, involving in a civil case the constitutionality of an act establishing a municipal court, the act not having received the requisite number of votes in the upper house of the legislature, distinguished because of the fact that the object of the statute in the Burt Case was constitutional, for the legislature had power to establish municipal courts, while the object of the statute in the Ramsey County case was a prohibited one, depending upon substance instead of form or procedure. The Ramsey County case could have been disposed of, and distinguished from the Burt Case, by invoking the doctrine that there cannot be a de facto officer where there is a de jure one in existence. There were, in the Burt Case, two boards, each contesting with the other for power. It is questionable, however, whether the taxpayers should be encouraged by the courts to resist payment of assessments under these circumstances and at this stage of the proceedings. They were on notice, doubtless, of the contest between the two boards, and they should not be permitted to sit by and accept without protest improvements for their benefit and for which they would normally have to pay, when they could by injunction have protected themselves from illegal acts on the part of either or both of the boards. Would it not have been more just, under the circumstances of the Ramsey County case, to have said that the acts of the boards in question, in so far as those done by order of the one later ousted from its functions were not in conflict with those of the board subsequently declared to be the legal body, were binding on the lot owners in question? If the court wished to hold that the statute permitting the assessments and the work to be done was unconstitutional it should have made that clear, for a justifiable case might well have been made out on that score, but it should not have decided the case on the basis of the de facto doctrine, if that was the objection advanced. Whether or not X should pay for the paving of a street in front of his lot should not depend upon the de facto or non de facto status of an officer or board, irrespective of what might be the rule in case the statute authorizing the work to be done was unconstitutional.

Two Illinois cases hold that an action to collect a tax may not be successfully resisted if the objection advanced in defence

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[39] Infra section 6a.
is that the officers involved were chosen in accordance with an invalid law. In one of them the court said:

"There are present, here, all the elements which, from considerations of public policy and for the avoiding of public inconvenience, have been recognized as going to make up the character of de facto officers, whose acts should be held valid,—as officers, by virtue of an election as such, under an act of the legislature, reputation of being public officers and public belief of their being such, public recognition thereof, and public acquiescence therein, and action as such unquestioned during a series of years, with no other body ready and willing to act as the board of supervisors." They had color of title, said the court, although the statute was defective. On grounds of policy this should be the rule whether the office was created by an invalid statute or whether the officer was chosen to fill the office under a defective statute. The reasons for applying the de facto doctrine in the one case apply with equal force to the other.

3. Eminent Domain.—A property owner whose property is about to be taken from him by public authorities may prevent immediate seizure of the same by obtaining an injunction, and may thus raise the question of the constitutionality of a law creating the office which the authorities pretend to occupy. If the statute is declared unconstitutional

"It results that the defendants are doing acts affecting the plaintiff's rights that they have no authority of law to do, because there is no such office, the duties of which they claim to be exercising."

Suppose however, that the officers of the municipality take possession of the property of a private citizen, thinking that they have the power to do so under the power of eminent domain possessed by the city? May the owner recover back the land taken from him, asserting that although the city had the power of eminent domain the officers who sought to act for the city in

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41Leach v. People ex rel. Patterson, (1887) 122 Ill. 420, 12 N. E. 726; Samuels v. Drainage Commissioners, (1888) 125 Ill. 536, 17 N. E. 829.
42Leach v. People ex rel. Patterson, (1887) 122 Ill. 420, 430, 12 N. E. 726. In Town of Decorah v. Bullis, (1868) 25 Ia. 12, the town sued in its corporate capacity to recover an assessment. The town officers enacting the sidewalk ordinance were elected to office under a statute which the court held inapplicable to this town, although the statute was constitutional. Held, the officers were not de facto and judgment for the defendant.
43Indianapolis Brewing Co. v. Claypool, (1897) 149 Ind. 193, 48 N. E. 228.
44Indianapolis Brewing Co. v. Claypool, (1897) 149 Ind. 193, 205, 48 N. E. 228.
the particular proceeding purported to be the incumbents of non-existing offices, the law creating them being invalid? This was the situation presented in *Nichols v. City of Cleveland*. In answer to the contention of counsel that the constitutionality of the statutes creating the offices in question could not be raised in such a case because the officers enjoyed a de facto status, and that their acts could therefore not be assailed, the United States circuit court of appeals for the sixth circuit said:

"This is to assert that the owner of private property may not dispute the claimed right of a municipal board to exercise the power of eminent domain. It needs no citation of authority to show that the rightful investment of such power is essential to the taking of private property in invitum. It would be a strange, and certainly an arbitrary rule that would forbid an owner to protect his property rights through challenge of the constitutional validity of the only statute relied on to justify the exercise of such a power as that of eminent domain."

The city contended, however, that inasmuch as it had possession of the property and inasmuch as a later statute had given the city the power to take property in this type of case, it should be permitted to retain the property upon making proper compensation to the owner. The court asserted, on this point, that title remained in the owner all the time, despite the possession of the city, but in view of the many years that had passed, and in view of the subsequent grant of authority to the city, a conditional judgment would be given, giving the city the privilege of instituting new condemnation proceedings to acquire the property. Allowance was made in computing the amount of the judgment, for rent, profits, and issues, compensation thus being made to the owner for the period during which he had been deprived of possession.

The distinction between the *Nichols Case*, where recovery of property which has been taken from one is asked, and the case where injunctive relief is asked against threatened taking, is an important one, fully justifying the different result reached in the two cases. Under the circumstances of the *Nichols Case* it would have been of little avail to have allowed the recovery of the land in question because the city could have regained possession of it upon the institution of condemnation proceedings.

In *King v. Philadelphia County* a bill was filed to restrain the county from maintaining gas pipes in a street which had...

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45(C.C.A. 6th Cir. 1917) 247 Fed. 731.
46Nichols v. Cleveland (C.C.A. 6th Cir. 1917) 247 Fed. 731, 739.
been opened through the plaintiff's land. The board of viewers provided for by statute in assessment and street opening proceedings was assailed, the statute being attacked as unconstitutional. The pipes had been laid for two or more years, and the street had been opened to traffic. The bill was dismissed, the court saying that it would be impracticable at that late date to tear up the pipes and undo the work that had been done. "Such municipal works having been done under color of lawful authority, when no question as to the validity of the authority was raised, must be regarded as lawfully done."\(^4\) That the work had been done in the regular way; that all official acts had been in accordance with what everybody supposed to be the law, that the defendants had not made the law; and that people had a right to expect that the officers' acts in these proceedings were in accordance with constitutional legislation all contributed, in the mind of the court, to support their decision not to undo the work of public officials, even though the constitutional warrant for their acts or offices was defective and would, under the doctrine of the injunction cases, have justified the court in protecting the individual against threatened official action had application for relief only been made earlier in the proceedings. The *King Case* emphasizes the doctrine of the *Nichols Case*, namely, that to obtain relief in this type of case application to the court must be made at an early stage in the proceedings.

4. *Bonds and other Contract Obligations.*—The leading case on this subject is *Norton v. Shelby County.*\(^4^9\) The facts of this famous case were as follows

"By the constitution of Tennessee there was, in each county, but one county court. This was composed of the justices of the peace elected in their respective districts in the county. Under the act of March 9, 1867, the governor was given power to appoint county commissioners who were to take the place of this court. The county court was one of the institutions recognized in the constitution of the state. County commissioners were authorities unknown to the constitution and previously unknown to the law of Tennessee. There was no general acquiescence in the change nor any general recognition of the new commissioners. On the contrary, the validity of the act was at once assailed. Within a month after its passage, a bill was brought against the


\(^{49}\) (1885) 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.
commissioners, and public opposition continued in various forms, until the case was finally settled. While litigation to test their authority was pending the commissioners issued county bonds to the amount of $29,000 and the liability of the county on these bonds became a subject of further controversy.\(^{50}\) This "further controversy" was the subject matter of the Norton Case. The supreme court decided that no recovery could be had on the bonds. That this was a proper disposition of the case seems clear. The people who purchased bonds under such circumstances as those presented in the Norton Case had notice of possible defects in the issue and the court could, in accordance with recognized rules of notice and estoppel, have justified the result reached. The case was not decided on these grounds, however, but was placed on grounds relating to the doctrines of de facto and the effect of an unconstitutional law.

Justice Field, delivering the opinion of the court, explained at considerable length the reasons for the doctrine of de facto officers. Following this explanation he said, "But the idea of an officer implies the existence of an office which he holds." The justice then reviews the argument presented by counsel on the question whether an unconstitutional statute can create an office. In stating the position of counsel for the bondholders Justice Field said, that their position was "that a legislative act, though unconstitutional, may in terms, create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else." Concerning this argument he continues

"It is difficult to meet it by any formal argument beyond this statement. An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office, it is in legal contemplation as inoperative as though it had never been passed."

The one redeeming future of this statement of Justice Field is that it does not purport to be an argument, but is expressly put forth as a dogmatic statement, and such it surely is. There is only one effective answer to it, it is not true. Courts have held that unconstitutional statutes have imposed duties, have granted rights, have created offices, and have some operative effect. The statement is, therefore, not an accurate statement of the rule of law in this regard. It is, and this is perhaps all

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\(^{50}\)Wallach, De Facto Officers, 22 Pol. Sci. Quart. 451, 469.
that it purports to be, a statement of one view of the effect of an unconstitutional statute, a view applied by many courts in numerous situations, but applied by no court in all cases. The real weakness in the opinion of Justice Field in this portion of the opinion is that it assumes the very point to be decided can an unconstitutional statute create an office, or, phrased in a somewhat different manner, will the acts of a person purporting to exercise the functions of an office created by an unconstitutional statute be treated by a court as valid and binding on the governmental unit for which he holds himself out to act? This dictum then is a statement of a view, not of an argument. Perhaps it is for this reason that it has been followed by so many courts, and applied in so many situations, whether such adherence and application accomplished the ends of justice or not. Had it been presented as argument other judges might have found it easier to detect its fallacy. As it is, this dictum has exercised a profound influence in cases involving the effect of an unconstitutional statute, regardless of the situation presented to the court which called forth its enunciation.

It is interesting to notice that Justice Field says, at the close of his opinion:

"It may be, as alleged, that the stock of the railroad company for which they subscribed is still held by the county. If so, the county may, by proper proceedings, be required to surrender it to the company, or pay its value, for independently of all restrictions upon municipal corporations, there is a rule of justice that must control them as it controls individuals. If they obtain the property of others without right, they must return it to the true owners, or pay for its value."

This was not, as the justice points out, a question involved in the case. It indicates however, that the bondholders in this case would not be remediless. They had merely brought their action on the wrong ground, basing it on the bonds. They should have demanded the return of the stock, and if the district had refused to surrender it, should then have brought an action for conversion. It is clear, then, that the case worked no more serious hardship on the plaintiffs than any case in which the wrong action is brought and the remedy for the wrong misconceived.

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In *City of East St. Louis v Witts* an action of debt was brought against the city on some scrip issued by certain police commissioners whose offices had been created by an invalid statute. The city was held not liable, apparently on the same theory as that expressed in the *Norton Case*.

In connection with these two cases the case of *Schloss & Kahn v McIntyre* is of interest. Defendants in that case were commissioners in charge of a local liquor dispensary. They purchased liquor from the plaintiff for purposes of re-sale in the dispensary. The statute establishing the dispensary, and creating the offices of commissioners, was held to be unconstitutional. Suit was brought against the commissioners to hold them liable in their individual capacity. They were not in the business for profit, received no benefit from the conduct of it, and made no personal promise to pay for the stock purchased, and for these reasons the court decided that they could not be held individually liable for the debt.

In *People ex rel. Bolton v Albertson* the city sought to escape payment of a bill for coal sold to the police department, on the ground that a new board had superseded the one to which plaintiff had sold the coal. Plaintiff asked for a mandamus to compel the signature of warrants to pay for the coal and the court granted the mandamus, declaring the statute creating the new board to be unconstitutional.

One entering into a contract with a board of trustees for a city, whose offices are created by an invalid law, is bound by the contract, and may not obtain rescission of it merely on the

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53(1871) 59 Ill. 155. In Parks v. Commissioners of Wyandotte County, (D.C. Kans. 1894) 61 Fed. 436, and First Nat. Bk. of Lansdale v. Commissioners of Wyandotte County, (C.C.A. 8th Cir. 1895) 68 Fed. 878, the bonds issued by officers holding offices created by an invalid statute were held to be non-negotiable. The court seems however, to have thought that despite this feature of the case the bonds would not have been binding obligations, because falling within the rule of the *Norton Case*. It is often impossible to collect bonds in such a case because of the difficulty of procuring validating legislation and also because the courts in the middle western states seemed disposed in the latter part of the past century to be rather ready to find grounds for defeating recovery. This was corrected to some extent by the position taken by the federal courts, but the instant case illustrates that recovery was sometimes difficult to obtain even in those courts. The writer is indebted to the officers of the First National Bank of Lansdale, Pa., for information as to the outcome of the litigation in the instant case. The bondholders in these cases were unable to recover anything.

54(1906) 147 Ala. 557 41 So. 11.

55(1873) 55 N. Y 50.
ground of the defect in the title of the trustees with whom he contracted.\textsuperscript{56} Nor can the constitutional qualifications of a commissioner appointed by the governor to apportion the cost of building a bridge between several railroads be questioned in an action on the contract by one road to obtain reimbursement of a share in the expense paid for another road. Such an officer is entitled to de facto status.\textsuperscript{57} It should perhaps be observed, relative to this last case, that it involved no question of the effect of an unconstitutional statute. It does, nevertheless, indicate the attitude which courts might be expected to take towards the acts of an officer whose title to office is challenged because of some constitutional defect in his alleged status. The case would be quite as strong for holding an officer de facto in such a situation as that last mentioned, if the defect had been in the statute providing for his appointment, instead of in his qualifications for the office.

5. \textit{Torts.}—Suppose that an action is brought against a village to recover damages for an injury due to a defective sidewalk. The defendants are the president and trustees of the village of X. The complaint alleges among other things that the village is a corporation, validly incorporated under the laws "made and provided" for the organization of villages of this class. The defendants file a demurrer to the complaint, claiming that there is no such corporation as the president and trustees of the village of X. In this type of case the Wisconsin court held that the village existed under another valid law, but that the one under which incorporation had been attempted was invalid. Furthermore, the statute regulating the selection of the officers of the village was unconstitutional. There was, then, presented to the court a case in which the office was held to be created by a valid statute, the incumbents of which had been selected in accordance with an invalid law. Were they de facto officers?\textsuperscript{58} Could de-

\begin{itemize}
  \item \textsuperscript{56}Heck v. Findlay Window Glass Co., (1898) 8 Oh. Cir. Dec. 757
  \item \textsuperscript{57}Fitchburg R. R. v. Grand Junction R. R. & Depot Co., (1861) 1 Allen (Mass.) 552.; Cf. Shelby v. Alcorn, (1858) 36 Miss. 273, 72 Am. Dec. 169, defective title is good defense to action to recover money paid, the work not having been performed per contract. The title defect arose from the holding of constitutionally incompatible offices.
  \item \textsuperscript{58}Cole v. President and Trustees of Black River Falls, (1883) 57 Wis. 110.
\end{itemize}
fendant deny their title to office? In answer to these questions the
court said, holding them de facto

"And the fact that they are in by color of a law which is un-
constitutional and void, does not make an exception to the rule."
The city was not permitted to deny the validity of the law providing
for the selection of these officers. It is difficult to say whether a
similar result would have been reached had the statute creating the
offices likewise been invalid, in the absence of any other valid
statute under which the city might have been organized.69

6. Civil Cases in which Office or Title of Judicial or Clerical
Officer is Challenged.—(a) The judge trying a civil case may have
been appointed or elected to office under an invalid statute. May
one of the parties to the suit appeal from a judgment rendered
by a judge so chosen, on that ground? The rule seems to be
that he cannot. A judge elected or appointed to office in accord-
ance with an invalid statute is a de facto officer and his title to
office cannot be challenged by one of the parties to a civil suit,
on appeal. One opinion sets forth three arguments in support
of this rule-69 (1) There is a strong public policy in favor of
recognizing the acts of such judges so that judicial business may
be carried on in an orderly manner, and cases settled on their
merits. (2) The judge is not a party to the action and has no
opportunity to defend the attack upon his title. It would be unfair
to try a man's title to office when he was not to be given a hearing
on the question. (3) This is a collateral attack, and only the state
should be permitted in a direct attack to question the title of an
officer, collateral attack being objectionable on the ground that con-
tinuous assaults upon official title would be made by private indi-
viduals who might have something to gain if they could succeed in
the attack. With respect to these points the following observa-
tions might be made That the first is the real basis of the de-
cision, that the second is at least partially unsound because even
if the title of the judge was declared to be defective that would
not of necessity mean that he would be ousted from office, ouster
following only upon judgment in quo warranto proceedings, and
finally, the third is not a reason but rather a statement of a rule
of law. That the first reason advanced is the real basis for the
decision appears from the following quotation from this same
opinion 69

59 For discussion of this factor in municipal corporation cases, see
Tooke, De Facto Municipal Corporations Under Unconstitutional
Statutes, 37 Yale L. J. 935.
"When a court with competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge, who presides in the court, to his office. If the court exists under the constitution and laws and it had jurisdiction of the case, any defect in the election or mode of appointing the judge is not available to litigants."

In another case, in which a writ of prohibition was sought to prevent a lower court from proceeding with the trial of a civil case the writ was denied, because, said the court, only the state could assail the title of the judge before whom the case was being tried. The court said, in the course of its opinion:

"Counsel argues that relator has no other available remedy for the wrong that is about to be done to him, and that, inasmuch as there must be a remedy for every wrong, therefore a writ of prohibition will lie. But the fallacy consists in the assumption that relator is threatened with any wrong. Respondent being a justice de facto, his acts are as valid as if he was a justice de jure. In fact, as to everybody except the state in proceedings by quo warranto to test his right to the office, he is, in effect, a justice de jure."

There is some authority to the contrary, however, and one of the parties to a civil action in a Baltimore court obtained a writ of mandamus to compel the removal of a case to another court, the one in which it was about to be tried being presided over by a judge chosen by virtue of an invalid statute. The fact that there existed a de jure court capable of taking and trying the case doubtless caused the court in this case to hesitate less than would ordinarily be the case, to grant the writ. Had there not been this other court to which the case could immediately have been taken and tried the result might well have been different.

When the defect is in the constitution of the office, instead of

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62 State ex rel. Derusha v. McMartin, (1889) 42 Minn. 30, 43 N. W. 572.
64 Lewin v. Hewes, (1912) 118 Md. 624, 86 Atl. 833. In Smith v. Normant, (1833) 5 Yerg. (Tenn.) 271, a statute providing for the appointment of a temporary judge was held invalid, and the commission of the judge said to be "void, and he incapable of doing any judicial act," so therefore the parties in a civil suit were permitted to challenge his acts. The court said, further, that "the judgments, decrees, and orders are all void, and must be set aside, and the causes remanded to the respective courts from whence they came, to be proceeded in." Ibid 278.
in the method of choice the courts are in irreconcilable conflict, some permitting attack while others refuse it.

In *Burt v. Winona and St. Peter R. R.*, the Minnesota court refused to permit one of the parties to a civil action to question the legality of the office of the judge who was trying the case, holding that even if the statute establishing the court had failed to receive the constitutionally required number of votes in the upper house the judge would be a de facto officer. The view of the court is well summarized in the statement that "The reason given for the de facto doctrine applies as well to offices and courts as to officers." The injustice of permitting cases to be decided upon such incidental points, instead of on their merits, the inconvenience and uncertainty which would inevitably follow the introduction of the doctrine that there can be no de facto office under an unconstitutional statute, and the hardship on litigants of compelling them to ascertain the legal title of a particular judge to office before daring to go to trial with a case, were stressed by the court as factors causing it to refuse to permit the legal existence of the office to be questioned. The court thought that where an office exists under "color of right that is, under color of law" that the incumbent of such an office should be unmolested in his possession of it until the state took the initiative in ousting him by means of quo warranto. A federal circuit court for the district of Minnesota applied the same rule as that laid down by the *Burt Case*.

On the other hand, the Kentucky court in *Hildreth's Heirs v. M'Intire's Devised* held on an appeal from a judgment in a civil case that proceedings which had previously been taken in a "court of appeals" created as a rival of the so-called "old court" were null and void, because the statute creating the new court was unconstitutional. The court pointed out that there could be a de facto officer, but that unless by revolution there could not,


66*Comstock v. Tracey*, (C.C. Minn. 1891) 46 Fed. 162. This likewise was a civil case, and the statute creating the court was alleged not to have received the requisite number of votes in the upper house of the state legislature. The court held that the statute could not be assailed in this case.

under a constitutional government, be a de facto office.\textsuperscript{68} The fact that the legality of the organization of the new court had been consistently resisted from the time of its establishment doubtless made the court feel less hesitant to pronounce its judgments totally void. A judgment of a justice of the peace in New York was reversed because the statute creating the office was invalid.\textsuperscript{69} A similar view to that expressed in the \textit{Hildreth Case} was taken in \textit{Ex parte Roundtree},\textsuperscript{70} wherein the Alabama court issued a writ of prohibition forbidding a judge to proceed with the trial of a case, the court treating both the office and the method of choice as bad. The court said, in the course of its opinion, that\textsuperscript{71}

"The usurpation of judicial power—the holding of pretended courts—is a great public wrong, productive of uncertainty and confusion, beclouding the title to property, vexing and harassing the citizen, involving him in a conflict of duties, subjecting him to oppression, and detracting from the dignity and authority of the known and established tribunals. It would be a reproach to the law and to justice, if there were not a speedy remedy to prevent such usurpation."

One cannot but wonder whether the results referred to by the court in this extract from its opinion were not more sure to follow from the view expressed therein than from the view that the title of the judge should not, in such a case, be permitted to be questioned by litigants. The reasons advanced by the Alabama court are exactly those which might well be advanced to justify the doctrine of the \textit{Burt Case}. As to the argument that there be a "speedy remedy to prevent such usurpation" the ready reply is that such a remedy is available, quo warranto at the instance of the state.

In \textit{Masterson v. Mathews}\textsuperscript{72} the Alabama court treated the case as one involving only the constitutionality of the method of choosing the judge, and held that in a suit on a judgment rendered by a judge selected in accordance with the invalid statute the defendant would not be permitted to object that the judge's title to office was defective. The difference between the two cases lies partly in the different attitude of the court towards the statute,

\textsuperscript{68}This question often arises in connection with de facto governments in international law. These cases will not be dealt with in this study.

\textsuperscript{69}Waters v. Langdon, (1863) 40 Barb. (N.Y.) 408. It is not altogether clear whether this was a criminal or civil case, but it seems to have been a civil one.

\textsuperscript{70}(1874) 51 Ala. 42.

\textsuperscript{71}Ex parte Roundtree, (1874) 51 Ala. 42, 51.

\textsuperscript{72}(1877) 60 Ala. 260.
for in the latter case the court was treated as having been validly created, while in the former the law of its creation was declared invalid, in addition to the law providing for the selection of the judge, and partly in the time element, the prohibition in the Roundtree Case being sought early in the case, while the challenge of title in the Masterson Case came after judgment had been rendered. It is only natural that the court should be more hesitant to disturb what has proceeded that far, particularly when the ground of objection is so remote from the merits of the case.

That the time element is not accorded the same weight by all courts is illustrated by the decision of the California court denying a writ of mandamus to compel the issuance of an execution on a judgment given by a judge of a court created by an invalid statute.73 The defendant was permitted at that late stage in the proceedings to challenge the existence of the court. However, if the defect goes only to the method of filling the office the courts incline to deny attack on title. Thus, in Taylor v Skrine74 and Neal v Kent75 the courts of South Carolina and Kansas respectively denied motions to set aside and vacate judgments, the motions being supported in each case by the argument that the judge in each instance had been selected by virtue of an unconstitutional statute.

The courts tend to view defects in statutes increasing the number of judges in a district, or on a court, as one going to the method of filling the office, instead of as going to the existence of the court. In these cases the de facto doctrine is generally applied, and judgments rendered by judges under these circumstances are not open to attack.76 In Nagel v Bosworth77 the

73 Miner v. Justices Court, (1898) 121 Cal. 264, 53 Pac. 795.
74 (1815) 3 Brev. (S.C.) 516.
75 (1818) 102 Kan. 239, 169 Pac. 1152. In Thompson v. Couch, (1906) 144 Mich. 671, 108 N. W. 363, one of the parties in a petty civil case asked for a writ of prohibition to prevent further consideration of a case by a lower court. He alleged the law creating the court, as well as that providing for the selection of the judge, was invalid. The court held the officer to be de facto, the office being created by a valid statute.
statute seems to have been considered by the court as one going to the existence of the office. At least when the Kentucky court came to distinguish it from the situation involved in the *Hildreth Case* the distinction between the two cases was said to be one arising out of the difference between a statute clearly invalid and one not invalid on its face. The statutes in the two cases were considered as going to the creation of the office, but the court thought that the statute in the *Hildreth Case* was void on its face, while this was said not to be true of the statute in the *Bosworth Case*. The court said, concerning this distinction:78

"The act, on its face, was a palpable violation of the constitution, as the Legislature was without power to create a court of appeals, but not so is the act here. The Legislature has power to create a circuit court, and under certain conditions to add an additional judge. The act that it passed showed that the conditions existed, which warranted it to create an additional judge."

The situation presented to the court in the *Bosworth Case* was not quite the same as that involved in the *Hildreth Case*. They did have in common, however, a statute creating an office, because increasing the number of judges was considered by the Kentucky court as creating that many more offices. The circumstances were more favorable in the *Bosworth Case* to elicit the application of the de facto doctrine than were those involved in the *Hildreth Case*. There was absent also, that rivalry that characterized the dispute between the two courts of appeals in the latter case. The trial of cases would be carried on by the de jure judge of the district, and when the legislature met the difficulties of overwork could be alleviated. It is then perhaps not accurate to say that the two cases are in conflict with each other, but the attitude of the court in the *Bosworth Case* was nevertheless somewhat different from

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77(1912) 148 Ky. 807, 809, 147 S. W. 940. This case is apparently not one involving a civil proceeding in which one of the parties to the suit was attacking the title of the judge. It is impossible to tell from the report of the case exactly what the nature of the action was, but it appears to have been a suit relative to compensation. The parties and some statements in the opinion lead to this conclusion.

78(1912) 148 Ky. 807, 809, 147 S. W. 940.
that manifested in the Hildreth Case on the question whether an invalid statute could create an office.

Occasionally the title of a judge is assailed because he is said not to possess the constitutional qualifications required for the office. The same is true with respect to the holding of two incompatible offices. Attack in these cases is usually unsuccessful, the de facto doctrine being extended to support the validity of the acts of the judges. But when an office has been abolished altogether, there remaining no legal warrant for the court, the de facto doctrine will not be applied.

Special judges provided for by invalid statutes have been held not to be entitled to de facto status, and their acts may be assailed by parties to the litigation.

(b) Cases sometimes arise in which the title of one of the clerical officers of a court is assailed in a civil case in which the officer is not one of the parties. In State Bank of Pender v. Frey an officer exercising authority over an unconstitutionally annexed portion of territory was held to be de facto, and recording a deed with him had the usual effect of notice. But when a mortgage has been acknowledged before a judge of a court created by an unconstitutional statute it has been held that there is "no basis on which to rest an application of the rules saving the acts of de facto officers." For this reason in a bill to quiet title a mortgage attempting to convey title to land was held ineffective. In Crawley v. Southern Ry. an attempt was made to remove to a federal district court a case which had been begun in a state court. The statute creating the judicial district and the office of deputy clerk was declared invalid by a state court. Because of this

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76Supra note 76.
77Ayers v. Lattimer, (1894) 57 Me. App. 78, court abolished.
79Caldwell v. Barrett, (1903) 71 Ark. 310, 74 S. W 748. The court said: "It would be beyond all precedent to term the judge presiding in a court which is not a court at all a de facto judge." A number of Arkansas cases are reviewed in the opinion. Van Slyke v. Trempealeau, etc., Ins. Co., (1876) 39 Wis. 390, 20 Am. Rep. 50. "Here Mr. Cole was not in possession of the office of judge, and did not claim it." The court declared that all that the appointee had accepted was some of its functions. Cf. discussion under division IV. Nagel v. Bosworth, (1912) 148 Ky. 807 147 S. W 940; Smith v Normant, (1833) 5 Yerg. (Tenn.) 271.
80(1902) 3 Neb. Unoff. 83. 91 N. W 239.
82King Lumber Co. v. Crow, (1908) 155 Ala. 504. 46 So. 646.
83(C.C. Ala. 1905) 139 Fed. 851.
the federal district court refused to take the case, on the ground that a suit cannot be removed from a non-existent court. There being no office there could not be a de facto officer, according to the views expressed by the court. The decision worked an injustice to the plaintiff, and thus the court recognized, because the statute of limitations had run on the cause of action, due to this delay; but although the court felt that justice was being sacrificed it did not feel that it could overturn the majority view that there can be no de facto officer where there is no de jure office.

In these cases there is to be found the same division of opinion as in the preceding sections, some of the courts permitting the judge's title to be challenged by private litigants if the statute creating the office is invalid, while if the method of choice is defective the de facto doctrine is applied.

7 Crimina! Cases in which the Existence of the Court or the Title to Office of a Judge or Clerical Officer of the Court is Challenged.—The cases in this section will be considered in the following order: (a) those involving an attack on the office or title of a judge, (b) those involving an attack on the office or title of other officers participating in criminal cases.

(a) One of the leading cases on the question whether the defendant in a criminal case can attack the title of a judge on the ground that the statute providing for his selection is unconstitutional is that of Brown v. O'Connell. In that case an action of debt was brought by the treasurer of Hartford on a recognizance given by the defendant in the police court of the city. The constitutionality of the law providing that police justices should be appointed by the council was assailed. The court held the statute to be invalid, but said that the justice was nevertheless a de facto officer, occupying the office by "color of appointment." He was not a usurper. He had color of appointment by the common council of Hartford, and they had color of delegated authority from the general assembly. His acts, said the court, were all done under "forms of law" and for that reason color was derived "from the law". State v. Carroll involved a situation in which a person accused of petty crime challenged the constitutionality of a statute permitting a temporary vacancy to be filled by appointment. The court decided however, that even though the statute be defective the acts of the

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88(1870) 36 Conn. 432.
87Brown v. O'Connell, (1870) 36 Conn. 432, 450.
88(1871) 38 Conn. 449.
temporary appointee would be binding on the plaintiff, the accused
below. For that reason the validity of the law was not settled.
For this same reason the statement of the court to the effect that
a person chosen to a de jure office by virtue of an invalid statute
was a de facto officer, was dictum.\(^8\)

The rule enunciated in the O'Connell Case is well established
and has been applied in several states.\(^9\) In one of these cases it
was stated, that\(^9\)

"The true doctrine seems to be, that it is sufficient if the
officer holds the office under some power having color of authority
to appoint, and that a statute, though it should be found repug-
nant to the constitution, will give such color."\(^9\)

Another court has expressed the opinion that judges should have
notice that their title is being assailed, and a right to be heard
on the question, before they lose their offices.\(^9\) This argument
is open to the same objection that is available to it in the civil
case.\(^9\) That is, that officers do not lose their offices even though
the statute should be declared unconstitutional, in the absence of
quo warranto proceedings by the state. The court perhaps ex-
pressed a more sound reason for its decision when it said
that it would recognize the acts of the judges in this case because
"under due forms of law they hold their offices by title regular
on its face."\(^9\) The rule has been applied in a situation in which
a statute legislating out of office one circuit judge, but providing

\(^8\) A definition sufficiently accurate and comprehensive to cover
the whole ground must, I think, be substantially as follows: An officer
de facto is one whose acts, though not those of a lawful officer, the
law, upon principles of policy and justice, will hold valid so far as
they involve the interests of the public and third persons, where the
duties of the office were exercised. Fourth, under color of an
election or appointment by or pursuant to a public unconstitutional
law, before the same is adjudged to be such." State v. Carroll, (1871)
38 Conn. 449, 471.

State, (1904) 142 Ala. 7 39 So. 242 See People v. Sassovich, (1886)
29 Cal. 480. State ex rel. Bales v. Bailey (1908) 106 Minn. 138, 118
N. W. 678, Ex parte Bassitt, (1894) 90 Va. 679, 19 S. E. 453 Town
of Lewiston v. Proctor, (1860) 23 Ill. 533, State v. Bartlett, (1874)
35 Wis. 287

\(^9\) Ex parte Strang, (1871) 21 Oh. St. 610. The statute here was
not declared unconstitutional, but the court decided that the result
would not be affected even though it had been invalid. In Parks,
Petitioner (1880) 3 Mont. 426, the de facto doctrine was applied to deny
attack on a judge by the accused in a trial for assault and battery.
The statute providing for the selection of the justice of peace was
contrary to the organic act of the territory


\(^9\) Supra section 6a.

\(^9\) Campbell v. Commonwealth, (1880) 96 Pa. St. 344, 347
for the selection of another, to uphold the acts of the latter although the statute was invalid. The doctrine applies whether the judicial officer whose title is assailed be a justice of the peace or a justice of the state supreme court.

On the other hand it seems equally well settled that the accused may challenge the existence of the court, or of the office of the judge, and if the statute creating them is unconstitutional the de facto doctrine will not be applied. The pettiness or magnitude of the crime of which the defendant is accused seems to be immaterial. If any difference in attitude is discernible in the opinions it will perhaps be found to favor leniency in permitting challenge in cases involving the more serious offenses.

The question of the validity of the law creating the court may be raised, it seems, in any stage of the proceeding, for it may be effective to quash an indictment, on the one hand, and to obtain freedom from imprisonment after conviction, in habeas corpus proceedings, on the other.

In People v. Toap the California court, while admitting the soundness of the general doctrine that collateral attack should not be allowed on a de facto officer, held that this rule did not apply when the existence of the office itself was in question. Counsel argued, in this case, that the de facto doctrine should be applied to give validity to the acts of judges in criminal cases because of the difficulties which would result in the effective administration

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95State v. Douglass, (1872) 50 Mo. 593.
96State v. Cochran, (1909) 55 Or. 157 105 Pac. 884, the constitutionality of a statute providing for the addition of two justices to the supreme court of the state. The court decided, the two justices whose title was involved not sitting, that their acts would be binding on litigants, because they would at any rate be justices de facto. The statute was, however, held to be constitutional. See Covle v. Sherwood, (1873) 1 Hun. (N.Y.) 272, justices of peace.
97State v. O'Brian, (1878) 68 Me. 153.
98Ex parte Babe Snyder, (1876) 64 Mo. 58.
of the criminal law if attack on the existence of the court was permitted. To this contention the court answered that they realized that a few criminals might escape, but that the number would not be large. Furthermore, they were convinced that the statute in question was so clearly unconstitutional that arguments based on policy to the contrary notwithstanding, they must hold it invalid. There was, thought the court, a stronger countervailing policy in favor of enforcing explicit constitutional limitations on legislative procedure, the act in this case having been in the form of a resolution, instead of in the form of a statute, as required by the constitution.

In the course of its opinion the court said, in the *Toal Case*, that most of the criminals in the city, of the government of which this particular court was a part, would be brought to trial subsequently, in the other courts which existed in the city. It, therefore, hesitated less than would otherwise be the case, in discharging the prisoner. Suppose however, that a person had been convicted of a serious crime, such as assault to commit murder which was the crime involved in the *Toal Case*. Could he, subsequent to his discharge following an appeal on which the statute creating the court was declared unconstitutional, be again brought to trial, this time in a different court? Could he not successfully plead that this constituted double jeopardy? If his trial in the "non-existent" court should be held to be one jeopardy the situation would then be that of a person accused and convicted of a serious crime going unpunished. Even if such a trial should be held not to constitute one jeopardy there is another factor to be considered the effect of such decisions releasing persons guilty of crime on the efficiency and zeal of law enforcement officers. While not conclusive, this should at all times cause a court to hesitate in discharging a person accused and convicted of a serious crime on grounds so far removed from the merits of the case.

Why should the accused in such a case be permitted to assail the existence of the office of a judge? Does the fact that he is appointed by the city council instead of by the governor, or

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100 No case has been found in which this precise question was raised. Courts disregarding entirely a statute which has been declared invalid, in the strict ab initio sense, might hold that trial before such a court did not constitute a trial for legal purposes. Other courts might in a more realistic vein call it one jeopardy. Cf. McGinnis v. State, (1848) 9 Humph. (Tenn.) 43, holding that if accused person acquiesces in trial under invalid statute defining a crime, he could not subsequently be tried under a valid statute.
that he was elected in accordance with a statute which did not meet the title requirements of the state constitution, or which was not read three times in the upper house, make the judge any more incompetent or prejudiced in the trial of a case? Is the grand jury indictment, or the information of the prosecuting attorney in such cases likely to be more defective or biased in one or the other of these cases? The accused in such a case is given a fair hearing and is tried before an impartial jury. If he is found guilty in a trial conducted in the regular manner it seems that he should be treated as are all other persons convicted of the same crime. The state has, of course, an interest in enforcing the constitutional limitations which are placed upon legislative power so that the machinery of government may be established in an orderly manner, and on a sound constitutional basis. It should be permitted, and is permitted, to challenge the existence of a court. It should be observed, however, that when a judge is ousted by quo warranto proceedings, this in no wise affects the status of the persons accused of crime whose cases may be on the docket of the court for trial. It is therefore submitted that persons accused of crime should not be permitted to question the existence of the court before which they are being tried.\(^\text{101}\)

The fact that there is an irregularity in the constitution of a judicial district in which a court is held is not sufficient to invalidate the acts of a judge sitting in such a district.\(^\text{102}\) This applies to a case in which the boundaries of the district or the population of a district are not such as to meet the requirements of the constitution.\(^\text{103}\) In one of the cases dealing with a constitutional population requirement, the court said, in holding the judge to be a de facto officer,\(^\text{104}\)

"A judge de facto assumes the exercise of a part of the power of sovereignty, and the legality of that assumption is open to the attack of the sovereign power alone."

Any other rule, thought the court, would ruin the administration of the criminal law. Some courts take the view, in these population cases, that the legislature is the final judge of whether a judicial district or a county has sufficient population to satisfy the

\(^{101}\)See infra part IV


\(^{103}\)Kline v. State, (1906) 146 Ala. 1, 41 So. 953; Speck v. State, (1872) 7 Baxt. (Tenn.) 46.


\(^{105}\)Covle v. Commonwealth, (1883) 104 Pa. St. 117
The constitutional qualifications of judges, as well as the holding of incompatible offices by them, are not open to question by persons brought before them for trial. The de facto doctrine extends to judges in these situations.

(b) Persons accused of crime sometimes seek to impeach the title of prosecutors, policemen, or other officers engaged in the work of law enforcement. *State v Poulin* is doubtless the leading case on the question whether the title of a criminal prosecutor can be impeached by a person brought to trial on an indictment procured and signed by a prosecuting attorney whose office has been created by an unconstitutional law. The Maine court held, in an elaborate opinion, that this could not be done, and that the prosecutor was a de facto officer despite the fact that the statute involved went to the existence of the office itself. The court expressed the opinion that the same reasons which would cause it to hold that an officer was de facto when a statute providing for his selection was unconstitutional should cause it to hold likewise when the statute creating the office was invalid. The fact that many fines had been imposed in prosecutions instituted by this prosecutor, that people had not only submitted to his authority, but had expected him to enforce the law by performing the functions of his office caused the court to treat his acts as valid, and to hold that their legality could not be questioned in this collateral way.

In accordance with the view expressed in the *Poulin Case* the Georgia court has held that a person indicted for murder whose prosecution was carried on by an attorney performing the functions of his office in a district a part of which had been included by virtue of an invalid statute, could not assail the title to office of the prosecutor for that reason. The de facto doctrine was applied so as to protect the acts of the state's attorney from attack, so far as they had taken place with respect to cases in the

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A mandamus will lie at the instance of the attorney general to compel a judge to restore a criminal case to the docket for trial, it having been removed because the indictment had been returned by a grand jury held under a judge in a district created by an invalid law. People ex rel. Brown v. Blake is difficult to justify. In that case a policeman arrested the relator. The officer had been appointed to office by the town board of trustees. The members of this board had been appointed to office. The statute authorizing their appointment was invalid, election being the constitutionally provided mode of filling the office. This board of trustees had caused the relator’s arrest by making a complaint before a justice of the peace. The accused petitioned for a writ of habeas corpus and was awarded the writ, receiving his discharge. The decision is contrary to the weight of authority from whatever angle it be viewed. In the first place it is out of line in holding that the acts of an officer engaged in enforcing the law may be challenged by the accused when the constitutionality of the statute providing for the filling of a de jure office was involved. In the second place the decision is contrary to the majority rule which denies attack on a statute under which a municipality is organized. The statute in this case also provided for the incorporation of the village. The court gave little attention to this phase of the case. In the third place, if the trustees be eliminated from the case the objection may be advanced that the relator was permitted to challenge the title to office of the appointors of the officer who had arrested him. Attack on the title of an official directly concerned with the proceedings is sufficiently objectionable, but it is much more objectionable to permit this “running back” along the line of appointing authority in a search for some constitutional break in the chain.

8. Cases of Crimes Involving Official Status.—Suppose that X is indicted for extortion. He defends by asserting that he is not an officer because the statute creating the office he purported to hold is unconstitutional. In New Jersey X was permitted to set up this defence, and obtain his freedom thereby. After stating

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211 Ex parte State, (1904) 142 Ala. 87, 38 So. 835. In Lask v. United States, (1839) 1 Phinney (Wis.) 77 prosecutor held a de jure office, but held two incompatible offices, contrary to the organic act of the territory. Held, a de facto officer.
that "an official character, either de facto or de jure, is essential" to constitute the crime of extortion, the court stated: 118

"These defendants were never the officers they are charged to have been, and therefore could not as such have extorted. This inexorable legal conclusion is the result of the unconstitutionality of the statute which created the office of license commissioners in certain counties, which offices the defendants are charged with using for extortionate purposes."

One wonders how inexorable this conclusion is when reading the case of State v. Gardner 111 in which the Ohio court held in a case involving an indictment for offering a bribe to a city commissioner that the latter was a de facto officer, although the statute which was assailed in this case not only created the office of commissioner but was the source of corporate existence of the city itself. The Gardner Case presented a somewhat stronger situation for the application of the de facto doctrine than did the New Jersey case, because of the policy favoring the denial of collateral attack on municipal corporations. In the Gardner Case both the office and the municipality were involved, while in the New Jersey case only the office was in question. The attitudes of the two courts were, however, quite at variance.

Whether the New Jersey court still adheres to the rule of this case is not clear. The opinion seems to rely to a considerable extent on the case of Flaucher v. Camden, 115 an earlier New Jersey case. There defendant set up a license granted to him by a board as a defence to a prosecution for selling liquor without a license. The state assailed the validity of the statute creating the board from the members of which defendant had received his license. The statute was declared invalid. The court held, that because of this the license afforded no defence, and the conviction was affirmed. This decision is criticized in Lang v. Mayor of Bayonne, 116 and expressly overruled in the course of the opinion in the latter case. Does an express statement that the case is overruled have its full apparent effect, however when the situations in the two cases are so different from each other as they were in these two cases? The Lang Case involved a dispute between

114(1896) 54 Ohio St. 24, 42 N. E. 999.
115Flaucher v. Camden, (1893) 56 N. J. L. 244, 28 Atl. 82.
116(1906) 74 N. J. L. 455, 63 Atl. 270, 68 Atl. 90. The court said in the Flaucher Case that "The only case which I have found which gives countenance to the view that there can exist a de facto officer without a de jure office, is that of Burt v. Winona & St. Peter R. R." (1884) 31 Minn. 472, 18 N. W 283.
an inferior and a superior officer. The *Flaucher Case* involved a prosecution for selling liquor without a license. Perhaps it is more accurate to say that the attitude of the court in the *Flaucher Case* towards the problem of the application of the de facto doctrine to cases involving offices created by unconstitutional statutes was disapproved in the *Lang Case*, rather than to say that one case overruled the other.

There is some authority for the New Jersey view, in the early case of *People v. Albertson*, in New York. That case goes so far as to hold that a person is not guilty of perjury if he testifies falsely in a trial before a justice of the peace holding a de jure office, but chosen to fill it in accordance with an invalid law. In view of the overwhelming weight of authority to the effect that in other types of situations the de facto doctrine will be extended to give binding effect to the acts of officers whose title to offices de jure is defective, a different result from that in the *Albertson Case* might well be reached if the situation presented in that case should come before a court at the present time.

**III**

**Compensation**

The decisions on the effect of an unconstitutional statute on the right to compensation of an officer selected in accordance therewith are not harmonious.

In *Meagher v. County of Storey* plaintiff sued the county to recover compensation for services rendered as magistrate. He had held the office of recorder in a city and a statute had conferred on the holder of that office the power of also acting as a magistrate. The supreme court of Nevada held that no recovery could be had. The court said that he had no authority to serve as a magistrate. For that reason his services were gratuitous, "for the right to the salary depends upon the title to such office, and cannot be recovered by one who is simply an officer..."
de facto." The acts of the plaintiff were, nevertheless said to be valid as to third parties, although 119  
"The considerations which support and validate the acts of an officer de facto do not go so far as to require the payment of fees to such officer for services so performed."

The case of *Reddy v. Tinkum* 120 involved a mandamus to compel the payment of a warrant against a county, the warrant being drawn in favor of the plaintiff. The county as constituted by statute included some territory belonging to the state of Nevada, and located in that state. The county was, for this reason, defectively organized, said the court, in denying the petition for the writ. The warrant was not a claim against this county, and plaintiff was not a de facto officer of any governmental organization.

On the other hand, the New Jersey court held in *Erunn v Jersey City* 121 that a city attorney could recover compensation for services rendered by him in his official capacity, even if the statute authorizing the board of commissioners to appoint him to office was invalid. The New Jersey court took the view that the plaintiff had rendered services, therefore he should receive his compensation. This is quite a different view from that adopted by the Nevada court, which maintained that salary was due to an officer only because of his title to office.

A group of New York cases have also passed on this question. The earliest of them is *Morris v People*. 122 The suit in that case was brought by the prosecutor for the state on the relation of a judge to recover a statutory penalty for refusal to audit a claim against the county for salary. The statute creating the court was assailed as unconstitutional, and it was contended that the judge therefore was not entitled to compensation. That being so, counsel argued, it followed that the defendants had properly refused to audit the claim. The legislature had by statute made the salary of these judges charges against the county. The court held, Senator Lott speaking for the majority, that the penalty was recoverable, that even if the statute was unconstitutional the judge was an officer de facto whose title could not be collaterally impeached in a proceeding to which he was not a party. The services were rendered by the judge and the legislature had

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120 (1882) 60 Cal. 458.
121 (1897) 60 N. J. L. 141, 37 Atl. 732.
122 (1846) 3 Demo (N.Y.) 381.
the power to make this a county charge, and that being the case, the defendants had no alternative but to audit the claim or pay the penalty.

*People ex rel. Kingsland v. Bradley* is the second of the New York cases. There a mandamus was granted to compel the treasurer of a county to pay a salary claim although the statute authorizing the appointment of the person to whom the salary was due was invalid. This case is perhaps not as strong an authority as the *Morris Case*, in support of the doctrine that such claims can be enforced, because the court treated the case as one involving legislative ratification through subsequent appropriations to pay the claims. This was also an element in the *Morris Case*, but not as clearly so as in the *Bradley Case*. The case is perhaps an authority to the effect that the legislature may appropriate money to pay claims of officers whose title to office was defective. The *Bradley Case* differs from the *Morris Case* also in this, that the statute in the latter case which was defective was one creating the office, while in the former case the statute involved was one providing for the filling of the office.

*Demarest v. The Mayor* is the third of the New York cases, and holds that a city may defeat an action for salary by a de jure officer by showing that the money had been paid to a person holding a certificate of election, though the election had been held under an invalid statute. The case was distinguished by the court from that of *Norton v. Shelby County* on the ground that there existed in the *Demarest Case* a de jure office, while in the *Norton Case* this was not true.

Where the statute creating the office was invalid the Illinois court refused to permit the claimant to the office to recover money deposited with the city, alleged to belong to him, the basis of the claim being that the city had no right to retain the money, it having been obtained by means of a non-existent office. This is a proper holding, because conceding that the city was not en-

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123(1872) 6 Barb. (N.Y.) 228.
124(1895) 147 N. Y. 203, 41 N. E. 405. The court in this case treated the office as validly existing saying at p. 209, in answer to a contrary contention: "Unless the office did not exist by law, how could the plaintiff and his associates base their present claim to have been elected to it? This very demand and suit are an ample concession that aldermanic offices existed to be filled."
125(1885) 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.
titled to it, by the reasoning supporting that conclusion the claimant would also be denied.

A series of Minnesota cases illustrate into what tangled situations courts are sometimes led as a result of conflicting claims to the salary of an office.

From 1912 to 1915 one Windom was the municipal judge in the city of Duluth, Minnesota. On April 6, 1915, an election was held at which one Smallwood was elected to the office of municipal judge. Windom retained the office, however until May 3, because of a contest of Smallwood’s election. Smallwood took possession of the office on May 3 and performed the duties of municipal judge until July 30. On this latter date the supreme court decided that Smallwood was not entitled to the office because of the unconstitutionality of the preferential voting statute in accordance with which he had been elected.127

Thereupon Windom brought an action to obtain a writ of mandamus to compel the canvassing board to issue a certificate of election to him. In this action he was successful.128 He assumed the duties of the office on July 31, and performed the judicial functions attached thereto until September 13. On September 13 the governor of Minnesota appointed Smallwood to the office of municipal judge of Duluth. This appointment was made on the theory that the office was vacant, because of the alleged unconstitutionality of a statute entitling Windom to act as a hold-over judge. On December 17 the supreme court of the state decided that Smallwood was entitled to the office by virtue of the executive appointment, the hold-over statute being unconstitutional, and a judgment of ouster was rendered against Windom in an action of quo warranto in which Smallwood was the relator.129

The city had paid Smallwood the salary attaching to the office during a part of the time that Windom had performed the duties of the office. To recover this money either from the city of Duluth or Smallwood, Windom brought an action against the city, joining Smallwood, for such sums as had been paid to Smallwood. Windom claimed that he was the de jure judge during the period up to September 13, when the executive appointment of Smallwood was made.

128 State ex rel. Windom v. Prince, (1915) 131 Minn. 399, 155 N. W. 628.
129 State ex rel. Smallwood v. Windom, (1915) 131 Minn. 401, 155 N. W. 629.
The Minnesota supreme court decided that Windom was entitled to compensation for the period he served as judge despite the fact that he was a hold-over judge under an unconstitutional statute. Smallwood, on the other hand, was said to be entitled to compensation for the period during which he had performed the duties of the office. He too, then, received his compensation despite the fact that he performed his functions while in office by virtue of an invalid statute.

The court declined to decide whether de facto status should be accorded both of the incumbents, each for the period during which he served. The city was willing to pay whoever was entitled to the money, and the court said that all that needed to be decided was how much of the money should be paid to each of the contestants. The opinion in the case intimates that Smallwood would be required to pay over to Windom the moneys received during the period while Windom was performing the functions of the office.

However, the court did stress, in the quo warranto case, the de facto status of both of the judges during the period that each had possession of the office. At all times, said the court, there existed a de jure office, because in none of the litigation was the existence of the office of municipal judge challenged. The case involved not the existence of the office, but the validity of the methods whereby it had been filled. It is submitted that the Minnesota court decided the last of these cases correctly, and that is the only one of interest at this point, in giving to each of the incumbents his salary for the period served.

It appears then that the courts are not only divided on the question whether salary shall be recovered where the statute creating the office is invalid, but also where the statute filling the office is invalid, the office being de jure. The courts will probably be more hesitant to allow recovery where the existence of the office is questioned, than in cases involving only the validity of the title.

130 Windom v. Duluth, (1917) 137 Minn. 154, 162 N. W 1075.
131 State ex rel. Smallwood v. Windom, (1915) 131 Minn. 401, 155 N. W 629. "To avoid useless controversy or litigation it is proper to say that the official acts of the relator and the respondent in their various incumbencies of the offices are valid. All the time there has been a de jure office of municipal judge. All the time there has been a de facto judge filling the office. The acts of a de facto judge, actually occupying the office and transacting business, are valid. In the actual incumbencies since the April, 1914, election, the official acts of the incumbent, whether Judge Windom or Judge Smallwood occupying the office and exercising its functions, are valid." 131 Minn. at 420-21. See text to note 65, supra.
to an admittedly valid office. But there may be some tendency, on the part of those courts who regard service rendered as the basis of the recovery, to permit recovery even if the defective statute went to the creation of the office itself. Certainly the legislature can by subsequent legislation provide for the payment of salary claims, and such legislation will not be objectionable as appropriating public moneys to private uses. Courts adhering strictly to the void ab initio theory may be expected for some time still to refuse to permit recovery in the absence of such legislation. The inequity of this should cause them gradually to adopt a less severe rule.\(^2\)

A few states have adopted statutes regulating the conditions under which payment of salary may be made to one of the contestants for an office.\(^3\) The matter of compen-

\(^1\) In People v. Toal, (1890) 85 Cal. 333, 24 Pac. 603, the court said at p. 338 in holding the court to have been created by an invalid statute: "And the emoluments of the office to which they were not entitled will probably compensate the judges for all liabilities incurred by them by reason of having acted without authority of law." Query: Could the state recover the money paid to the officer as salary? In Nagel v. Bosworth, (1912) 148 Ky. 807, 147 S. W 940, the court said that "a de facto officer is not entitled to the emoluments of the office, and so Judge Hodge is not entitled to any salary as circuit judge." Cf. Hubbard v Martin, (1835) 8 Yerg. (Tenn.) 498.

\(^2\) Cal. Pol. Code (Deering 1923) sec. 936. "When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined. provided, however, that this section shall not be construed to apply to any party to a contest or proceeding now pending or hereafter instituted, who holds the certificate of election or commission of office and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest or proceeding was pending."

\(^3\) Mo. Rev Stat. 1919, sec. 13, 329. "Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, shall be contested or disputed by two or more persons claiming the right thereto, or by information in the nature of a quo warranto then no warrant shall be drawn by the auditor, or paid by the treasurer, for the salary by law attached to said office, until the right to the same shall be legally determined between the persons or parties claiming such right: Provided, However, and it is hereby further enacted, that in all cases when the persons to whom the commission for such office shall have issued shall deliver to the party contesting his right to such office a good and sufficient bond, in double the amount of the annual salary of such office, conditioned that if, upon final determination of the rights of the contestants, it shall be decided that the obligor is not, and that the obligee therem is, entitled to the office, in controversy he shall pay over to the
sation should be regulated by statutes in all of the states, in order that the government may know to whom to make payments, and in order that equity may be done between the claimants.

IV

SUMMARY AND CONCLUSIONS

A brief statement of the generalizations which might be made from the cases thus far considered may aid an attempt to examine the points of contact in doctrines as to the effect of an unconstitutional statute with the theories underlying de facto status in the law of officers.

(1) Persons acting in an official capacity for the state may assail the legal basis for an office. In granting judgment of ouster in such cases the courts may use their discretion in delaying the execution of the judgment in order that the functions of government may not be seriously interrupted.

(2) Official status may be questioned in disputes between claimants for an office as well as in disputes between two independent officers who may be contesting the power of each other to perform specific functions. An inferior officer is not ordinarily permitted to assail the official status of one of his superiors.

(3) Private individuals may not, in the absence of statute, invoke quo warranto to question official status. In other cases they are similarly restricted, if the defect in official status is one going to the mode of filling an office instead of a defect in the constitution of the office itself. However, although there is some respectable authority to the contrary, the decided weight of authority is that a private individual may question the existence of an office, in disputes with officers purporting to hold such offices, if the statute establishing the office is unconstitutional. This is true in tax, eminent domain, bond, tort, and criminal and civil cases generally. It applies to judicial as well as clerical officers. There is perhaps a tendency in the more recent cases to apply

obligee the amount of salary therefor drawn from the date of the receipt of each installment received by him, then, and in such case, notwithstanding the provisions of this law, a warrant may be drawn by the auditor, and paid by the treasurer to the person holding the commission aforesaid, for the amount of his salary, as the same shall become due. It shall be the duty of any person contesting the election of any such office to give notice of such contest to the state auditor, and no such contest shall be heard or determined until he shall satisfy the tribunal trying such contest that such notice has been given."
the de facto doctrine in order to prevent private individuals from questioning official status even though the existence of the office is involved, but the weight of authority is as yet decidedly to the contrary.

In presenting this analysis of the present state of the rules of law as to the effect of an unconstitutional statute on the status of a public officer, it was thought best to omit detailed considerations of theory, except in so far as they were necessarily involved in the approval or criticism of particular cases or classes of cases. Some care was taken also to avoid dwelling on landmark dicta, some of which have been of controlling importance in this branch of the law.

Is there a sound basis for the distinction which the courts draw between cases involving the existence of an office and those involving the method of filling it? A consideration of the reasons which have been advanced in support of the rule denying collateral attack may be helpful in answering this question. Four reasons have been suggested in the cases for refusing to permit a private individual to question official status when the office is de jure and only the method of filling it is defective.

1. The title of a person to office should not be tried in an action to which he is not a party. There is some merit in this reason, although it is perhaps not as weighty as would seem to be the case at first glance. The officer is not personally given an opportunity to enter a defence in many cases, but it often happens that the state or some other governmental division is an interested party. The state's attorney in such a case would in effect then be pleading the case of the officer. So too, for example, in the case of a civil proceeding, in which the title of a judge is challenged. The party who is to lose by the successful attack on the status of the judge may be expected to defend the status of the officer with varying degrees of diligence. It is true, however, that in some cases there may not be adequate presentation of the case of the officer whose status is assailed. On the other hand, it must be remembered that ouster does not follow an inquiry into status in any but quo warranto proceedings, so that unless the state proceeds to oust him the officer may continue the performance of his functions. Against this, in turn, must be balanced the possibility that private individuals would continue to challenge the authority of the officer to such an extent that for all practical purposes his work will be seriously hampered or even completely stopped by repeated inquiries into his official status.
2. Some courts say that the status of an officer cannot be questioned in certain types of situations because he is a de facto officer. At other times the reason is phrased in the rule that collateral attack will not be permitted on a de facto officer. This assumes the point to be decided, and is a statement of a rule, but not of a reason.

3. The reason most usually urged in support of treating an officer as de jure to all others than the state, is that confusion in the work of government will ensue from a policy of permitting attack on official status. There is much soundness in this position, despite the facts that it may be mitigated to some extent by curative and validating legislation, and, as previously pointed out, actual ouster takes place only when attack is by the state. Cases should be settled on their merits, so far as possible, and the work of government should be disrupted as little as possible by private litigants.

4. In cases involving the status of judges the peculiar situation is presented of having persons pass upon their own status. It is true that a higher court may with propriety pass upon the status of a lower one. But what of the case, as in Oregon, where the status of some of the members of the supreme court of the state was involved? The court in that case took jurisdiction and passed upon the question, the two justices whose status was questioned not participating in the decision, and held that their status was unassailable.

The question which naturally suggests itself at this point is whether these reasons are not equally applicable to a case involving the existence of an office? It would seem that the same reasons of public policy apply to the one as to the other. There is, perhaps, this observation to be made concerning the two problems: it may be a more serious matter to have an office created by an unconstitutional statute than to have a particular officer selected in accordance with an invalid law, because a statute creating an office defines and authorizes the performance of certain governmental functions. In the case of the defective statute authorizing the selection of the officer the problem is one as to the method of choice, the functions are in any event to be performed by somebody. It is quite possible that this has been at the basis of the distinction drawn by the courts between these two classes of cases. It is not without considerable weight.

But, when the problem is viewed from the standpoint of the
private individual dealing with the officer, or from that of the officer whose compensation may be denied because of the non-existence of the office, or from that of the public at large whose primary interest is, in such a case, to have the work of government carried on in an orderly fashion, it seems clear that there is also some soundness in the contention that the state alone should be permitted to challenge usurpation by officers of powers and functions of government.

The problem in all of these cases is really one concerning the effect of an unconstitutional statute. The de facto doctrine is involved only as a medium whereby to give to an unconstitutional statute sufficient effect to accomplish the ends of justice and government. All courts seem to agree that the doctrine should be invoked to give effect to a statute providing for the selection of officers, even though the statute be invalid. When, however, the courts have before them a statute which purports to create an office, they refuse to give it any effect if the enactment is unconstitutional. For this reason they do not apply the de facto doctrine in such a case. Sometimes this refusal to apply it is due to the view that an unconstitutional statute is not law, and is to be given no effect whatever in the disposition of the case. At other times it is due to the belief that a valid statute is an essential prerequisite to the application of the de facto doctrine. The fact that some courts have regarded the de facto doctrine as one method whereby to accord some effect to an unconstitutional statute, and that other courts have looked upon the doctrine as an independent rule or principle, to be applied only in certain situations in which specified factors are present, has caused a different rule to be formulated with respect to the situation in which the invalid statute is one purporting to create an office, as compared with that in which the defective law is one purporting to fill it.

In the greater number of cases reviewed in this study justice would have been served by giving some effect to the invalid statutes involved. That the decisions in many of them were rendered on the assumption that an invalid statute authorizing the performance of governmental functions could have no effect was usually due to a failure to distinguish cause from effect. It may be that in some classes of cases no effect should be given to an

\[134^{\text{For attempts to generalize on the cases in terms of the de facto doctrine see Tooke, De Facto Municipal Corporations Under Unconstitutional Statutes, 37 Yale L. J. 935. Wallach, De Facto Officers, 22 Pol. Sci. Quart. 451, 469.}}\]
unconstitutional statute. If this be true it should be because justice is not served by giving the law any effect, and not because of some assumed rule of constitutional law. It cannot be too strongly emphasized that there is no general rule of constitutional law which requires that an unconstitutional statute be given no effect.\textsuperscript{135}

When this is realized and when the courts again have occasion to reconsider the question of attack on official status, the views expressed in \textit{State v. Gardner,}\textsuperscript{136} \textit{Burt v. Winona & St. Peter R.R.,}\textsuperscript{137} and \textit{State v. Poulin}\textsuperscript{138} will doubtless gain an increasing number of adherents. The opinion in the latter case contains the following statement which has already become the classic brief exposition of the view that official status cannot be assailed even though the office involved has been created by an unconstitutional statute.\textsuperscript{139}

"The de facto doctrine is exotic, and was engrafted upon the law, as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. It would be unreasonable to require the public to inquire into the title of an officer, or compel him to show title, and these have become settled principles in law. To protect those who deal with officers apparently holding office under color of law, in such manner as to warrant the public in assuming that they were officers and in dealing with them as such, the law validates their acts as to the public and third persons, on the ground that as to them although not officers de jure they are officers in fact whose acts public policy requires to be construed as valid. This was not because of any character or quality conferred upon the officer, or attached to him by reason of any de-

\textsuperscript{135}For a brief survey of typical situations in which an unconstitutional statute is given some effect, see Field, The Effect of an Unconstitutional Statute, 1 Ind. L. J. 1, 60 Am. L. Rev. 232, 100 Cent. L. J. 145. For a summary of the various views as to the effect of an unconstitutional statute see the opening paragraphs of Field, The Status of a Private Corporation Organized Under an Unconstitutional Statute. 17 Cal. L. Rev., (May, 1929).

\textsuperscript{136}(1896) 54 Oh. St. 24, 42 N. E. 999.

\textsuperscript{137}(1884) 31 Minn. 472, 18 N. W. 283.

\textsuperscript{138}(1909) 105 Me. 224, 74 Atl. 119.

\textsuperscript{139}(1909) 105 Me. 224, 229, 74 Atl. 119. A note writer in 8 Mich. L. Rev. 229, 236, says: "It is the writer's opinion that the beneficial result accomplished by these recent cases will not only justify the reasons supporting their decision, but also win followers." The note disapproves the doctrine of the Norton case. The writer argues for a similar rule with respect to officers as that which obtains in the municipal corporations cases. Cf. Jewell v. Gilbert, (1885) 64 N. H. 13, 5 Atl. 80.
fective election or appointment, but as a name or character given to his acts by the law for the purpose of making them valid.”

As to the rule with respect to the effect of an unconstitutional statute, in its bearing on this problem, the court said:140

“Declaring a statute unconstitutional does not necessarily render it void ab initio. It is an axiom of practical wisdom, coeval with the development of the common law, founded upon necessity, that de facto acts of binding force may be performed under presumption of law. There is another rule so uniform in its application that it, too, has become a legal maxim that ‘all acts of the legislature are presumed to be constitutional.’”

After all, legislative acts are facts, and should be factors in the decision of a case, even though as law they are not entitled to full force and effect. People act in reliance on such laws, and until their unconstitutionality has been judicially declared, those so relying upon them should be protected.141

140State v. Poulin, (1909) 105 Me. 224, 228, 74 Atl. 119.
141The foregoing discussion of the de facto doctrine has not attempted to go beyond the judicial exposition of the doctrine. What effect such a statute as the following, taken from N. Y. Cons. Laws (Cahill 1923) ch. 41, sec. 1820, following a section making the performance of official duties prior to the taking of oath, or the filing of required security, a criminal offense, would have, is problematical: “The last section must not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, where persons other than himself are interested in maintaining the validity of such acts.”