

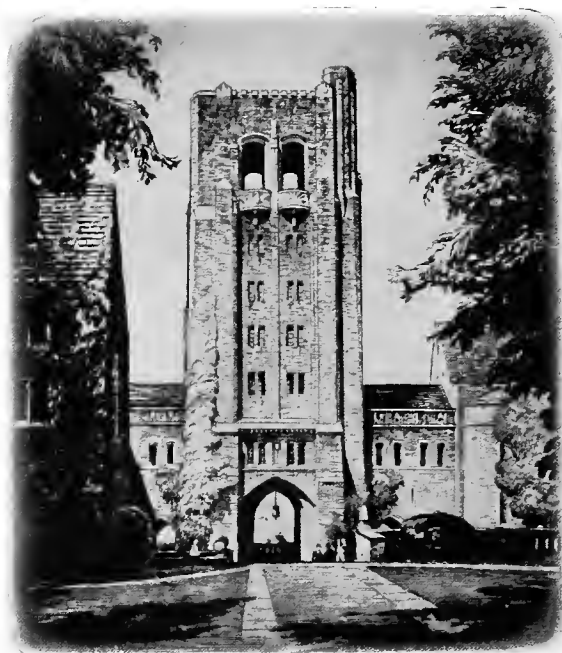
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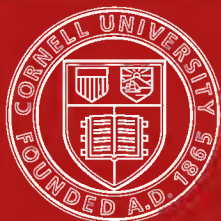
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A treatise on the de facto doctrine in



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A TREATISE ON THE DE FACTO DOCTRINE

IN ITS RELATION TO PUBLIC OFFICERS AND PUBLIC CORPORATIONS BASED UPON THE ENGLISH, AMERICAN, AND CANADIAN CASES INCLUDING COMMENTS UPON EXTRAORDINARY LEGAL REMEDIES IN REFERENCE TO THE TRIAL OF TITLE TO OFFICE AND CORPORATE EXISTENCE

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ALBERT CONSTANTINEAU.



PREFACE.

This work is designed to give a systematic and comprehensive exposition of the *de facto* doctrine in its relation to public officers and public corporations. The aim of the author has not been merely to set forth general principles, but to illustrate them adequately by cases selected from the English, American, and Canadian reports. Text-writers are often unmindful of the fact that access to an extensive library is the privilege of the few, and that very many practitioners have to depend, in a large measure, upon the law as expounded in the pages of their treatises. Especially is this so in the United States, where, owing to the number and cost of the law reports, a practitioner cannot be expected to have them all on the shelves of his private library. Bearing this in mind, an endeavor has been made to state the law with such detail and abundance of illustration, that it can, to a satisfactory extent at least, be gathered from the work itself, without the necessity of resorting to the reported decisions.

The text will frequently be found interwoven with *verbatim* quotations from the reports. This method, it is submitted, offers a twofold advantage. In the first place, the possibility of misconstruing the language of a court or a judge, by paraphrasing it, is avoided; in the second, it imparts to the work a larger measure of authority.

Furthermore, as this is a pioneer treatise on a subject which has received so far but incidental attention in legal publica-

tions, there is good reason why it should expound the subject in its entirety and fulness.

The author also would remind the reader that this book was not written for any particular jurisdiction, but for all communities whose systems of jurisprudence are based upon the English Common Law. What may be a settled question in one community, may be a mooted one in another. Something of merely academic or historical interest in one country, may be of practical importance in another. A truism to an American lawyer, whose intimate acquaintance with the *de facto* doctrine is due to its greater elaboration by the courts of his country, may be but little understood by members of his profession in other jurisdictions. While, as just stated, the subject has received great attention in the American Courts, strange to say, there is no English modern work which more than hints at the existence of such a principle. Blackstone speaks of *de facto* kings, Roe of *de facto* returning officers, Viner and Bacon state that the acts of *de facto* officers are valid; but this appears to be the extent of information that may be acquired from a perusal of the older books. On the other hand, in the digests of the present day the earlier cases on the *de facto* doctrine will be found to be omitted.

In these facts we undoubtedly have the true reason why, in the British Colonies, the doctrine has been overlooked in many cases where its application would have been an easy means of settling difficult points of law. The author has often been present in court when a whole jury-panel would be quashed by a judge of inferior jurisdiction, because of some slight irregularities in the selection of jurors. He also knows of many instances of the setting aside of official acts of municipal officers who had been openly acting for a considerable period, on the mere ground that their appointment did not conform strictly to the formalities required by statute.

In fact, it is just these experiences that led to the preparation of this work.

But to refer again to the present status of the English law in relation to *de facto* doctrine, it would be a mistake to infer from what has been said, that because the text-writers do not mention it, there is any deliberate intention to ignore it. On the contrary, the legislatures occasionally enact laws compelling its recognition, under certain conditions. But such enactments, however, impart no knowledge of the principles which regulate its application. What is a *de facto* officer—under what circumstances is one to be regarded as such—what is the distinction between a usurper and a *de facto* officer—what are the rights, duties, and liabilities of a *de facto* officer—what are the liabilities of his official sureties—what are his rights and liabilities in respect to the salary of the office—when, where, and under what circumstances, his acts are valid, and when not—when his title may be collaterally assailed and when not—what are the proper proceedings to determine his title—all these and many other subjects are left undetermined, and to be surmised by the practitioner, whose only means of knowledge, so far as the English law is concerned, is a reference to decided cases, many of which, as already explained, are not found in the digests, while others, though digested, are inserted without any systematic arrangement. Similar remarks might be made with reference to *de facto* corporations.

Apart from this, it may be added that, though the *de facto* doctrine has been recognized in England for nearly five centuries, as attested by the reports, yet owing to the peculiar character of its political institutions, the field has been little explored. And so one might easily go astray or be entirely lost were he to confine himself to such untrodden territory to discover the detailed principles of a branch of law only adverted to at rare intervals. The English or Canadian lawyer,

therefore, must seek another field where the track is better beaten and more light can be obtained. This field is found in the United States, where an unbroken current of authority pours its steady stream for over a century. Here can be traced the evolution of the principle from its first undeveloped stages to the settled doctrine of the present day. The courts have gone on correcting early misconceptions, making certain what was uncertain before, expanding old principles to meet the requirements of new combinations of facts and circumstances. The Canadian judges have so well realized that fact, that in many cases their decisions are founded solely on American authorities, which they seem to regard, and rightly too, as embodying the best exposition of the *de facto* doctrine.

The author, therefore, would undoubtedly have been justified in quoting the American cases, even had his intention been to write only an English or Canadian work. But, it will be found that the English and Canadian decisions have been given, as much as possible, a certain prominence throughout the book. This is not attributable to any partiality on the part of the author, but simply to the fact that any other method would have resulted in practically hiding the cases in question in the great mass of American authorities.

It may further be stated that all the authorities bearing directly on the *de facto* doctrine, which the author has been able to discover by persistent research, have been examined, classified, and cited. The highest court in every American State being practically supreme in the interpretation of its own laws, every practitioner is naturally interested in the cases which have been decided in his own jurisdiction. And here, at the risk of being pedagogic, the author would point out how much more difficult it is to write an American, than an English, treatise. In the British Empire, a decision of the

House of Lords or of the Judicial Committee of the Privy Council, settles the law on the point in litigation throughout the whole empire. On the other hand, a decision of the Supreme Court of the United States is, in many instances, only a respectable authority for the State courts, and may be followed or disregarded as the court is disposed. Therefore, to find the law throughout the American Union one has to examine the reports of the federal courts, then those of the numerous States, Districts, and territories: a task requiring much patience, labor, and perseverance, notwithstanding all the assistance to be had from the digests and the encyclopedias.

In the last part of the work, are treated in concise form certain subjects relating to questions of title to office. Chief among the proceedings discussed, are habeas corpus, certiorari, mandamus, injunction, and quo warranto. The object of the author has been to clearly indicate what remedies are and what remedies are not available to question the authority of a *de facto* officer. Special care has been devoted to the chapter on quo warranto, in order to render it of practical usefulness in daily practice. This last part, it is hoped, will be specially appreciated by the Canadian profession, since works dealing with extraordinary legal remedies, and containing the English cases, let alone the Canadian ones, are seldom found in the hands of the average lawyer.

The index has been made as exhaustive as possible.

The date of every case cited is given, and all the references to the various reports are generally stated.

With these explanations, the work is offered to the generous and indulgent acceptance of the profession. Whether the author has succeeded or not in accomplishing the purpose he intended is not for him to decide, but at least he has the satisfaction of knowing that he has spared no time, pains, or trouble in his attempt to perform worthily the task under-

taken. That there are many imperfections in the book goes without saying, for *humanum est errare*. With the infirmities inherent in our nature, to seek perfection, not to attain it, is the common lot of mankind.

THE AUTHOR.

Ottawa, May, 1910.

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TABLE OF ABBREVIATIONS.

(A few abbreviations that may require explanation.)

| | |
|---------------------|---|
| A. | Atlantic Reporter |
| B. C. | British Columbia Reports |
| Fed. | Federal Reporter |
| Gr. (U. C. or Ont.) | Grant's Chancery Reports, Upper Canada or Ontario |
| L.R.A. | Lawyers' Reports, Annotated |
| L. ed. | Lawyers' Edition Supreme Court Reports |
| N. B. | New Brunswick Reports |
| N. E. | Northeastern Reporter |
| N. W. | Northwestern Reporter |
| N. Y. S. | New York Supplement |
| O. L. R. | Ontario Law Reports |
| O. R. | Ontario Reports |
| P. | Pacific Reporter |
| Que. R. (K. B.) | Quebec King's Bench Reports |
| Que. R. (S. C.) | Quebec Superior Court Reports |
| S. or South | Southern Reporter |
| S. E. | Southeastern Reporter |
| S. W. | Southwestern Reporter |
| Ter. Law R. | Territories Law Reports (Canada) |
| U. C. C. P. | Upper Canada Common Pleas Reports |
| U. C. K. B. | Upper Canada King's Bench Reports |
| U. C. Q. B. | Upper Canada Queen's Bench Reports |

BOOK I.

OF THE DE FACTO DOCTRINE AND OF PUBLIC
OFFICES AND OFFICERS IN GENERAL.

BOOK I.

OF THE DE FACTO DOCTRINE AND OF PUBLIC OFFICES AND OFFICERS IN GENERAL.

CHAPTER 1.

THE DE FACTO DOCTRINE—INTRODUCTORY REMARKS.

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| <p>§ 1. Definition of the de facto doctrine.</p> <p>2. Same subject.</p> <p>3. Necessity of the de facto doctrine.</p> <p>4. Universality of the same.</p> <p>5. Historical sketch of the de facto doctrine in England.</p> <p>6. Same subject.</p> <p>7. Same subject.</p> <p>8. Historical sketch of the de facto doctrine in the United States.</p> | <p>§ 9. Same subject.</p> <p>10. Historical sketch of the de facto doctrine in Canada.</p> <p>11. Same subject.</p> <p>12. De facto doctrine different from legal presumption as to official character.</p> <p>13. To what public officers de facto doctrine applicable.</p> |
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§ 1. Definition of the de facto doctrine.—The de facto doctrine is a rule or principle of law which, in the first place, justifies the recognition of the authority of governments established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government; secondly, which recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies; and, thirdly, which imparts validity to the official acts of persons who, under color of right or authority, hold of-

fice under the aforementioned governments or bodies, or exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage. The doctrine is grounded upon considerations of public policy, justice, and necessity, and is designed to protect and shield from injury the community at large or private individuals, who, innocently or through coercion, submit to, acknowledge, or invoke the authority assumed by the governments, corporate bodies, or officers, above mentioned.

While this definition may be susceptible of improvement, yet, we think it accurately and sufficiently embodies the leading features and scope of the de facto doctrine. Singularly enough, notwithstanding the abundance of literature written upon this subject by judges and text-writers, no general definition embracing the whole ground covered by the doctrine has, so far as we are aware, ever been attempted.

§ 2. **Same subject.**—The first part of the above definition, as is obvious, relates to de facto governments and de facto corporations; the second, to the functionaries of such governments or corporations, and to ordinary illegal officers. The two classes of irregular officers are included together, because the same color of title or authority is requisite to constitute an officer de facto under a de facto government or a de facto corporation, as is required under ordinary circumstances. It is true that the functionaries of the first class can never become more than de facto officers, however regular their appointment and qualification may be, because the offices they hold are tainted with the same illegality as the power which gave them birth, or under which they are held. But, nevertheless, were a person to take charge of such an office,

without at least color of authority, he would be regarded as a mere usurper, and his acts could not be upheld on any consideration.

It must also be remembered that *de facto* corporations are of two kinds: those organized for the benefit of the public and generally denominated "municipal" or "quasi-municipal," and those incorporated for private ends or purposes. With private *de facto* corporations and their officers, however, it is not our intention to deal in this work, though the principles applicable to these are generally identical with the rules which obtain in regard to *de facto* public corporations and their officials. Our purpose is to confine ourselves to a consideration and discussion of the *de facto* doctrine in its relation to public officers, and incidentally to treat of *de facto* public corporations, *de facto* governments, and other collateral subjects.

§ 3. Necessity of the *de facto* doctrine.— The necessity of the *de facto* doctrine becomes manifest from whatever aspect it is viewed. As regards the public and third persons, it would be unreasonable to expect them to inquire beforehand into the title of the officers with whom they purpose to deal, to ascertain whether or not reliance can be placed on their assumed authority. This would be making the validity of their official acts dependent on their official titles, which would be intolerable. On the other hand, were every officer bound to uphold or defend his title against every one who might choose to deny or attack it in a collateral way, he would often be so much thwarted in the performance of his official duties that his efficiency as an officer might at times be greatly impaired. Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the or-

der and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

These are substantially the views expressed by all the authorities, both English and American. In *Scadding vs Lorient*,¹ in the House of Lords, the Lord Chancellor, dealing with the authority of vestrymen de facto to make a rate, said: "With regard to the competency of the vestrymen, who were vestrymen de facto, but not vestrymen de jure, to make the rate, your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are who are charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set anything right done by the officers, taking the law into their own hands."

The language of Mr. Justice Field, delivering the opinion of the Supreme Court of the United States in *Norton vs Shelby County*,² is to the same effect. "The doctrine," says the

¹(1851), 3 H. L. Cas. 418. 5
Eng. L. & Eq. 16.

²(1886), 118 U. S. 425, 6 Sup.
Ct. 1121, 30 L. ed. 178.

learned judge, "which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question."³

§ 4. Universality of the de facto doctrine.—The principles involved in the de facto doctrine are not confined in their application to countries governed by the English law, but must of necessity be recognized in some form or other, and either expressly or tacitly, by all the civilized nations of the world. History, with its endless tales of strife, conflict and revolution in all parts of the world and in all ages, abundantly establishes the truth of this assertion. What empire, kingdom or state can boast of never having had its throne or sovereignty usurped by the conqueror or the revolutionary? If all the acts performed by usurpers and those holding under them, while the affairs of the state are under their control, were to be subsequently declared null and void,

³See also *State vs Carroll* (1876), 119 Mass. 465, 20 Am. (1871); 38 Conn. 449, 9 Am. Rep. 335; *United States vs Alexander* (1891), 46 Fed. R. 728. 409; *Harbaugh vs Winsor* (1866), 38 Mo. 327; *Petersilea vs Stone*

there would be no end of confusion, and the restoration of the lawful power would be worse than the usurpation.

These views are tersely and eloquently laid down in an American case,⁴ where it is said: "It is a fundamental maxim, not of the law, but of civilized society, that the acts of officers *de facto* are valid. Without it, there would be no security for life, or liberty, or property. It took form and shape in a statute in the time of Edward, as to the rights of a king *de facto*, but its foundation was beyond that. Without the rights of *de facto* governments, who would recognize the Norman titles against the Saxon barons? Who the varying rights of York and Lancaster, or Tudor and Plantagenet, of king and commonwealth, and kings again, of Stuart and Orange, or Stuart and Brunswick? Where would you find your resting place in the history of civilization? In the Roman empire? In its Gothic conquerors? In the house of Charlemagne? In that of Hughes Capet? In the Bourbon or the Bonaparte? The kingdom, the republic, the empire, the kingdom, the republic, the empire again. In 1789, in 1793, in 1800, in 1815, in 1848, or in 1852? When, where, and how, would you base your rights *de jure*? Brandenburg rises on the ruins of other houses, as Hapsburg before it, and will fall again, as Hapsburg has done. The history of the world is the history of kingdoms and empires, and civilizations *de facto*, becoming *de jure*, because they are *de facto*." ⁵

§ 5. Historical sketch of the *de facto* doctrine in England.—The *de facto* doctrine originated in England centuries ago, and sprang into existence as soon as circumstances arose calling for its adoption and application. This is assert-

⁴Griffin's Case (1869), 11 Fed. Cas. (No. 5,815) p. 7.

(1866), 2 Cold. (Tenn.) '605, 91 Am. Dec. 270.

⁵See also Ward vs State

ed by an American judge, who remarks: "The common law in relation to de facto officers had its origin in England; it was there laid upon a foundation as broad as their necessities required."⁶ The first case on record is to be found in the Year Books as far back as 1431, under the name of *The Abbé de Fontaine*.⁷ The action was on a bond given by one who illegally held the office of abbot of the convent of Fontaine, for supplies furnished the convent. The office was elective, and though the unlawful holder had obtained only a minority of the votes, yet he had procured himself to be instituted and inducted by the ordinary, and had taken possession of the abbacy. Subsequently, however, the duly elected abbot succeeded in displacing him, and was in turn inducted into office. The action being brought against the latter on the bond of his predecessor, he pleaded the invalidity of the same, on the ground that it had been given by one who never was the lawful abbot of the convent. There is nothing in the report to show that the case was ever finally decided, but from the general trend of the discussion between the counsel and the court, and among the judges themselves, it seems evident that the bond was considered valid. The case is interesting from many points of view, but perhaps its most striking feature is that it shows that even then the principles of the de facto doctrine were not entirely new. This is evident from the language of Chief Justice Babington. In one part he says: "In every case, if a man be made abbot or parson erroneously, and then is removed for precontract, or any like matter, yet a deed made by him and the convent, or by the parson and the patron and the ordinary, is good; as if an abbacy or church be vacant, and

⁶Bradbury, J., in *State vs Gardner* (1896), 54 Ohio St. 24, 42 N. E. 999, 31 L.R.A. 660

⁷9 H. VI., fol. 32.

a man who had no right pretended to be patron, and preferred one A, by force whereof he is installed, and then he is ousted by legal process inasmuch as the patron had no right; yet a deed which was made before is good."

Not long after the trial of the above case, the *de facto* doctrine received a solemn recognition from an Act of Parliament, passed in 1461. This was after the house of York had re-asserted its title to the Crown of England, and succeeded in establishing it in the person of Edward the Fourth. At the latter's accession to the throne, a statute⁸ was enacted to indemnify those who had submitted to the kings of the house of Lancaster, and to provide for the peace of the kingdom, by confirming all honors conferred and all acts done by those who were now called usurpers, not tending to the disherison of the rightful heir. In that act Henry IV, Henry V, and Henry VI, are designated as "late kings of England in deed and not of right;" and in all the charters of King Edward, whenever he has occasion to speak of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ*."⁹ Thus arose in England the distinction between the kings *de jure* and the kings *de facto*; and the *de facto* doctrine was carried so far with respect to the English Crown that treasons committed under Henry VI, not in aid of the lawful claimant, were punished under Edward IV. Moreover, Bacon says that "it hath been settled, that all judicial acts done by Henry the Sixth, while he was king, and also all pardons of felony and charters of designation granted by him, were valid."¹⁰

§ 6. *Same subject.* — From that period the *de facto* doctrine rapidly spread in England, and became firmly estab-

⁸Edw. IV., c. 1.

¹⁰Bacon Abr. Prerogative (A).

⁹Black. Comm. 204.

lished. Following that of the *Abbé de Fontaine* came numerous other cases dealing with its various features, and expanding its principles to meet the requirements of diverse circumstances and different times. These cases will be duly considered in this work under appropriate headings, and a reference to them will make it evident that the *de facto* doctrine has been recognized in England by an unbroken current of authorities for nearly five hundred years. Quite a number are cited here, as later on there will be no favorable opportunity of adverting to them collectively. Among those quoted in this place there are some which may bear only indirectly on *de facto* doctrine, but in all of them its existence as a well settled rule of law is fully acknowledged.¹¹

¹¹*Knowles vs Luce* (1580), Moore, 109, 72 Eng. R. 473; *Lord Dacres Case* (1584), 1 Leon. 288, 74 Eng. R. 263; *Harris vs Jays* (1599), Cro. Eliz. 699, 78 Eng. R. 934; *Leak vs Howell* (1591), Cro. Eliz. 533, 78 Eng. R. 780; *Costard vs Winder* (1600), Cro. Eliz. 775, 78 Eng. R. 1005; *O'Brian vs Knivan* (1620), Cro. Jac. 552, 79 Eng. R. 473; *Leech's Case* (1682), 9 Cobbett's State Trials, pp. 351, 355; *Knight vs Corporation of Wells* (1695), Nelson's Lutw. 156, Lutw. 508; *Parker vs Kett* (1701), 12 Mod. 466, 88 Eng. R. 1454, s. c. more briefly reported in 1 Ray. (Ld.) 658, 91 Eng. R. 1338; *Kitton vs Fag* (1714), 10 Mod. 288, 88 Eng. R. 732; *R. vs Mayor of Shrewsbury* (1735), Cas. Temp. Hard. (Lee) 147, 95 Eng. R. 94; *R. vs Lisle* (1738), Andr. 163, 95 Eng. R. 345, s. c. briefly reported in 2 Str. 1090, 93 Eng. R. 1051; *Seymour vs Bennett* (1742), 2 Atk. 482; *R. vs Malden* (1767), 4

Burr. 2135; *Bodmin Case* (1791), 2 Fras. 236; *Turner vs Baynes* (1795), 2 H. Bl. 559, 3 R. R. 506; *Milward vs Thatcher* (1787), 2 Term. (D. & E.) 81, 1 R. R. 431; *R. vs Bedford Level Corporation* (1805), 6 East 356, 2 Smith K. B. 535; *Margate Pier Co. vs Hannam* (1819), 3 B. & Ald. 266, 22 R. R. 378; *R. vs Herefordshire, J. J.* (1819), 1 Chitty 700; *R. vs Slythe* (1827), 6 B. & C. 240, 30 R. R. 312; *De Grave vs Monmouth Corporation* (1830), 4 C. & P. 111; *R. vs Dolgelly Union Guardians* (1838), 8 A. & E. 561, 7 L. J. M. C. 99; *Penney vs Slade* (1839), 5 Bing. (N. C.) 319, 7 Scott 484, 8 L. J. C. P. 221; *R. vs St. Clement's* (1840), 12 A. & E. 177; *R. vs Mayor of Cambridge* (1840), 12 A. & E. 702, 10 L. J. Q. B. 25; *R. vs Cheshire, J. J.* (1840), 4 Jur. 484; *Scadding vs Lorant* (1851), 3 H. L. Cas. 418, 5 Eng. L. & Eq. 16, affirming 13 Q. B. 706; *Lancaster & Carlyle Ry. Co.*

Perhaps the most important of them is *Parker vs Kett*, decided in 1701, inasmuch as it contains a review of the prior cases, and enters into a thorough and instructive discussion of the principles underlying the doctrine. But it would be inopportune at this present stage to press further an inquiry into the English case law on this subject. The foregoing is amply sufficient to convince any one that for ages, as already intimated, the de facto doctrine has been an integral part of the common law of England. Viner refers to it in his *Abridgement* and declares that acts done by an officer de facto, and not de jure, are good; for the law favors one in a reputed authority.¹²

§ 7. **Same subject.**—Turning next to the English Parliament, we see, in 1626, the doctrine being applied to a member of the House of Commons. Sir Edward Coke, being sheriff of Buckingham, was, in the second year of Charles I, returned for Norfolk, and sat till the dissolution of that Parliament. But his right to sit was called in question, and both in the journals and in the debates, and in the writings of his contemporaries, he is talked of as only a member de facto.¹³ However, he was accorded the same privileges as a member de jure. The entry of the order for allowing him privileges of Parliament is in the following words: “Upon question, Sir Edward Coke, standing de facto returned a member of this House, to have privilege against a suit in Chancery commenced against him by the Lady Cleare.”¹⁴

vs Heaton (1858), 8 El. & Bl. 952, 27 L. J. Q. B. 195; Waterloo Bridge Co. vs Cull (1858), 1 El. & Bl. 213, 28 L. J. Q. B. 70; Mahony vs East Holyford Mining Co. (1875), L. R. 7 H. L. 869, Ir. R. 9 C. L. 306; In re County Life Assurance Co. (1870), L. R.

5 Chy. App. 288, 39 L. J. Ch. 471. (Last two cases concern officers de facto of private corporations.)

¹²Vin. Abr. Officer and Offices (G. 4).

¹³1 Doug. El. Cas. 425.

¹⁴1 Doug. El. Cas. 444. See also Digby vs Lord Stirling (1831), 8

About the same time, also, the House of Commons applied the *de facto* principles to its own elections, and laid down the rule that where an election of a member of Parliament has been fairly made, the same will be supported, even if it appears that it was held or conducted by officers having only a *de facto* title to their office.¹⁵

Finally, in 1837, the *de facto* doctrine was extended by statute,¹⁶ to cases where theretofore its application had been denied. Until then the courts, unlike Parliament, had refused to uphold municipal elections presided over by merely *de facto* officers, unless they had been in office for at least six years previous to the election.¹⁷ This anomaly was removed by the statute.¹⁸

§ 8. Historical sketch of the *de facto* doctrine in the United States.—The American jurisprudence being founded on the English law, it is obvious that the *de facto* doctrine has always been a part of the common law of America. In a work published in 1836, under the name of “American Common Law Cases,” it is declared to be a “well settled rule and principle of law, that the acts of officers *de facto*, are valid, when they concern the public, or the rights of third persons, who have an interest in the act done, and the rule has been adopted to prevent a failure of justice.”¹⁹ The same

Bing. 55. The above ruling of the House is not in conflict with the principle hereinafter referred to, that an officer *de facto* enjoys no personal privileges by virtue of his office. Privileges of Parliament are granted to members for the benefit of the public.

¹⁵Winchelsea Case (1624), 1 Jour. 798; Portsmouth Case (1710), 16 Jour. 480; Bodmin Case (1791), 2 Fras. 236; Taunton

Case (1805), 1 Peck. 406, 58 Jour. 382; Wakefield Case (1842), Bar. & Aus. El. Cas. 270.

¹⁶1 Vic. c. 78, s. 1.

¹⁷33 Geo. III, c. 58, s. 3.

¹⁸And now, see 45 & 46 Vic. c. 50, ss. 42 & 102, declaring acts of *de facto* corporate officers valid.

¹⁹Vol. 7, p. 142, quoting from Keyser vs McKissan (1828), 2 Rawle (Pa.) 138.

principle is enunciated by Kent, in his *Commentaries on American Law*.²⁰

But it would be of little use to pursue authorities to prove recognition on the part of the American courts and jurists of the *de facto* doctrine, when a cursory reference to a digest will reveal hundreds and hundreds of cases bearing on it. With its essentially democratic institutions, requiring nearly all public offices to be filled by popular election, the American republic has offered the most propitious field for the development of the doctrine. In fact, without it, the American people could not, with any degree of satisfaction, carry on the public affairs of the country, whether in relation to the State, the administration of justice, or municipal government, and uncertainty would prevail everywhere, which at times might lead to great disorders. This controlling necessity directly suggests the reason for the vast number of cases to be found scattered through the various American reports, State and federal, involving the consideration of almost every conceivable feature of the doctrine, and extending its limits to the furthest point warranted by reason and justice. Indeed, to the American courts credit must be given for having expounded the same along modern lines and for having imparted to it increased life and vigor. While it was not invented by them, yet they enlarged its usefulness and bestowed upon it a status, character and rank that it never had enjoyed in England. The English courts had sanctioned its application as far as it was necessary to meet the requirements of British institutions; the American judges started where their English colleagues had left, and expanded its principles to satisfy the needs and conditions of a new country, with a different form of government and a different mode of filling public offices. When the *de facto* doctrine was implanted in America it

²⁰² Kent. Comm. p. 295.

was, figuratively speaking, but a slender offshoot of the English common law, but through the fostering care of judges and courts ever alive to the necessities of the people, it has become a vigorous tree with luxuriant branches spreading in every direction, occasionally serving to shelter national institutions from the blasts of political strife and excitement.

§ 9. **Same subject.**—The leading case in America is undoubtedly *State vs Carroll*,²¹ decided in 1871 by the Supreme Court of Connecticut. The opinion of the tribunal was delivered by Chief Justice Butler, who, in an elaborate and exhaustive judgment, reviewed the older English cases and several of the American ones, and in a scholarly manner discussed the fundamental principles of the doctrine. Possibly a quotation from this interesting opinion would not be without interest. “The de facto doctrine,” says the learned Chief Justice, “was introduced in 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 duties of an office, without being lawful officers. It was seen as was said in *Knowles vs Luce*,²² that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons, on the ground that, as to them, although not officers de jure, they were officers in fact, whose acts public policy required should be considered valid.”

²¹38 Conn. 449, 9 Am. Rep. 409.

²²(1580), Moore, 109, 72 Eng. R. 473.

The only instance in America of refusal to recognize the de facto doctrine was that of Congress with reference to the election of its own members. For a considerable period that body was disinclined to support elections conducted by illegal officers, but in process of time it became converted to the principles universally enforced by the courts of the country.

§ 10. **Historical sketch of the de facto doctrine in Canada.**—In Canada, until a comparatively recent period, the de facto doctrine made no progress. It seemed to have been completely ignored at times, and a perusal of some of the Canadian reports compels one to wonder why in certain cases it was not invoked by counsel or applied by the courts. Among the several instances of the kind that can be found, may be quoted *Gibson vs McDonald*,²³ and *R. vs Amer*.²⁴ In the first case, a County Court Judge had presided over a court in a county adjoining his, under the authority of an Act of the legislature of Ontario. It was claimed that the statute was unconstitutional, and hence that the judge had acted without jurisdiction. Upon a motion to prohibit him, however, the character of his judicial acts became of no consequence, inasmuch as the motion was disposed of on another ground. Nevertheless, the majority of the court declared the act ultra vires; and the irresistible inference to be drawn from the language of the judges, as was apparently conceded by counsel, is that, had the validity of the acts of the judge been directly in question, the same would have had the fate of the Act itself and been declared null and void. Indeed, Mr. Justice O'Connor, one of the three judges, proceeds to deplore the terrible consequences that may possibly arise (in other cases) from a declaration that the Act is unconstitutional, and observes that "it

²³ (1885), 7 O. R. 401.

²⁴ (1878), 42 U. C. Q. B. 391.

is impossible to calculate the evil results which may be expected to result from the confusion created by so disturbing a cause." Now this motion was argued by prominent counsel and decided by able judges, but neither in the arguments nor in the written judgments is there a single word suggesting that though the statute might be unconstitutional, yet the judicial acts performed under its authority and before it was declared *ultra vires*, might be valid and binding as the acts of a *de facto* judge.²⁵

In the other case, two persons were convicted of murder at a special court of Oyer and Terminer and General Gaol Delivery presided over by a District judge. From the report it would appear, that no objection was raised to the presiding officer until the jury brought in a verdict of "guilty." Then the counsel objected to the passing of judgment upon the ground, among others, that a district judge was not qualified to sit as judge of the court. His appointment, however, was upheld on various grounds, but in no part of the arguments of counsel or of the judicial opinions was there even a mention of the *de facto* doctrine. There the judge had received two commissions authorizing him to hold the court, one from the federal and the other from the provincial government, and surely these were sufficient to afford him color of title, even if he were ineligible. True it was a special court, but the prisoners could not take the chance of a favorable verdict, and then object to the jurisdiction of the presiding judge on account of defects in his title.

There is also a dictum found in a recent Manitoba case,²⁶ which is not devoid of interest. The question in dispute there led the court to consider, whether certain school trustees had duly qualified by making the declaration of office prescribed

²⁵See further as to this case, post, sec. 425.

De Facto—2.

²⁶*Youville S. Dist. vs Bellemere* (1904), 14 Man. 511.

by statute. Referring to the declaration of one of such trustees, one of the learned judges remarked: "To reject it upon the ground taken by the Inspector, and, on that ground, to hold the trustee disqualified after he had been acting as such for two years, would be to raise *serious questions* as to every thing done by the Board during that period, in order to give effect to a petty technicality." This language speaks for itself and requires no comment.²⁷

In other cases the de facto doctrine is adverted to and discussed, and while the results of the decisions may sometimes be unimpeachable, nevertheless it is felt that the courts did not fully grasp its underlying principles and its true scope as a doctrine.²⁸

On the other hand, there are quite a number of cases in which is exhibited an accurate knowledge and a wise application of the de facto doctrine. Especially is this so since the appearance in Canada of a certain American work,²⁹ which has much contributed towards its introduction, or at least its development, in many sections of the country. In fact, in recent years, the American authorities are so copiously quoted, that the uninitiated might be led to believe that the doctrine is of American and not of English origin. But be this as it may, it is interesting to note that the doctrine has gradually and steadily expanded in Canada during the last few decades. There is no doubt that eventually the legal profession will become thoroughly familiarized with the principles it lays down, and that in practice it will be invoked whenever the circumstances are of a nature to warrant its application.

²⁷See also *R. vs Com'rs. of Sewers* (1872), 1 Pug. (N. B.) 161.

²⁸*Drew vs The King* (1902), 11 Que. R. (K. B.) 477, 6 Can. Crim. Cas. 241, affirmed (1903), 33 Can. Sup. Ct. R. 228, 6 Can. Crim. Cas.

424; *Ex p. Mainville* (1898), 1 Can. Crim. Cas. 528; *R. vs Boyle* (1868), 4 Ont. Pr. R. 256.

²⁹The American and English Encyclopedia of Law.

Thus a new field of knowledge will be opened to many a practitioner, who will realize how much easier and simpler it is to have recourse to it, than to endeavor by ingenious arguments to uphold the constitutionality of legislative enactments, or the validity of elections or appointments, in order to sustain the acts of illegal officers.

§ 11. **Same subject.**— The following quotations will demonstrate that, though the Canadian courts have occasionally overlooked or failed to accurately appreciate the principles of the de facto doctrine, yet this has not always been the case. “The rule of law,” says Chief Justice Strong of the Supreme Court of Canada, “is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons, but the holder of the legal title to the office, legal and binding.”³⁰ So in an Ontario case, Mr. Justice Meredith, discussing the validity of an award made by a township engineer illegally appointed, observes: “Then, can the defendants say that he was at all events de facto the engineer? If so, this attack upon the award must fail, for it would be intolerable if such an act of such a public officer would invariably depend for its legality upon the regularity of his appointment.”³¹ So in *Rouleau vs Corporation of St. Lambert*,³² a Quebec case, the de facto doctrine is ably dealt with by Mr. Justice Routhier, who quotes with approval the leading propositions on this subject contained in the American and English Encyclopedia of Law, and declares that “as a general principle it is incontestable, that the acts of officers de facto illegally elected or

³⁰O’Neil vs Atty.-Gen. of Canada (1896), 26 Can. Sup. Ct. 122, 1 Can. Crim. Cas. 303.

³¹Turtle vs Township of Euphemia (1900), 31 O. R. 404.

³²(1896), 10 Que. R. (S. C.) 85.

appointed, are valid.”³³ Likewise, in a Nova Scotia case, where the doctrine is expounded and applied along the lines of the American authorities, Mr. Justice Meagher says: “The principle has long been recognized and acted upon, that the acts of officers de facto are valid as respects the public and the rights of third persons, and it is not permissible to assail the title of such officers in a collateral proceeding.”³⁴ Many other cases may be cited where similar statements of the law are found, or the principles involved therein have been applied, or at least adverted to.³⁵

§ 12. De facto doctrine different from legal presumption as to official character.—The de facto doctrine must not be confounded with a certain legal presumption, which at first sight may seem to bear some resemblance thereto, but

³³As to Quebec, it may be noted that the de facto principles have received statutory recognition in their relation to municipal officers. Que. Mun. Code, Art. 120.

³⁴R. vs Gibson (1896), 29 Nov. Scot. 4.

³⁵County of Pontiac vs Ross (1889), 17 Can. Sup. Ct. 406, affirming s. c. sub. nom. County of Pontiac vs Pontiac Pacific Junction Railway Co. (1888), 11 Leg. News (Que.) 370; Speers vs Speers (1896), 28 O. R. 188; Lewis vs Brady (1889), 17 O. R. 377; R. vs Hodgins (1886), 12 O. R. 367; Smith vs Redford (1866), 12 Gr. (U. C.) 316; Kent vs Mercer (1862), 12 U. C. C. P. 30; Municipality of Whitby vs Flint (1859), 9 U. C. C. P. 449; Township of Whitby vs Harrison (1859), 18 U. C. Q. B. 603, 606; Gill vs Jackson (1856), 14 U. C. Q. B. 119; R. vs Smith (1848), 4

U. C. Q. B. 322; In re McPherson vs Beeman (1859), 17 U. C. Q. B. 99; Ex p. Curry (1898), 1 Can. Crim. Cas. 532; Hogle vs Rockwell (1898), 20 Que. R. (S. C.) 309; Lacasse vs Roy (1895), 8 Que. R. (S. C.) 293; Paris vs Couture (1883), 10 Que. Law R. 1; Lacasse vs Labonté (1896), 10 Que. R. (S. C.) 97, 104; Rouleau vs Corporation of St. Lambert (1896), 10 Que. R. (S. C.) 69, 85; Le Boutillier vs Harper (1875), 1 Que. Law R. 4; Crookshank vs McFarlane (1853), 7 N. B. 544; Ex p. Johnston (1894), 32 N. B. 556; Ex p. Raymond (1872), Steven's Digest (N. B.) 127; R. vs Burke (1896), 29 Nov. Scot. 227; Ex p. Renaud (1875), 3 Pug. (N. B.) 174; Modstock Mining Co. vs Harris (1902), 40 Nov. Scot. 336; Cawley vs Branchflower (1884), 1 B. C. (pt. 2) 35; R. vs Dubord (1885), 3 Man. 15.

which in principle and application is entirely different therefrom. Such presumption, which makes the fact of acting in an official capacity *prima facie* evidence of good title to the office,³⁶ constitutes merely a rule of evidence and pertains to the adjective law, whereas the *de facto* doctrine forms part of the substantive law. The effect of this presumptive evidence differs from that of the *de facto* doctrine in several essential particulars. Thus the presumption constitutes in the eye of the law the officeholder, an officer *de jure* for the time being, and this is the reason that his acts are upheld. But in the case of an officer *de facto*, the court may be aware of defects in his title or qualification, and yet, so far as his official acts concern the public or third persons, they will be maintained, not, as is obvious, on account of any presumption, but simply because he is what he is, that is, an officer *de facto*. Again, the presumption only confers a *prima facie de jure* title which may be shown by rebuttal evidence to be illegal, and upon such proof, the acts of the reputed officer will become void.³⁷ On the contrary, the *de facto* doctrine imparts to the officer a character which cannot be attacked collaterally, and his acts will always be upheld, unless of course they be performed for his own benefit.

This distinction is clearly drawn by Sutherland, J., in a New York case.³⁸ There the learned judge, after referring to several cases on the *de facto* doctrine, says: "It will be observed that these cases do not go upon the ground that the claim by an individual to be a public officer, and his acting as such, is merely *prima facie* evidence that he is an officer *de jure*; but the principle they establish is this: that an

³⁶Berryman vs Wise (1791), 4 Term (D. & E.) 366; McMahon vs Lennard (1858), 6 H. L. Cas. 970, 984; Doe vs Barnes (1846), 8 Q. B. 1037.

³⁷R. vs Verelst (1813), 3 Camp. 432, 14 R. R. 775.

³⁸Wilcox vs Smith (1830), 5 Wend. (N. Y.) 231, 21 Am. Dec. 213.

individual coming into an office by color of an election or appointment, is an officer *de facto*, and his acts in relation to the public or third persons are valid until he is removed, although it be conceded that his election or appointment was illegal.”³⁹

This distinction, apparent as it is, has not always been kept in sight in England or in Canada, and the legal presumption has often been confounded with the *de facto* doctrine. The reason undoubtedly is that under the peculiar circumstances of the cases, the application of the legal presumption was sufficient to meet the ends of justice; but had any attempt been made to rebut that presumptive evidence, it is evident that the courts would have been compelled to fall back on the *de facto* doctrine. Nay more, there are many cases where the judges must necessarily have had in mind the principles of the doctrine, and still they only speak of the presumption of law.⁴⁰

§ 13. To what public officers *de facto* doctrine applicable.— It is almost needless to say that the principles of the *de facto* doctrine are applicable to all classes of public officers, whether they be political, judicial, ministerial, municipal, military, or the like. The condition or rank of the officer is also immaterial, and it is of no consequence whether it be the highest or the lowest in the land. “The reason of the rule,” says a learned judge, “and the rule itself, embrace every officer from the highest to the lowest.”⁴¹ There may be a *de facto* king, a *de facto* president of the United States, a *de facto* governor, a *de facto* member of a legislative body,

³⁹See also *Com. vs Wotton* (Mass. 1909), 87 N. E. 202; *Kottman vs Ayer* (1848), 3 Strob. (S. C.) 92.

⁴⁰See *R. vs Gordon* (1789), 1

Leach C. C. 515, 1 East P. C. 312, 315; *Hamilton School Trustees vs Neil* (1881), 28 Grant (Ont.) 408.

⁴¹*Kottman vs Ayer* (1848), 3 Strob. (S. C.) 92.

a de facto judge, a de facto churchwarden, a de facto constable, a de facto school trustee, and so on of all public officers. This will fully appear in the course of this work, where abundant illustrations will be given of the various kinds of de facto public officers.

CHAPTER 2.

OF PUBLIC OFFICES AND OFFICERS—DE JURE AND DE FACTO OFFICERS—USURPERS.

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| § 14. English definitions of "office" and "officer." | § 20. Nature and incidents of Canadian offices. |
| 5. American definitions. | 21. Definition of an officer de jure. |
| 16. Difference between an office and an ordinary employment. | 22. Definition of an officer de facto. |
| 17. Classification of offices. | 23. General characteristics of an officer de facto. |
| 18. Nature and incidents of English offices. | 24. Officers holding by defeasible title. |
| 19. Nature and incidents of American offices. | 25. Definition of a usurper. |

§ 14. English definitions of "office" and "officer."—

An office, as defined by Blackstone, "is a right to exercise a public function or employment, and to take the fees and emoluments thereunto belonging." ¹

"It is said that the word *officium* principally implies a duty, and in the next place the charge of such duty, and that it is a rule, that when one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it an officer." ²

An officer is also defined as one who is lawfully invested with an office. Every man is a public officer, who has any duty concerning the public; and he is not the less a public officer, where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty,

¹ 2 Bl. Comm. 36.

² Bac. Abr. Offices and Officers (A).

which makes him a public officer, and not the *extent* of his authority.³

§ 15. American definitions.—The American definitions are exceedingly numerous and varied in language, though, as a rule, not widely differing from one another in substance. “An office,” says Chief Justice Marshall, “is defined to be ‘a public charge or employment,’ and he who performs the duties of the office, is an officer.”⁴

A public office, as defined by the New York Court of Appeals, is “a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law.”⁵ A public office has also been said to be “an agency for the state, and the person whose duty it is to perform this agency is a public officer.”⁶

§ 16. Difference between an office and an ordinary employment.—There is a difference between an office and an employment, every office being an employment, but there are employments which do not come under the denomination of offices.⁷ The term “office” implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office, while an employment does not con-

³Ibid.

⁴United States vs Maurice (1823), 2 Brock. (U. S.) 96.

⁵Per Allen, J.—Matter of Hathaway (1877), 71 N. Y. 238.

⁶Pearson, C. J., in Clark vs Stanley (1872), 66 N. C. 59.

⁷Bac. Abr. Offices and Officers (A).

prehend a delegation of any part of the sovereign authority.⁸ Hence there is a greater importance, dignity and independence attaching to an office than there is to an employment.⁹

An office is also generally distinguished from an employment by the manner in which it is filled, and by the nature of the duties to be performed, which are prescribed by law and not founded on contract, and are continuing and permanent, and not occasional or temporary.¹⁰ "It is generally, if not universally true," says one judge, "that a duty or employment arising out of a contract, and dependent for its duration and extent upon the terms of such contract is never considered an office. . . . And we apprehend that it may be stated as universally true, that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office, and the person who performs it is an officer."¹¹

§ 17. **Classification of offices.**—Bacon classifies offices into public and private; ancient and of new creation; civil and military; and judicial and ministerial.¹²

In the United States there have been different attempts at classification, but none of them seem to have met with universal approval, and to have been accepted by all text-writers and judges. Perhaps the one most frequently quoted is that of Clifford, J., one of the justices of the Supreme Court of the United States. "Offices," says the learned judge, "may be and usually are divided into two classes—

⁸Montgomery vs State (1895), 107 Ala. 372, 18 So. 157.

⁹Throop vs Langdon (1879), 40 Mich. 673.

¹⁰Lewis vs Jersey City (1889), 51 N. J. L. 240, 17 A. 112; Bac. Abr. Offices and Officers.

¹¹Smith, C. J.—Shelby vs Al-

corn (1858), 36 Miss. 273, 72 Am. Dec. 169. See also United States vs Maurice (1823), 2 Brock. (U. S.) 96; Darley vs The Queen (1845), 12 Cl. & Finn. 520.

¹²Bac. Abr. Offices and Officers. (A).

civil and military. Civil offices are also usually divided into three classes—political, judicial, and ministerial. Political offices are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the president or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose and not by deputies. Ministerial offices are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior, many of which are merely employments requiring neither a commission nor a warrant of appointment, as temporary clerks or messengers.”¹³

With regard to the public body or power on behalf of which they act, American officers are also sometimes classified into (1) State officers; (2) County officers; and (3) Municipal officers.

§ 18. Nature and incidents of English offices.—In England, the Crown is the fountain of all offices, whether the same be directly created by it by virtue of its prerogative, or indirectly so, with the advice and consent of Parliament.¹⁴ Blackstone classes them among incorporeal hereditaments, and says that a man may have an estate in them, either to him or his heirs, or for life, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators.¹⁵ Accordingly, certain offices may be the subject of property, and may be conveyed and

¹³Twenty Per Cent Cases (1871), 13 Wall. (U. S.) 568.

¹⁴Darley vs The Queen (1845), 12 Cl. & Finn. 520.

¹⁵2 Bl. Comm. 36.

transferred as such. These are generally said to lie in grant. But most offices are granted either during good behaviour or at pleasure. Of the latter tenure are all those created by modern statutes, unless it is otherwise provided.¹⁶

§ 19. Nature and incidents of American offices.—

All offices, in the United States, owe their existence to constitutional or statutory provisions. The principal offices, at least those under the control of the various States, are generally of constitutional creation, but the legislative authority may create as many offices as it deems necessary; the only limitation being, that there must not be any invasion of the plan of the fundamental law, or anything inconsistent with its provisions and their unobstructed operation.¹⁷ Offices are also sometimes created by public boards or municipal bodies authorized by the legislature to create the same.¹⁸

No American office can properly be termed an hereditary, or a thing capable of being inherited. The constitution, or the law, of the State provides for the extent of the duration of the office, which is never more permanent than during good behaviour.¹⁹ It is not regarded as a grant or contract, the obligation of which cannot be impaired, but rather as a trust or agency.²⁰ The officeholder, therefore, is a mere agent or trustee, who has no proprietary interest or vested right in the office;²¹ nor in the prospective salary or emoluments to be derived therefrom, which may at all times, even during his official term, be altered, increased,

¹⁶*Smyth vs Latham* (1833), 9 Bing. 692, 2 L. J. Ex. 241.

¹⁷*State vs Hill* (1892), 70 Miss. 106, 11 So. 789.

¹⁸*Miller vs Warner* (1899), 42 N. Y. App. Div. 208, 59 N. Y. S. 956; *State vs Spaulding* (1897), 102 Iowa, 639, 72 N. W. 288.

¹⁹3 Kent Comm. 454.

²⁰*Coffin vs State* (1855), 7 Ind. 157.

²¹*State vs Dews* (1835), *Charlt. R. M.* (Ga.) 397.

reduced, or otherwise regulated, by the legislative power.²² Likewise, the official duties may be increased, diminished or changed to suit public convenience, or the office itself may be entirely abolished, there being no obligation on the part of the legislature or the people to keep up a useless office, or pay an officer who is not needed.²³ When, however, the office is created, and its tenure and salary are fixed and protected by the constitution, the legislature has no power to make changes which would be a violation of the organic law. But even as to constitutional offices, where there are no restrictions or inhibitions in that respect, the legislative power may regulate, and add to or diminish the duties or the compensation attached to it.²⁴ Finally, it may be said that one of the characteristic features of the American offices, under State constitutions and legislatures, is that, outside of the civil service, they nearly all are filled by election instead of by appointment.

§ 20. Nature and incidents of Canadian offices.—

Offices in Canada seemingly partake of the nature and incidents of both the English and American offices. As in England the fountain of all Canadian office is theoretically in the Crown, and the officers receive their appointments from the representatives, and in the name, of the sovereign, and not from any election by the people. On the other hand, as in the United States, all Canadian offices are of statutory or constitutional creation, though there are very few of the

²²Conner vs New York (1851), 5 N. Y. 285, 2 Sandf. 355.

²³Butler vs Pennsylvania (1850), 10 How. (U. S.) 402; State vs Goldthait (Ind., 1909), 87 N. E. 133.

²⁴Warner vs People (1845), 2

Den. (N. Y.) 272, reversing 7 Hill. 81. As to property in office, North Carolina authorities conflict with those of other States. See Hoke vs Henderson (1833), 4 Dev. (N. C.) 1, 25 Am. Dec. 677.

latter kind. Some, however, though created by statute, are partly regulated by constitutional provisions, such as the judicial offices of the superior courts. The longest tenure, also, is during good behaviour. And where the office is created or its tenure is fixed by the constitutional Act, only an amendment thereof by the Imperial Parliament can alter the nature of such office, or of such tenure. Except, however, so far as the organic law may forbid interference therewith, the offices are completely within the power and under the control of the Canadian government, or the provincial legislatures.

§ 21. **Definition of an officer de jure.**—"De jure" means of right; legitimate; lawful; by right and just title.²⁵ Therefore, in a literal sense, an officer de jure is one who has the legal title to, and is clothed with the insignia and all the power and authority of, the office. He has a title against the whole world to exercise the functions of the office, and receive the fees and emoluments appertaining to it. His acts, within the scope of his authority, cannot be questioned by the citizens, nor by any department of the government.²⁶ According to this definition, it is obvious that an officer de jure is also an officer de facto, for he cannot exercise the office without being in possession of it. "Officer de jure," however, is not generally used in this comprehensive sense, but merely in contradistinction to "officer de facto," as designating one who has the lawful right to an office, but is not the actual incumbent thereof, either because he has never been in possession of it, or has been ousted therefrom.²⁷ It

²⁵Black Dict.

²⁷Hamlin vs Kassafer (1887),

²⁶Auditor-Gen. vs Supervisors 15 Or. 456, 15 P. 778, 3 Am. St. R. 176.
(1891), 89 Mich. 552, 51 N. W. 483.

is always in that restricted sense, that the term is used in connection with the de facto doctrine.

§ 22. **Definition of an officer de facto.**—"De facto" means in law, as well as elsewhere, in fact; from, arising out of, or founded in fact; in deed; in point of fact; actually; really.²⁸ "De facto" is the opposite of "de jure" in the language of the de facto doctrine; and, as applied to an officer, it means one who, though not lawfully an officer, is nevertheless in the possession and exercise of an office.

The definition of an officer de facto given by Lord Holt in *Parker vs Kett*,²⁹ as generalized by Lord Ellenborough in *R. vs Bedford Level*,³⁰ has received universal recognition in England, and has been quoted with approval by numerous American authorities. It reads: "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."

There are a great number of American definitions, but the most exhaustive, and the one most approved and favored by all the authorities, is that of Chief Justice Butler in *State vs Carroll*.³¹ "An officer de facto," says the learned judge, "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 officer were exercised; First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or

²⁸McCahon vs Leavenworth (1871), 8 Kan. 437.

³⁰(1805), 6 East 356.

²⁹(1701), 12 Mod. 466, 98 Eng. R. 1454, s. c. 1 Ray. (Ld.) 658.

³¹(1871), 38 Conn. 449, 9 Am. Rep. 409.

91 Eng. R. 1338.

invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such as ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

§ 23. General characteristics of an officer de facto.—

Notwithstanding the above definitions, it may not be amiss to give a general description of an officer de facto, and exhibit what his status is in the English and American jurisprudence. In *R. vs Lisle*³² it is said that he "is a notional creature only, erected by the law, in order to answer the ends of justice and equity under particular circumstances." Hence he is a legal being, and although, as pointed out in *State vs Carroll*,³³ it is the quality and character of his acts, which induce law to afford them validity, and not "because of any quality or character conferred upon the officer, or attached to him by reason of any defective election or appointment," yet it must be admitted that the law, in order to attain the end desired, is compelled to recognize in him a qualified official status. He is, therefore, *ex necessitate* a creature known to the law, possessing an individuality of his own, distinct from and independent of that of an officer de jure. He is invested with certain rights, powers and duties; is under certain responsibilities to the public and third persons;

³²(1738), Andr. p. 166.

³³(1871), 38 Conn. 449, 9 Am. R. 409.

and even his authority is protected by law to a certain degree. His official power is not the outcome of any relation between him and the rightful officer, as that between principal and agent, or officer and deputy, but is derived from the office itself. With respect to innocent persons dealing with him, he is a lawful officer, so far as the validity of his official acts is concerned. While he may be accountable to the *de jure* officer for the fees and emoluments which he is illegally in receipt of, and to the public for unlawfully holding a public office—yet, so long as his title has not been adversely determined in a direct proceeding brought for the purpose, his assumed official character cannot be collaterally assailed, unless he attempts to gain a personal advantage from his incumbency, or to justify as an officer in civil actions brought against him. To sum up, it may be said that he is a good officer so far as the interests of the public and third persons require him to be so, and to that extent he is recognized by law, but no further; and therefore he is not a good officer as to himself.³⁴

§ 24. Officers holding by defeasible title.—In New York a distinction has been made between *de facto* officers whose original title is invalid, and those who have merely failed to qualify, after having been duly elected or appointed. “There are many loose expressions,” says the New York Court of Appeals per Dwight, C., “in the law books concerning an officer *de facto* and *de jure*. Under the former term, judges have frequently grouped together persons who were mere usurpers, with those who had a colorable title, and even with those who were regularly inducted into office, and yet, had committed some act which would justify a

³⁴See *Hamlin vs Kassafer* (1887), 15 Or. 456, 15 P. 778, 3 Am. St. R. 176.

De Facto—3.

forfeiture. This last case is, however, not properly a case of an officer de facto. It is an instance of a rightful officer holding by a defeasible title. His acts are in all respects lawful, until the State interferes by a proceeding in the nature of a quo warranto. It only tends to confusion to style him an officer de facto, whose acts are only valid as to the public and third persons, and cannot be sustained as to himself.”³⁵ The learned judge, however, admitted that there might be cases where the language of the statute was so imperative, as to make the act of qualifying a condition precedent to becoming an officer.

But however sound may be the above distinction, and whatever force it may have in cases involving questions affecting the officer himself, or the validity of his official acts under exceptional circumstances, it has never prevailed even in the State of New York, to the point of disturbing the usual classification of officers with regard to title, into officers de jure and officers de facto. And we think very properly so, for though some officers de facto may have a superior title to others, yet they all are illegal officers. However valid may have been their election or appointment, their failure afterwards to qualify makes them unlawful officeholders. “The title to every office,” says Lord Hardwicke, “is grounded on two things; the election of the party, and his being sworn into the office.”³⁶ And in another case Chief Justice Raymond says: “The right to the office arises from the election, and the exercise of it from the swearing; he could not act without being sworn.”³⁷ Moreover, as the

³⁵Foot vs Stiles (1874), 57 N. Y. 399; Horton vs Parsons (1885), 37 Hun (N. Y.) 42, affirming 1 How. Pr. (N. S.) 124. See also State vs Findley (1840), 10 Ohio, 51. The term “defeasible title” is

also used by Lord Coleridge in R. vs Mayor of Cambridge (1840), 12 A. & E. 702, 714.

³⁶R. vs Ellis (1735), 9 East. 252.

³⁷R. vs Hull (1724), 11 Mod. 390, 88 Eng. R. 1107. See also R.

acts of all officers *de facto*, whatever degree or kind of illegality may affect their right to hold the office, are generally valid as regards the public and third persons, the New York distinction is of no practical purpose or value in ordinary cases.

§ 25. **Definition of a usurper.**—A usurper is defined as one who assumes the right of government by force, contrary to and in violation of the constitution of the country.³⁸ But the term as applied to ordinary officers, is used to designate one who takes possession of an office without authority. “A mere usurper,” says a learned judge, “is one who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever; and his acts are void in every respect.”³⁹

vs Hearle (1724), 1 Stra. 625, 93 Eng. R. 742. In *Craig vs Norfolk* (1675), 1 Mod. 122, 86 Eng. R. 780, a distinction is made between an elective and a patent office; and it is said, that in an elective office the party must be invested to gain possession, but in an office by patent he is in by the creation. But whatever may be the nature of the

office, the officer is generally required to take an oath before exercising it, and if he fails in that respect, he is not strictly a legal officer.

³⁸Black's Dict.

³⁹Christian, J.—*McCraw vs Williams* (1880), 33 Gratt. (Va.) 510; quoted in *Com. vs Bush* (Ky., 1909), 115 S. W. 249.

BOOK II.

**OF THE REQUISITES TO CONSTITUTE AN OFFI-
CER DE FACTO.**

BOOK II.

OF THE REQUISITES TO CONSTITUTE AN OFFICER DE FACTO.

CHAPTER 3.

INTRODUCTORY.

§ 26. What are such requisites.

§ 27. Purpose of Book II.

§ 26. What are such requisites.—Three things are essential to constitute one an officer de facto, viz:—

1. The office held by him must have a de jure existence, or at least one recognized by law;
2. He must be in the actual possession thereof; and
3. His holding must be under color of title or authority.

Without the existence and concurrence of these three elements, no person can be regarded as an officer de facto. Indeed, whatever color of title one may have, and whatever may be his possession, if the office be one not recognized by law, he can never acquire the status of an officer. On the other hand, however strong and well founded may be a person's claim to a lawfully existing office, yet if he be deprived of the actual possession thereof, he may be an officer de jure, but he cannot be an officer de facto. Finally, the bare possession of a de jure office, without color of title or authority, will only constitute the occupant a usurper.

§ 27. Purpose of Book II.—This book will be devoted to a study of the several topics alluded to in the preceding

section. The next two chapters will deal with questions affecting the existence or creation of offices; the fourth, with official possession; and the fifth, with color of title or authority. These chapters will be entitled as follows:—

1. Existence of de jure office necessary to constitute an officer de facto.

2. Of offices recognized by law *ex necessitate* and offices irregularly created—De facto governments—De facto municipal corporations.

3. Possession of office necessary to constitute an officer de facto—Incidents of possession.

4. Color of title or authority necessary to constitute an officer de facto.

CHAPTER 4.

EXISTENCE OF DE JURE OFFICE NECESSARY TO CONSTITUTE AN OFFICER DE FACTO.

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| § 28. General rule. | § 35. Same subject. |
| 29. Authorities upholding above rule. | 36. Same subject. |
| 30. A person cannot be a de facto officer of an abolished office. | 37. Conflicting doctrine. |
| 31. Conflicting doctrine. | 38. Same subject. |
| 32. Same subject. | 39. Same subject. |
| 33. Same subject. | 40. Same subject. |
| 34. A person cannot be a de facto officer of an office attempted to be created by an unconstitutional Act. | 41. Observations on unconstitutionality of laws—No unconstitutionally created offices in England. |

§ 28. General rule.—The general rule is that the existence of a de jure office is a condition precedent to the existence of an officer de facto, and that without such an office the pretended officer can never be afforded any legal recognition. "The idea of an officer," says one of the judges of the United States Supreme Court, "implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can only exist by force of law."¹ And in *Ex p. Snyder*,² Sherwood, J., delivering the opinion of the Supreme Court of Missouri, observes: "Numerous cases can be instanced from the books, where the acts of an incumbent of an office have

¹Field, J.—Norton vs Shelby County (1886), 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed. 178.

²(1876), 64 Mo. 58.

been held valid, upon the ground that such an incumbent was an officer de facto. But an officer of that description necessarily presupposes an office which the law recognizes. And a quite extensive research has failed to discover an instance where an incumbent has been held an officer de facto, unless there was a legal office to fill."

§ 29. **Authorities upholding above rule.**—The authorities upholding or recognizing the above proposition are most numerous.³ Thus in *Jester vs Spurgeon*,⁴ which was

³*R. vs Saunders* (1802), 3 East 119; *Welch vs Ste. Genevieve* (1871), 1 Dillon C. C. (U. S.) 130; *Miner vs Justices Court* (1898), 121 Cal. 264, 53 P. 795; *People vs Toal* (1890), 85 Cal. 333, 23 P. 203; *People vs Hecht* (1895), 105 Cal. 621, 38 P. 941, 45 Am. St. R. 96, 27 L.R.A. 203; *State vs Shuford* (1901), 128 N. C. 588, 38 S. E. 808; *Jester vs Spurgeon* (1887), 27 Mo. App. 477; *Missouri vs Boone County Court* (1872), 50 Mo. 317; *State vs O'Brian* (1878), 68 Mo. 153, following *Ex p. Snyder* (1876), 64 Mo. 58; *Weesner vs Bank* (1904), 106 Mo. App. 668, 80 S. W. 319; *Decorah vs Bullis* (1868), 25 Iowa, 12; *People vs Welsh* (1907), 225 Ill. 364, 80 N. E. 313; *Moon vs Mayor* (1905), 214 Ill. 40, 73 N. E. 408; *Kenneally vs Chicago* (1906), 220 Ill. 485, 77 N. E. 155; *Chicago vs Burke* (1907), 226 Ill. 191, 80 N. E. 720; *Lewiston vs Proctor* (1860), 23 Ill. (13 Peck.) 533; *Ward vs Cook* (1898), 78 Ill. App. 111; *In re Hinkle* (1884), 31 Kan. 712, 3 P. 531; *In re Norton* (1902), 64 Kan. 842, 68 P. 639, 91 Am. St. R. 255;

Hildredth vs McIntyre (1829), 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61; *Treble vs Frame* (1829), 1 J. J. Marsh. (Ky.) 205; *Cheevers vs Duffel* (1880), 32 La. Ann. 649; *Carleton vs People* (1862), 10 Mich. 250; *In re Parks* (1880), 3 Mont. 426; *Clark vs Easton* (1888), 146 Mass. 43, 14 N. E. 795; *Blackburn vs Oklahoma City* (1893), 1 Okla. 292, 33 P. 708; *City of Guthrie vs Wylie* (1896), 6 Okla. 61, 55 P. 103; *Walcott vs Wells* (1890), 21 Nev. 47, 24 P. 367, 37 Am. St. R. 478, 9 L.R.A. 59; *State vs Lake* (1873), 8 Nev. 276; *Matter of Quinn* (1897), 152 N. Y. 89, 46 N. E. 175; *People vs Terry* (1886), 42 Hun (N. Y.) 273; *New York vs Flagg* (1858), 6 Abb. Pr. (N. Y.) 296; *Flaucher vs Camden* (1893), 56 N. J. L. 244, 28 A. 82; *State vs District Court of Ramsay County* (1898), 72 Minn. 226, 75 N. W. 224, 71 Am. St. R. 480; *Tinsley vs Kirby* (1881), 17 S. C. 1; *Merchant's Nat. Bank vs McKinney* (1891), 2 S. Dak. 106, 48 N. W. 841; *Turney vs Dibrell* (1873), 3 Bax. (Tenn.) 235; *Daniel vs Hutcheson* (1893), 4 Tex. Civ. App. 239, 22

an action of replevin, the property in controversy was a mule formerly owned by the plaintiff, and claimed by the defendant as purchaser at an execution sale. The plaintiff challenged the validity of the sale on two grounds, one of which was that the person to whom the writ of execution was directed, and who had sold the mule, was neither an officer de jure nor de facto. The alleged officer had been appointed in 1884, by the County Court of Clarke County, upon the petition of a number of citizens, as an additional constable for the township of Des Moines, there being already in office a lawful constable who had been previously elected. The new appointee had given bond and acted as constable for nearly two years. The sale was nevertheless set aside, the court observing that the appointment was made to fill an office which, for all that appeared, the county court itself attempted to create, namely, the office of an additional constable; and as that was an office unknown to the law, there could be no officer de jure of such an office, and therefore no officer could fill it as an officer de facto.

In *Decorah vs Bullis*⁵ the town of Decorah, in its corporate capacity, attempted to recover an assessment from the

S. W. 278; *Boyer vs Fowler* (1860), 1 Wash. Terr. 119; *Ex p. Roundtree* (1874), 51 Ala. 42; *Caldwell vs Barrett* (1903), 71 Ark. 310, 74 S. W. 748; *Hawver vs Seldenridge* (1867), 2 W. Va. 274, 94 Am. Dec. 532; *Yorty vs Paine* (1885), 62 Wis. 154, 22 N. W. 137; *Chicago Ry. Co. vs Langlade* (1883), 56 Wis. 614, 14 N. W. 844; *Cole vs Black River Falls* (1883), 57 Wis. 110, 14 N. W. 906; *Farrington vs New England Invest. Co.* (1890), 1 N. D. 102, 45 N. W. 191. But see contra, *State vs Bailey* (Minn. 1908), 118 N. W.

676; *Burt vs Winona Ry. Co.* (1884), 31 Minn. 472, 18 N. W. 285; *Adams vs Lindell* (1878), 5 Mo. App. 197, affirmed 72 Mo. 198; *State vs Ely* (1907), 16 N. D. 569, 113 N. W. 711; *Heck vs Window Glass Co.* (1898), 16 Ohio Cir. Ct. 111; *State vs Stroble* (1904), 25 Ohio Cir. Ct. 762; *State vs Gardner* (1896), 54 Ohio St. 24, 42 N. E. 999; *State vs Bingham* (1897), 14 Ohio Cir. Ct. 245; *Lang vs Bayonne* (1907), 74 N. J. L. 455, 68 A. 90.

⁴(1887), 27 Mo. App. 477.

⁵(1868), 25 Iowa, 12.

defendant for the building of a sidewalk in front of his premises. The town had been organized in 1857 under a special charter, by which the legislative authority of the town was vested in a president and board of six trustees, who were to be elected annually on the last Tuesday in June. On the first Monday of March, 1860, and annually thereafter until 1867, it had elected a mayor, recorder, and five trustees, under and pursuant to an Act passed in 1858, authorizing organization and re-organization of municipal corporations, but no other step had been taken to abandon the special charter, and no vote of the people had been taken upon the question of such abandonment or of re-organization under the Act of 1858. The council thus elected passed an ordinance requiring the owners of property on a certain street to build a sidewalk in front thereof. The defendant having failed to build the sidewalk as required by the ordinance, the town built it, and brought the action to collect the cost of it. Held, that the ordinance was invalid, for the reason that it was not passed by the corporate body in which, under the special charter, the legislative authority was vested. The court remarked, that "if the corporate body which passed the ordinance had assumed to act under and by virtue of the charter—had claimed to exercise the powers given by chapter 42 of the Code—in other words, had assumed and claimed to be the president and trustees of the town under its organic Act—their acts as such officers, being in such case officers *de facto*, would undoubtedly be valid;" but they claimed to act as the legislative body of a new or re-organized corporation, whose existence in point of law was mythical.

So a person who is elected and performs duties as an officer under a supposed municipal corporation organized prior to the existence of laws authorizing the formation of municipal corporations, cannot be regarded as an officer *de facto*, and

is not entitled to claim salary from the de jure corporation which succeeds to the supposed corporation, for the time that he acted under the latter.⁶

Likewise, where one is appointed to an office and attempts to act as an officer before the coming into force of the Act creating the office, he cannot be recognized as an officer de facto, and his acts are utterly void.⁷

§ 30. A person cannot be a de facto officer of an abolished office.—The second rule, which is a corollary of the first, is that an office, which has had a legal existence, but has been subsequently abolished, has no more claim to legal recognition than an office which never existed, and therefore cannot be filled by a de facto officer.⁸ Thus, in *Matter of Quinn*,⁹ which was an habeas corpus proceeding, the object of the application was to obtain the discharge of one John Quinn from the custody of a Marshal of the City of New York. The warrant under which the arrest was made had been issued by one John J. Ryan, claiming to be a police justice of said city. It was contended on behalf of Quinn, that Ryan had acted without jurisdiction and authority because his office had previously been abolished by an Act of the legislature. This contention was sustained, and Mann, J., delivering the opinion of the Court, said:—"We think there can be no de facto officer when there is no

⁶*Blackburn vs Oklahoma City* (1893), 1 Okla. 292, 33 P. 708.

⁷*State vs Shuford* (1901), 128 N. C. 588, 38 S. E. 808. But see *State vs Ely* (1907), 16 N. D. 569, 113 N. W. 711. See also de facto courts, sec. 396 et seq.

⁸*Walker vs Phoenix Ins. Co.* (1895), 62 Mo. App. 209; *Boyer vs Fowler* (1860), 1 Wash. Ter. 119; *Cheevers vs Duffel* (1880), 32

La. Ann. 649; *State vs Tilford* (1865), 1 Nev. 240; *Strickland vs Griffin* (1883), 70 Ga. 541; *Gorman vs People* (1892), 17 Colo. 596, 31 P. 335; *In re Wood* (1886), 34 Kan. 645, 9 P. 758; *People vs Welsh* (1907), 225 Ill. 364, 80 N. E. 313; *McAllister vs Swan* (1897), 16 Utah, 1, 50 P. 812.

⁹(1897), 152 N. Y. 89, 46 N. E. 175.

office to fill. The act of the legislature was notice to all that the office had been abolished and that no one was authorized to discharge its functions after midnight of June 30, 1895. After that date there could be no appearance or color of right to induce the public to ask for or yield to action, official in form, on the part of the former police justice in the belief that he was still the officer he assumed to be."

In *In re Hinkle* ¹⁰ the petition was also for a writ of habeas corpus. The process under which the prisoner was arrested, had been issued by a justice of the peace and executed by a constable of a municipal township, which had been abolished by a legislative enactment. It was held that the restraint of the petitioner was wholly illegal, inasmuch as when a township is abolished there are no township officials left, for there is neither a constitutional nor a statutory office to fill, the township office must go with the township, and this irrespective of the question whether the township officers' terms have expired or not.

In *Daniel vs Hutcheson* ¹¹ a sale of land ordered by a probate judge, in 1870, and made in the same year, and confirmed thereafter, was held void, because prior thereto the County Courts as Courts of Probate had been abolished by the Texas Constitution of 1869, and probate jurisdiction vested in the District Courts.

In *Ayers vs Lattimer* ¹² the appeal was from a judgment of the Criminal Court, annulling a judgment of an alleged Justice of the Peace. The latter claimed to act under an appointment from the County Court, but prior to such appointment, the general law under which it purported to be made, had been repealed. The Court held that the appointee

¹⁰ (1884), 31 Kan. 712, 3 P. 531

¹² (1894), 57 Mo. App. 78.

¹¹ (1893), 4 Tex. Civ. App. 239,
22 S. W. 278.

under such circumstances could not be deemed an officer de facto and his judgment was void, for the "plaintiff was bound to know, when he instituted a suit before him, that no such office existed, and hence no such officer could exist."

Again, in *State vs Jennings*,¹³ it was held that an office created by an ordinance is abolished by a repeal of the ordinance, and the incumbent thereby ceases to be an officer.

§ 31. **Conflicting doctrine.**—Notwithstanding the sound and logical foundation upon which rests the preceding rule, there are a few decisions in the State of Missouri, upholding a contrary doctrine. Thus, in *Adams vs Lindell*,¹⁴ the suit was on a special tax bill issued in pursuance of an ordinance of the city council of St. Louis, after the legal adoption of a new charter, by which such city council had been abolished. At the time, however, the ordinance was passed, it was generally thought that the new scheme and charter had been defeated; and the officers of the old municipal government were holding on, as they believed, rightfully. But, subsequently, it was judicially determined that the scheme and charter had carried, that the new city government was, under the law, the rightful one, and that the officers of the old council, who passed the ordinance for the improvement (and on account of which the tax bill was issued), were then holding offices which in law had been abolished. Nevertheless, the acts of this council, defunct as it was under the law, were upheld, and on the ground, too, that such acts came within the scope of the de facto rule. The court used this argumentative language:—"Where the office legally exists, and the officer is merely a de facto officer, there is a violation of law. The officer not

¹³ (1898), 57 Ohio St. 415, 49 N. E. 404.

¹⁴ (1878), 5 Mo. App. 197, affirmed 72 Mo. 198.

being legally such, his acts are, apart from the principle of validation, of no legal effect; but if to this state of things we superadd the element of non-existence of the office, what essential difference can this make? The question is as to the validity of the acts of a certain man, claiming to be a public officer. If those acts are invalid, they certainly cannot be made more invalid by the addition of another quantity. 'Contrary to Law' and 'invalid' do not admit of degrees of comparison; and in the expression, 'clearly invalid,' the adverb refers to evidence, not existence. The act of the so-called officer being thus contrary to law, as he has no right to the office, the de facto principle is applied, and thus an otherwise void act is validated, not because of any character or quality attached to the so-called officer or to his office, but because this is necessary to preserve the rights of third persons and keep up the organization of society. The rule is based merely on policy, and its origin and historical development show that it is founded in comparative necessity. If the citizen is in no way in fault, if in his dealings he trusts to the non-legal authorities in whom all believe, his rights are not to be destroyed. Where he is in fault, the case is different. But when he himself meets all legal requirements, it is evident that the necessity which creates the rule of validation may exist in precisely the same way and degree where there is no legal office as where there is merely no legal officer; and it is further evident that to apply the principle to cases where there is no legal office is taking no new or further step; for, as above said, the act being already invalid, it cannot be any more than invalid where there is no legal office. Why, then, should the rule suddenly halt, when both logic and necessity require it to proceed?"

§ 32. **Same subject.**—However plausible may be the above language, it seems evident that the principle laid down

is unsound. It is difficult to assent to the proposition that the acts of a pretended officer, assuming to exercise a non-existing office, are entitled to the same consideration, so far as innocent parties are concerned, as those of an illegal officer in charge of a lawful office. When the office has a de jure existence, and the duties attached thereto are prescribed by law, it is of little consequence, in practice, whether such lawful duties are discharged by a good officer or not. The public, in whose behalf all offices are created, are interested in having them constantly filled and the duties thereof performed. Hence it is a wise provision of the law that validates, under proper circumstances, the acts pertaining to the discharge of a public office, even when the agent performing them is doing so without lawful authority. Very dissimilar, however, is the case where there is no legal office in existence. Then the law is not only called upon to validate what is merely irregular, but to impart legality to what is essentially illegal. The pretended officer is not only usurping an authority which another might lawfully be invested with, but is guilty of a direct encroachment upon the sovereign authority, from which proceed all offices, and is exercising powers which no citizen in the land could lawfully exercise or possess. To allow a rule of convenience to thus destroy the fundamental principles of government, is, to our mind, extending the same beyond the limit justified by reason, justice, and public requirement.

Furthermore, it seems that the court might have upheld the ordinance in question without laying down a general principle unsupported by the weight of reason, and in direct conflict with the authorities in general. A less objectionable argument, even if not strictly faultless, might have been based on the fact that, though the former municipal offices were abrogated, yet municipal government was not abol-

ished in the City of St. Louis. By some such reasoning it might possibly have been shown that the old offices were still substantially in existence under another form, and that the persons filling the same and carrying on municipal government in the city, though not strictly in conformity to law, were entitled to be regarded as de facto officers.^{14a}

§ 33. Same subject.—However, *Adams vs Lindell* was followed in several other cases,¹⁵ but a few excerpts from the judgment of Gill, J., delivering the opinion of the court in the last quoted one, will make it obvious that the doctrine recognizing a de facto office rests on rather flimsy grounds. Said the learned judge: “But, contends plaintiff’s counsel in an argument of much logical force, there can be no officer de facto unless there exists, to start with, an officer de jure. And candor compels the admission, that if this case should be forced to determination on the apparent weight of authority—untrammelled by controlling precedents, and regardless too of manifest hardship and injustice—I should, speaking for myself, write here a reversal rather than an affirmance, and that, too, on the ground just stated.” And later on, referring to *Adams vs Lindell*, he observes, “The court, in that case, practically denied the doctrine asserted by Judge Dillon, and which, too, had been announced in *In re Snyder*,¹⁶ to wit, that there could not be in any event a de facto officer in the absence of a de jure office.” And finally, he adds:—“While now, as already intimated, I regard *Adams vs Lindell* as an innovation or modification of the rule announced by a majority of the decided cases, I cheerfully advise that it be

^{14a}See post, as to alteration of form of Municipal government, sec. 201.

¹⁵*Perkins vs Fielding* (1893), 119 Mo. 149, 24 S. W. 444, 27 S. W.

1100; *Hilgert vs Barber Asphalt Pav. Co.* (1904), 107 Mo. App. 385, 81 S. W. 496, and *Simpson vs McGonegal* (1892), 52 Mo. App. 540. ¹⁶(1876), 64 Mo. 58.

followed in the determination of the case at hand. . . . A contrary holding would be most disastrous in its results."

As is manifest, the doctrine laid down in *Adams vs Lindell* was intended to meet the requirements of a peculiar class of cases but not to extend beyond that. This explains why, notwithstanding its affirmance and approval by the Supreme Court, yet in two cases, and one as late as 1904, the general principle regarding the necessity of a de jure office to constitute one an officer de facto, is re-affirmed.¹⁷ In the last quoted case the court said: "The general rule unquestionably is that there cannot be an officer de facto, where there is no office de jure. *Ex parte Snyder*, 64 Mo. 58; *State vs O'Brian*, 68 Mo. 153; *Jester vs Spurgeon*, 27 Mo. App. 477. There have been indeed cases where courts by a specious reasoning tried to establish an apparent limitation of this rule, because a contrary holding under the peculiar facts of the case would have produced a state bordering on anarchy (*Adams vs Lindell*, 5 Mo. App. 197); but to invoke such a limitation in the case at bar would be wholly unjustified."¹⁸

§ 34. A person cannot be a de facto officer of an office attempted to be created by an unconstitutional Act.—

A further corollary of the general rule is, that an unconstitutional Act, being no law, is incapable of creating a de jure office, and therefore the incumbent of an office thus created is not an officer de facto. "An unconstitutional Act," says

¹⁷*Weesner vs Bank* (1904), 106 Mo. App. 668, 80 S. W. 319; *Ayers vs Lattimer* (1894), 57 Mo. App. 78.

¹⁸The recent case in Pennsylvania of *Keeling vs Pittsburg etc. Ry. Co.* (1903), 205 Pa. St. 31, 54 A. 485, where a mayor acted after his office was abolished by an Act

which substituted that of recorder in its stead, must not be taken as supporting the principle laid down in some of the Missouri cases, because there the Act expressly provided that the mayor should continue in office until a recorder was duly appointed.

Field, J., delivering the opinion of the Supreme Court in *Norton vs Shelby County*,¹⁹ "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."²⁰ And further on, he adds: "Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel. But, when read in connection with the facts, they will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a de facto office under a constitutional government, and that the acts of the incumbent are entitled to consideration as valid acts of a de facto officer."

In the above case, the legislature of Tennessee had passed an Act creating the County Commissioners of Shelby County, vesting in them the powers and duties of the county or quarterly court of the county. They were also authorized to subscribe stock in railroads, which the county court had been authorized to subscribe, and to issue bonds, for the amount of such subscriptions. After the issuance of bonds by them, the statute, by which they were created and their duties defined, was declared by the Supreme Court of Tennessee unconstitutional. The question of the validity of the bonds afterwards came before the Supreme Court of the United States, on a writ of error to the United States Circuit Court for the Western district of Tennessee. It was contended on behalf of the plaintiff, that if the Act creating the board was void, and the commissioners were not officers de

¹⁹ (1886), 118 U. S. 425, 6 Sup. (1890), 20 Nev. 427, 22 P. 1054, Ct. 1121, 30 L. ed. 178. 19 Am. St. R. 374.

²⁰ See also *State vs Tully*

jure, they were nevertheless officers de facto, and that their acts as those of a de facto board were binding on the county. But it was held, that the contention was not tenable because there could be no officer, either de jure or de facto, if there was no office to fill; and as the Act attempting to create the office of commissioner never became law, the office never came into existence; and hence the pretended commissioners were mere usurpers.

§ 35. **Same subject.**—This case presents a most forcible application of the above rule, but there are many other authorities upholding the same views. Thus, in *Hildreth vs McIntyre*,²¹ the legislature of Kentucky attempted to abolish the Court of Appeals established by her constitution, and create in its stead a new court. Members of the new court were appointed and undertook to discharge judicial functions. They dismissed an appeal because the record was not filed with the person acting as their clerk. A certificate of the dismissal signed by the latter was received by the lower court and entered of record, and execution to carry into effect the original decree was ordered to issue. To reverse this order an appeal was taken to the constitutional Court of Appeals. The question was, whether the court below erred in obeying the mandate of the members of the new court; and its solution depended upon another, whether they were judges of the Court of Appeals and the person acting as their clerk was its clerk. It was held that neither the judges nor the clerk were officers de facto. The court said: "Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character, are totally null and void, unless they had been regularly appointed under and according to the constitution. A de facto court of appeals cannot exist under a written constitution, which

²¹(1829), 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61.

ordains one Supreme Court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. There cannot be more than one court of appeals in Kentucky, as long as the constitution shall exist; and that must necessarily be a court 'de jure.' . . . There might be under our constitution, and there have been 'de facto' officers. But there never was and never can be, under the present constitution, a 'de facto' office."

§ 36. Same subject.—In *People vs Terry* ²² a writ of habeas corpus was procured to obtain the discharge of a person convicted and sentenced to penitentiary, by one Seaver, assuming to be justice of the peace of the village of Canton, which formed part of the town of that name. The latter claimed his office by virtue of an election held under the charter of the village, which provided for the election of "one justice of the peace," by ballot, at the annual meeting at which the other village officers were elected. It was held that the statute authorizing such an election was unconstitutional, because under the constitution, the legislature could only establish, in villages, the office of police justice, with a strictly local jurisdiction, while the election of justices of the peace belonged exclusively to towns and cities. And it was further held that Seaver could not be regarded as a de facto justice of the peace, inasmuch as there was no such office lawfully created for the village of Canton. The prisoner was discharged. ²³

In *Kirby vs State* ²⁴ the motion was to quash an indictment against license commissioners charged with extortion. Their offices had been created by an unconstitutional law.

²²(1886), 42 Hun (N. Y.) 273.

²³This case was, however, reversed in *People vs Terry* (1887), 108 N. Y. 1, 14 N. E. 815, on the

ground that the Act was constitutional.

²⁴(1894), 57 N. J. L. 320, 31 A. 213.

Held, that the incumbent of an office which an unconstitutional statute purports to create, cannot be guilty of extortion, as he is neither a de jure nor a de facto officer.^{24a}

And in *People vs Knopf*²⁵ it was held that where the office of township assessor exists in a town, and subsequently an unconstitutional Act is passed retaining such office, but creating a board of assessors to perform its duties in such town, the county clerk cannot justify a refusal to deliver to the township assessor the books and papers necessary for him to perform his duties as such, on the ground that delivery of such books has been made to the board of assessors as de facto officers, since the board having no legal existence, there can be no de facto officers thereof.²⁶

§ 37. **Conflicting doctrine.**—However, in *Burt vs Winona etc. R. Co.*,²⁷ the Supreme Court of Minnesota attempted to introduce a new doctrine, in obvious conflict with the principles laid down by the foregoing authorities. It declared that there may be a de facto court or office, and that when a court or office is established by a legislative Act apparently valid, and the court has gone into operation, or the office is filled and exercised under the Act, it is a de facto court or office. In that case it was sought to have the judgment of a lower court annulled, on the ground that the Act creating the court had not received a sufficient majority in

^{24a}See, however, note 23a under sec. 259.

²⁵(1900), 183 Ill. 410, 56 N. E. 155.

²⁶See also *Walcott vs Wells* (1890), 21 Nev. 47, 24 P. 367, 37 Am. St. R. 478, 9 L.R.A. 59; *People vs Toal* (1890), 85 Cal. 333, 23 P. 203; *Miner vs Justices Court* (1898), 121 Cal. 264, 53 P. 795; *State vs District Court of Ramsay*

County (1898), 72 Minn. 226, 75 N. W. 224; *Ex p. Roundtree* (1874), 51 Ala. 42; *Flaucher vs Camden* (1893), 56 N. J. L. 244, 28 A. 82. But last case was disapproved in *Lang vs Bayonne* (1907), 74 N. J. L. 455, 68 A. 90.

²⁷(1884), 31 Minn. 472, 18 N. W. 285, 4 Am. & Eng. Corp. Cases 426.

the senate to make it law, according to the requirements of the constitution. But it was held, for the reason above stated, that the legality of the court could not be called in question, except in a direct proceeding for that purpose by the State. Two of the five judges, however, dissented; and Mitchell, J., in the course of his dissenting judgment, said: "I am unable to concur in the views expressed in the majority opinion, that even if the act creating the court was never constitutionally passed, still it would be a *de facto* court. The logical result of this would be that the person assuming to act as judge of that court would be an officer *de facto*, and the judgments of the court as valid as those of a legal court. To borrow an expression from the majority opinion, I think that a *de facto* court or office is a political solicism. The idea of an officer *de facto* presupposes the existence of a legal office. It seems to me that there cannot be an officer *de facto* unless there is a legal office, so that there might be an officer *de jure*. There are many cases to the effect that a person holding an office under an unconstitutional law is an officer *de facto*, but I think that in every one it will be found that there was a legal office, and that the law only went to the mode or manner of filling it. As suggested in the opinion, the *de facto* doctrine is founded on reasons of public policy and necessity, but it must have some reasonable limit, unless we are ready to recognize practical revolution and a legislative right to ignore all constitutional barriers." And in a subsequent case in the same State ²⁸ the court, referring to the above decision, observed: "The decision was guardedly placed upon the particular facts in hand. We do not here either approve or disapprove the

²⁸State vs District Court of Ramsay County (1892), 72 Minn. 226, 75 N. W. 224.

Burt case; but in no event can it be extended in its application."

The case is also adversely criticized in *Flancher vs Camden*²⁹ by Reed, J., delivering the opinion of the court, in the following language: "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 *Burt vs Winona and St. Peter Ry. Co.* . . . This point was decided by a majority of one, in a court consisting of five judges. The editor of the reports last mentioned, in a note to this case, cites a number of cases which he thinks strongly tend to support the doctrine laid down by the majority of the judges in *Burt vs Winona and St. Peter Ry. Co.* I fail to find any, among those cases, which, in my judgment, supports the view that there can exist a de facto officer without the existence of a de jure office." However, the doctrine laid down in *Burt vs Winona* has been recently re-asserted in Minnesota,³⁰ and adopted in New Jersey and Ohio.³¹

§ 38. Same subject.—Other authorities have also sometimes been quoted as upholding the views expressed in *Burt vs Winona etc. R. Co.*, but few afford any real support thereto. In *Leach vs People*,³² there is a dictum of the majority court which lends itself to such interpretation. The court was dealing with an unconstitutional Act which had attempted to change the composition of the board of supervisors in Wayne County, and in reviewing the authorities, it referred

²⁹(1893), 56 N. J. L. 244, 28 A. 82.

³⁰*State vs Bailey* (Minn. 1908), 118 N. W. 676.

³¹*Lang vs Bayonne* (1907), 74 N. J. L. 455, 68 A. 90, which declares the doctrine laid down in *Flancher vs Camden* to be un-

sound; *State vs Gardner* (1896), 54 Ohio St. 24, 42 N. E. 999; *Heck vs Findlay Window Glass Co.* (1898), 16 Ohio Cir. Ct. 111; *State vs Stroble* (1904), 25 Ohio Cir. Ct. 762.

³²(1887), 122 Ill. 420, 12 N. E. 726.

to *Trumbo vs People*,³³ where the establishment of a school district was in controversy. It said: "So far as that alleged district was concerned, there was no such legal school district, and there was no de jure office of school director of that alleged school-district; yet upon a proceeding to collect a tax levied by persons assuming to be and acting as school directors of the district, the tax was sustained, it being held that the school directors were officers de facto." This language is undoubtedly misleading, for a perusal of the opinion makes it clear that the court did not rely on the principle that a de facto office was entitled to recognition, to arrive at its conclusion. This is pointed out in the recent case of *People vs Knopf*,³⁴ where the court, after asserting that there can be no de facto officer unless there is a de jure office in existence, remarks: "The case of *Leach vs People*, 122 Ill. 420, which seems to be relied upon by counsel, does not hold the contrary. In that case the real cause of complaint was said to be 'that the office legally existing was illegally filled.' The legislature had attempted to change the composition of the board of supervisors of Wayne County, but as the court said, 'there was all the while a legally established office or official body of the board of supervisors of Wayne County.'"

*State vs Carroll*³⁵ contains also a deceptive sentence, which accounts for its being occasionally cited in support of the conflicting doctrine under consideration. "If then the law of the legislature," said the court, per Butler, C. J., "which creates an office and provides an officer to perform its duties, must have the force of law until set aside as unconstitutional by the courts, it would be absurd to say that an officer so

³³ (1874), 75 Ill. 561.

³⁵ (1871), 38 Conn. 449, 9 Am.

³⁴ (1900), 183 Ill. 410, 56 N. E. R. 409.

provided had no color of authority." But in *Norton vs Shelby County*,³⁶ Field, J., commenting on this case, said: "Of the great number of cases cited by the Chief Justice none recognizes such a thing as a de facto office, or speaks of a person as a de facto officer, except when he is the incumbent of a de jure office. The fourth head refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing. That such was the meaning of the Chief Justice is apparent from the cases cited by him in support of the last position."

§ 39. **Same subject.**—In *Donough vs Dewey*,³⁷ the court (per Champlin, C. J.) declared that while it is true that there cannot be an officer de facto unless there be an office to fill, yet the rule is modified, so far as officers have been created by the legislature, while the statute creating them has not been declared unconstitutional. No authorities are quoted in support of such proposition, except Mechem, whose work on public offices warrants no such statement of the law. Moreover, the facts before the court made it unnecessary for it to proclaim such a general principle. The constitution provided that the township clerk should be ex officio school inspector, and that annually one school inspector should be elected in each organized township. But an Act was passed authorizing the election of two inspectors yearly instead of one, and making females eligible to the office. One Elvene M. Hollister was elected to the office of school inspector, and she concurred with the other members of the board, the ex officio inspector and the other elected members,

³⁶(1886), 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed. 178.

nom. *Donough vs Hollister*, 46 N. W. 782.

³⁷(1890), 82 Mich. 309, s. c. sub.

in a vote to change the boundaries of a school district. It was claimed that the Act of the legislature was unconstitutional, and that the concurrence of the female inspector in the action of the board made it illegal. But the court held that the constitutional question did not necessarily arise, because "there was in fact and in law one school inspector elected by the electors of the township of Penn, and he, with the town-clerk, would constitute the board, if the additional school inspector was unauthorized."

In *Com. vs McCombs*³⁸ an Act had created the office of assistant attorney, and the incumbent's title was assailed, on appeal from a taxation of costs, on the ground that the Act was unconstitutional. The court refused to entertain the objection, and said that "an Act of Assembly, even if it be unconstitutional, is sufficient to give color of title, and an officer acting under it is an officer de facto." This, however, is not a well considered case upon the question we are now discussing.

§ 40. Same subject.—From the foregoing cases, it is evident that the weight of authority is against the theory that an unconstitutional Act can create an office. At all events, as pointed out in *Buck vs Eureka*,³⁹ all decisions favoring such views are in direct conflict with the great leading case of *Norton vs Shelby County*,⁴⁰ already referred to. But aside from authority, it is readily perceivable that the adoption of such principle is a dangerous innovation to introduce under a constitutional government. While a strict adherence to the opposite doctrine may, at times, be productive of mischievous consequences, yet if a legislative body, whose powers are limited by a written instrument, be per-

³⁸ (1867), 56 Pa. St. 436.

⁴⁰ (1886), 118 U. S. 425, 6 Sup.

³⁹ (1895), 109 Cal. 504, 42 P. 243. Ct. 1121, 30 L. ed. 178.

mitted to create offices in violation of such instrument, and the courts are to condone such wrongdoing by holding the incumbents thereof officers de facto, it is easily seen that the paramount rights of the people are unduly sacrificed to avoid occasional evils to a few individuals or to a small portion of the community. To sanction such usurpation of power, is to allow the legislature to ignore and override the sovereign will and authority of their masters. Where one of two evils must exist, reason, justice, and expediency demand the adoption of the lesser one.

Moreover, as we shall hereafter see, the authorities generally recognize certain reasonable limitations and qualifications to the general rule laid down in *Norton vs Shelby County*, which mitigate its apparent harshness, and prevent injustice being done to the public and private individuals, in many instances.

§ 41. **Observations on unconstitutionality of laws—No unconstitutionally created offices in England.**—It will be observed that, in the foregoing pages, no English case is quoted upon the question whether or not an unconstitutional law can create an office. The reason is obvious. No such case can occur under the British constitution. In England, the Parliament is supreme, and whatever office it may deem advisable to create cannot be drawn into question by the courts. Even if the Act creating an office be unconstitutional in the sense that it is in violation of the rules, precedents, and statutes which are considered part of the British constitution, still such enactment is valid and binding. The British Parliament, in the plenitude of its powers, may enact any laws, and their validity cannot be assailed in any proceedings by the courts. In fact, in the strict sense of the term, only in England can there be an unconstitutional

law, that is, a law which is legal and obligatory, though it be against the fundamental principles of the constitution. In the United States an unconstitutional law is an anomaly; it is no law at all. And as in that country, there is not only a written constitution for the whole nation, but a separate constitution for and in every State comprised therein, a law to be valid must neither violate the Federal nor the State constitutions.

In Canada and Australia, where the exercise of powers of sovereignty are confided, in part to a Federal Parliament, and in part to provincial or local legislatures, with a paramount authority over all in the Imperial Parliament, the term "unconstitutional law" has a meaning corresponding to what it has in the United States.⁴¹

As in the American Union, the will of the Canadian or Australian legislative bodies is law only where it is not in conflict with the controlling constitutional instrument. Legislation not in harmony with it, is no law at all. The same rule applies to all British possessions enjoying self-government under written constitutions.

⁴¹See *Severn vs The Queen* hon vs *Ottawa* (1878), 2 Ont. App. (1878), 2 Can. Sup. Ct. 70; *Lepro-* R. 522.

CHAPTER 5.

OF OFFICES RECOGNIZED BY LAW EX NECESSITATE AND OFFICES IRREGULARLY CREATED—DE FACTO GOVERN- MENTS—DE FACTO MUNICIPAL CORPORATIONS.

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48. Status of a de facto municipal corporation, and of the offices thereunder.
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59. Same subject.
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65. Same subject.

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| § 66. Estoppel to deny corporate existence of de facto corporation. | § 69. Long user of municipal franchise with public or State acquiescence. |
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| | 72. Same subject. |

§ 41a. **Scope of this chapter.**—In the preceding chapter, we have expounded and discussed the prevailing rule governing the creation and legal recognition of offices, together with its corollaries. We shall next deal with two exceptions, which have received the sanction of law. The first exception is founded upon dire necessity and is justified on no other ground. It concerns offices existing under a de facto government. But the other is more in the nature of a modification of the general rule than a radical exception. It relates to offices irregularly created—as contradistinguished from non-existing or void offices. To that class, among others, belong offices existing under a de facto municipal corporation. The treatment of these topics will require us to refer briefly to de facto governments, and to deal at some length with de facto public corporations.

§ 42. **Offices under de facto governments.**—A government de facto, in the proper legal sense, is a government that unlawfully gets possession and control of a State or country, dispossessing the rightful legal government, and maintaining itself there by force and arms against the will of the rightful legal government, and claiming to exercise the powers thereof.¹ While an actual government of this sort exists it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible as wrongdoers for

¹Chisholm vs Coleman (1869), 43 Ala. 204, 94 Am. Dec. 678.

those acts, though not warranted by the laws of the rightful government.² But obedience to such government naturally involves obedience also to the public functionaries holding offices thereunder who, though in possession of offices tainted with the same illegality as the government itself, yet discharge duties identical with, and of equal importance to, the citizens at large, as those performed by like officers under a lawful government. And from this compulsory obedience arises the correlative necessity of holding the acts of such illegal officers valid, so far as they affect the rights of those who are compelled to deal with them; otherwise the latter, notwithstanding their innocence, would suffer irreparable injury and detriment. Hence it is that the law recognizes those public functionaries as *de facto* officers, though they hold only *de facto* offices. "A *de facto* office," says the court, in *Hawver vs Seldenridge*³ "cannot exist under a constitutional government, but when the government is entirely revolutionized, and all its departments usurped by force, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries; and in such cases the acts of a *de facto* executive, a *de facto* judiciary and a *de facto* legislature must be recognized as valid." The government of Cromwell in England is a memorable instance of a *de facto* government.⁴

§ 43. Offices irregularly created.—Offices irregularly created form a middle class between offices lawfully exist-

²*Thorington vs Smith* (1868), 8 Wall. (U. S.) 1, 19 L. ed. 361.

³(1867), 2 W. Va. 274, 94 Am. Dec. 532.

⁴The above principle has been invoked to support a *de facto* municipal government organized by the state of Texas over a territory belonging to the United States. *Cullins vs Overton* (1898), 7 Okla. 470, 54 P. 702. As to *de facto* corporations under military inspection.

De Facto—5.

ing, and those pretended offices which are mere nullities, either because no bona fide attempt at creating them has been made, or their existence is obnoxious to the constitution or the organic laws of the body attempting to create them. Unlike the latter kind, though not lawfully created, yet they are capable of being so; they are endowed with the possibility of a perfect legal existence; and it is merely by reason of accidental irregularities in their creation that their status is not what it should be. In other words, they enjoy a de jure existence *in potentia*; and any informalities found in the attempt to afford them a de jure existence *in actu*, will not debar them from legal recognition, provided the same are not such as to render their creation utterly void. The law is satisfied with color of lawful creation or existence. "While it is certainly impossible," said the court in *Buck vs Eureka*,⁵ "to conceive of an officer, either de facto or de jure, filling or attempting to fill a non-existing office, there is a marked and well recognized distinction between such non-existing offices and those which, while having an irregular or merely potential . . . existence, yet do exist, and are recognized by the law."

In the same class as irregularly created offices may sometimes be placed those whose initial creation is lawful, but whose actual de jure existence in a locality is conditional on the performance of certain formalities on the part of the people or of public bodies, such as acceptance or the like. The filling of such offices by those empowered to appoint or elect thereto will constitute the incumbents officers de facto, though the formalities alluded to have been disregarded either in part or *in toto*.

tion, see *Ensley vs Nashville* 5 (1895), 109 Cal. 504, 42 P. 243. (1872), 2 Bax. (Tenn.) 144.

§ 44. Same subject—Illustrations.— In *Gibb vs Washington* ⁶ it was claimed that the appraisement of the goods, on which the duties were levied, was void, on the ground, among others, that the board of appeals, who had appraised the goods was not legally constituted. The objection related to one of the appraisers who had been appointed under a clause in the General Appropriation Bill of 1853, which provided for an additional Appraiser-General at a salary of six thousand dollars. It was contended that this was not a lawful creation of the office. But the court said: “If such an office has been even colorably created, and the present incumbent has discharged de facto its duties, then any irregularity which does not render the creation of the office void, cannot be availed of in this collateral proceeding.”

In *Smith vs Lynch* ⁷ it was sought to restrain the collection of a tax assessed by the board of health of the village of West Cleveland, upon the plaintiff's lots situate therein, for the expense of removing a nuisance from the lots. The ordinance of the village council establishing the board of health, by whose orders the nuisance was so removed, was not read on three several days; nor were the yeas and nays of the members of the council voting for the suspension of the rule requiring it to be so read recorded, nor did a majority of the members vote for the suspension, as prescribed by the municipal code. Hence, the plaintiff claimed that the board of health was not a lawful board, that they acted without authority, and that the tax was therefore illegally assessed. The record showed that the persons so constituting, or claiming to be, the board of health were the only persons claiming to be, or acting as such, and that they were publicly and gen-

⁶ (1858, U. S. C. C.), 1 McAll. 430.

⁷ (1876), 29 Ohio St. 261.

erally known and acknowledged as such at the time of the removal and assessment.

To the objection that there was no lawful office in existence, the court answered: "It is claimed by the counsel for the plaintiff that this is not a case where an office has been filled, and its duties performed, by parties not legally appointed or qualified, but a case where there was no office to be filled. We do not so understand the law. The statute (66 Ohio L. 200) creates the office. It authorizes the council to 'establish' the board, and to fill it by appointment. True, until the council act in the premises, it is a mere potentiality in their hands; yet it is none the less an office, known to the law, and provided for by law. Where the council assumes to establish the board under the law, and to appoint its members, there is no good reason why an irregularity or illegality in the act of establishing the office, any more than an irregularity or illegality in the appointment of the officers, should be held as rendering the acts of the officers void, and themselves mere trespassers. The reasons—the considerations of public policy—which exist in one case, exist equally in the other. It is enough that the office is one provided for by law, and that the parties have the color of appointment, assumed to be and act as such officers, and that they are accepted and acknowledged by the public as such to the exclusion of all others. Such was the case here. There was both the color and the fact of office."

§ 45. Same subject — Illustrations continued. — In *Clark vs Easton*⁸ the contention was that the road commissioners, whose acts were complained of, could not be regarded as public officers either de jure or de facto, because the town had never voted to accept the provisions of the statute re-

⁸ (1888), 146 Mass. 43, 14 N. E. 795.

lating to road commissioners, as it should have done before electing such officers. But it was held, that the road commissioners elected by the town were de facto such, and that the validity and regularity of their election should not be inquired into collaterally. The court said: "It is urged by the plaintiff, that the doctrine as to officers de facto cannot apply in this case, because there is no such office as that of road commissioner in Easton. . . . The statute of 1871, re-enacted in the public statutes, operating throughout the state, created the office of road commissioner. . . . Under the statute the right inheres in each town to elect its citizens to fill the office. The office potentially exists in each town, capable of being filled in a certain manner. As a preliminary to a legal election, the town must first accept the Act. If it fails to do this, it is an illegality or irregularity in the election; but the persons who qualify and perform the functions of the office are in the position of persons who are publicly discharging the duties of a charge or trust created and defined by the general laws. The vote of the town accepting the Act does not create the office. That exists by virtue of the general law, and the vote merely puts the town in a position in which it can legally fill the office by an election."

But, undoubtedly, the leading case upon this subject is *Buck vs Eureka*,⁹ which contains an elaborate review of the authorities. There the plaintiff sued the City of Eureka for services rendered by him as attorney under a special contract or retainer. In defence of the action, the city pleaded that, at the time of his employment, plaintiff was its city attorney, and that the contract was therefore void as increasing his compensation during his term of office, in violation of the constitution. The plaintiff attempted to meet and destroy

⁹ (1895), 109 Cal. 504, 42 P. 243.

this objection, by showing that the office of city attorney of the city of Eureka had never been created, and hence that he could never have been the incumbent thereof. His contention rested on the fact that the city, though it had repeatedly recognized the existence of the office and fixed the salary thereof, yet had never passed an ordinance creating the same. It was, however, held that although the council were required to create the office by ordinance, in pursuance of the political code, yet if they fixed the salary of a city attorney by ordinance, one accepting an appointment from the city council to that office, and qualifying and receiving the salary affixed to the office, was a *de facto*, if not a *de jure*, officer. And the court, after referring with approval to the general rule requiring the existence of a *de jure* office to constitute an officer *de facto*, remarked: "When, however, we come to consider the doctrine as applied to offices having an irregular or potential existence (as distinguished from a non-existing office, or one void in its creation), the cases are numerous and uniform in treating the incumbents of such offices, as *de facto* officers." ¹⁰

§ 46. **Municipal corporations.**—A municipal corporation is defined in Wharton's Law Lexicon, to be a body of persons in a town having the powers of acting as one person, of holding and transmitting property, and of regulating the government of the town. While this definition may be comprehensive enough in England, it is obviously too narrow to meet the requirements of a broad and general definition of the idea in the United States. Judge Dillon defines a municipal corporation, "to be the incorporation, by the authority of the government, of the inhabitants of a particular place

¹⁰But see *Moon vs Mayor* *Hedrick vs People* (1906), 221 Ill. (1905), 214 Ill. 40, 73 N. E. 408; 374, 77 N. E. 441.

or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinguishing feature of a municipal corporation proper.”¹¹

Municipal corporations are created either singly by special charter, or by general incorporating Acts under which a corporation may be brought into existence merely by adopting the method of procedure established by such statutes. But in England municipal corporations also exist by the common law and by prescription. It seems that prescriptive corporations may also exist in the United States.¹²

These general observations will suffice for our purpose, but we should point out that under the term “municipal corporations,” we include in this chapter public corporations of all kinds, whether they be strictly “municipal,” or only “quasi-municipal.” As instances of the latter class, may be mentioned counties,¹³ and school districts.¹⁴

§ 47. **De facto corporations.**—The phrase, “de facto corporations,” can hardly be said to have acquired any fixed and definite meaning. It is sometimes used to denote bodies, claiming to be corporations, which have no foundation for the claim except the fact of user. It is more generally used to denote bodies of a more or less defective legal organization. It would appear that the phrase should be limited to bodies which fall short of being corporations de jure, but whose organization is so far complete and legal that their

¹¹Dillon Mun. Corp. § 20.

Kan. 240, 45 P. 610, 34 L.R.A. 674.

¹² Kent Comm. 276, Dillon Mun Corp. § 37.

¹⁴School Dist. vs Thompson (1861), 5 Minn. 280; Public Institute Comm'rs. vs Fell (1894), 52

¹³County Comm'rs. vs County Comm'rs. (1878), 50 Md. 245; Rathbone vs Hopper (1896), 57

N. J. Eq. 689, 29 A. 816.

corporate existence cannot be questioned collaterally.¹⁵ The misuse of the term, and its frequent application to bodies not having even the color of lawful corporate existence, is a great source of confusion and increases the difficulty of systematizing the authorities.

A corporation *de facto* has been defined, as one where the proceedings for its organization are irregular or defective, when by regularity of proceedings to incorporate, it might be one *de jure*.¹⁶ Another court gives a more detailed definition, and declares that a corporation *de facto* exists, when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by the law—when there is an organization with color of law, and the exercise of corporate franchises.¹⁷

These definitions comprise all kinds of *de facto* corporations, for the law recognizes no distinction between public and private corporations in the application of the *de facto* doctrine. However, inasmuch as we are not dealing with private corporations, our exposition of the *de facto* principles in the following pages will, as far as possible, be confined, in the matter of illustrations and authorities, to municipal corporations.

§ 48. Status of a *de facto* municipal corporation, and of the offices thereunder.—A municipal corporation *de*

¹⁵*Vanneman vs Young* (1890), 3 R. & Corp. Rep. 660, notes.

¹⁶*Guthrie vs Wylie* (1896), 6 Okla. 61, 55 P. 103.

¹⁷*Snider's Sons Co. vs Troy* (1890), 91 Ala. 224, 8 So. 658.

facto has the same right to act and transact business as a de jure corporation, and its existence can only be questioned by the State in a direct proceeding brought for the purpose. "The doctrine," says Shiras, J., delivering the opinion of the United States Supreme Court in *Shapleigh vs San Angelo*,¹⁸ "successfully invoked in the court below by the defendant, that where a municipal corporation is wholly void ab initio, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation, which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against every body except the state acting by direct proceedings. Such an organization is merely voidable, and if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor."

As is evident, the offices under a corporation of this sort cannot be of a superior character to that of the corporation itself, and therefore they are merely de facto offices; yet they are recognized by law, and the incumbents thereof are officers de facto and their acts are valid.¹⁹

§ 49.—Requisites to constitute a municipal corporation de facto.—The requisites to constitute a corporation of this kind are three: (1) A charter or general law under which such a corporation as it purports to be might be lawfully organized; (2) An attempt to organize thereunder;

¹⁸(1897), 167 U. S. 646, 17 Sup. Ct. 957.

¹⁹*People vs Pederson* (1906), 220 Ill. 554, 77 N. E. 251.

and (3) actual user of the corporate franchise.²⁰ The last two requisites seldom present much difficulty in practice, in their relation to municipal corporations; but it is otherwise with the first, which involves in many cases the task of determining the effect of an unconstitutional law in attempting to bring into existence such a corporation. As already seen, the prevalent rule, supported by a decided weight of authority, is that an unconstitutional law can create no office, but the majority of courts are seemingly less rigid towards the organization of corporations, and to be willing to recognize a municipal corporation thus created. The reason of this is found in the fact that the denial of a de facto character to a municipal corporation, generally entails disastrous consequences as well to private individuals as to the public at large, and often causes irreparable injury to innocent persons.

§ 50. Where there is no law authorizing municipal corporations, no such corporation can exist de facto.—

As we have seen, the first requisite to constitute a de facto corporation is the existence of a law authorizing the incorporation. Where, therefore, there is no law providing for the organization of municipal corporations, there cannot be any such corporation either de facto or de jure.²¹ Thus, in

²⁰*Tulare Irrigation District vs Sheppard* (1901), 185 U. S. 1, 122 Sup. Ct. 531, 46 L. ed. 773; *Johnson vs Okerstrom* (1897), 70 Minn. 303, 73 N. W. 147; *Eaton vs Walker* (1889), 27 Am. & Eng. Corp. Cas. 310, notes.

²¹*City of Guthrie vs Wylie* (1896), 6 Okla. 61, 55 P. 103; *Blackburn vs Oklahoma City* (1893), 1 Okla. 292, 33 P. 708;

Oklahoma City vs Richardson Lumber Co. (1895), 3 Okla. 5, 39 P. 386; *Foster vs Hare* (1900), 26 Tex. Civ. App. 177, 62 S. W. 541; *Kent's Comm.* 277, (14th Ed.) notes; *Eaton vs Walker* (1889), 27 Am. & Eng. Corp. Cas. 310, notes; *Krutz vs Paolo Town Co.* (1878), 20 Kan. 397; *Galloway vs Town of Tavares* (1896), 37 Fla. 58, 19 So. 170.

City of Guthrie vs Territory,²² it was shown that at the opening of the Oklahoma country to settlement and occupancy, a large number of people settled for townsite purposes upon the lands now occupied by the city of Guthrie. To avoid certain inhibitions in the Act of Congress, those lands were sub-divided into four separate parcels. The townsite settlers, and occupants of each of these sub-divisions, organized what was called provisional governments, under charters adopted by the people at public meetings held for such purposes, and selected municipal officers, made public improvements, graded streets, erected buildings, constructed bridges, adopted laws and ordinances, and arrested, punished and imprisoned violators of such ordinances. These provisional governments assumed and exercised all the powers, functions and authority of legally constituted municipal corporations, and continued to exercise the same until 1890, when they were consolidated and organized as a village corporation under and pursuant to the laws of Nebraska, as adopted and extended over the territory by Act of Congress, and the said village of Guthrie succeeded to all the improvements, property, books and documents of the several provisional governments. During the existence of the latter they each contracted and created in various ways pertaining to their municipal affairs, certain debts which remained unpaid at the time the provisional governments were converted into a legally constituted municipal corporation. Under those circumstances, it was held that the provisional governments could not be deemed de facto municipal corporations, since there was no law authorizing municipal organization in the territory during their existence. But, on the other hand, it was further held that, although the contracts of such illegal governments were null and void and could not be enforced upon them or their suc-

²²(1892), 1 Okla. 188, 31 P. 190.

cessors, yet the legislature had power to impose the payment of the debts contracted by them upon the de jure corporation which succeeded.

§ 51. **General views of the authorities as to whether an unconstitutional law can create a de facto municipal corporation.**—The authorities are not harmonious on this subject. Some favor the doctrine enunciated in *Norton vs Shelby County*,²³ that an unconstitutional Act not being law, is incapable of creating or organizing a corporation. Others are disposed to look upon an unconstitutional law, which brings into existence a municipal corporation of the class provided for by the constitution, in the same light as an irregular or informal proceeding of individuals in attempting to organize a corporation under a valid law. Finally, others, without any attempt at giving circuitous reasons to justify their holding, positively assert that any unconstitutional Act is sufficient to impart color of law to a municipal corporation and to invest it with a de facto character.

The authorities under the second class generally hold, that the corporation is potentially created by the constitution, and that an unconstitutional law is sufficient to afford it such a color of lawful actual existence that it will be recognized by law. This reasoning, as is obvious, brings this class of cases within the rule already referred to, as to the irregular creation of offices. The third class, however, only claim support from necessity and public policy, and in that respect, can be assimilated to the case of de facto governments.

But it would be a mistake to assume that the circumstances in each case always justify the above classification, as the same is based more on the declarations of the judges as to the effect of an unconstitutional law to create a de facto

²³ (1886), 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed. 178.

corporation, than on the real state of facts before them. There are indeed only a few cases where the courts do not rely on other circumstances besides the unconstitutional law, to sustain municipal bodies collaterally attacked. The doctrine of estoppel, whether founded on an actual recognition of the corporation, or on long user of the municipal franchise with State and public acquiescence, is often invoked. Sometimes even presumptions are relied on.

It is evident, therefore, that we have to gather as best we can, what are the real opinions of the courts as to the question, whether or not an unconstitutional statute can create or organize a *de facto* municipal corporation. This will be our first purpose, but later on we shall refer to the collateral considerations just alluded to, which often influence the tribunals in arriving at their conclusions.

§ 52. Doctrine that unconstitutional law cannot create a *de facto* municipal corporation.—The authorities maintaining this doctrine assert, that there can be no *de facto* corporation where there is no valid law authorizing the formation of a *de jure* corporation. Thus, in *Town of Winneconne vs Village of Winneconne*,²⁴ the plaintiff sued to recover from the defendant village certain liquor license monies collected by the village during three consecutive years. The complaint alleged the corporate character of the town; that the defendant was a village duly incorporated, under chapter 40, Rev. St. (Wis.) 1878. By the answer it was pleaded in abatement, that the defendant was never a duly incorporated village; that an attempt was made to incorporate the defendant village in the year 1887; but that the law under which such attempt was made was unconstitutional, and hence that such proceedings were void, and that the

²⁴(1901), 111 Wis. 10, 86 N. W. 589.

defendant never became incorporated. This plea was sustained and the complaint was dismissed on the ground that at the time the suit was instituted and such plea was made, the defendant village, owing to the unconstitutionality of the law, did not exist either *de jure* or *de facto*.²⁵

In *Brandenstein vs Hoke* ²⁶ the plaintiff was the holder of certain bonds of a levee district, which were issued and sold for the purpose of securing funds to carry on improvements in the levee district. A writ of mandate was prayed for, requiring the board of fund commissioners of the district to levy a tax upon the property within the limits thereof, to be applied in liquidation of the principal and interest of the plaintiff's bonds. The principal question raised involved the constitutionality of the Act under which the district was organized. The court declared the Act unconstitutional, and held that a levee district so organized is not a corporation *de facto*, and may set up the unconstitutionality of the law to defeat the collection of bonds issued by it. And it further held, that such district is not estopped from denying liability on the bonds by the fact that it retained the proceeds arising from their sale, and paid interest on them for several years. The court expressly followed the decision of the Supreme Court in *Norton vs Shelby County*.²⁷

In *Railroad Co. vs Kearney County*,²⁸ it was held that a *de facto* municipal organization cannot be said to exist, where the evidence of its non-existence *de jure* appears upon the

²⁵See also *Gilkey vs Town of How* (1899), 105 Wis. 41, 81 N. W. 120, 49 L.R.A. 483; *Huber vs Martin* (1906), 127 Wis. 412, 105 N. W. 1031; *Evenson vs Ellingson* (1887), 67 Wis. 634, 31 N. W. 342.

²⁶(1894), 101 Cal. 131, 35 P. 562.

²⁷(1886), 118 U. S. 425, 6 Sup.

Ct. 1121, 30 L. ed. 178. See also *Eaton vs Walker* (1889), 76 Mich. 579, 43 N. W. 638, 6 L.R.A. 102, 27 Am. & Eng. Corp. Cas. 310; *Snyder vs Studebaker* (1862), 19 Ind. 462, 81 Am. Dec. 415; *McDonald vs Doust* (1905), 11 Idaho, 14, 81 P. 60, 69 L.R.A. 220.

²⁸(1897), 58 Kan. 19, 48 P. 583.

face of the law. The action there was upon warrants issued by Kearney Township. The law of Kansas provided that when an unorganized county was attached to an organized one for judicial purposes, it became a municipal township of the county to which it was attached. An Act was passed attaching Kearney County to Hamilton county, and it was assumed that it thereby became Kearney township of that county. On the strength of this assumption, township officers were elected, and township indebtedness contracted and warrants issued. But the Act was declared unconstitutional, because there was a contradiction between the title and the subject thereof; and it was accordingly held that Kearney county not having been lawfully attached to any other county, had no municipal existence and could contract no debts. "A political organization such as a county," said the court, "owes its life to the legislative will alone. If that will has not been exerted, the organization can have no existence, de jure or de facto."²⁹ But in *Speer vs Board of County Commissioners*,³⁰ the Circuit Court of Appeals (Eighth Circuit) refused to follow the above decision of the Supreme Court of Kansas, on the ground, *inter alia*, that the organization of the township of Kearney was really effected pursuant to the general laws of Kansas, and not under color of the void enactment.

Again, in *Kline vs State*,³¹ it was held that where a territory from one county is added to another by an unconstitutional law, an indictment for a crime committed in the territory so attached is void, if found in the county to which it is made part by the void statute.

²⁹But see *Riley vs Garfield Township* (1897), 58 Kan. 299, 49 P. 85.

³⁰(1898), 88 Fed. 749, 32 C. C. A. 101.

³¹(1906), 146 Ala. 1, 41 So. 953.

§ 53. **Authorities holding that corporations organized under an unconstitutional law are only irregularly created.**—These authorities, as already explained, look upon the unconstitutional law as merely an irregular step or proceeding to afford actual life and being to what already exists in a potential state under the constitution. Some courts assimilate such irregular creation of a municipal corporation to an irregularity or informality committed in the filling of an office lawfully existing. A learned judge commenting on this subject, says: “The same rule is applicable to corporations *de facto* and officers *de facto*.”³²

In that class of cases, it is generally found that the constitution in express terms provides for the organization of municipal corporations by the legislature, but imposes certain limitations or conditions as to population, territory, or the like. . The non-observance of the constitutional requirements always involves the determination of questions of fact, which the courts are of opinion should not be inquired into collaterally. The Act being valid on its face and being *prima facie* within the power of the legislature, it is claimed that the conclusion arrived at by that body as to the existence of the state of facts, which prompted its action, should not be reviewed, except in a direct proceeding for the purpose. In other words, the courts declare that they will not investigate incidentally the manner in which the power conferred by the supreme law on the legislature has been exercised, whether regularly or irregularly. “In a case,” says a learned judge, “which required the ascertainment of a fact upon which legislative authority to act depended, the exercise of that authority carries with it the presumption that the fact had been ascertained, and that the legislature acted within

³²Per Sanborn, J.—*Speer vs Board of County Commissioners* (1898), 88 Fed. 749, 766, 32 C. C. A. 101, 119.

the sphere of its authority.”³³ Indeed, some authorities have gone so far as to hold that the determination by the legislature of the existence of certain facts and conditions upon which depends its jurisdiction, is conclusive and cannot be assailed in any court by evidence *aliunde*.³⁴

§ 54. Same subject — Illustrations. — There are several cases illustrative of the principle that a municipal corporation organized under an unconstitutional law is only irregularly created. In *Ashley vs Board of Supervisors*³⁵ the validity of bonds which had been regularly issued by the board of supervisors of Presque Isle County and the proceeds applied to the erection of county buildings, was disputed on the ground, among others, that the organization of the county was defective because merely authorized by an unconstitutional Act. Upon that point the court argumentatively said: “But counsel for the defendant lays principal stress upon the doctrine that there cannot be a county de facto where there can be none de jure; and it is argued because the law of 1871 was void when enacted, and gave no authority for organization, there was no law under which Presque Isle County could become de jure a county, and therefore it could not become de facto such. The general proposition is no doubt correct, as a statement of a doctrine of law. But we do not think that proposition, as applied to the case before us, is sound. . . . The supreme law of the state recognizes counties as political bodies corporate.

³³Per Krekel, J., in *Judson vs Plattsburg* (1874), 14 Fed. Cas. (No. 7,570) 22, 3 Dill. 181.

³⁴*Fraser vs James* (1902), 65 S. C. 78, 43 S. E. 292; *Rumsey vs People* (1859), 19 N. Y. 41, 49; *Mattox vs State* (1901), 115 Ga.

De Facto—6.

212, 41 S. E. 709; *State vs County of Dorsey* (1873), 28 Ark. 379; *Lusher vs Scites* (1870), 4 W. Va. 11.

³⁵(1893), 60 Fed. 55, 16 U. S. App. 709, 8 C. C. A. 455.

Their existence is not only permitted, but is essential to the government which is organized. Their corporate character is not given by the legislature. That body, if it deems the organization consistent with public policy, prescribes a method of organization in form. This law, whether operative or not, signified the approval of the legislature of the formation of the new county, and in so far was in execution of its authority under the constitution; and we apprehend the rule to be that an unconstitutional and void law may yet be color of authority to support, as against any body but the state, a public or private corporation *de facto*, where such corporation is of a kind which is recognized by, and its existence is consistent with, the paramount law, and the general system of law in the state."

In *State vs City of Des Moines*³⁶ upon an appeal in a *quo warranto* proceeding it was claimed on behalf of the relator, that the defendant city had no right to exercise corporate authority over certain territory added thereto by legislative enactment. The contention was that the Act was unconstitutional and the court so held, but it refused to reverse the judgment of the lower court, and to disturb the existing *de facto* organization of the city, alleging various reasons, one of which was that the void enactment could be regarded as a mere irregularity. "In some of the cases," said the court, "the defects as to organization have been spoken of as irregularities, because of which appellant thinks the cases not applicable, because this is a void proceeding. The term 'irregularity' is oftener applied to forms or rules of procedure in practice than to a non-observance of established rules and practices. The annexation in question was a legal right under the law, independent of the act held void. It was not a void thing, as if prohibited by law.

³⁶ (1896), 96 Iowa, 521, 65 N. W. 818, 59 Am. St. 381, 31 L.R.A. 186

The most that can be said is that the proceeding for annexation was not the one prescribed, but it was a violation or nonobservance of that rule or law. It seems to us that the proceeding is no less an irregularity than in the cases cited.”³⁷

§ 55. Same subject — Illustrations continued. — In *Speck vs State*³⁸ the constitution authorized the legislature to establish new counties, but provided that “no line of such county shall approach the court house of any old county from which it may be taken nearer than eleven miles.” An Act was passed establishing Moore County, which was constitutional on its face, but which violated the organic law in that one of the lines was run by the commissioners nearer than eleven miles to the court house of the old county. It was held that the objection could not be taken in a collateral proceeding by a defendant who had been indicted in the new county. “When,” said the court, “nothing appears on the face of an act showing its invalidity, it is to be regarded, *prima facie*, as valid. Respect for the legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not void, but voidable only; and it follows as a necessary legal inference from this position, that the ground of avoidance for unconstitutionality can be taken advantage of only by those who have a legal right to question the validity of the act, and not by strangers.”

In *State vs Rich*³⁹ the ground of a motion to quash an indictment was that the Act of the General Assembly establishing the county of Stone, where the indictment was found,

³⁷See also *McCain vs Des Moines* (1899), 174 U. S. 168, 19 Sup. Ct. 644, 43 L. ed. 936; *McCain vs Des Moines* (1905), 123 Iowa, 331, 103 N. W. 979; *State vs McLean County* (1902), 11 N. D.

356, 92 N. W. 385; *State vs Gardner* (1896), 54 Ohio St. 24, 42 N. E. 999.

³⁸(1872), 7 Bax. (Tenn.) 46.

³⁹(1855), 20 Mo. 393.

was unconstitutional, because the establishment of the county had the effect of reducing the old county from which it was taken, below the ratio of representation then required; that, therefore, Stone County was not constitutionally established, and there was, in point of law, no such court constituted as the Stone Circuit Court, where an indictment could be lawfully found. The Circuit attorney admitted the alleged fact, and upon his admission, the lower court decided that the Act being unconstitutional and there being no lawfully constituted Stone Circuit Court, the indictment was a nullity and should be quashed. This judgment was reversed on appeal on two grounds:—(1) That there was no evidence that the Act complained of had the effect claimed, the admission of counsel not being evidence in that particular; and (2) that the alleged unconstitutionality of the Act involved questions of fact which could be inquired into only in a direct proceeding for the purpose. The court said: "The invalidity of this act does not, as is usually the case, appear upon the face of the statute; it is impossible, therefore, to determine, from a comparison of the act with the constitution, that there is any conflict between them." ⁴⁰

§ 56. Where unconstitutional law causes an irregularity, though the municipal organization is not effected under it.—Closely resembling the irregularly created corporations we are now considering, are those which, though organized under a valid law, are nevertheless affected in their organization by the operation of an unconstitutional statute, and rendered thereby defectively organized bodies. As, however, the municipal corporation in such cases is not the

⁴⁰See also *Riley vs Garfield* 19 N. Y. 41; *City of Topeka vs Township* (1897), 58 Kan. 299, 49 P. 85; *In re Short* (1891), 47 Kan. 417; *Coyle vs Commonwealth* 250; *Rumsey vs People* (1859), (1883), 104 Pa. St. 117.

creation of the unconstitutional law, but is only indirectly affected by it, it is clear that such corporation may have a de facto status, notwithstanding the void legislation. Thus, in *School District vs State*,⁴¹ an unconstitutional law had been passed which purported to detach certain territory from the county of Stafford, and to attach it to the county of Barton, in the State of Kansas. Thereupon, on the supposition that this law was valid, the county superintendent of Barton county and the inhabitants of a portion of this territory organized a school district, elected officers, and voted for an issue of the bonds of the district to build a school house, under the general laws of the state. When an action was brought on the bonds, the trial court held that the attaching Act was void, and the superintendent of Barton County had no authority to organize the school district, but as its organization was perfected under valid laws of the State of Kansas, it was a school district de facto, and its bonds were valid. The effect of the unconstitutional Act, as is evident, was merely to cause the school district to be organized by an improper officer.⁴²

§ 57. **Authorities unconditionally holding that a municipal corporation may be created by an unconstitutional law.**—The third class of authorities, as we have seen, unreservedly and unconditionally declare that a municipal corporation can be created or organized by or under an unconstitutional Act. Accordingly, in *Coast County vs Spring Lake*,⁴³ it was held that no matter how clearly unconstitutional are the provisions of a general Act providing for the organization of a municipality; no matter if in some other

⁴¹ (1882), 29 Kan. 57.

⁴³ (1896), 56 N. J. Eq. 615, 36 A.

⁴² See also *Speer vs Board of* 21.
County Commissioners (1898), 88
Fed. 749, 32 C. C. A. 101.

suit similar statutes or the same statute have been decided to be inimical to the constitution, nevertheless such a municipality is a de facto corporation until its municipal existence is annulled by a direct proceeding instituted for that purpose. In that case the common council of a borough, by resolution, threatened to tear down a building in course of erection on land which it claimed was dedicated to public use. A bill was filed to restrain the borough and its officers. The corporation had been organized under a general statute, which had been declared unconstitutional in quo warranto proceedings brought to test the legal existence of another municipality organized thereunder. Relying on that decision, the complainant claimed that the incorporation of the defendant borough and the resolution passed by it and under which it assumed to act were void, and therefore it had no authority to remove the alleged obstruction or nuisance. But the court held that although the Act had been declared unconstitutional in another case, yet that this did not justify a collateral attack on the existence of the defendant borough since it was a de facto municipality.⁴⁴

In *Speer vs Board of County Com'rs*⁴⁵ the foregoing doctrine is thus laid down: "We are unable to yield our assent to the broad proposition that there can be no de facto corporation under an unconstitutional law. Such a law passes the scrutiny and receives the approval of the attorney general, of the lawyers who compose the judiciary committees of the state legislative bodies, of the legislature, and of the

⁴⁴See also *Atty. Gen. vs Town of Dover* (1898), 62 N. J. L. 138, 41 A. 98; *Steelman vs Vickers* (1889), 51 N. J. L. 180, 17 A. 153, 14 Am. St. R. 675; *Riverton & P. Water Co. vs Haig* (1895), 58 N. J. L. 295, 33 A. 215; *St. Louis vs Shields* (1876), 62 Mo. 247; *Riley*

vs Garfield Township (1897), 58 Kan. 299, 49 P. 85; *People vs Maynard* (1867), 15 Mich. 463; *State vs Gardner* (1896), 54 Ohio St. 24, 42 N. E. 999.

⁴⁵(1898), 88 Fed. 749, 32 C. C. A. 101.

governor before it reaches the statute book. When it is spread upon that book, it comes to the people of a state with the presumption of validity. Courts declare its invalidity with hesitation and after long deliberation and much consideration, even when its violation of the organic law is clear, and never when it is doubtful. Until the judiciary has declared it void, men act and contract, and they ought to act and contract, on the presumption that it is valid; and where, before such a declaration is made, their acts and contracts have affected public interests or private rights, they must be treated as valid and lawful. The acts of a *de facto* corporation or officer under an unconstitutional law before its invalidity is challenged in or declared by the judicial department of the government cannot be avoided, as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity, by any *ex post facto* declaration or decision that the law under which they acted was void. This proposition is not without the support of eminent authority.”⁴⁶

§ 58. Mere irregularities in the organization of a municipal corporation will not deprive it of a *de facto* character — **Must be, however, a bona fide attempt to organize.**—The second requisite to constitute a municipal corporation *de facto* is a bona fide attempt to organize under the provisions of the law. Upon this point there is no conflict of opinion among the authorities. They all admit that when the law under which the incorporation is attempted is valid, a corporation may acquire a *de facto* character, though it owes its existence to irregular or informal pro-

⁴⁶See also *City of Topeka vs Dwyer* (1904), 70 Kan. 244, 78 P. 417; *Railroad Co. vs Town of Kentwood* (1897), 49 La. Ann. 931,

22 So. 192; *Ritchie vs Mulvane* (1888), 39 Kan. 241, 17 P. 830; *Coxe vs State* (1895), 144 N. Y. 396, 39 N. E. 400.

ceedings.⁴⁷ "Whenever there is a valid law," it is said in one case, "under which a corporation with the powers assumed might have been lawfully incorporated, and there is an attempt, apparently in good faith, to comply with the requirements of such law, and the corporation thus attempted to be created is organized and enters upon the transaction of business, its existence as a de facto corporation is established, even though it has failed to comply with the law in some particular which prevents it from being a corporation de jure."⁴⁸

In that case, the plaintiff sued the towns of How and Armstrong to recover payment of certain town orders. The board of Supervisors of Oconto County were authorized by law to divide and change the boundaries of towns in that county after the proposition so to do had been voted on by the elec-

⁴⁷Hill vs City of Kahoka (1888), 35 Fed. 32; Herring vs Modesto Irrigation District (1899), 95 Fed. 705; Miller vs Perris Irrigation District (1899), 92 Fed. 263; Shapleigh vs City of San Angelo (1897), 167 U. S. 646, 17 Sup. Ct. 957; Nat. Life Ins. Co. vs Bd. of Education (1894), 62 Fed. 778, 10 C. C. A. 637; Trumbo vs People (1874), 75 Ill. 561; Alderman vs School Directors (1878), 91 Ill. 179; Hamilton vs County of San Diego (1895), 108 Cal. 273, 41 P. 305; People vs Larue (1885), 67 Cal. 526, 8 P. 84; State vs Fuller (1888), 96 Mo. 165, 9 S. W. 583; Kayser vs Trustees of Bremen (1852), 16 Mo. 88; Franklin Ave. G. S. Inst. vs Bd. of Education (1882), 75 Mo. 408; Rice vs McClelland (1874), 59 Mo. 116; Mendenhall vs Burton (1889), 42 Kan. 570, 22 P. 558; Levitt vs City of Wilson (1905),

72 Kan. 160, 83 P. 397; City of Topeka vs Dwyer (1904), 70 Kan. 244, 78 P. 417; Kansas Town & Land Co. vs Kensington (1897), 6 Kan. App. 247, 51 P. 804; City of El Paso vs Ruckman (1898), 92 Tex. 86, 46 S. W. 25; St. Paul Gas Light Co. vs Village of Sandstone (1898), 73 Minn. 225, 75 N. W. 1050; Corey vs Borough of Edgewood (Pa. Com. Pl. 1901), 31 Pittsb. Leg. J. (N. S.) 299. But see Town of Woodbury vs Brown (1899), 101 Tenn. 707, 50 S. W. 743; Angel vs Town of Spring City (Tenn. Chy. App. 1899), 53 S. W. 191; School District vs Wallace (1898), 75 Mo. App. 317; Black vs Early (1907), 208 Mo. 281, 106 S. W. 1014.

⁴⁸Per Cassiday, C. J.—Gilkey vs Town of How (1899), 105 Wis. 41, 81 N. W. 120, 49 L.R.A. 483.

tors. Acting under this authority, the county board had erected a new town, called the town of Wampee, by detaching territory from the defendant towns. During the existence of such town and while it carried on municipal government, it issued the orders sued on by the plaintiff. It being subsequently dissolved in a direct proceeding for the purpose, on the ground of defects in the ordinance creating the same, and the territory comprised therein having reverted to the defendant towns, the plaintiff sued the latter, claiming that they were liable for the payment of his orders in proportion to the assessed value of the land over which they had respectively resumed possession and ownership by reason of the dissolution. The defendants contended in their demurrer, that the statutes under which the supervisors had attempted to organize the town of Wampee were mandatory, and that the failure of the plaintiff to show a substantial compliance therewith, was fatal to his claim. But the demurrer was overruled, the court holding that it was not necessary to prove a substantial compliance with the requirements of the statutes, it being sufficient to show a bona fide attempt to comply with them; and that under the circumstances the town of Wampee was a de facto corporation at the time of the issuance of the orders in question, and the defendants were liable for the payment of such orders in the proportion claimed.

· § 59. Same subject.—In *Merchant's Nat. Bank vs McKinney*⁴⁹ the facts were as follows: Under and by virtue of the provisions of Chapter 21, Code 1877, the governor of the late territory of Dakota proceeded to organize the unorganized county of Douglas, by appointing three county commissioners therefor, as provided in said Act, upon a petition presented to him which contained the names of persons not

⁴⁹(1891), 2 S. Dak. 106, 48 N. W. 841.

residents of the county, and the names of persons affixed thereto without their knowledge, and at a time when there were not over 20 voters in the county, although the law required at least fifty. But it was not shown by the record that the Governor had any knowledge that any names upon the petition were not genuine, or that there was not the required number of voters in the county. It was held that the commissioners so appointed, having appointed the other county officers of said county, the organization was, at least, a de facto county organization.

In *Whipple vs Tuxworth* ⁵⁰ there had been an attempt in good faith to organize an improvement district under the law, and the only defect in the organization was that the petition to the city for its establishment was signed by ten residents of the city owning real estate therein, instead of ten residents of the district owning real estate therein, as it should have been. This was due to an ambiguity in the statute. Held, that the district so irregularly created having for years collected assessments under its attempted organization, was a de facto corporation.

In *Coler vs Dwight School Township* ⁵¹ the county superintendent of Schools, under the laws then in force in North Dakota, organized a school district, officers were elected and exercised the functions of their respective offices; teachers were employed by the district, and school was taught therein; and a meeting was held in the district to vote upon the question of issuing bonds to build a school house, and the result was that bonds were afterwards issued. In an action upon some of the interest coupons of such bonds, it was held that the district was a de facto municipal corporation, and therefore it could not be interposed as a defence that the district

⁵⁰(1907), 81 Ark. 391, 99 S. W.
86.

⁵¹(1893), 3 N. Dak. 249, 55 N.
W. 587.

had no legal existence, because of failure to comply with the provisions of the statute regulating the organization of such districts. The objection was that the county superintendent had failed to furnish the county commissioners of the county with a written description of the boundaries of the district pursuant to the provisions of the statute, which declared that such description must be filed in the office of the register of deeds, before such district could be entitled to proceed with its organization by the election of school district officers. The court, by way of argument, observed that this irregularity was not more fatal to the de facto existence of the corporation, than would be a defect in the petition presented to and filed by the county superintendent, assuming that it was not signed by a majority of the citizens residing in the territory to be affected. Such a petition was another requirement of the statute.

§ 60. Same subject.—Again, in *People vs Schafer*,⁵² highway commissioners attempted to organize a drainage district, including lands in more than one town. The organization was invalid for want of power in the commissioners to organize a district where the lands involved extended in two or more towns, but they nevertheless perfected an organization and did business as a de facto drainage district, without any ouster or objection, until they reorganized by legal proceedings under another section of the statute. It was held that the original district was a de facto corporation, and after its legal re-organization was not subject to ouster because of the defective original proceedings. The court dwelt upon the circumstances that there was in existence a statute authorizing the creation of a drainage district of the same character as the one that was organized, and that the

⁵² (1907), 228 Ill. 17, 81 N. E. 785.

want of power in the commissioners depended on the existence of facts not shown in the record of their proceeding, and therefore that the user of the franchise was under color of a regular legal organization.

A contrary doctrine, however, was upheld in some Ontario cases,⁵³ where the formation of school sections, under the law then in force, was in dispute. Thus, in *Askew vs Manning*,⁵³ a union section of which the defendants assumed to be trustees, had been formed by adding to a section in one township parts of two sections in another township, and it was held that inasmuch as a union school section can be legally formed only of two sections, not of parts of sections, there was not merely an irregular exercise but a want of power to form such a union, and therefore the validity of the formation might be collaterally questioned in any action. "Where there is power to do a thing," said Harrison, C. J., "and the only question is, whether the power has been regularly exercised, and the inquiry is into a matter of fact, which may be differently found by different tribunals, and the right to office depends on the finding, it is only proper to hold, as we did in this case, that the inquiry can only be properly made in some proceedings where the question will be once for all decided as to bind the rights of all parties concerned." And further on he remarked, that "where the question is not merely the regular exercise of power, but the possible exercise of power," the question can be determined in any suit. The learned judge also distinguished the case before him from that of *In re Gill vs Jackson*,⁵⁴ where the proceedings only showed irregularities in an attempt to organize or alter a school section, and hence a tax levied by the school trustees was held valid as the act of de facto officers.⁵⁵

⁵³*Askew vs Manning* (1876), 38 U. C. Q. B. 345; *Halpin vs Calder* (1876), 26 U. C. C. P. 501.

⁵⁴(1856), 14 U. C. Q. B. 119.

⁵⁵However, de facto Union School sections formed as above

§ 61. Where no bona fide attempt to comply with the law, no de facto corporation.—The mere fact, however, that there is a valid law under which a corporation might be erected, and that certain parties have agreed to act as a corporation, and carry on municipal government, is not sufficient to constitute a corporation de facto. There must be, at least, a colorable compliance with the law under which a corporation de jure might be lawfully created by a substantial compliance with its requirements.⁵⁶ Thus, in *City of Guthrie vs Wylie*,⁵⁷ the action was to recover a specified sum of money from the city of Guthrie under the following circumstances: The townsite of the city of Guthrie, as already explained, was settled by townsite settlers, who, at a time when there was no law in the territory authorizing municipal corporations, established and carried on municipal government. This provisional government, in 1889, undertook by ordinance to grant to certain parties the privilege of constructing and operating a street railway. The ordinance provided for a deposit of \$1000 by the grantees, which was to become forfeited to the provisional city, in case of failure on the part of said grantees to comply with certain conditions. On June 13th, 1890, the money was declared forfeited by resolution of the council for reasons alleged by them, and converted to the use of the city. Previous to such conversion, on May 2nd, 1890, by the Organic Act of Oklahoma Territory, certain chapters and provisions of the laws of Nebraska were adopted and extended over the territory and put in force therein. Those laws provided for the organization of cities of the second class into villages, and under them in August,

were afterwards legalized by an Act of the Legislature. *Boyd vs Bobcaygeon* (1878), 43 U. C. Q. B. 35; *Nicol School Trustees vs Maitland* (1899), 26 Ont. App. 506.

⁵⁶*Johnson vs Okerstrom* (1897), 70 Minn. 303, 73 N. W. 147.

⁵⁷(1896), 6 Okla. 61, 55 P. 103.

1890, the village of Guthrie was organized and continued in existence until 1891, when the city of Guthrie was incorporated according to the laws of the territory, enacted by the legislature thereof. After being so incorporated, the city of Guthrie was sued by the above-named grantees for the recovery of the deposit of \$1000 and interest thereon. The liability of the defendant city depended upon the question, whether the provisional municipal corporation which had received the money and converted the same to its own use could be considered a de facto corporation; for if it were only a pretended municipal organization, no responsibility for its acts could attach to its de jure successor. The facts showed that at the time the forfeiture was declared and the conversion made, no steps had been taken to incorporate under the laws which had previously been declared in force in the territory. Under those circumstances, the plaintiff's right of action was denied; and it was held that the Organic Act of 1890 did not, by the mere passing thereof, have the effect of transforming the so-called provisional government of the city of Guthrie into a de facto corporation; and therefore that the city derived no benefit from that Act until it took steps to incorporate according to the provision of the laws which were thereby made operative in the territory.⁵⁸ "In our opinion," said the court, "no canon of construction would warrant an interpretation of this section that would make it self-operative. The act does not purport, in any of its provisions, to create villages. It simply authorizes their creation and incorporation by means of machinery it specifies, and in the manner and upon conditions expressly stated. . . . The act did not, upon its adoption for this Territory, operate *eo instanti* to breathe the breath of life into municipal corporations."⁵⁹

⁵⁸Overruling on that point, *Blackburn vs Oklahoma City* (1893), 1 Okla. 292, 33 P. 708.

⁵⁹See also *Foster vs Hare* (1900), 26 Tex. Civ. App. 177, 62 S. W. 541.

§ 62. **Actual user of the corporate franchise.**—The third requisite to constitute a *de facto* municipal corporation is actual user of the corporate franchise. The acts to show user must in their nature be corporate acts, or such as would be corporate acts if the attempted incorporation had been perfected, and they must unequivocally be such.⁶⁰ Questions of this sort, however, are more likely to arise in connection with private corporations, than with public corporations. In the former case, it is not always easy to ascertain whether the alleged acts of user were really corporate acts, or merely the acts of persons acting in the capacity of partners. In the latter case, no such difficulty presents itself, inasmuch as if the alleged corporators acted at all, it must necessarily be assumed that they attempted to act as a corporation.

§ 63. **Collateral grounds tending to sustain *de facto* corporations.**—Hitherto, we have treated of the intrinsic qualities of *de facto* corporations, that is, of the reasons that induce their recognition on their own merits, so to speak. We shall next deal with certain rules of law or procedure which at times have the effect of maintaining their assumed corporate character, independently of the irregularity or illegality of their creation or organization, and this upon purely collateral grounds. The first rule, however, that of immunity from collateral attack, always presupposes the existence of at least a *de facto* corporation. But the other rules, such as estoppel, official recognition by the State or public acquiescence, have often the effect of sustaining a corporation which may not possess all the pre-requisites to constitute it a *de facto* corporate body. In some instances, too, incidental legislative recognition imparts even a *de jure* character to an illegally organized corporation.

⁶⁰De Witt vs Hastings (1876), 40 N. Y. Sup. Ct. 463.

§ 64. Rule as to collateral attacks on de facto corporations.—The invariable rule is, that the corporate existence of a de facto corporation, public or private, cannot be inquired into collaterally; and this is equally true whether it be formed under a general law or created by special charter. The State alone, as a rule, is empowered to test the legality of its existence by a direct proceeding for the purpose, usually a quo warranto.⁶¹ The reason is that the unlawful assumption of corporate powers is a direct encroachment upon the sovereign authority,⁶² of which corporate bodies exercise a portion thereof, but it is no invasion of private rights. Therefore, if the State acquiesces in the existence of a corporation, especially one publicly exercising a municipal franchise, a private citizen has no cause of complaint.

The above rule, however, is sometimes so broadly stated by the authorities,⁶³ as seemingly to countenance the theory

⁶¹R. vs Corporation of Car-Marthen (1759), 2 Burr. 869, 1 W. Bl. 187; R. vs Ogden (1829), 10 B. & C. 230; R. vs Jones (1863), 8 L. T. (N. S.) 503; R. vs Taylor (1840), 11 A. & E. 949, 3 P. & D. 652; Shapleigh vs San Angelo (1897), 167 U. S. 646, 17 Sup. Ct. 957; Ashley vs Presque Isle County (1893), 60 Fed. 55, 16 U. S. App. 709; Hill vs City of Kahoka (1888), 35 Fed. 32; Black vs Early (1907), 208 Mo. 281, 106 S. W. 1014; State vs Fuller (1888), 96 Mo. 165, 9 S. W. 583; Town of Frederickton vs Fox (1884), 84 Mo. 59; Mendenhall vs Burton (1889), 42 Kan. 570, 22 P. 558; School District vs School District (1891), 45 Kan. 543, 26 P. 43; Town of Henderson vs Davis (1890), 106 N. C. 88, 11 S. E. 573; Town of Decorah vs Gillis (1859),

10 Iowa, 234; Bird vs Perkins (1875), 33 Mich. 28; Coe vs Gregory (1884), 53 Mich. 19, 18 N. W. 541; Town of Mendota vs Thompson (1858), 20 Ill. 197; Aldermen vs School Directors of Dist. No. 5 (1878), 91 Ill. 179; Gale vs Knopf (1901), 193 Ill. 245, 62 N. E. 229; Speck vs State (1872), 7 Bax. (Tenn.) 46; Hamilton vs County of San Diego (1895), 108 Cal. 273, 41 P. 305; Graham vs City of Greenville (1886), 67 Tex. 62, 2 S. W. 742; Brennan vs City of Weatherford (1880), 53 Tex. 330, 37 Am. R. 758; City of Carthage vs Burton (Tex. Civ. App., 1908), 111 S. W. 440; Ex parte Moore (1878), 62 Ala. 471.

⁶²Elizabeth City Academy vs Lindsey (1846), 6 Ired. L. (N. C.) 476, 45 Am. Dec. 500.

⁶³State vs Whitney (1894), 41

that it operates to shield from collateral attack any pretended corporation, actually exercising corporate powers, irrespective of the nature of its origin. But to give the judicial language such interpretation would be unwarrantable, for it would mean that a rule, which is merely an incident of a *de facto* corporation, and consequently presupposes the existence of a body having the essential requisites to be regarded as such, would have the effect of sustaining, in private litigation, any sort of corporate usurpation. This could not be. Undoubtedly, then, the true rule is, that whenever the existence of a corporate body is incidentally challenged, the inquiry into its creation or organization should proceed far enough to enable the tribunal to determine whether or not it can be deemed a *de facto* corporation; and upon that determination should depend the ruling of the court as to whether the attempted attack should be permitted or not. This is, by analogy, applying to corporations the rule that obtains in regard to *de facto* public officers. The courts will not allow the title of the latter to be collaterally assailed, but nevertheless will investigate it sufficiently to ascertain whether they are in reality *de facto* officers, for no tribunal will protect mere usurpers. Moreover, this is the principle we find supported, in express terms, by numerous authorities with reference to both public and private corporations.⁶⁴ "While,"

Neb. 613, 59 N. W. 884; *City of Billings vs Dunnaway* (1893), 54 Mo. App. 1; *State vs Birch* (1905), 186 Mo. 205, 85 S. W. 361; *Hamilton vs City of Carthage* (1860), 24 Ill. 22; *Tisdale vs Town of Minonk* (1867), 46 Ill. 9; *Bird vs Perkins* (1875), 33 Mich. 28.

⁶⁴*Askew vs Manning* (1876), 38 U. C. Q. B. 345; *Brandenstein vs Hoke* (1894), 101 Cal. 131, 35 P. 562; *Huber vs Martin* (1906), 127

Wis. 412, 105 N. W. 1031; *Bergeon vs Hobbs* (1897), 96 Wis. 641, 71 N. W. 1056; *Davis vs Stevens* (1900), 104 Fed. 235; *St. Paul Gas Light Co. vs Village of Sandstone* (1898), 73 Minn. 225, 75 N. W. 1050; *Railroad Co. vs Shires* (1884), 108 Ill. 617; *Foster vs Hare* (1900), 26 Tex. Civ. App. 177, 62 S. W. 541; *In re Short* (1891), 47 Kan. 250, 27 P. 1005; *School District vs Wallace* (1898),

says a court, "it is a settled rule in this state that the legal existence of a corporation can not be questioned collaterally, still the existence of the requisites necessary to constitute a corporation de facto must be shown." ⁶⁵

§ 65. **Same subject.**—Such being the character and scope of the rule, it follows that it is a misapplication of the same to resort thereto, to avoid deciding difficult matters affecting the creation or organization of an alleged corporation, when such matters may operate to deprive it of even a de facto status. For instance, it is no argument in favor of upholding the validity of a corporation purporting to have been created by an unconstitutional law, to assert that a de facto corporate body cannot be collaterally assailed.⁶⁶ This is merely begging the question,—taking it for granted that a void enactment can impart a de facto character to the corporation it purports to create. It is also perverting the rule, really making it a cause, rather than treating it as an effect dependent upon a principal fact, which must first be established. Hence, unless the court is willing to hold that a corporation created by an unconstitutional Act is a de facto corporation, it should not invoke the rule as an argument to sustain a corporate body thus created.

§ 66. **Estoppel to deny corporate existence of de facto corporation.**—Another rule is, that a person who acknowledges the validity of an alleged corporation, by his conduct, admissions, or dealings with it, is estopped afterwards to deny its corporate existence. This principle is

75 Mo. App. 317; *Rnohs vs Town of Athens* (1891), 91 Tenn. 20, 18 S. W. 400, 30 Am. St. R. 858; *Quint vs Hoffman* (1894), 103 Cal. 506, 37 P. 514.

⁶⁵*Stanwood vs Sterling Metal Co.* (1903), 107 Ill. App. 569.

⁶⁶*City of Topeka vs Dwyer* (1904), 70 Kan. 244, 78 P. 417.

equally applicable to public and private corporations.⁶⁷ Thus, one who participates in forming a corporation,⁶⁸ or becomes a member, or acts as an officer, thereof,⁶⁹ is estopped from denying the legality of its incorporation. So a township which assesses taxes against a water company, and receives the taxes paid by it under protest, cannot be heard to say, in an action by the company to recover them, that it was not lawfully incorporated.⁷⁰ So a person who sues a corporation by its corporate name,⁷¹ or admits its corporate existence in his pleadings,⁷² cannot question the validity of its creation or organization in that suit.

But the most frequent application of the doctrine of estoppel occurs in actions on contracts. The rule on this branch of the subject is, that one who has contracted with a *de facto* corporation as such, within the scope of powers which would belong to it as a corporation *de jure*, will not be permitted to allege any defects in its creation or organization, in an

⁶⁷*Chubb vs Upton* (1877), 95 U. S. 665, 24 L. ed. 523; *Rannels vs Rowe* (1906), 145 Fed. 296; *Eaton vs Aspinwall* (1859), 19 N. Y. 119, affirming 13 How. Pr. 184, *Snider's Sons Co. vs Troy* (1890), 91 Ala. 224, 8 So. 658, 24 Am. St. R. 887, 11 L.R.A. 515; *In re Borough of Flemington* (1895), 168 Pa. St. 628, 32 A. 86; *Stout vs Zulick* (1886), 48 N. J. L. 599, 7 A. 362; *Fresno Canal & Irrigation Co. vs Warner* (1887), 72 Cal. 379, 14 P. 37; *State vs Bailey* (1861), 16 Ind. 46, 79 Am. Dec. 405; *Spahr vs Farmers' Bank* (1880), 94 Pa. St. 429; *Bon Aqua Imp. Co. vs Standard Fire Ins. Co.* (1891), 34 W. Va. 764, 12 S. E. 771; *Bates vs Wilson* (1890), 14 Col. 140, 24 P. 99; *Corey vs Morrill* (1889), 61 Vt. 598, 17 A. 840; *Rockville &*

W. Turnpike Road vs Van Ness (1824), 20 Fed. Cas. (No. 11,986) 1080, 2 Cranch C. C. 449.

⁶⁸*Marshall Foundry Co. vs Kilian* (1888), 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539.

⁶⁹*Upton vs Hansbrough* (1873), 28 Fed. Cas. (No. 16,801) 839, 3 Biss. 417; *Wheelock vs Kost* (1875), 77 Ill. 296; *Mason vs Nichols* (1867), 22 Wis. 376; *Marsh vs Mathias* (1899), 19 Utah, 350, 56 P. 1074; *Parrott vs Byers* (1871), 40 Cal. 614.

⁷⁰*Monroe Water Co. vs Frenchtown Township* (1894), 98 Mich. 431, 57 N. W. 268.

⁷¹*Hinsdale vs Larned* (1819), 16 Mass. 64.

⁷²*Nat. Mnt. Bldg. & Loan Ass'n vs Ashworth* (1895), 91 Va. 706, 22 S. E. 521.

action brought by it to enforce the contract.⁷³ In any such litigation, it will be presumed, and that by irrebutable presumption, as a rule, that the corporate body is a legal entity. Thus, a party to a contract which recites that the other party to it is a corporation, is estopped to deny the other's incorporation.⁷⁴ So one who has given a note,⁷⁵ a bond,⁷⁶ or a mortgage⁷⁷ to a corporation by its corporate name, cannot deny that the corporation was legally organized. Accordingly, where a county issues its bonds payable to a railroad company, it is estopped in an action upon such bonds, to set up that the railroad company was not a corporation *de jure* at the time of the issue of the bonds.⁷⁸ So in a suit against a city on a contract evidenced by an ordinance, and entered into between the city and a corporation, the defendant city is estopped from impeaching the validity of the corporation, in order to escape liability.⁷⁹

The principle of estoppel, however, works both ways, against as well as in favor of a corporation. Hence, gener-

⁷³See cases cited at beginning of this section.

⁷⁴*St. Louis Gas Light Co. vs City of St. Louis* (1884), 84 Mo. 202.

⁷⁵*School District No. 61 vs Alderson* (1889), 6 Dak. 145, 41 N. W. 466; *National Bk. of Fairhaven vs Phoenix Warehousing Co.* (1875), 6 Hun (N. Y.) 71; *Ransom vs Priam Lodge No. 145* (1875), 51 Ind. 60.

⁷⁶*City of St. Louis vs Shields* (1876), 62 Mo. 247; *Mackenzie vs School Trustees of Edinburg* (1880), 72 Ind. 189; *Douglas County vs Bolles* (1876), 94 U. S. 104, 24 L. ed. 46; *Lewis vs Clarendon* (1878), 15 Fed. Cas. (No. 8,320) 474, 5 Dill. 329.

⁷⁷*Manitoba Mortgage & Invest. Co. vs Daly* (1895), 10 Man. L. Rep. 425; *Snyder vs State Bank* (1826), 1 Ill. 161; *Lorrillard vs Van Houten* (1829), 10 N. J. L. 270; *Franklin vs Twogood* (1868), 25 Iowa, 520, 96 Am. Dec. 73.

⁷⁸*Darlington vs La Clede County* (1877), 6 Fed. Cas. (No. 3,577) 1191, 4 Dill. 200. See also other cases on bonds, just cited.

⁷⁹*City of Greenville vs Greenville Waterworks Co.* (1900), 125 Ala. 625, 27 So. 764; *City of Kalamazoo vs Kalamazoo Heat Etc. Co.* (1900), 124 Mich. 74, 82 N. W. 811.

ally, a body contracting, or holding itself out to the world, as a corporation, is estopped from denying its corporate existence in suits brought against it.⁸⁰

§ 67. **Extent of the rule of estoppel.**—The authorities are not entirely in harmony as to what extent the doctrine of estoppel should preclude an inquiry into the creation or organization of an alleged corporation. The majority express no opinion on this subject, for the facts involved in the cases they were considering were such, that there could be no question as to the applicability of the rule. Among those who have dealt with the question, some are apparently of opinion that an estoppel should operate as an absolute prohibition to draw into question the legality of a corporation, however illegitimate may be its birth.⁸¹ Conformably to this view, it has been held that the doctrine will protect from collateral attack, a corporation created by an unconstitutional law.⁸²

But this doctrine is denied by other courts; and it is declared that the corporate existence may be impeached, where there is no law or only an invalid law authorizing the same. In an Indiana case, it is said: "The estoppel arises upon matter of fact only, and not upon matter of law. Hence if there be no law which authorized the supposed corporation, or if

⁸⁰*Brennan vs City of Weatherford* (1880), 53 Tex. 330, 37 Am. R. 758; *Argenti vs City of San Francisco* (1860), 16 Cal. 256; *Meurer vs Detroit Musicians etc. Ass'n* (1893), 95 Mich. 451, 54 N. W. 954; *Phinizy vs Augusta & K. R. Co.* (1894), 62 Fed. 678; *Abbott vs Aspinwall* (1857), 26 Barb. 202; *Beal vs Bass* (1894), 86 Me. 325, 29 A. 1088; *Franklin Ave. G. S. Inst. vs Bd. of Education* (1882), 75 Mo. 408.

⁸¹*Brown vs Atlanta Ry. & Power Co.* (1901), 113 Ga. 462, 39 S. E. 71.

⁸²*City of St. Louis vs Shields* (1876), 62 Mo. 247; *McCarthy vs Lavasche* (1878), 89 Ill. 270, 31 Am. R. 83; *Winget vs Quincy Bldg. Ass'n* (1889), 128 Ill. 67, 21 N. E. 12; *Brown vs Atlanta Ry. & Power Co.* (1901), 113 Ga. 462, 39 S. E. 71.

the statute authorizing it be unconstitutional and void, the contract does not estop the party making it, to dispute the existence of the corporation. But if, on the other hand, there be a law which authorized the corporation, then, whether the corporators have complied with it, so as to become duly incorporated, is a question of fact, and the party making the contract is estopped to dispute the organization or legal existence of the corporation.”⁸³

The solution of the above question would seem, according to the authorities, to narrow itself down to this: Whether a corporation created by an unconstitutional law, is to be regarded as a de facto corporation or not. If the affirmative is to be held, then the rule of estoppel should prevail. If the negative, it should not.

§ 68. **Same subject.**—A like test, based on the character of the corporation, is apparently applied in a great number of cases where the law is admittedly valid, but there is want of compliance with it, either in toto or in some particulars. Those decisions, in express terms or by implication, lay down the principle that there can be no estoppel unless there is at least a de facto corporation *in esse*. “The doctrine of estoppel,” says one court, “cannot be successfully invoked, we think, unless the corporation has at least a de facto existence.”⁸⁴

⁸³Snyder vs Studebaker (1862), 19 Ind. 462, 81 Am. Dec. 415; Heaston vs Cincinnati etc. R. Co. (1861), 16 Ind. 275; Burton vs Schildbach (1881), 45 Mich. 504, 8 N. W. 497; Eaton vs Walker (1889), 76 Mich. 579, 43 N. W. 638, 6 L.R.A. 102, 27 Am. & Eng. Corp. Cas. 310; St. Louis Col. Ass'n vs Henessy (1882), 11 Mo. App. 555.

⁸⁴Per Hayst, C. J.—Jones vs Aspen Hardware Co. (1895), 21 Colo. 263, 40 P. 457, 29 L.R.A. 143; Empire Mills vs Alston Grocery Co. (1891), 4 Tex. App. Civ. Cas. 346, 15 S. W. 505, 12 L.R.A. 366; Williams vs Hewitt (1895), 47 La. Ann. 1076, 17 So. 496; Chubb vs Upton (1877), 95 U. S. 665, 24 L. ed. 523; Frost vs Frostburg (1860), 24 How. (U. S.) 278;

Thus confined, it is obvious that the doctrine of estoppel has no greater scope or effect than the rule prohibiting collateral attacks on corporations. For, as we have seen, no one but the State can question the legality of a corporation which has the essential requisites to entitle it to be regarded as a *de facto* corporation. This is, we apprehend, restricting the purpose and effect of the doctrine within too narrow limits. The true scope thereof would seem to lie between two extremes. On the one hand, private admissions or acknowledgments should not be effectual to erect into a corporation, even for the purpose of private litigation, a body having no color whatever of lawful existence, and hence no claim whatever to legal recognition.⁸⁵ On the other hand, where there is a valid law creating the corporation or providing for its organization, and it openly exercises corporate powers, with the apparent acquiescence of the State, the proof of these facts should seemingly be sufficient to work an estoppel as against a party who has dealt with it and acknowledged its corporate existence, even if it be not shown that it has complied with all requisites which might be held necessary to constitute it a corporation *de facto* in the strict sense of the term.⁸⁶

Within these limits, the application of the doctrine will reasonably safeguard the dignity and sovereignty of the State, and protect the interests of private individuals as well as those of corporate bodies. In the forcible language of

Butchers' etc. Bank vs McDonald (1881), 130 Mass. 264; *McLennan vs Hopkins* (1895), 2 Kan. App. 260, 41 P. 1061; *Merriman vs Magiveny* (1873), 12 Heisk. (Tenn.) 494; *Central Agriculture etc. Ass'n vs Alabama Gold L. Ins. Co.* (1881), 70 Ala. 120; *Bibb vs Hall* (1893), 101 Ala. 79, 14 So. 98; *Eaton vs Aspinwall* (1859), 19 N.

Y. 119; *Globe Pub. Co. vs State Bank* (1894), 41 Neb. 175, 59 N. W. 683; *Bergeron vs Hobbs* (1897), 96 Wis. 641, 71 N. W. 1056, 65 Am. St. R. 85.

⁸⁵*Krutz vs Paolo Town Co.* (1878), 20 Kan. 397.

⁸⁶*See Vanneman vs Young* (1890), 3 Am. R. & Corp. Rep. 660. notes.

the United States Supreme Court, it might be said that "to hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of Justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it."⁸⁷

§ 69. Long user of municipal franchise with public or state acquiescence.— In addition to the foregoing cases, many authorities, by an extended application of the doctrine of estoppel, ingraft another exception upon the rule previously explained, that a municipal corporation, in order to be immune from collateral attack, must be shown to possess all the requisite qualities to constitute it a corporation *de facto*. This occurs where a municipal body has been in existence and has openly exercised its franchise for a considerable length of time, with public and state acquiescence. In such case, it seems that if the municipal corporation be of a class known to the law, that proof of user alone, under appropriate circumstances, will be sufficient to protect it from collateral attack. As to what will be deemed a sufficient length of user, a learned judge says: "I do not find much real conflict in the cases on this question, though none of them presume to fix any certain time after which such organization cannot be questioned collaterally, and no doubt it would be unwise, if not impossible for the court to make any general rule on the subject, as each case must be governed in part by its own circumstances."⁸⁸

⁸⁷Casey vs Galli (1876), 94 U. S. 673.

⁸⁸Austrian vs Guy (1884), 21 Fed. 500.

The above principle has sometimes been carried so far as not only to preclude collateral attacks, but even direct attacks by the State against the validity of a corporation.⁸⁹ This is somewhat an attempt to apply to municipal corporations of recent creation the common law rule as to prescription.⁹⁰ However, as already seen, it has been held that corporations may exist by prescription in the United States.⁹¹

The reason for estoppel in case of long user is thus explained by a Michigan judge: "Even in private associations, the acts of parties interested may often estop them from relying on legal objections, which might have availed them if not waived. But in public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on year after year raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can be no longer open to question."⁹² In that case, it was held that where townships have become organized under a statute and have acted for many years (ten), and have been recognized by the various State and local authorities, it is too late to inquire into the validity of the law providing for their original creation, and their corporate existence cannot be questioned.

⁸⁹State vs McLean County (1902), 11 N. D. 356, 367, 92 N. W. 385, 391.

⁹⁰R. vs Stratford-upon-Avon (1811), 14 East, 348.

⁹¹²Kent Com. 277; Robie vs Sedgwick (1861), 35 Barb. (N. Y.)

319; Eaton vs Walker (1889), 76 Mich. 579, 43 N. W. 638, 6 L.R.A. 102, 27 Am. & Eng. Corp. Cas. 310. notes.

⁹²People vs Maynard (1867), 15 Mich. 463.

§ 70. **Same subject.**—For the same reason it was held, that where a school district has assumed to possess and exercise all the rights and franchises of a regularly organized corporation for thirteen years, with entire acquiescence of everybody, it is not liable to have the regularity of its organization, or the legislation under which it acted, called in question thereafter in a merely private and collateral suit.⁹³ “To require,” said Judge Cooley, “a municipal corporation, after so long an acquiescence, to defend, in a merely private suit, the irregularity, not only of its own action, but even of the legislation that permitted such action to be had, could not be justified by the principles of law, much less by those of public policy.”

So the regularity of the organization of a graded school district, in existence and in the exercise of corporate powers for nearly twenty years, was held unassailable in proceedings to enjoin the collection of a tax assessed by it.⁹⁴ So where a school district had been in *esse* for many years (19), and during that time had continued to receive money out of the county school fund, and had had several special taxes levied and collected for its benefit, a person on whose property such a tax was levied was denied the right of attacking the legality of the organization of the district.⁹⁵

So, although the original orders organizing a town were invalid, it was held that, after the lapse of a period of ten years, the validity of such organization and its authority to levy taxes could not be questioned collaterally, in a proceeding by the alleged owner of town lots to remove a cloud on his title, caused by a tax deed issued to a purchaser at a

⁹³*Stuart vs School District No. 1 of Kalamazoo* (1874), 30 Mich. 69.

District No. 1 (1894), 98 Mich. 437, 57 N. W. 404.

⁹⁵*State vs Central Pac. R. Co.*

(1890), 21 Nev. 75, 25 P. 296.

⁹⁴*Keweenaw Ass'n vs School*

tax sale for taxes levied by such town.⁹⁶ And it was even held that, where the State has continually recognized a municipal corporation during a considerable period, through her officers, State and county, it is precluded from proceeding by quo warranto to deprive it of a franchise so long exercised in accordance with the general law.⁹⁷ On the other hand, in *Ward vs Gradin*,⁹⁸ it was laid down that long user of corporate powers will estop the corporation itself from denying the validity of its existence in a collateral proceeding.⁹⁹

§ 71. Legislative recognition of municipal corporations.—There is also another instance where a municipal corporation cannot be assailed, no matter how defective may have been its organization. This is where it has been legislatively recognized, either directly or indirectly. Such recog-

⁹⁶*Austrian vs Guy* (1884), 21 Fed. 500.

⁹⁷*State vs Leatherman* (1881), 38 Ark. 81.

⁹⁸(1906), 15 N. D. 649, 109 N. W. 57.

⁹⁹*Brennan vs City of Weatherford* (1880), 53 Tex. 330, 37 Am. Rep. 758. For further authorities on the subject of this section, see *Presque Isle County vs Thompson* (1894), 61 Fed. 914, 10 C. C. A. 154; *Speer vs Bd. of County Com'rs* (1898), 88 Fed. 749, 32 C. C. A. 101; *Jamieson vs People* (1855), 16 Ill. 257, 63 Am. Dec. 304; *Bow vs Allenstown* (1857), 34 N. H. 351, 69 Am. Dec. 489; *Voss vs Union School District No. 11* (1877), 18 Kan. 467; *Ritchie vs Mulvane* (1888), 39 Kan. 241, 17 P. 830; *Barnes vs Barnes* (1834), 6 Vt. 388; *Sherwin vs Bugbee* (1844), 16 Vt. 439; *Town of Readsboro vs Town of Woodford*

(1904), 76 Vt. 376, 57 A. 962; *Bassett vs Porter* (1849), 4 Cush. (Mass.) 487; *Burnham vs Rogers* (1902), 167 Mo. 17, 66 S. W. 970; *Rice vs McClelland* (1874), 58 Mo. 116; *Stamper vs Roberts* (1887), 90 Mo. 683, 3 S. W. 214; *State vs Miller* (1905), 110 Mo. App. 542, 85 S. W. 912; *Town of Henderson vs Davis* (1890), 106 N. C. 88, 11 S. E. 573; *Prentiss vs Davis* (1891), 83 Me. 364, 22 A. 246; *People vs Alturas County* (1899), 6 Idaho 418, 55 P. 1067, 44 L.R.A. 122; *State vs Sweeney* (1898), 24 Nev. 350, 55 P. 88; *Cullins vs Overton* (1898), 7 Okla. 470, 54 P. 702; *Rumsey vs People* (1859), 19 N. Y. 41. But see *McMillan vs Hannah* (1901), 106 Tenn. 689, 61 S. W. 1020; *Redfield School Dis. No. 12 vs Redfield Ind. School Dist. No. 20* (1901), 14 S. Dak. 229, 85 N. W. 180.

dition, however, does not merely impart a *de facto* character to the corporation, but constitutes it a *de jure* one to all intents and purposes, so that all inquiry into its original organization is precluded, whether it be attacked collaterally, or directly by the State. "It is universally affirmed," says the United States Supreme Court, "that when a legislature has full power to create corporations, its acts recognizing as valid a *de facto* corporation whether private or municipal, operates to cure all defects in steps leading up to the organization and makes a *de jure* out of what was before only a *de facto* corporation."¹⁰⁰

Evidently, the court did not use the term "*de facto*" in its technical sense, but as embracing all organizations actually exercising corporate powers, whether entitled to be regarded as *de facto* corporations or not. The legislature, however, must have original power to create corporations of the character which it recognizes,¹⁰¹ for otherwise no amount of recognition on its part will be of any avail to the pretended corporate body. For instance, a corporation attempted to be created by an unconstitutional law is in no better position after having been recognized by subsequent enactments, unless the original act was only defective in form, or the legislature has afterwards acquired the power of creating such a corporation.

§ 72. **Same subject.**— There are many cases illustrating the foregoing principle of legislative recognition. Thus, where a municipal corporation has been empowered by the legislature to issue negotiable obligations, such recogni-

¹⁰⁰Per Brewer, J., delivering the opinion of the court in *Comanche County vs Lewis* (1890), 133 U. S. 198, 10 Sup. Ct. 286, 33 L. ed. 604, affirming 35 Fed. 343.

¹⁰¹*State vs Com'rs of Pawnee County* (1874), 12 Kan. 426.

tion will preclude the issue of quo warranto to test its legality.¹⁰² So where no charter or Act of incorporation of a town can be found, the annexation of other territory to the town by legislative enactment, impliedly makes it a town, if it was not so before.¹⁰³ So where the charter of a city, which had been in force for nearly twenty years, was assailed on the ground that the election at which it was accepted had not been held pursuant to the notice required by law, it was held that even if this was so, the legislature cured the same by recognizing and amending its charter.¹⁰⁴

¹⁰²Jameson vs People (1855), 16 Ill. 257, 63 Am. Dec. 304.

¹⁰³Bow vs Allentown (1857), 34 N. H. 351, 69 Am. Dec. 489.

¹⁰⁴Town of Henderson vs Davis (1890), 106 N. C. 88, 11 S. E. 573. See also Harper County Com'rs vs Rose (1891), 140 U. S. 71, 11 Sup. Ct. 710, 35 L. ed. 344; People vs Farnham (1864), 35 Ill. 562; Coe vs Gregory (1884), 53 Mich. 19, 18 N. W. 541; State vs Tosney (1879), 26 Minn. 262, 3 N. W. 345; Broking vs Van Valen (1893), 56 N. J. L. 85, 27 A. 1070;

State vs Com'rs of Pawnee County (1874), 12 Kan. 426; Town of Bath Com'rs vs Boyd (1840), 23 N. C. (1 Ired. L.) 194; Rumsey vs People (1859), 19 N. Y. 41; Prentiss vs Davis (1891), 83 Me. 364, 22 A. 246; People vs Alturas County (1899), 6 Idaho, 418, 55 P. 1067, 44 L.R.A. 122; Muse vs Town of Lexington (1903), 110 Tenn. 655, 76 S. W. 481; State vs Town of Pell City (Ala. 1908), 47 So. 246; but see Savannah etc. Ry. Co. vs Jordan (1901), 113 Ga. 637, 39 S. E. 511.

CHAPTER 6.

POSSESSION OF OFFICE NECESSARY TO CONSTITUTE AN OFFICER DE FACTO—INCIDENTS OF POSSESSION.

§ 73. Necessity of possession.

74. Officer de jure and officer de facto may exist simultaneously, but both cannot hold at same time.

75. Same subject.

76. Same subject—Illustrations.

77. Same subject—Illustrations continued.

78. Two officers de facto cannot hold office at same time.

§ 79. Where two rival claimants have each only a partial or imperfect possession of the office, neither is a de facto officer.

80. Where one of two claimants has full possession, the other cannot deprive him of his de facto character by unlawfully dispossessing him.

81. Possession of office by usurper affords no right.

§ 73. Necessity of possession.—The second requisite to constitute a person an officer de facto is, that he be in the actual possession of the office and have the same under his control.¹ This condition precedent is naturally implied from the words “de facto.” A de jure officer, as already explained, may be unlawfully ousted from office or hindered from performing the duties thereof, without his legal title thereto being impaired. But with a de facto officer the mere claim to be a public officer is not sufficient; the claimant having no title must be clothed with the outward appearance of being

¹McCahon vs Leavenworth County (1871), 8 Kan. 437; Herkimer vs Keeler (1899), 109 Iowa 680, 81 N. W. 178; Hamlin vs Kassafer (1887), 15 Or. 456, 15 P. 778, 3

Am. St. R. 176; Fulton vs Andrea (1897), 70 Minn. 445, 73 N. W. 256; Mead vs Ingham County (1877), 36 Mich. 416; Paris vs Couture (1883), 10 Que. L. R. 1.

the rightful incumbent of the office, and such appearance he cannot have, if he is kept out of it or the same is in the possession of someone else. "Before a person," says a learned judge, "can become an officer *de facto* he must obtain the actual possession of the office; he must obtain the possession of the office in fact; and he must generally be recognized as the officer."²

Accordingly, where a city charter provided for the removal of officers by the aldermen in a manner therein set out, and in the exercise of such power, the aldermen assumed to remove a street commissioner, and appointed another in his stead, but the former refused to vacate the office and continued to exercise its functions, it was held that the latter, not having the possession of such office, could not be regarded as an officer *de facto*.³ The court said: "But it is claimed by plaintiff that he has, since his appointment, been acting as street commissioner, and is therefore *de facto* such officer. . . . The defendant, by his refusal to deliver up the property, books, and papers of the office, has indicated that he claimed to hold the office. If he was once lawfully in office, a fact which we are not allowed to question on this record, and has never yielded, but has held on and continued to act, then the plaintiff has never gotten possession, and cannot be regarded as an officer *de facto*."

Likewise, it was held that a person who was in hiding during the year it was claimed he was an officer, and had no place of business, and could not even be communicated with through the postoffice, could not be deemed an officer *de facto*,

²Valentine, J. in *Neeland vs State* (1888), 39 Kan. 154, 18 P. 165. Also *Chowning vs Boger* (1885), 2 Tex. App. Ct. (Civ. Cas.) 650, 9 Am. & Eng. Corp. Cas. 91.

³Hallgren vs Campbell (1890), 82 Mich. 255, 46 N. W. 381, 21 Am. St. Rep. 557, 9 L.R.A. 408.

since he had no possession.⁴ "A man," remarked the court, "who holds a public office cannot discharge the duties of such office when he is in hiding. He cannot conceal himself from the public, and yet claim to be a public officer."

§ 74. Officer de jure and officer de facto may exist simultaneously, but both cannot hold at same time.—

In the earlier English cases, it seems to have been doubted whether there could be a de facto officer when there was an officer de jure in existence, the office being then legally full. Thus, in *R. vs Lisle*,⁵ Chief Justice Lee observed "that it would deserve great consideration, whether collation by a bishop de facto is good where there is a rightful one in being;" and he cited *The Queen vs Davis*, in Queen Anne's time, where on a motion for information it was held, that there cannot be an officer de facto and an officer de jure at the same time. This opinion is apparently sustained by a dictum in the *Abbé de Fontaine case*.⁶ "If," says Babington, C. J., "an abbacy or church be legally full, and the patron prefer one, who is instituted by the ordinary, without deposing the other by due process, and then the other makes a re-entry and oust the other, in this case a deed made by him who was put in possession wrongfully is void, because there was always another parson, so that the second was only a usurper."

But the true doctrine is recognized in *O'Brian vs Knivan*⁷ and *Harris vs Jays*.^{7a} In the first case one John Bale was lawfully created bishop, and after being consecrated took

⁴*Williams vs Clayton* (1889), 6 Utah 86, 21 P. 398.

⁵(1738), Andr. 163, 95 Eng. R. 345.

⁶(1431), Year Book, 9 H. 6 fol. 32.

⁷(1620), Cro. Jac. 552, 79 Eng. Rep. 473.

^{7a}(1599), Cro. Eliz. 699, 78 Eng. Rep. 934.

possession of the bishoprick. During his lifetime, by superinstitution, another person was made bishop of the same see, to whom John Bale relinquished his place. The question was, whether a lease made by the bishop *de facto* was valid, and though the court held it was not, because it was a voluntary act injurious to the successor, yet it declared that all judicial acts performed by him, as admissions, institutions, certificates, etc., were good.

In the second case, it was also conceded by the court, that if one being created bishop, the former bishop not being deprived or removed, admits one to a benefice upon a presentation, or collates by lapse, these are good and not avoidable, for the law favors the acts of one in a reputed authority. The words "deprived or removed" evidently mean *legally* deprived or removed.

The latter doctrine is supported by all the modern authorities. "That there may be," says a learned judge, "an officer *de facto*, while there is an officer *de jure*; or, in other words, though an office is not vacant, and there is an existing officer *de jure*, one who enters into and assumes its duties, under color of appointment, will be an officer *de facto*, is a proposition maintained by all the authorities we have had an opportunity of consulting." ⁸

§ 75. **Same subject.**— But though it is now settled beyond dispute, that there may be a *de facto* officer while there is a *de jure* officer in existence, nevertheless it is obvious that both cannot actually hold the office at the same time.⁹ If

⁸Brickell, J.—Diggs vs State (1873), 49 Ala. 311. See also Brinkerhoff vs Jersey City (1900), 64 N. J. L. 225, 46 A. 170; Fulton vs Andrea (1897), 70 Minn. 445, 73 N. W. 256; In re County

De Facto—8.

Life Assurance Co. (1870), L. R. 5 Chy. App. 288; Gill vs Jackson (1856), 14 U. C. Q. B. 119.

⁹R. vs Corp. of Bedford (1800), 1 East, 79. As to offices filled by more than required number, un-

the de jure officer be in possession, his superior title will exclude all others, and any one attempting to discharge the duties of the office can be but a mere usurper. "It is," says one court, "not every person who assumes to execute official functions who is to be classed as an officer de facto, and whose acts can be successfully invoked by a third person. If there is an officer or board of officers having legal title to the office, and claiming to be in possession of the office, and being present ready to exercise its functions, no other officer or board of officers can, during the same period, by any colorable appointment to such office, or by any acts in professed execution of the office, acquire a de facto character. Such person or persons are but intruders into the office. In other words, where an officer by law is also an officer in fact, there is no room for any other officer in fact in the same office."¹⁰

It is probably in that sense that it is laid down in *Andrews vs Eagle*,¹¹ that "if there be a churchwarden de jure, and a churchwarden de facto, in the same parish, the latter cannot justify the laying out of, or receiving money, but he is accountable to the churchwarden de jure; he is no more than another man, and he that is de jure may bring an indebitatus assumpsit against the other."

On the other hand, if the actual possession be held by a de facto incumbent, there is no place left for the de jure officer, and he cannot exercise the office before the unlawful holder has been ousted. The public and third persons are not bound to determine at their peril which of the two claimants has the legal title, and their interests demand that the one in possession should be regarded as a good officer, until he is declared a usurper by a court of competent jurisdiction.¹²

der authority of unconstitutional law, see sec. 199 et seq.

¹⁰*Dienstag vs Fagan* (1907), 74 N. J. L. 418, 65 A. 1011.

114 Vin. Abr. 527.

¹²*Leach vs Cassidy* (1864), 23 Ind. 449; *Hamlin vs Kassafer* (1887), 15 Or. 456, 15 P. 778, 3

§ 76. **Same subject—Illustrations.**—The above doctrine is strikingly illustrated by a decision of the New York Court of Appeals.¹³ The action was brought by plaintiff, as overseer of the poor of the town of German Flats, to recover penalties for alleged violations of the excise law in selling ale and beer without a license. Defendant justified under a license purporting to have been issued by the commissioners of excise of said town. It was signed by H. M. Bliss and J. W. Kinne as commissioners of excise. It appeared that one Bellinger was elected excise commissioner in March, 1876; he filed his oath of office March 11, and also an official bond, but the same was not approved by the supervisor of the town until after the town meeting in 1877. Bellinger met with the other commissioners as a member of the board of excise on the first Monday of May, 1876. At the town meeting in 1876, on the supposition that there was a vacancy, because of the failure of Bellinger to have his bond duly approved, votes were cast for J. W. Kinne "to fill vacancy, if any exist," and he was declared by the town clerk elected to fill vacancy, if any existed. On the first Monday of May, 1877, Lewis, Bliss and Bellinger met as the excise board and adjourned for a year without granting licenses. Kinne filed an oath of office and a bond. In March, 1877, Bliss and Kinne notified Lewis to meet with them as a board of excise; and this he declined to do. Bliss and Kinne met March 10, 1877, and claiming to act as such board signed the alleged license.

It was held that the license afforded no defence, on the ground that Bellinger being an officer *de jure* in possession of the office, Kinne could not be regarded as an officer *de*

Am. St. R. 176; *Chowning vs Boger* (1885), 2 Tex. App. Ct. (Civ. Cas.) 650, 9 Am. & Eng. Corp. Cas. 91.

¹³*Cronin vs Stoddard* (1884), 97 N. Y. 271. See also *Cronin vs Gundy* (1879), 16 Hun (N. Y.) 520.

facto when signing the same. The court said: "The difficulty with the appellant's case is that when Kinne assumed to act as excise commissioner the office was already full. Bellinger, who was elected in 1876 for a term of three years, was in de jure, and in 1877 was performing the duties of his office. There was, therefore, no place in which another could act. And this is so although his official bond was not approved by the supervisor until after the time when Kinne claims to have been elected. The omission at the utmost afforded cause for forfeiture of the office, but did not create a vacancy. That could be effected only by a direct proceeding for that purpose. . . . It follows that Kinne had not even an apparent authority or color of title to act as excise commissioner, and the license granted by him furnishes no defence to the action." ¹⁴

In a subsequent New York case,¹⁵ a like question arose, but the application of the same principle led to an opposite result. It was contended, as in the previous one, that the defendant could not justify under his license because one Shepard, who had signed it with another commissioner, was neither a de jure nor a de facto officer; and that the same should have been signed by one Hugg who, it was alleged, had succeeded to Shepard. The facts showed that although the term of one excise commissioner only had expired, three names were placed on the tickets of each of the two political parties, and all three names on the tickets cast by the majority having received the same number of votes, the inspectors of election declared the three elected. Among them were Hugg and Shepard, the latter seeking re-election. Hugg attempted to discharge the duties of the office and sat on one or

¹⁴See also *People vs McAdoo* (1905), 110 N. Y. App. Div. 432, 96 N. Y. S. 362.

¹⁵*Montgomery vs O'dell* (1893),

67 Hun (N. Y.) 169, 35 N. E. 205, 22 N. Y. Supp. 412, affirmed 142 N. Y. 665, 37 N. E. 570.

two occasions with Shepard and the two other de jure commissioners. On his behalf, it was urged that the certificate of the inspectors gave him apparent authority or color of title to act as such commissioner, and, hence, he became a commissioner de facto upon qualifying and acting as such, and that he being a commissioner de facto to fill the vacancy caused by the expiration of Shepard's term, he was the only commissioner who could fill that vacancy, and Shepard was neither commissioner in law nor in fact. On the other hand, Shepard claimed that he had obtained one vote more than the other two, on account of a paster having been attached to one of the ballots on which his name only was written and voted for; and for that reason he had continued to exercise the office.

The court held that the certificate of the inspectors failing to give more color of right to Hugg than to the two others on the ticket, he could not be deemed an officer de facto when the office was already filled by Shepard, who had a right thereto by his extra vote, or by the provision of the law declaring that an officer shall hold his office until his successor is appointed. Hence, the license was held to be a good defense to the action.¹⁶

§ 77. Same subject—Illustrations continued.—There are many other cases illustrative of the same principle. Thus, where some members of a city council attempted to fill a supposed vacancy in the council when none in fact existed, their appointee was not a de facto officer, though he qualified and acted as councilman, since the person whose place he was appointed to fill, though he failed to attend the meetings

¹⁶For further application of like principle, see *School District No. 13 vs Smith* (1895), 67 Vt. 566, 32 A. 484.

of the council, continued to be councilman, both *de facto* and *de jure*.¹⁷

So where there was a contest between two boards of school trustees, each board claiming to be the lawful officers, and each proceeding as though the other board did not exist, it was held that the old board was the *de jure* board, and that the acts of the new board, before the statute under which they were elected had been declared unconstitutional, were invalid. The court said: "If an office is filled, and the duties appertaining thereto are performed, by an officer *de jure*, another person, although claiming the office under color of title, cannot become an officer *de facto*." ¹⁸

So where a school warrant was issued by a woman, who, though ineligible, claimed to be a county superintendent *de facto*, the same was held invalid, because there was another *de jure* superintendent in possession of the office at the same time.¹⁹

So where there was a *de jure* House of Representatives in existence, holding its sessions and transacting business in the hall of the House of Representatives, it was held that there could not be at the same time another body entitled to be recognized as a *de facto* House of Representatives.²⁰

Upon the same principle, it is held that where a person, legally appointed or elected to an office, qualifies and enters upon his official duties, his predecessor ceases to be an officer,

¹⁷*Somerset vs Somerset Banking Co.* (1900), 109 Ky. 549, 60 S. W. 5.

¹⁸*State vs Blossom* (1886), 19 Nev. 312, 10 P. 430. Also *Genesee Township vs McDonald* (1881), 98 Pa. St. 444; *McCahon vs Leavenworth County* (1871), 8 Kan. 437;

Dienstag vs Fagan (1907), 74 N. J. L. 418, 65 A. 1011; *White vs School District* (1887), 5 Sadl. (Pa. Sup. Ct. Cas.) 323, 8 A. 443.

¹⁹*Cohn vs Beale* (1883), 61 Miss. 398.

²⁰*In re Gunn* (1893), 50 Kan. 155, 32 P. 470, 948.

and any pretended official act performed by him afterwards is null and void.²¹

But in a Georgia case,^{21a} it was held that one holding a commission as notary public from the Governor and acting as such, is a *de facto* officer, though the office is filled by a *de jure* incumbent, exercising the functions thereof. This, however, is not a well considered decision, and no authorities are cited in support of it. "We are of opinion," said the court, "that there can be but one legal commissioned notary in a district at one time, but the proper mode to settle this is by a proceeding for the purpose, and not, as is attempted here, by collaterally attacking his acts."

§ 78. Two officers *de facto* cannot hold office at same time.—For the like reason that an officer *de jure* and an officer *de facto* cannot simultaneously hold an office, so two persons cannot, at the same time, be in the actual occupation and exercise of an office, as officers *de facto*, when the law provides for one incumbent only. "Two physical bodies," says one judge, "cannot occupy the same space at the same time, and two persons cannot be officers *de facto* for the same office at the same time."²²

²¹United States vs Alexander (1891), 46 Fed. 728. See post, sec. 123. For further illustrations, see School Directors vs Nat. School Furnishing Co. (1893), 53 Ill. App. 254; Boardman vs Halliday (1843), 10 Paige (N. Y.) 223; Mead vs Ingham County (1877), 36 Mich. 416; State vs Dorton (1898), 145 Mo. 304, 46 S. W. 948; Powers vs Commonwealth (1901), 110 Ky. 386, 61 S. W. 735, 22 Ky. L. R. 1807, 63 S. W. 976, 53 L.R.A. 245; Fulton vs Andrea (1897), 70 Minn. 445, 73 N. W. 256; Baker vs Hob-

good (1900), 126 N. C. 149, 35 S. E. 253; Bennett vs Colfax (1880) 53 Iowa, 687, 6 N. W. 36.

^{21a}Pool vs Perdue (1871), 44 Ga. 454.

²²Per Leonard, J.—in State vs Blossom (1886), 19 Nev. 312, 10 P. 430. Also McCahon vs Leavenworth County (1871), 8 Kan. 437; Conover vs Devlin (1857), 15 How. Pr. (N. Y.) 470, 6 Abb. Pr. 228; Hamlin vs Kassafer (1887), 15 Or. 456, 15 P. 778, 3 Am. St. R. 176; State vs Murphy (1893), 32 Fla. 138, 13 So. 705; Dickerson vs But-

Thus, in *Morgan vs Quackenbush*,²³ two persons, Perry and Quackenbush, claimed the office of mayor under a charter election. Perry was first declared elected by the outgoing common council, and after qualifying, took possession of the office. But subsequently, the new council declared Quackenbush elected, and he in turn assumed to act as mayor. It was held that as Perry had become a mayor de facto under color of the determination of the first board, Quackenbush, whatever his right, could not be a mayor in fact at the same time. "Indeed," said the judge, "I do not understand that two persons can be in possession of the same office at the same time. . . . They could not hold as tenants in common—each having a legal right to perform its functions. If Mr. Perry became a mayor de facto, the defendant Quackenbush, whatever his right, could not be mayor in fact at the same time."

§ 79. Where two rival claimants have each only a partial or imperfect possession of the office, neither is a de facto officer.—Where one of the claimants has, in addition to the partial or imperfect possession of an office, a known de jure title thereto, no difficulty arises, because, as already seen, the legal right excludes the consideration of any other claim. Thus, when two persons are present at the seat of government, each claiming to be the Governor de

ler (1887), 27 Mo. App. 9; *Somerset vs Somerset Banking Co.* (1900), 109 Ky. 549, 60 S. W. 5. *Jersey City vs Erwin* (1896), 59 N. J. L. 282, 35 A. 948, holding that the acts of two persons who had acted as city attorney, were valid, though the office could only be legally filled by one, was re-

versed by *Erwin vs Jersey City* (1897), 60 N. J. L. 141, 37 A. 732. 64 Am. St. R. 584, where it was held that one of the incumbents was not an officer de facto. As to offices filled by more than required number, under authority of unconstitutional law, see sec. 199 et seq. 23 (1856), 22 Barb. (N. Y.) 72

jure, the one who has been adjudged Governor de jure is also Governor de facto.²⁴

But it is otherwise when the question of title arises collaterally and it is not known which of two claimants has the legal right, and each claims to be an officer de facto by reason of some temporary or partial occupancy of the office in dispute. In such case, inasmuch as both lack that actual, exclusive, and peaceable possession, which is essential to constitute one an officer de facto, neither can be regarded as such an officer. Thus, in *Conover vs Devlin*²⁵ both the plaintiff and the defendant claimed the office of street commissioner. The facts showed that on the 12th of June, Conover was appointed by the Governor. On the 13th, he took the oath of office, and executed his official bond, and filed it. He was in the rooms or place of the official business, for a part of two days claiming a right to the office, and to the books and papers, and doing, as he claimed, one official act. On the 16th of June, he was supplanted by Devlin, who claimed the office through an appointment made by the Mayor on that day. The new appointee, after duly qualifying, came into the same rooms that had occupied his predecessor, took possession of the books and papers, and was holding them on the 19th of June, when proceedings were commenced to compel him to deliver the same to Conover. Upon this state of facts, it was held that neither was entitled to be regarded as an officer de facto. The court observed that the circumstances had not permitted either of them, as against the other, to acquire the reputation of being the rightful and legal street commissioner; nor had the claims of either, as against the other, been acquiesced in by the public, so as to call upon the law to regard either of

²⁴*Powers vs Commonwealth* (1901), 110 Ky. 386, 61 S. W. 735, 22 Ky. L. R. 1807, 63 S. W. 976 53 L.R.A. 245. See also *Baker vs*

Hobgood (1900), 126 N. C. 149, 35 S. E. 253.

²⁵(1857), 15 How. Pr. (N. Y.) 470, 6 Abb. Pr. 228.

them as the street commissioner de facto, for the protection of the public.²⁶

But in a South Carolina case, in which was involved the validity of a pardon, it was held that where two persons are each in possession of the office of Governor and claiming by an apparent title, and the question as to which is entitled to discharge the functions of the office arises in a collateral proceeding, it must be decided by determining which has the best apparent right.²⁷ There, however, the person adjudged Governor de facto had obtained the highest number of votes, though he had never been regularly installed; and though his adversary, who was his predecessor, had succeeded in getting himself inaugurated as if he had been elected and had taken possession in part of the office. Moreover, some of the reasons given for the decision rest on such high grounds that they could hardly be invoked in ordinary cases.

§ 80. Where one of two claimants has full possession, the other cannot deprive him of his de facto character by unlawfully dispossessing him.— This proposition is evident, for if a person once gains sufficient possession to become an officer de facto, he is entitled to retain the office until he is ousted by lawful proceedings,²⁸ no matter what may be the color of title of his adversary. And the latter is not permitted by illegal means, whatever they may be, to dispossess him, and assume his official character. An unlawful intrusion into an office occupied by another, can only constitute the intruder a usurper.

In *Brady vs Theritt*²⁹ the plaintiff and the defendant were

²⁶See also *Brumby vs Boyd* (1902), 28 Tex. Civ. App. 164, 66 S. W. 874, a case much in point as to the facts, though decided on another ground.

²⁷*Ex p. Norris* (1877), 8 S. C. (8 Rich.) 408.

²⁸*Henderson vs Glynn* (1892), 2 Colo. App. 303, 30 P. 265.

²⁹(1877), 17 Kan: 468.

opposing candidates for the office of councilman. Theritt claimed that he had received a majority of all the votes cast, and that he was therefore duly elected, but Braidy on the other hand contended that the vote was a tie, and that the judges of the election under the law by lot had decided in his favor. Theritt, however, received the certificate of election, and qualified under the same by taking the proper oath, and was in the actual possession of the office when the council met. But the mayor, who was present and presided at the meeting, refused to recognize him as a councilman, claiming that Braidy had been elected to fill his place. Thereupon, Theritt with two other councilmen retired from the meeting. Braidy was then sworn in as a member of the council, and he with the remaining councilmen proceeded to do business as a city council, and the Mayor recognized them as such. It was held that Theritt had never created such a vacancy in his office that any other person could step in and become a councilman de facto, at least as between himself and Theritt. The court also pointed out, that it was evident the retiring councilmen had no intention of abandoning their offices when they withdrew from the council meeting, but that they simply intended to leave the council without a quorum, so that the Mayor and the two members of the council who recognized Braidy's claim, could not do any business. "It would be," said Valentine, J., "strange doctrine to announce, that whenever an officer steps out of the place where he usually does business, that any person who may choose to claim the office may at once step in, and become immediately an officer de facto. Such a short road to obtain a contested office has never yet been opened. This is not the legal way to obtain the possession of a disputed office. The only legal remedy in such a case for the party out of office to obtain possession of the same is by a civil action in the nature of *quo warranto*."

So where two persons claimed the office of county treasurer, and one being rightfully in possession of the tax duplicate, the other wrongfully entered his office during his absence and carried off the same, leaving a receipt therefor, it was decided that the former had a right to compel restoration thereof.³⁰ The court said: "The mode of obtaining possession of the book was a wrong, and his (respondent's) possession of the record cannot be regarded as offering evidence of his actual possession of the office."

Again, where a person was in possession of the office of city recorder by virtue of holding over and under a declaration of election made by the common council as the board of canvassers, it was held that he was a *de facto* officer, notwithstanding the existence of a bona fide dispute between him and another claimant as to the title to the office, and that the latter was not justified in attempting to take possession of the office by violence.³¹

§ 81. Possession of office by usurper affords no right.—A usurper being a mere trespasser, his possession cannot afford him any claim to be regarded as an officer *de facto*, unless he holds during such length of time and under such circumstances as to give him color of right by reputation, or acquiescence on the part of the public. Barring this exception, his acts are absolutely void.³² "I apprehend," says one judge, "while the law regards the acts of officers *de facto*, acting under color of legal title, valid as regards

³⁰*Runion vs Latimer* (1874), 6 Rich. (S. C.) 126.

³¹*Blain vs Chippewa* (1906), 145 Mich. 59, 108 N. W. 440. See also *Van Amringe vs Taylor* (1891), 108 N. C. 196, 12 S. E. 1005, 23 Am. St. R. 51, 12 L.R.A. 202; *Hand vs Deady* (1894), 79

Hun (N. Y.) 75, 29 N. Y. Supp. 633. But see *Scott vs Sheehan* (1905), 145 Cal. 691, 79 P. 353.

³²*Van Amringe vs Taylor* (1891), 108 N. C. 196, 12 S. E. 1005, 23 Am. St. R. 51, 12 L.R.A. 202.

the public and third persons, it does not go the romantic length of giving sanction, in any case, to the acts of an officer where there is a plain usurpation of the office, without any show of legal title. The law holds the acts of the intruder void, both as regards the public and third persons.”³³

Thus, in *Keeler vs Newbern*,³⁴ the plaintiff declared upon a special contract for his wages as a policeman in the city of Newbern for a part of the year 1865. He offered proof that certain persons were exercising the functions of Mayor and Councilmen of the city of Newbern in July, 1865, and that as such they employed him to serve as policeman from that time to January, 1866. He, however, produced no charter or Act of incorporation of the city, nor did he produce any evidence of the manner in which the said persons were inducted into office; but it was shown that they had taken possession of the offices in July, 1865, and continued to act as incumbents until March following without interruption. Nevertheless, they had never been elected, and had never held office in any previous year; and it was admitted that the charter and the laws by which the city was governed, required an election of the Mayor and Councilmen. The court held that the persons acting as Mayor and Councilmen at the time of the contract with the plaintiff were mere intruders or usurpers, and had no authority to bind the city.

³³Per Mason, P. J. in *People vs Cook* (1852), 14 Barb. (N. Y.) 259, affirmed in 8 N. Y. 67, 59 Am. Dec. 451. See also judgment of Casault, J. in *Paris vs Couture* (1883), 10 Que. L. R. 1. ³⁴(1868), 61 N. C. (Phill. Law) 505.

CHAPTER 7.

COLOR OF TITLE OR AUTHORITY NECESSARY TO CONSTITUTE AN OFFICER DE FACTO.

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| <p>§ 82. Color of title, ground of distinction between officers de facto and usurpers.</p> <p>83. Color of title, definition of.</p> <p>84. Color of authority, definition of.</p> <p>85. Color of right, definition of.</p> <p>86. Other expressions used by judges.</p> <p>87. Colorable—Colorable title—Colorable election—Definitions of.</p> <p>88. Same subject.</p> | <p>§ 89. Color of office or colore officii—By virtue of an office or virtute officii—Meaning of.</p> <p>90. Color of title or authority, from what derived.</p> <p>91. Same subject—Examples of circumstances giving color of title or authority.</p> <p>92. Same subject—Examples of circumstances giving no color of title or authority.</p> <p>93. No color when official title known to be bad.</p> <p>94. Generally no color after title judicially declared invalid.</p> |
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§ 82. **Color of title, ground of distinction between officers de facto and usurpers.**—The third requisite to constitute a person an officer de facto, is color of title or authority on his part. This color of title or authority, often termed color of right, is the test or criterion by which the character of persons unlawfully in possession of offices, is determined. If their possession is accompanied by such color, they are denominated officers de facto and their official acts are valid, so far as the public and third persons are concerned; while if they have only a bare possession, without more, they are styled usurpers or intruders, and their acts are utterly void.¹

¹Nall vs Coulter (1904), 117 Ky. 747, 78 S. W. 1110.

As put by an American Judge: "A usurper is one who takes possession without any authority . . . A de facto officer is one who goes in under color of authority."² Likewise, a Canadian Judge declares that an officer de facto "is one who exercises the duties of an office under claim and color of right."³

Such is the principle found in the oldest English cases. Thus, in *Knowles vs Luce*,⁴ a distinction was taken by the Court between copyholds granted by a steward of a manor who had color, but no right to hold a court, and those granted by one who had neither color nor right, and who was therefore a mere usurper. The former were deemed valid,—the latter void. And in *Viner's Abridgement*,⁵ it is said: "If a stranger, without the appointment of the lord, or consent of the right steward, or without any color of authority, will on his own head come into a manor, and keep a court, it seems that the performance of any judicial duty, or the executing of any acts whatsoever, will not be warranted."

§ 83. **Color of title, definition of.**—As a modifier, in legal parlance, color means appearance as distinguished from reality.⁶ Hence, "color of title" has been defined by the Supreme Court of the United States "to be that which in appearance is title, but which in reality is no title."⁷ This is the definition generally concurred in by the courts.⁸

²Reade, J.—*Norfleet vs Staton* (1875), 73 N. C. 546, 550.

³Stuart, J.—*Le Boutillier vs Harper* (1875), 1 Que. L. R. 4.

⁴(1580), Moore 109, 72 Eng. R. 473, quoted with approval in *R. vs Corp. of Bedford Level* (1805), 6 East 356, 2 Smith K. B. 535; *Parker vs Kett* (1701), 12 Mod. 466, 88 Eng. R. 1454, 1 Ray. (Ld.) 658, 91 Eng. R. 1338.

⁵Steward of Courts (G).

⁶Per Peckham, J.—*McCain vs Des Moines* (1899), 174 U. S. 168, 19 Sup. Ct. R. 644.

⁷Per Daniel, J.—*Wright vs Mattison* (1855), 18 How. (U. S.) 50, 57.

⁸*McIntyre vs Thompson* (1881), 10 Fed. 531; *Lindt vs Uihlein* (1902), 116 Iowa 48, 89 N. W. 214; *Dugan vs Farrier* (1885), 47

"Color of title," says another judge, "is that which is apparently good title, but which, by reason of some defect not appearing on its face, does not in fact amount to title."⁹ It has been said that "color of title to an office is analogous to color of title to land."¹⁰ However, color of title to an office necessarily presupposes some form of an election or appointment, for, unlike in the case of land, no one can acquire a statutory title to an office by mere possession, and therefore no color of title can exist, unless it is derived from some election or appointment.

§ 84. **Color of authority, definition of.**—"By color of authority," says a judge, "is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer."¹¹ This definition is evidently not comprehensive enough, for a person may hold an office under color of authority without ever having been elected or appointed to it. This occurs where the apparent authority is the result of long user of official power with public acquiescence. For instance, in *Parker vs Kett*,¹² "color and reputation of an authority" is made use of. It is a mistake, we think, to assign to "color of authority" the restrictive sense of "color of title."

§ 85. **Color of right, definition of.**—"Color of right" has been defined by a Canadian Judge, "to be such semblance or appearance of right as shows that the right is really

N. J. L. 383, 1 A. 751, affirmed, 48 N. J. L. 613, 7 A. 881.

⁹Per Mitchell, J.—*McLellan vs Omodt* (1887), 37 Minn. 157, 33 N. W. 326.

¹⁰Per Deady, J.—*Ah Lee*, In re (1880), 6 Sawy. (U. S.) 410, 5 Fed. 899.

¹¹Per Winslow, J.—*State vs Oates* (1893), 86 Wis. 634, 57 N. W. 296, 39 Am. St. R. 912. Also In re Krickbaum's Contested Election (Pa. 1908), 70 A. 852.

¹²(1701), 1 Salk. 95.

in dispute, for there may be color of right where there is no right.”¹³ This definition as applied to an office may also be too narrow to meet the requirements of all cases, because it is not always essential that a person’s title be “really in dispute” to constitute him an officer de facto. He may have been an usurper *ab origine*, and therefore not have even a doubtful claim to the office.

The following, though not strictly a definition, affords a more accurate idea of what is understood by color of right: “It may be said, then, that the color of right which constitutes one an officer de facto, may consist in an election or appointment, or in holding over after the expiration of one’s term, or acquiescence by the public in the acts of such officer for such length of time as to raise the presumption of colorable right by election or appointment.”¹⁴

§ 86. Other expressions used by judges.—There are many other expressions used by judges to qualify the apparent title or authority of an officer de facto, found disseminated through the reports. They are generally used synonymously with the foregoing terms, and their import is obvious. A few, however, require special reference, because they are susceptible of different meanings, and are sometimes improperly employed by the courts.

§ 87. Colorable—Colorable title—Colorable election—Definitions of.—Among the various meanings ascribed to the word “colorable” by the New English Dictionary, are: “Capable of being presented as true or right; having at least a *prima facie* aspect of justice or validity; and again: “Covert,

¹³Per *Armour, C. J.*—*Price vs Kassafer* (1887), 15 Or. 456, 459, *Guinane* (1888), 16 O. R. 264, 267. 15 P. 778, 3 Am. St. R. 176.

¹⁴Per *Lord, C. J.*—*Hamlin vs De Facto*—9.

pretended, feigned, counterfeit, collusory, done for appearance's sake." It seems that in the English law "colorable" is often used in the latter sense, as the reverse of bona fide, or as meaning utterly void.^{14a}

In *Etherington vs Wilson*¹⁵ the question was whether the defendant was a parishioner of a certain parish. The judgment of the Vice-Chancellor was reversed, and among the remarks of James, L. J., we find: "The Vice-Chancellor proceeded upon the ground that Wilson was not a bona fide householder and parishioner, that his qualification as a parishioner was colorable. Now I cannot help thinking that the fallacy of the judgment arose from the use of that word 'colorable' and the use of the words 'bona fide.' Of course, if the man never did become occupier—if the man never did enter into a contract for taking, and never did take the house, but only got somebody to put up his name over the door, or something of that kind, then it would have been colorable and it would have been a sham. In that case he never would have been a parishioner, but if he was really a parishioner in point of law then the thing is not colorable, is not fictitious, is not mala fide."

So in *R. vs Bankes*¹⁶ Lord Mansfield said that where there was a "mere colorable election" mandamus would lie instead of quo warranto. In another case, it was likewise said that the office "was not full" because there had been a "mere colorable election," "a void election" and "as no election at all."¹⁷ Again, in *Frost vs Mayor of Chester*,¹⁸ Coleridge, J., said: "What is colorable? I always thought that, where

^{14a}Stroud's Jud. Dict.

¹⁷*R. vs Cambridge* (1767), 4

¹⁵(1875), 1 Chy. Div. 160, 45 L. J. Ch. 153, 33 L. T. 652, 24 W. R. 303.

Burr. 2008.

¹⁸(1855), 5 El. & B. 531.

¹⁶(1764), 3 Burr. 1452, 1 W. Bl. 452.

an authority existed, and there was a bona fide intention to execute it, the proceeding was not colorable though there might be a mistake in law." Nevertheless, Lord Ellenborough, in discussing the de facto principles, used the expression "colorable authority" in the sense of color of right or authority.¹⁹

§ 88. **Same subject.**—In the United States, however, the words "colorable title," "colorable election," "colorable appointment," "colorable right," "colorable authority," "colorable claim," and the like, are seemingly used, at least with reference to the de facto doctrine, in the sense first given in the dictionary, as affording bona fide appearance of title. "Colorable title," says a judge, "then in appearance is title, but in fact is not, or may not be any title at all."²⁰ Another judge says: "The definition of a colorable title, or as it is more frequently expressed 'color of title.'"²¹ "An apparent or colorable title" is used by the United States Supreme Court.²² Again, "colorable right,"²³ "presumption of colorable election or appointment,"²⁴ "colorable authority,"²⁵ are common expressions found in the American reports and are used in the sense just mentioned.

§ 89. **Color of office or colore officii—By virtue of an office or virtute officii—Meaning of.**—These expressions,

¹⁹R. vs Corporation of Bedford Level (1805), 6 East 356, 2 Smith K. B. 535.

²⁰Fairecloth, J.—Dickens vs Barnes (1878), 79 N. C. 490, 491.

²¹Gibson, C. J.—McCall vs Neely (1834), 3 Watts. (Pa.) 69, 72.

²²Per Daniel, J.—Wright vs Mattison (1855), 18 How. (U. S.) 50.

²³Hamlin vs Kassafer (1887), 15 Ore. 456, 459, 15 P. 778, 3 Am. St. R. 176.

²⁴Wilcox vs Smith (1830), 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; Burke vs Elliott (1844), 4 Ired. (N. C.) 355, 42 Am. Dec. 142.

²⁵Ex p. Strang (1871), 21 Ohio St. 610.

strictly speaking, have no reference whatever to the officer's title, but to the quality of the acts performed by him, whether he be an officer *de jure* or *de facto*. "The words, *colore officii*, are always taken in *malam partem*, and differ from the words *virtute officii*, or, *ratione officii*, which are always taken in *bonam partem*, and where the office is the just cause of the thing, and the thing is pursuant to the office. But *colore officii* implies that the thing is under pretence of office, but not duly, and the office is no more than a cloak to deceit, and the thing is grounded upon vice, and the office is as a shadow thereto." ²⁶ "The distinction," says Bronson, C. J., "is this: acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii*, are where they are of such a nature that his office gives him no authority to do them." ²⁷ But though the above seems to be the true meaning of the words "color of office," a great number of judges use that phrase in the sense of color of title or authority.²⁸

§ 90. Color of title or authority, from what derived.—

Generally it is found that *color* is derived from some election or appointment, but, as already intimated, it may sometimes

²⁶Argument apparently approved by court in *Dive vs Meningham* (1550), Plowd. 60, 64.—Same doctrine in *Alcock vs Andrews* (1788), 2 Esp. 542.

²⁷*People vs Schuyler* (1850), 4 N. Y. 173, 187. Also *Gold vs Campbell* (Tex. Civ. App. 1909), 117 S. W. 463; *Decker vs Judson* (1857), 16 N. Y. 439, 442; *Burrall vs Acker* (1840), 23 Wend. (N. Y.) 606, 35 Am. Dec. 582; *Gerber vs Ackley* (1875), 37 Wis. 43, 19

Am. R. 751; *Bishop vs McGillis* (1891), 80 Wis. 575, 50 N. W. 779.

²⁸Ex p. *Ward* (1898), 173 U. S. p. 456, 19 Sup. Ct. R. p. 460; *Lambert vs People* (1879), 76 N. Y. pp. 238, 241; *Case vs State* (1879), 69 Ind. p. 48; *Shelby vs Alcorn* (1858), 36 Miss. pp. 293, 294; *Herkimer vs Keeler* (1899), 109 Iowa, p. 683, 81 N. W. p. 179; *Woodstock vs Bolster* (1863), 35 Vt. p. 637.

arise from the mere exercise of an office, with public acquiescence, under such circumstances as to create official reputation.²⁹ In the latter case the officer cannot be said to have color of title, but he has certainly color of right or authority, without which he would be a mere usurper. Indeed, if a person be in possession of an office and invested with all the insignia thereof, and the public generally regard him as a good officer, it would be absurd to say that such person has no color of lawful authority.

Especially is this so when it is borne in mind that *color* must be viewed and appreciated from the standpoint of the public and third persons dealing with the officer, and not from the point of view of those possessing legal knowledge. As stated in a case involving the validity of the acts of a de facto deputy sheriff, the de facto "rule, being a law of justice and reason, and not an arbitrary ordinance enacted by a court, does not exclude the learned or the unlearned from its protection, and did not require the plaintiff to try Graham's appointment by the test of such authority as would be apparent to the few who enjoy the advantage of a legal education."³⁰ Upon this principle it was held, that one who has received what purports to be an appointment to an office which is supposed by him to be valid is an officer de facto, although his appointment contains a defect which is apparent on its face to those skilled in the law, but not to people in general.³¹

§ 91. Same subject—Examples of circumstances giving color of title or authority.— But it is not always easy to determine when there is color of title or authority and

²⁹Hamlin vs Kassafer (1887), N. H. 13, 5 A. 80, 10 Am. St. R. 15 Or. 456, 458, 15 P. 778, 3 Am. St. R. 176; Ex p. Tracy (Tex., 1905), 93 S. W. 538.

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³¹State vs Barnard (1892), 67 N. H. 222, 29 A. 410, 68 Am. St. R. 648.

³⁰Jewell vs Gilbert (1885), 64

when there is not. Each case must depend upon its own peculiar set of facts and circumstances. For although, as stated above, *color* is generally derived from some election or appointment, it must not be assumed that there is color every time there is proof of an election or appointment. There are often various collateral circumstances which go to increase, diminish, or even nullify the effect of the election or appointment upon the incumbent's title, and result in constituting him either an officer *de facto* or a mere usurper.

This will be fully exemplified by numerous reported decisions in the next book, when we speak of the different kinds of officers *de facto*. Reference, however, is made here to a few cases to briefly illustrate the principle of the existence or absence of color, some of which being quoted chiefly because they exhibit rather extraordinary circumstances. Thus, where through the ignorance of the death of a person, a commission appointing him justice of the peace and intended as a renewal of a former one, was forwarded to his name and usual address, but was received and acted upon by another person of the same name, it was held that the latter while performing the functions of the office had "a color and show of right" under the commission, and was an officer *de facto*.³²

So where under a town charter there was at least a valid foundation for a bona fide claim by the intendant of the town, to be *ex officio* justice of the peace, and on the faith of his election as such intendant he proceeded to perform the duties of justice of the peace, he was deemed an officer *de facto*, though his claim was ill-founded in law.³³

So where a person is declared elected by the election officers or by a court of competent jurisdiction in an election contest,

³²Coolidge vs Brigham (1861),
1 Allen (Mass.) 333.

³³Williamson vs Woolf (1861),
37 Ala. 298.

and takes charge of the office, he becomes an officer de facto, though the election officers afterwards declare someone else elected, or the judgment is reversed on appeal. In the first instance he maintains his de facto character until ousted by quo warranto, and in the latter, until a final judgment is adversely pronounced against him.³⁴

So, if pursuant to an opinion of the State Superintendent of Public Instruction, one of two contestants for the office of school director assumes the duties of the office and acts as such officer, he is while so acting a de facto officer of the district.³⁵ Likewise a person assuming the duties of a supervisor of roads by virtue of a void election by a fiscal court, and discharging the duties of the office with the acquiescence of the court, even after the office has been declared vacant and another supervisor elected, is an officer de facto.³⁶

So where members of a legislature are seated by a vote of a number less than the constitutional quorum, they have sufficient color of title to their seats to constitute them officers de facto.³⁷ Again, where a judge exercises his functions within a county, attached by the legislature to his district, the Act thus extending his jurisdiction, even if invalid, affords him sufficient "color of title" to constitute him an officer de facto as to such county.³⁸

§ 92. Same subject—Examples of circumstances giving no color of title or authority.— But a judge who acts in an adjoining county during a vacancy in the judicial office

³⁴R. vs Winchester (1837), 7 Ad. & El. 215; Saline County vs Anderson (1878), 20 Kan. 298, 27 Am. Rep. 171. See also Morgan vs Quackenbush (1856), 22 Barb. (N. Y.) 72.

³⁵Bishop vs Fuller (1907), 78 Neb. 259, 110 N. W. 715.

³⁶Henry vs Commonwealth (1907), 31 Ky. L. R. 760, 103 S. W. 371.

³⁷State vs Smith (1886), 44 Ohio St. 348, 7 N. E. 447.

³⁸Clark vs Com. (1858), 29 Pa. St. 129.

there, without any commission or appointment, and without the least *prima facie* right to fill the office, has no color or show of authority, and is a mere intruder.³⁹

So where at a school meeting, some one proposed that a certain person be elected school trustee, and the latter being under the influence of liquor, rose up and asked that all in his favor say "aye," and there being one response, he immediately declared himself elected, but the chairman did not ask for the votes, and the meeting proceeded at once to elect another person as school trustee, who entered upon the duties of his office; and afterwards, the illegally elected trustee called upon the duly elected one and by means of a threat obtained possession of the district books, and acted for about a month, it was held that his pretended election did not afford him any colorable right to the office, and hence he was not an officer *de facto*.⁴⁰

So it was held that a person appointed to an office without authority, and never performing any official duty as such officer, could not be deemed an officer *de facto* holding under color of right.⁴¹ So the performance of a single official act is insufficient to constitute one an officer *de facto*, when that act is the sole foundation for any pretended color of right to the office.⁴²

So where, during the American civil war, a person at a county seat in possession of the Federal forces, assumed to act as deputy clerk of the county court, without any appointment from the clerk, who had abandoned the county taking with him a portion of the records of the office and was within

³⁹Denny vs Mattoon (1861), 2 Allen (Mass.) 361, 79 Am. Dec. 784.

⁴⁰Hand vs Deady (1894), 79 Hun (N. Y.) 75, 29 N. Y. Supp. 633.

⁴¹Schenck vs Peay (1869), 21 Fed. Cas. (No. 12,451) 672, 1 Dill. 267.

⁴²Biencourt vs Parker (1864), 27 Tex. 558; State vs Murphy (1893), 32 Fla. 138, 13 So. 705.

the Confederate lines, it was held that under the circumstances he could not be considered a *de facto* deputy,—nor a *de facto* clerk because he had never assumed to act in that capacity.⁴³ Likewise, where two persons pretended, the one as clerk and the other as sheriff, to hold their offices and to exercise the functions thereof, under what they called the “McEnry government” in opposition to the authority of the United States and the laws and decisions of courts of Louisiana, they were denied the character of *de facto* officers.⁴⁴

§ 93. No color when official title known to be bad.—

It is obvious that there cannot be color of title or authority, when the pretended official title is known to be bad. “An existing appearance of right,” says a learned judge, “which may mislead, is the essential ground of the (*de facto*) doctrine, for otherwise there is no excuse for the party deceived and no basis for a demand of protection.”⁴⁵ And another judge referring to one who had unlawfully intruded into an office, says: “When without color of authority he simply assumes to act, to exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes.”⁴⁶

⁴³Herring vs Lee (1883), 22 W. Va. 661.

⁴⁴State vs McFarland (1873), 25 La. Ann. 547. For further illustrations, see Donegan vs Wood (1873), 49 Ala. 242, 20 Am. Rep. 275; Simpson vs Loving (1867), 3 Bush. (Ky.) 458, 96 Am. Dec. 252; Keeler vs Newbern (1868), 61 N. C. (Phill. Law) 505; Van Amringe vs Taylor (1891), 108 N. C. 196, 12 S. E. 1005, 23 Am. St. R. 51, 12 L.R.A. 202; Braidys vs Theritt (1877), 17 Kan. 468; Reddy vs Tinkum (1882), 60 Cal. 458;

Woods vs Inhabitants of Bristol (1892), 84 Me. 358, 24 A. 865; Williams vs Clayton (1889), 6 Utah 86, 21 P. 398; Brumby vs Boyd (1902), 28 Tex. Civ. App. 164, 66 S. W. 874.

⁴⁵Per Finch, J.—Williams vs Boynton (1895), 147 N. Y. 426, 42 N. E. 184, affirming (1893), 71 Hun (N. Y.) 309.

⁴⁶Merrimon, C. J.—Van Amringe vs Taylor (1891), 108 N. C. 196, 12 S. E. 1005, 23 Am. St. R. 51, 12 L.R.A. 202.

The same doctrine is found in the English and Canadian cases.⁴⁷ Thus, in *Knowles vs Luce*, the reason given for upholding the acts of a steward acting under color is that "those for whom such acts are done, know not the extent of the steward's title."

However, the occupant of an office may have color, though his title be known to be disputed by another.⁴⁸

§ 94. **Generally no color after title judicially declared invalid.**—Following the principle laid down in the preceding section, generally no color of title or authority can exist after the incumbent's title has been declared invalid by a court of competent jurisdiction. "We think," says a New York judge, "that when by a judgment of the court of last resort, in a direct proceeding to determine the title of officers de facto, it has been adjudged that they have no rightful title to the office, but are mere usurpers, then, at least, as to all who have notice of such proceeding and judgment, the color of authority has ceased, and this without regard to whether anybody else has been inducted into the office or not. As officers de facto there must be at least a presumption that they are rightfully in office. Such presumption cannot be said to exist after the decision of a competent tribunal to the contrary. To hold that persons who, according to the decision of the court having jurisdiction to decide so as to bind the parties and the public, are mere usurpers, may still exercise the powers and discharge the duties of the usurper's

⁴⁷*Knowles vs Luce* (1580), Moore 109, 72 Eng. R. 473. R. vs Corp. of Bedford Level (1805), 6 East 356, 2 Smith K. B. 535. *Le Boutillier vs Harper* (1875), 1 Que. L. R. 4.

⁴⁸*Blain vs Chippewa* (1906), 145 Mich. 59, 108 N. W. 440. For further treatment of this subject, see post, sec. 302 et seq.

office, is to deprive the judgment of ouster of all force or effect.”⁴⁹

Accordingly, where the members of a board of chosen freeholders attempted to act after a judgment of ouster had been pronounced against them, it was held that they had no “color of authority” and were mere usurpers.⁵⁰ So where in an election contest for the office of Governor, the decision of the General Assembly was given in favor of one of the contestants, it was held that the other was thereby deprived of all “color of title,” and therefore could not be looked upon as an officer *de facto*.⁵¹

However, as an adverse decision against one’s title is a fact which may, for a time at least, remain concealed from a portion of the public, it is conceivable that a person disobeying such decision and continuing to act in contempt thereof, may still, under certain circumstances, and upon principles of justice, have to be considered an officer *de facto* as to innocent persons.⁵²

⁴⁹Talcott, J.—Rochester etc. Railroad vs Clark Nat. Bank (1871), 60 Barb. (N. Y.) 234.

⁵⁰Hugg vs Ivins (1897), 59 N. J. L. 139, 36 A. 685.

⁵¹Powers vs Commonwealth (1901), 110 Ky. 386, 61 S. W. 735, 22 Ky. L. R. 1807, 63 S. W. 976, 53 L.R.A. 245. See also State vs Rose (1906), 74 Kan. 262, 86 P. 296; People vs Board of Sup’rs. (1898), 56 N. Y. Supp. 318; Portsmouth’s Petition (1848), 19 N. H. 115; Williams vs Boynton (1895), 147

N. Y. 426, 42 N. E. 184, affirming (1893), 71 Hun (N. Y.) 309; McVeeny vs New York (1880), 80 N. Y. 185, 36 Am. Rep. 600, reversing 1 Hun, 35; Fawcett vs Superior Court (1896), 15 Wash. 342, 45 P. 23, 55 Am. St. R. 894; Peck vs Holcombe (1836), 3 Port. (Ala.) 329; R. vs Lisle (1738), Andr. 163, 95 Eng. R. 345.

⁵²State vs Rose (1906), 74 Kan. 262, 86 P. 296. See also Kent vs Mercer (1862), 12 U. C. C. P. 30.

BOOK III.

**OF THE DIFFERENT CLASSES OF OFFICERS DE
FACTO.**

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OF THE DIFFERENT CLASSES OF OFFICERS DE FACTO.

CHAPTER 8.

INTRODUCTORY.

§ 95. Classification of officers de facto.

§ 95. **Classification of officers de facto.**— Officers de facto are divided into different classes according to the nature of the defects in their title. Chief Justice Butler, as we have already seen,¹ groups them under four heads. But though his classification is very comprehensive and includes nearly all kinds of officers de facto, yet we find it necessary to further sub-divide them in order to ensure a thorough and exhaustive treatment of the subject. With this end in view, we shall distribute them into seven classes, to each of which will be devoted one chapter in this book. The classification is as follows:

1. Officers by reputation or acquiescence, without a known appointment or election.

2. Officers duly elected or appointed for a specified term, but acting before the commencement, or holding over after the expiration, of such term.

3. Officers under color of a known election or appointment, but whose title is defective because they were ineligible, or have become disqualified to hold the office.

¹See sec. 22.

4. Officers under color of a known and valid appointment or election, but who have failed to qualify as required by law.

5. Officers under color of an irregular election or appointment.

6. Officers under color of an election or appointment by an unauthorized official person or body.

7. Officers under color of an election or appointment by or pursuant to an unconstitutional law.

CHAPTER 9.

OFFICERS DE FACTO BY REPUTATION OR ACQUIESCENCE, WITHOUT A KNOWN APPOINTMENT OR ELECTION.

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| <p>§ 96. Earlier American cases as to necessity of election or appointment.</p> <p>97. Same subject.</p> <p>98. Probable cause of the erroneous American definitions—<i>R. vs Lisle</i>.</p> <p>99. Same case as reported by <i>Strange</i>.</p> <p>100. Criticism of <i>R. vs Lisle</i> by Chief Justice <i>Butler</i>.</p> <p>101. Later American cases declare color of election or appointment unnecessary.</p> <p>102. Same subject.</p> <p>103. Same principle upheld by English and Canadian authorities.</p> <p>104. What will constitute an officer de facto by reputation or acquiescence.</p> | <p>§ 105. Reputation or acquiescence—Definition of terms.</p> <p>106. Nature of office—Effect of open possession upon reputation.</p> <p>107. Circumstances establishing or affecting reputation.</p> <p>108. Same subject.</p> <p>109. Same subject.</p> <p>110. Acquiescence—Effect thereof upon assumed official character.</p> <p>111. Usurpers may become officers de facto by reputation or acquiescence.</p> <p>112. Officers de jure who usurp the official functions of other officers.</p> |
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§ 96. Earlier American cases as to necessity of election or appointment.—The first part of Chief Justice *Butler's* definition ¹ relates to officers without a known appointment or election, but under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or invoke their actions, supposing them to be the officers they assume to be. Several of the American

¹*State vs Carroll* (1871), 38 Conn. 449, 9 Am. Rep. 409.
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cases, chiefly the earlier ones, seem to ignore that class of officers, and to countenance the theory that color of election or appointment is necessary in all cases to constitute one an officer de facto. But a close examination of those decisions will disclose that only a few were really intended to be authority for that proposition. "In most, if not all, of these cases, the officer held under color of title, and, of course, it was not necessary for the court to go farther in discussing the question." ²

§ 97. **Same subject.**— But while this is undoubtedly true, it must be conceded that there are quite a number of authorities containing judicial language, which, if literally interpreted, would necessarily narrow down the application of the de facto doctrine to officers holding under color of an election or appointment. Thus, in *St. Luke's Church vs Matthews*,³ the court declared that "being sworn in, and acting, do not, without an election constitute an officer de facto."⁴ In *McCall vs Byram Mfg. Co.*⁵ the court observed that "there must be an apparent election to office, although for some cause, the person chosen is not de jure qualified for his station."⁶

In *Plymouth vs Painter*,⁷ an officer de facto is defined as "one who exercises the duties of an office, under color of an appointment or election to that office." In *Prescott vs Hayes*,⁸ it is said that "in order to constitute an officer de facto, there must be some color of right, some pretence or claim of title by some appointment or election." In *Tucker*

²Henderson, J. in *Ex p. Tracey* (Tex., 1905), 93 S. W. 538.

³(1815), 4 Des. Eq. (S. C.) 578.

⁴Quoting 2 Str. 1090.

⁵(1827), 6 Conn. 428.

⁶*R. vs Lisle* (1738), 2 Str. 1090,

93 Eng. R. 1051, *Andr.* 163, 95 Eng. R. 345, relied on.

⁷(1846), 17 Conn. 585, 44 *Am. Dec.* 574.

⁸(1860), 42 N. H. 56.

vs Aiken,⁹ it is likewise said that "an officer de facto is one who under color of an election or appointment has the reputation of being the officer he assumes to be, but is not a good officer in point of law."¹⁰ In *Fitchburg Ry. Co. vs Grand Junction Ry. Co.*¹¹ it is pointed out that "the exact distinction between a usurper or intruder and an officer de facto is this: the former has no color of title to the office; the latter has, by virtue of some appointment or election."¹² In *Griffin's vs Cunningham*,¹³ it is declared that "an officer de facto is one who comes in by the power of an election or appointment."¹⁴

But the American case which apparently has most contributed towards introducing narrow and deceptive definitions of the above character, is *People vs Collins*.¹⁵ Decided as early as 1811, and by a judge of the eminence of Chief Justice Kent (afterward Chancellor), it naturally had a tendency to influence other courts. A perusal, however, of the case makes it clear that it never was intended to support the proposition for which it has often been quoted. The definition supposed to have been given there originated in this way: One of the counsel upon the argument said, "An officer de facto is one coming into office by color of election, and all his acts are good until he is removed." To this the learned judge replied, "That law is too well settled to be discussed." Evidently the Chief Justice had in mind, when he assented to the statement of counsel, to the de facto principles in

⁹ (1834), 7 N. H. 113.

¹⁰ Followed in *Hooper vs Goodwin* (1861), 48 Me. 79.

¹¹ (1861), 1 Allen (Mass.) 552.

¹² But see criticism of this case in *Petersilea vs Stone* (1876), 119 Mass. 465, 20 Am. Rep. 335.

¹³ (1870), 20 Gratt. (Va.) 31.

¹⁴ See also *Douglas vs Wickwire*

(1849), 19 Conn. 488; *State vs Brennan's Liquors* (1856), 25 Conn. 278; *Trenton vs McDaniel* (1859), 7 Jones L. (N. C.) 107; *Elliott vs Willis* (1861), 1 Allen (Mass.) 461; *Peck vs Holcombe* (1836), 3 Port. (Ala.) 329.

¹⁵ (1811), 7 Johns. (N. Y.) 549.

general, and not to the particular definition advanced. He refers to no such definition in his judgment.

§ 98. **Probable cause of the erroneous American definitions—*R. vs Lisle*.**—The true cause, however, of all the restricted definitions of an officer *de facto* found in the earlier American cases, must undoubtedly be assigned to the erroneous report of an English case, which is frequently quoted in the older American decisions. That case is *R. vs Lisle*.¹⁶ There a quo warranto was brought against the defendant for acting as burgess of Christ Church, to which he pleaded that an assembly was convened by one Goldwire, Mayor of the borough, at which he was nominated by the said Goldwire, and elected by the majority of the burgesses who were present, a burgess; and afterwards he was admitted and sworn into the office. But it was claimed on behalf of the crown that Goldwire was not Mayor, either *de jure* or *de facto*, and had no right to nominate. It appeared that he never was in fact elected, but pretended to be so, was sworn in, and acted as such. It also appeared that quo warranto was pending against him at the time of election, and that the facts were all known to Lisle. Several questions were propounded, of which two only are material. The first was, whether Goldwire was Mayor *de facto*; the second, whether, if he was such, the nomination and election of Lisle was good.

Upon the first question, Andrews says that “it was held by the whole court, except Lee, C. J., who gave no direct opinion as to this point, that Goldwire was not so much as a Mayor *de facto*. For in order to constitute a Mayor *de facto*, it is necessary that there be some form or color of an election; but without this, the taking the title and regalia

¹⁶Decided in 1738, and reported in 2 Strange, 1090, 93 Eng. R. 1051, and in Andrews, 163, 95 Eng. R. 345.

of the office, and the acting and being sworn in as Mayor, are not sufficient: and with this agrees the *Abbot of Fountain's* case. Now here it appears that Goldwire was never elected in fact; and though it be stated that he was sworn at the leet, it does not appear (as it ought) that this was agreeable to the constitution of the borough: and it is not material that he acted as Mayor, as it is found that a quo warranto was recently prosecuted against him, pending which the present election was made, and that he was thereupon adjudged to be a usurper. The consequence hereof plainly is, that the election is void, and Lee C. J. said, that in these cases the proper question is, whether the person be an officer de facto as to the particular purpose under consideration, according to 1 Salk. 96."

Upon the second point it was said by the whole court: "Supposing that Goldwire was a Mayor de facto, yet the acts here found to be performed by him are not good, because they were not necessary for the preservation of the corporation. In these cases the proper distinction is between such acts as are necessary for the good of the body, which comprehend judicial and ministerial acts, and such as are arbitrary and voluntary. The election of the defendant is of the latter kind: For as the number of burgesses is indefinite, it doth not appear, nor is it stated, as it should have been, that the choice of a burgess was necessary." And continuing the court added: "This case therefore differs from those that have been cited for the defendant; for in those, either the act was such as the officer was obliged or compellable to do (as Palm. 479), or such in which a stranger was concerned, and had a right to, or paid consideration for."

§ 99. Same case as reported by Strange.—The head note in Strange states that "a bare swearing in and acting does not make a man an officer de facto, and unless there is

some form of election he is a mere usurper." The report is very concise. After propounding the two questions set forth in the preceding section, and briefly stating the facts, the author goes on to say: "And upon this state of the case the court were all of opinion, that Goldwire must be taken to have been a mere usurper, and that in order to constitute a man an officer de facto, there must be at least the form of an election, though that upon legal objections may afterwards fall to the ground."

"The other point was left undetermined, as not being necessary to deliver any opinion upon, as it was not pretended that the presiding of a mere usurper would do, and the court had determined Goldwire was no more. But they strongly inclined, that the presence of a Mayor de facto recently prosecuted, and against whom judgment of ouster had been obtained, would not be sufficient to authenticate the defendant's election. The court gave judgment for the King."

§ 100. **Criticism of *R. vs Lisle* by Chief Justice Butler.**—Chief Justice Butler in *State vs Carroll*,¹⁷ gives an elaborate and able criticism of *R. vs Lisle*, and of the manner in which it was reported. Referring to a comparison between the two reports, the learned Chief Justice says: "It will be seen that the report of Strange is inaccurate and deceptive in three particulars. The first is the statement, as a general proposition, that in order to constitute a man an officer de facto there must be at least the form of an election. The court said no such thing. They were dealing with a case which concerned the corporation only, and they said that in order to constitute a Mayor de facto there must be some form or color of an election. The proposition contained in Strange is a general one, embracing all officers, and opposed to all the

¹⁷(1871), 38 Conn. 449, 9 Am. Rep. 409.

cases before reported. The proposition of the court was confined to the particular case, involving the status of an officer of a corporation in respect to the proceedings of the corporation, and had no reference to the public or third persons. Moreover, it appears in *Andrews* that the court distinguished the case from cases in which strangers were concerned—an important fact, in respect to which the report in *Strange* is silent.”

“The second misrepresentation of *Strange* is that the court all agreed in that proposition. But the fact appears that Lee, C. J., gave no direct opinion upon the point, but on the contrary said: ‘In these cases the proper question is whether a person be an officer *de facto* as to the particular purpose under consideration,’ thus limiting the opinion to the particular case. And that distinction is sustained by an irresistible current of authority.”

“The third misrepresentation is that the second point was left undetermined, whereas it was fully determined by the whole court, and it was distinctly held that, even if Mayor *de facto*, the election was void, on the ground that the act concerned the corporation only, and was not a necessary one.”

“I have been thus particular about that case, because it was misreported by *Strange*, and related to the internal affairs of a corporation only, and not to the public or third persons, and is not, as his report makes it, in opposition to the whole current of English decisions before and since, but outside of that current, and because the courts of this country have been misled by his report in the adoption of erroneous definitions and conceptions of the subject.”

§ 101. Later American cases declare color of election or appointment unnecessary.—But whatever may have been the true reason for the definitions given in the older

American reports, and whatever may have been the intention of the courts in propounding them, it was soon found that they were incomplete, and were superseded by others, broader and more comprehensive. As early as 1830, the Supreme Court of New York, without the least hesitation, disregarded all previous definitions of a more restricted character, and held in effect that no color of election or appointment was necessary to constitute a person an officer *de facto*.¹⁸

In that case the officer, whose official acts were challenged, was reputed to be a justice of the peace for the town of Shelby, and had acted as such for three years. The town was part of the county of Genessee during his first year's service, but it was afterwards erected together with seven other towns into a separate county under the name of Orleans. He acted two years under the new organization, notwithstanding that four justices of the peace had been lawfully appointed for the town of Shelby, and he was not one of their number. The court of Common Pleas ruled that inasmuch as it was shown, that he had never been appointed a justice of the peace of the county of Orleans, he was not a legal justice of that county, and his acts could not be maintained. But the Supreme Court overruled that decision, and held that his title could not be collaterally assailed. It declared that "the mere claim to be a public officer, and the performance of a single or even a number of acts in that character, would not perhaps constitute an individual an officer *de facto*. There must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment."

Not long afterwards the same principles were re-affirmed

¹⁸*Wileox vs Smith* (1830), 5 Wend. (N. Y.) 231, 21 Am. Dec. 213.

in *People vs Peabody*,¹⁹ but this time in a language still more forcible. "A person," said the judge, "unquestioned, claiming, entering upon, and exercising the duties of an office under the forms or color of an appointment, or of an election; or a person without even the color of an election or appointment, permitted by the government for a length of time, unquestioned, to perform the duties of an office, acquires the reputation of being an officer in fact, though he may not be an officer in point of law. . . . The public and third persons, in their dealings with each other, and with him as such acting officer, have therefore a right to act upon such reputation; and as to them, he is a good officer, whether he has a legal title to the office or not, so far as they are interested in his acts."²⁰

§ 102. **Same subject.**— Like principles were adopted by other courts.²¹ Thus, in *Burke vs Elliott*,²² the Supreme Court of North Carolina declared that to constitute an officer de facto "there must, at least, be some colorable election and induction into office ab origine, or so long an exercise of the office and acquiescence therein of the public authorities, as to afford to an individual citizen a strong presumption, that the party was duly appointed." And it further said: "When one is found actually in office and openly and notoriously exercising its functions in a limited district, so that it must be known to those, whose official duty it is to see that the office is legally filled and also that it is not illegally usurped; and when this goes on for a great length of time,

¹⁹(1858), 6 Abb. Pr. (N. Y.) 228.

²⁰And see recent case of *Williams vs Boynton* (1893), 71 Hun (N. Y.) 309, affirmed (1895), 147 N. Y. 426, 42 N. E. 184.

²¹*State vs Jacobs* (1848), 17 Ohio, 143; *Biencourt vs Parker* (1864), 27 Tex. 558; *Brown vs Lunt* (1854), 37 Me. 423.

²²(1844), 4 Ired. (N. C.) 355, 42 Am. Dec. 142.

or for a period which covers much of the time for which the office may be lawfully conferred; it would be entrapping the citizen and betraying his interests, if, when he had applied to the officer de facto to do his business, and got it done, as he supposed, by the only person, who could do it, he could yet be told, that all that was done was void, because the public had not duly appointed that person to the office, which the public allowed him to exercise.”²³

But the case which finally settled the law in America, and exploded forever the theory, if it ever existed, of the necessity of color of election or appointment to constitute one an officer de facto, is *State vs Carroll*.²⁴ There, in the elaborate definition given, officers de facto by reputation or acquiescence, and without a known appointment or election, are set down as a distinct and separate class; and by an exhaustive review of the authorities, English and American, it is clearly demonstrated that there never was any foundation or reason for ignoring that class of officers. “It should be remembered,” said the learned Chief Justice, “that among the earliest cases there was a distinct class entirely independent of color derived from any known appointment or election, where the law said to the public as a rule of policy: ‘If you find a man executing the duties of an office, under such circumstances of continuance, reputation, or otherwise, as reasonably authorize the presumption that he is the officer he assumes to be, you may submit to or employ him without taking the trouble to inquire into his title, and the law will hold his acts valid as to you, by holding him to be, so far forth, an officer de facto. If he has color of appointment or elec-

²³Citing *Berryman vs Wise* (1791), 4 Term. (D. & E.) 366; *R. vs Gordon* (1789), 1 Leach. C. C. 515, 1 East. P. C. 312, 315.—Followed and approved in *Gilliam vs*

Reddick (1844), 4 Ired. (N. C.) 368.

²⁴(1871), 38 Conn. 449, 9 Am. Rep. 409, 21 Am. Law R. 165.

tion, and yet is not a good officer for the want of authority in the appointing power, or irregularity in exercising it, or because there was another lawful officer entitled to the office, or because the incumbent was ineligible, or had not qualified as the law required, or his term had expired, your case is made stronger by the color, but that kind of color is not essential to your protection, for you are not bound to inquire to see that it exists.' So the law has spoken in England from the first introduction of the doctrine, as the cases abundantly show. So it speaks there now. So it spoke in this country until that deceptive definition was introduced from Strange, and so it has since spoken, and the definition been modified accordingly, whenever a case has arisen where the policy upon which the law is founded has made it necessary that it should so speak, to save the public from mischief, or individuals from loss." The definition ^{24a} given in *State vs Carroll* has been accepted and approved by all the courts which ever had occasion to consider it. The doctrine it lays down is now too firmly established in the United States to ever be disputed. It is supported by all the later authorities.²⁵

^{24a}For definition, see ante, sec. 22.

²⁵*Norton vs Shelby County* (1886), 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed. 178; *Hussey vs Smith* (1878), 99 U. S. 20, 25 L. ed. 314; *Van Amringe vs Taylor* (1891), 108 N. C. 196, 12 S. E. 1005, 12 L.R.A. 202, 23 Am. St. R. 51; *Perkins vs Fielding* (1893), 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100; *Walcott vs Wells* (1890), 21 Nev. 47, 24 P. 367, 9 L.R.A. 59, 37 Am. St. R. 478; *State vs Quaint* (1902), 65 Kan. 144, 69 P. 171;

Auditor-Gen. vs County Sup'rs (1891), 89 Mich. 552, 51 N. W. 483; *Hamlin vs Kassafer* (1887), 15 Or. 456, 15 P. 778, 3 Am. St. R. 176; *Franklin vs Vandernort* (1901), 50 W. Va. 412, 40 S. E. 374; *Barlow vs Stanford* (1876), 82 Ill. 298; *Ex p. Tracey* (Tex., 1905), 93 S. W. 538; *Heard vs Elliott* (1905), 116 Tenn. 150, 92 S. W. 764; *Petersilea vs Stone* (1876), 119 Mass. 465, 20 Am. R. 335; *Pierce vs Edington* (1881), 38 Ark. 150; *Cary vs State* (1884), 76 Ala. 78.

§ 103. **Same principle upheld by English and Canadian authorities.**—This doctrine is also founded on the English common law, for, as pointed out by Chief Justice Butler, none of the cases in England have at any time favored the principle laid down by Strange, in his report of *R. vs Lisle*. On the contrary, the whole current of English authorities impliedly, if not directly, hold or assume that reputation alone is sufficient to constitute one an officer de facto. Thus, in *Lord Dacres* case, decided in 1584, the servant of the steward held a manorial court without any authority, and he was holden a good officer de facto, and his acts were declared valid as to third persons.²⁶ So in *Harris vs Jays*,²⁷ it is said that “the law favors acts of one in reputed authority; and the inferior shall never inquire if his authority be lawful; and 2 Edw. 6 Br. “Copy” 26, it was held, that grant by copy by one in court who had no authority to hold court, is good.”²⁸

But perhaps there is no better proof of the unsoundness of the theory found in Strange, than the very words of the English definition of an officer de facto: “An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.” This language obviously excludes the idea of any essential requirement to constitute an officer de facto, beyond that of reputation.

The Canadian authorities fully recognize this principle. Thus, in *Le Boutillier vs Harper*,²⁹ Stuart, J., observes that to constitute an officer de facto “there must be some color to the claim under an appointment, or an exercise of official functions and an acquiescence on the part of the public, for

²⁶1 Leonard, 288, 74 Eng. R. 263.

²⁷(1599), Cro. Eliz. 699, 78 Eng. R. 934.

²⁸See also *Parker vs Kett*

(1701), 12 Mod. 466, 88 Eng. R. 1454, s. c. 1 Ray. 658, 91 Eng. R. 1338, and other English cases quoted under sec. 6.

²⁹(1875), 1 Que. L. R. 4.

a length of time sufficient to afford a strong presumption of a colorable right." So in *Rouleau vs Corporation of St. Lambert*,³⁰ Routhier, J., evidently referring to the American cases, says: "Others (courts) have held that an appointment or an election was in all cases necessary to constitute an officer de facto, and that an usurper could never become an officer de facto. I believe that now those distinctions are abandoned, and that even without an election, one may become an officer de facto."³¹

§ 104. What will constitute an officer de facto by reputation or acquiescence.—Having now shown that officers de facto may exist without color of a known title, but merely under color of right derived from reputation or acquiescence, we must next consider what is requisite to establish, on a sufficient basis, such appearance of official authority. It is obvious that it would be impossible to lay down strict rules upon this subject, since the surrounding circumstances must control each case. "The possession," says a learned judge, "by the claimant of the office and the indicia thereof, the performance by him of the duties, in such an open and public manner as will justify the public generally in the belief that he is the officer, and especially the recognition by the people of and their acquiescence in his acts as such officer, are all elements which go to establish the character of a de facto officer."³² And Andrews, J., in *Lacasse vs Labonté*,³³ commenting on Lord Ellenborough's definition of an officer de facto, says: "From this definition it is apparent

³⁰(1896), 10 Que. R. (Sup. Ct.) 85.

³¹See also *Lacasse vs Roy* (1895), 8 Que. R. (Sup. Ct.) 293, where *State vs Carroll* is referred to with approval.

³²Beatty, J. in *United States vs Alexander* (1891), 46 Fed. 728.

³³(1896), 10 Que. R. (S. C.) 104.

that a man in one place, at one time, and among certain persons might 'have the reputation of being the officer he assumes to be,' and the same man in a different place, or at a different time, or among different persons, might not have such reputation. Therefore it is plain that whether the man is a *de facto* officer or not cannot be decided absolutely, once for all, and as to all, but on the contrary depends on the knowledge possessed by those with whom he deals as to his true status. As Lee, C. J. said in the case of *R. vs Lisle*,³⁴ 'In these cases the proper question is whether a person be an officer *de facto* as to the particular purpose under consideration.' ”³⁵

Hence all we can do here is to enunciate leading principles which may be useful as guides in investigations of this kind. The nature of the office, the length of time the incumbent has been in possession, the manner in which he is regarded by the public, or by those whose duty it is to see that public offices are properly filled, and many other like circumstances, must be examined and weighed to ascertain whether a pretended officer has sufficient color of right or authority to constitute him an officer *de facto*.

§ 105. Reputation or acquiescence — Definition of terms.—The authorities generally use the words “reputation or acquiescence,” and sometimes “reputation and acquiescence,” with reference to the class of *de facto* officers we are now dealing with. Let us define and explain these terms. Reputation is defined in the Imperial Dictionary as “character by report; opinion of character generally entertained; character attributed to a person, action or thing; report, in

³⁴Andr. 163, 95 Eng. R. 345.

E. 1005, 23 Am. St. R. 51, 12

³⁵See also *Van Amringe vs Tay-*

L.R.A. 202.

lor (1891), 108 N. C. 196, 12 S.

a good or a bad sense." And acquiescence is defined as "the act of acquiescing or giving a quiet assent; a silent submission, or submission with apparent consent."

From these definitions it is obvious that reputation implies acquiescence; for if a person takes possession of an office, but his pretended claim or title thereto is immediately, and at all times, challenged by the public, who refuse to recognize his official character, he undoubtedly cannot acquire the reputation of being the officer he assumes to be.³⁶

But does acquiescence imply reputation? We think it does, in a qualified sense at least; because from such acquiescence there must of necessity arise a general belief in the community that the officeholder is sufficiently a good officer to be entrusted, without peril, with the performance of official duties. He could not be an officer *de facto* without such reputation. As stated by the court in *Hussey vs Smith*,³⁷ an officer *de facto* is one who "claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly."³⁸

§ 106. Nature of office—Effect of open possession upon reputation.—Every officer *de facto*, as seen elsewhere, must be in the actual occupancy of the office; but if possession is necessary in all cases, it is obvious that the most stringent proof thereof is required, where there is no election or appointment to impart color of title to the officer,—and his claim is merely based upon various circumstances, of which the principal and most convincing one is open, peaceable,

³⁶*Williams vs Boynton* (1895), 147 N. Y. 426, 42 N. E. 184, affirming (1893), 71 Hun (N. Y.) 309.

³⁷(1878), 99 U. S. 20, 25 L. ed. 314.

³⁸Also *Lacasse vs Labonté* (1896), 10 Que. R. (S. C.) 104; *Herkimer vs Keeler* (1899), 109 Iowa 680, 81 N. W. 178; *Brown vs State* (1902), 43 Tex. Crim. R. 411, 66 S. W. 547.

continuous, and undisturbed possession. However, all offices are not of the same nature. Some are so openly held and exercised, that their occupation for even a short time, with appearance of right and public acquiescence, must necessarily at once create reputation; while others are of such private character, that it might be difficult in some cases to base a claim of official reputation on their occupation, as such occupation might not be publicly known. Therefore the nature of the office is a very essential feature to be considered, to ascertain whether a person has really acquired the reputation of being an officer.

So influenced by these considerations was one of the judges of the New York Court of Appeals,³⁹ that he expressed the opinion that there could be no officer *de facto*, by reputation only, as to certain offices. "I am not, however, prepared," says the learned judge, "to deny that an officer may have sufficient color, in some cases, without any appointment or election whatever; as when he takes possession of the public building or room where the duties are to be discharged, and has possession of the public property pertaining to the office, and is thus clothed with all the indicia of official position, and has for a considerable time, with the acquiescence of the public, and without dispute, openly and notoriously exercised the duties of the office. Such a case could rarely, if ever, occur in this country; but if it should occur, it might give color of office. To illustrate more clearly my meaning: if one should take possession of a county clerk's office, claiming to be clerk, and should there act as clerk for a considerable time, by the general acquiescence of the public, there being no one else to exercise the duties of the office, he might have sufficient color of office to make him clerk *de facto*. But a

³⁹Earl, J., in *Lambert vs People* 293, reversing *Lambert vs People* (1879), 76 N. Y. 220, 32 Am. R. (1878), 14 Hun (N. Y.), 512.

notary public having no public office, clothed with none of the symbols or outward tokens of official position, being one of thousands who may, anywhere in the same county, exercise the duties of the same office, cannot get color of office by simply acting from time to time as he might have opportunity. He can get color of office only by an appointment emanating from the appointing power. . . .”

With much deference, however, we think that the proposition laid down by the learned judge is theoretically unsound. However difficult it may be in practice to acquire official reputation as to certain offices, without the aid of some election or appointment, yet it is not an impossibility. One can easily imagine circumstances that would make the holder of any public office, whatever might be its nature, an officer *de facto* by reputation.⁴⁰

§ 107. **Circumstances establishing or affecting reputation.**—But be the character of the office what it may, the bare possession of it will not create or confer official reputation, since “the mere intrusion into a public office does not suffice to make the intruder an officer *de facto*.”⁴¹ The officer must, as already explained, be in possession under some color or appearance of right, resulting from various circumstances tending to establish his official authority, and to mislead the community into the belief that he has such authority.⁴² “The foundation stone,” says a judge, “of this whole doctrine of

⁴⁰As to *de facto* notaries and remarks on their office, see *Keeney vs Leas* (1863), 14 Iowa 464; *Smith vs Meador* (1885), 74 Ga. 416, 58 Am. R. 438; *Davenport vs Davenport* (1906), 116 La. 1009, 41 So. 240.

⁴¹*People vs Dike* (1902), 37 Misc. (N. Y.) 401, 75 N. Y. Supp. 801.

⁴²*Matter of Collins* (1902), 75 N. Y. App. Div. 87, 77 N. Y. Supp. 702; *Williams vs Boynton* (1895), 147 N. Y. 426, 42 N. E. 184, affirming (1893), 71 Hun (N. Y.), 309; *Olson vs Trego County* (1898), 8 Kan. App. 414, 54 P. 805; *State vs Pinkerman* (1893), 63 Conn. 176, 28 A. 110, 44 Am. & Eng. Corp. Cas. 233; *Oliver vs*

a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo-officer.”⁴³

Accordingly, there cannot be any reputation where the same would be unreasonable, and inconsistent with the known facts.⁴⁴ For instance, one who is known to be a deputy cannot acquire the reputation of being the principal officer de facto, by assuming to act as such after the death of his principal, for he can never have the reputation of being more than a deputy.⁴⁵ So where a city oil inspector, claiming title to his office under a void municipal ordinance, had openly acted thereunder and never attempted to act under a State statute, it was held that he could not be regarded as an officer de facto, by reputation, as to the statutory office. The reason given was, that “there was nothing which would lead any person to recognize or treat him as an incumbent of the office created by the statute, but, on the contrary, his reputation was that of being oil inspector under the ordinance of the city.”⁴⁶

§ 108. **Same subject.**—The requisite color or appearance of right is generally established by showing a continual

Jersey City (1899), 63 N. J. L. 634, 76 Am. St. R. 228, 44 A. 709, 48 L.R.A. 412, reversing 63 N. J. L. 96, 42 A. 782; Nall vs Coulter (1904), 117 Ky. 747, 78 S. W. 1110; Herkimer vs Keeler (1899), 109 Iowa, 680, 81 N. W. 178; Herring vs Lee (1883), 22 W. Va. 661; R. vs Corp. of Bedford Level (1805), 6 East, 356, 2 Smith K. B. 535.

⁴³Sherwood, J., in *State vs Per-*

kins (1897), 139 Mo. 106, 40 S. W. 650.

⁴⁴*Lower Terrebonne R. & M. Co. vs Police Jury* (1906), 115 La. 1019, 40 So. 443; see also other cases above quoted.

⁴⁵*R. vs Corp. of Bedford Level* (1805), 6 East 356, 2 Smith K. B. 535.

⁴⁶*Chicago vs Burke* (1907), 226 Ill. 191, 80 N. E. 720, reversing 127 Ill. App. 161.

and undisturbed exercise of the office, with public acquiescence, for a certain length of time. "There must be an acquiescence by the public, for a length of time, which would afford a strong presumption of colorable right."⁴⁷ How many acts must be performed and how long the office must be held, without dispute, before official reputation can be acquired, are matters which must be governed by the circumstances. "What shall constitute an officer *de facto*," says Ruffin, C. J., "may admit of some doubt in different cases. The mere assumption of the office by performing one or several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto*."⁴⁸

According to these principles, it has been held that in order to prove a person to be an officer *de facto*, it is necessary to show that he has acted as such on other occasions than that which is the subject of the controversy.⁴⁹ Thus, where a single act was performed by a notary public, who had vacated his office by accepting an incompatible office, it was held not sufficient to make him a notary public *de facto*.⁵⁰ So where a corporation attorney, after having laid down the work of the office and transferred the same to his successor, was prevailed upon by the Mayor, who was unwilling to approve the new appointment, to resume the duties of the office, and while so acting reluctantly at the request of the Mayor, did some work which consisted in the approval of a few contracts, it was held that he could not be regarded as an officer *de facto*, but was a mere volunteer.⁵¹

⁴⁷Kimball vs Alcorn (1871), 45 Miss. 151.

⁴⁸Burke vs Elliott (1844), 4 Ired. (N. C.) 355, 42 Am. Dec. 142; also Wilcox vs Smith (1830), 5 Wend. (N. Y.) 231, 21 Am. Dec. 213.

⁴⁹Goulding vs Clark (1856), 34 N. H. 148; Hall vs Manchester (1859), 39 N. H. 295.

⁵⁰Biencourt vs Parker (1864), 27 Tex. 558.

⁵¹Erwin vs Jersey City (1897), 60 N. J. L. 141, 37 A. 732, 64 Am.

§ 109. *Same subject.*—But it is otherwise where not only a few unimportant acts are performed by a person in an official capacity, but all the duties of the office are publicly and notoriously discharged by him, without opposition and with the apparent approval of the public, and especially of those in authority, whose duty it is to see that the office is properly filled.⁵² In such case there is at once an appearance of right, which cannot fail to impart to him, in a very short time, official reputation, so that third parties will be justified in recognizing him as an officer, for “persons coming to a public office to transact business who find a person in charge of it and transacting its business in a regular way, are not bound to ascertain his authority so to act; but to them he is an officer de facto.”⁵³

Accordingly, in *Leak vs Howel*,⁵⁴ it was held that it was lawful for merchants to make an agreement to pay subsidies with a person found sitting in the custom-house with other officers, and acting as deputy, though he was an illegal officer. So where the son of a deputy district clerk was the only person in charge of the office, transacted the business therein, was permitted by the clerk and the deputy to sign their names and his official acts were recognized by them and the people dealing with him, it was held that as to third parties he must at least be regarded as an officer de facto.⁵⁵

But the presumption of official character will materially

St. R. 584. See also *People vs Peabody* (1858), 6 Abb. Pr. (N. Y.) 228, s. c. sub nom. *Conover vs Devlin* (1857), 15 How. Pr. (N. Y.) 470, 6 Abb. Pr. (N. Y.) 228.

⁵²*Henry vs Commonwealth* (1907), 31 Ky. L. R. 760, 103 S. W. 371; *Missouri Pac. Ry. Co. vs Preston* (1901), 63 Kan. 819, 66 P. 1050; *Heard vs Elliott* (1905), 116 Tenn. 150, 92 S. W. 764.

⁵³*Nofire vs U. S.* (1897), 164 U. S. 657, 17 Sup. Ct. 212. Also *Cromer vs Boinest* (1887), 27 S. C. 436, 3 S. E. 849; *Cook vs Hall* (1844), 6 Ill. 575.

⁵⁴(1591), Cro. Eliz. 533, 78 Eng. R. 780.

⁵⁵*Nofire vs U. S.* (1897), 164 U. S. 657, 17 Sup. Ct. 212.

be strengthened where there has been a long user of the office, or such user has occurred at such a distant period that the records of it are apparently lost. Thus, it was held that where a person has been acting as notary public for 25 years, and has the reputation of being such in the community in which he lives, he is an officer *de facto*, no matter what his official title or right may be.⁵⁶ So where it was shown that a person had signed a paper as deputy clerk of a court, and had been recognized as such, it was held that he must be regarded as an officer *de facto* as to his signature, though seventeen years afterwards he did not remember ever having been appointed or acting in that capacity, and the record of his appointment could not be found.⁵⁷

It will readily be seen that the rules of presumptive evidence as to official title,⁵⁸ and the principles of the *de facto* doctrine run on parallel lines, where the *de facto* officer's sole color of right is based upon reputation derived from an actual exercise of the office. There comes however a point of divergence which occurs at that uncertain stage where, in the one case, the *prima facie* evidence of title continues to remain a rebuttable presumption, while, in the other, it becomes irrefutable, so far, at least, as this is necessary to protect those who have bona fide acknowledged the authority of the apparent officer. This observation explains the reason why the authorities mix up so much the two rules or principles, when dealing with such cases.⁵⁹

⁵⁶Davenport vs Davenport (1906), 116 La. 1009, 41 So. 240. See also Hughes vs Long (1896), 119 N. C. 52, 25 S. E. 743; Ex p. Tracey (Tex., 1905), 93 S. W. 538; State vs Davis (1892), 111 N. C. 729, 16 S. E. 540.

⁵⁷Burke vs Cutler (1889), 78 Iowa, 209, 43 N. W. 204.

⁵⁸Berryman vs Wise (1791), 4 Term (D. & E.), 366; Bryan vs Walton (1853), 14 Ga. 185.

⁵⁹Burke vs Elliott (1844), 4 Ired. (N. C.), 355, 42 Am. Dec. 142; Hutchins vs Van Bokkelen (1852), 34 Me. 126; Burke vs Cutler (1889), 78 Iowa 299, 43 N. W. 204.

§ 110. **Acquiescence—Effect thereof upon assumed official character.** — We have already explained that without acquiescence no one can acquire the reputation of being a good officer. This is manifest from the judicial quotations we have given. But another proposition is equally true, that where there is acquiescence, even without the least color of title, the person whose authority is acquiesced in will have sufficient appearance of right, and reputation to constitute him an officer de facto. As pointed out in *Pierce vs Edington*,⁶⁰ “color of title by election, appointment or commission is not essential as between other parties to constitute” an officer de facto where there is such “acquiescence of the public as will authorize the presumption, at least, of a colorable appointment or election.”^{60a}

Moreover, the State authorities are primarily interested in preventing usurpations of offices, and if they raise no objection, others should not be prejudiced by their inaction. “The sufferance of the State, and silence of the government is construed to be a ratification of his (de facto officer’s) acts.”⁶¹ Especially is this so where the officer derives his color of authority directly from the government.⁶² Upon analogous principles, a person who becomes a member or an officer of a public body, with the acquiescence of such body, will be an officer de facto, however wrongful may be his assumption of official power.⁶³ Again, the color or appearance of right

⁶⁰ (1881), 38 Ark. 150.

^{60a}As to English case where acquiescence is relied on, see post, sec. 320.

⁶¹*Kimball vs Alcorn* (1871), 45 Miss. 151; *Hamlin vs Kassafer* (1887), 15 Or. 456, 15 P. 778, 3 Am. St. R. 176.

⁶²*Burton vs Patton* (1854), 2 Jones L. (N. C.) 124, 62 Am. Dec.

194; *Kimball vs Alcorn* (1871), 45 Miss. 151.

⁶³*Aud.-Gen. vs Supervisors* (1891), 89 Mich. 532, 51 N. W. 483; *Atty.-Gen. vs Crocker* (1885), 138 Mass. 214; *State vs Cartwright* (1907), 122 Mo. App. 257, 99 S. W. 48; *Ex p. Tracey* (Tex., 1905), 93 S. W. 538; *Mahoney vs East Holyford Mining Co.* (1875),

of an incumbent will derive additional strength from the circumstance that the outgoing officer has peaceably surrendered the possession of the office to him,⁶⁴ or that his pretended title is not disputed by the de jure officer.⁶⁵

Many illustrations could be given as to the effect of acquiescence, though of course it is difficult to find cases where the acquiescence stands alone, without even the semblance of an election or appointment. Still there are some. Thus, in *Dugan vs Farrier*,⁶⁶ a person who, by virtue of his election as director, had previously been entitled to preside at the board of chosen freeholders, but whose office of director was then legally abolished, and who had become ineligible to the office of president, claimed the right still to preside, and assumed the chair. The board acquiesced and proceeded to do business, and the self-constituted chairman was held to be an officer de facto, though the board had the exclusive power of electing its own president. So where through the failure of the directors of a school district to appoint a clerk, a person had for years assumed the office and was recognized as such, and his acts and services were acknowledged and acted upon by the board and the public, it was held that he was an officer de facto and his acts as such were binding upon the board and the district.⁶⁷

L. R. 7 H. L. 869, 33 L. T. 383, Ir. R. 9 C. L. 306.

⁶⁴*Ellis vs N. C. Inst. Deaf etc.* (1873), 68 N. C. 423.

⁶⁵*People vs McDowell* (1893), 70 Hun (N. Y.) 1, 23 N. Y. S. 950, 10 N. Y. Crim. R. 462.

⁶⁶(1885), 47 N. J. L. 383, 1 A. 751, affirmed 48 N. J. L. 613, 7 A. 881.

⁶⁷*State vs Cartwright* (1907), 122 Mo. App. 257, 99 S. W. 48. See also *State vs Speaks* (1886),

95 N. C. 689; *U. S. vs Alexander* (1891), 46 Fed. 728; *Williams vs Boynton* (1895), 147 N. Y. 426, 42 N. E. 184, affirming (1893), 71 Hun (N. Y.), 309; *Milford vs Zeigler* (1890), 1 Ind. App. 138; *Highby vs Ayers* (1875), 14 Kan. 331; *Zabel vs Harshman* (1888), 68 Mich. 273, 42 N. W. 44; *Watson vs McGrath* (1904), 111 La. 1097, 36 So. 204; *People vs Ammons* (1848), 10 Ill. 105; *Chiles vs State* (1885), 45 Ark. 143.

But it was held that the surveyor of one county, who, as such, assumed in violation of a statute to make surveys in another county in which another officer was alone empowered to make surveys, could not be *de facto* the surveyor of such county, even though his acts as such were generally acquiesced in by the public, and sanctioned by the commissioner of the general land office.⁶⁸

§ 111. **Usurpers may become officers *de facto* by reputation or acquiescence.**— From the foregoing, it is manifest that the assumed official character of those who usurp or intrude into offices, without the least color of title, cannot always be ignored. This, however, is not inconsistent with the general principle explained elsewhere, that the pretended authority of a usurper is never recognized, and that the same may be collaterally assailed at any time. For such rule has reference to persons who are still usurpers at the time they attempt to act officially, and not to those who, though usurpers *ab initio*, have through a peaceable user of the office, with public acquiescence, for a certain period, subsequently acquired the reputation of being good officers. “It may be said,” observed a learned judge, “that a mere usurper cannot be said to be an officer *de facto*; yet one who at first was but a mere usurper may, by acquiescence, become an officer *de facto*.”⁶⁹

§ 112. **Officers *de jure* who usurp the official functions of other officers.**— There is one kind of usurpation which deserves special notice. It is that of certain *de jure* officers who usurp the functions of other officers, and, under

⁶⁸Cox vs Ry. Co. (1887), 68 Tex. 226, 4 S. W. 455.

⁶⁹McGrath, J., in Auditor-Gen. vs Sup'rs (1891), 89 Mich. 552, 51 N. W. 483. See also Van Amringe

vs Taylor (1891), 108 N. C. 196, 12 S. E. 1005, 23 Am. St. R. 51, 12 L.R.A. 202; Norfleet vs Staton (1875), 73 N. C. 546.

certain circumstances, become officers de facto as to the functions or offices so usurped. It is needless to say that they derive no color of title to the second office by reason of their election or appointment to their own office, and therefore their status, as de facto officers, necessarily depends solely upon reputation and acquiescence. Thus, in *Case vs Wrestler*,⁷⁰ the facts were as follows: A township board of education—acting upon the supposition that the local directors of the sub-district were neglecting to discharge their duties—assumed the exercise of those duties, under certain provisions of the school law, and employed the plaintiff to teach a school in the sub-district, which he did for three months, without being notified by the local directors to desist. At the expiration of that time, the board of education gave him an order on the defendant, the township treasurer, for his wages. The local directors notified the defendant not to pay it, and threatened him with a suit if he did, whereupon he refused to pay it. The reason for the notification was that the local directors had not neglected their duties, and that, therefore, the board of education had unlawfully usurped their authority. It was held that the treasurer was bound to pay the order, and a mandamus was granted to compel him to do so. The Court said: “It may well be admitted, that to be entitled to payment for services rendered, the retainer must have been by competent authority; but here the retainer was by a board exercising de facto the powers of local directors, without any objection, made known to the plaintiff, against their so doing. Under such circumstances, we think he is entitled to the payment of his order.”

⁷⁰(1855), 4 Ohio St. 561. It may possibly be said that this case is not strictly in point, inasmuch as an election to the first office invested the board with potential

power to act in the second. Conceding this, yet it must be admitted that where the functions of the second office are unlawfully usurped, only reputation and ac-

So in *Heard vs Elliott* ⁷¹ it appeared that the office of entry taker, in the State of Tennessee, was consolidated with that of county surveyor by an Act of 1870. In 1875, it was abolished, and again established in 1879. One Thurman was elected county surveyor of Sequatchie county in 1881, but was not elected entry taker until April, 1887. He nevertheless had possession of the books and records of the entry taker's office from 1881 to 1904, held himself out as entry taker, was reputed to be and was recognized by the public, and during all that time performed the duties of making entries. It was held that he was an entry taker de facto prior to the date of his formal election as such, so that an entry taken by him in January, 1887, was valid.⁷²

But in order that the usurping officer be regarded as an officer de facto under the circumstances mentioned, it must appear that the lawful officer, if any, ceased to act while the usurpation lasted,⁷³ for, as already seen, there cannot be a de jure officer and a de facto officer holding the same office at the same time.⁷⁴

quiescence can afford color of authority to the usurpers.

⁷¹(1905), 116 Tenn. 150, 92 S. W. 764.

⁷²See also *Hussey vs Smith* (1878), 99 U. S. 20, 25 L. ed. 314.

⁷³*Cox vs Ry. Co.* (1887), 68 Tex. 226, 4 S. W. 455.

⁷⁴See ante, secs. 74 et seq.

CHAPTER 10.

OFFICERS DE FACTO BECAUSE OF ENTRY BEFORE COMMENCEMENT OF OFFICIAL TERM, OR OF HOLDING OVER AFTER EXPIRATION OF SAME.

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| § 113. General rule. | § 121. Officers temporarily holding over until assumption of office by successors. |
| 114. Same subject. | 122. Same subject—Illustrations. |
| 115. Entry before beginning of official term—Illustrations. | 123. Same subject—Officer holding over after qualification of successor. |
| 116. Officers holding over—English authorities. | 124. Officers who, under claim of right, refuse to surrender the offices to their successors. |
| 117. Same subject — Canadian authorities. | 125. Officers holding over after abolition of their offices. |
| 118. Classification of officers holding over, based upon the American authorities. | 126. Holding must be uninterrupted. |
| 119. Officers holding over indefinitely — American illustrations. | |
| 120. Same subject — Deputies holding over. | |

§ 113. **General rule.**— The general rule is that a person elected or appointed to an office, who enters into possession before his official term begins, or holds over after such term has expired, and exercises the duties thereof with public acquiescence, is an officer de facto. An officer de facto has been defined, as “one who comes in by the power of an election or appointment, but in consequence of some informality, or want of qualification, or by reason of the expiration of his term of service, or it may be said also by entering upon the duties of his office before his term of service fixed by law

begins, cannot maintain his position when called upon by the government to show by what title he holds his office.”¹

The above rule is indisputable. But whether an officer so holding derives color of title from his election or appointment, or merely acquires color of right by reputation and acquiescence, is a question upon which there is diversity of views among the authorities. Speaking of an officer holding over, a learned judge observes: “Although his term of office had expired, he was still holding over under color of title, having been appointed by the proper authorities, and was a *de facto* officer.”² But another judge says: “It seems to me absurd to say that color from election or appointment can extend beyond the distinct and independent term for which the officer was elected or appointed—beyond the term when the election or appointment could be operative, if legal.”³ The latter theory is seemingly the most logical one, where at least the official term is not so indefinite as to admit of doubt as to its real duration, but begins and ends at known dates fixed by law.

§ 114. *Same subject.*—But while this is undoubtedly true, it is also beyond question that the reputation, which affords color of right to an officer holding without an election or appointment, is the result of various incidents and circumstances, of a character apt to lead the public into the

¹Christian, J. in *McCraw vs Williams* (1880), 33 Gratt. (Va.) 510.

²Reynolds, J. in *Canaseraga vs Green* (1903), 88 N. Y. Supp. 539. Also *McCraw vs Williams* (1880), 33 Gratt. (Va.) 510; *Brown vs Lunt* (1854), 37 Me. 423; *Cromer vs Benoist* (1887), 27 S. C. 436, 3 S. E. 849.

³Butler, C. J.—*State vs Carroll* (1871), 38 Conn. 449, 9 Am. Rep. 409. Also *Pritchett vs People* (1844), 6 Ill. 525; *Cary vs State* (1884), 76 Ala. 78; *Dugan vs Farrier* (1885), 47 N. J. L. 383, 1 A. 751, affirmed in 48 N. J. L. 613, 7 A. 881.

belief of the existence in him of official title. Then, if a person is known to have been elected or appointed to an office, and is afterwards seen in the open discharge of its duties, it is evident that in the mind of the public, unskilled in the law, and often ignorant of the precise beginnings and endings of official terms, the possession of the office will be connected with the election or appointment to it of which they are cognizant. Hence it is obvious that though strictly speaking, it is a fallacy to attribute to an officer holding over or entering before the beginning of his term, any color of title from his election or appointment, yet the fact of his being elected or appointed is a powerful factor or circumstance, aiding him in acquiring the reputation which is essential to give him color of right, and distinguish him from a usurper. Possibly it is in that sense that some judges have referred to the election or appointment as affording color of title, and that the mistaken impression created by their words is merely due to inaccuracy of language.⁴

§ 115. **Entry before beginning of official term—Illustrations.**—This subject is well illustrated by the case of *McCraw vs Williams*.⁵ There it appeared that Judge Armistead had been elected County Court Judge on the 27th January, 1880, and commissioned by the Governor on the 9th February of the same year. On the 23rd February, 1880, he, believing that his term commenced immediately, although it did not in fact begin before the 1st of January of the following year, took his seat on the bench, after having recorded his certificate of qualification and commission. The predecessor made no objection by way of protest or otherwise, but resumed his practice at law in that court. On the 27th

⁴See *Cromer vs Boinest* (1887), 27 S. C. 436, 3 S. E. 849.

⁵(1880), 33 Gratt. (Va.) 510.

April, 1880, one Cecilia McCraw was tried in that Court for the murder of her infant child recently born, found guilty of manslaughter and sentenced by Judge Armistead. Upon these facts it was attempted upon habeas corpus to have the conviction quashed, on the ground that the judge had acted without lawful authority. But it was held that "at the time of the indictment, trial, and conviction of the prisoner, Judge Armistead was certainly a judge *de facto*, holding his office under color of title. He was then in office by virtue of his election by the legislature and his commission by the governor. At that time there was no question as to his authority to hold the court, nor was there any person claiming and asserting title to the office into which he had been duly installed."

But a person elected or appointed to an office cannot be deemed an officer *de facto* during his predecessor's term, if the latter does not abandon the office, as there cannot be two officers holding the same office at the same time.⁶ Nor can such a person be an officer *de facto*, even if his predecessor vacates the office, where no portion of the public, save such predecessor, recognizes his claim to be then an officer.⁷

§ 116. **Officers holding over—English authorities.**—We give the English and Canadian authorities as they come, without any attempt at bringing them within the classification hereinafter set forth. Considering that there are so few we think it desirable to keep them by themselves. Besides, some of the English cases only bear very indirectly upon the present subject.

In *Knowles vs Luce*,⁸ Manwood, J., in giving his opinion,

⁶*School District vs Dorton* (1898), 145 Mo. 304, 46 S. W. 948. ⁸(1580), Moore, 109, 72 Eng. R. 473.

⁷*Dabney vs Hudson* (1890), 68 Miss. 292, 8 So. 545, 24 Am. St. R. 276.

says that if an under-steward continues to perform the duties of his office after his term has expired, that is, after the death of the steward, he is a good officer *de facto*.

In *R. vs Corporation of Bedford Level*⁹ one of the questions was whether a deputy registrar of titles, who had continued to act after the death of the registrar, could be considered an officer *de facto*. It was held that he could not, because the fact of his principal's death was known. But it is to be inferred from the case that the decision would have been different, had the public been ignorant of that fact. Lord Ellenborough, C. J., observed "that, however the acts of a legal deputy to a ministerial officer may be good after the death of his principal, before notice thereof to those who are interested in his acts, as being done under color of authority, yet that the titles of land-owners within the level, registered by the deputy after the death of his principal was known, were invalid." And referring to *Knowles vs Luce*, he added: "This doctrine of Manwood's seems no more than what was the law in the case of all judicial officers, when the interest of the officers determined on the demise of the crown: for though, in consideration of law, the commissions of the judges, etc., determined immediately on such demise, yet their intermediate acts, between the demise of the Crown and notice of it, were good."

This last doctrine, as announced by Lord Ellenborough, was laid down in the case of *Crew vs Vernon*.¹⁰ There the question was, whether a commission issuing out of the court of Chester, between Sir Randolph Crew, late Chief Justice, and George Vernon, one of the barons of the Exchequer, to examine witnesses in a case depending before the Chamberlain of Chester, was well executed. The commissioners

⁹ (1805), 6 East 356, 2 Smith K. B. 535.

¹⁰ (1628), Cro. Car. 97, 79 Eng. R. 686.

began the examination of their witnesses on March 28th, 1625, being Monday, which was the day after the demise of King James, and continued until the Friday following; at which time, having notice of the demise of the King, they ceased, and returned all what they had done. Upon a motion to suppress the depositions, it was held that they were valid, because they had been taken under the commission without notice of the king's demise.¹¹

§ 117. **Same subject — Canadian authorities.** — In *O'Neil vs Atty. Gen. of Canada*,¹² Chief Justice Strong, while commenting on the rule of law which validates the acts of de facto officers, remarked: "Especially is this so in the case of officers holding over and continuing to perform official duties after their term has expired." But the Canadian case which is most in point is *Speers vs Speers*.¹³ There an appeal was taken from the Surrogate Court of a county, upon the ground of want of jurisdiction in the Junior County Judge who had tried the issue without a jury, and afterwards delivered the judgment. A will was being proved in solemn form, and at the time of the trial there was no Senior County Judge, he having died, and the Junior County Judge was acting Surrogate Judge under a statute authorizing him to do so during the vacancy. After the trial, however, a Senior Judge was appointed, and subsequent to his appointment judgment was delivered by the Junior Judge, in favor of the plaintiffs. Against the authority of the Junior Judge, it was urged that while the office was vacant he could have

¹¹Judges' commissions are not now determined on the demise of the crown: See 1 Ann. Stat. 1. c. 8; 6 Ann. c. 7. s. 8 (Ruffhead); Rev. Stat. Can. (1906), c. 101, ss. 2, 3; and other similar statutes.

¹²(1826), 26 Can. Sup. Ct. 122, 1 Can. Crim. Cas. 303.

¹³(1896), 28 O. R. 188.

acted, but as soon as a Senior Judge was appointed, he became *functus officio*, and could not deliver any valid judgment. But the court, relying on several English and American cases, held that the judgment could not be assailed on the ground of lack of authority in the Junior Judge. "Here," said Boyd, C., "the circumstances amply justify the action of the Junior Judge as being of a *de facto* character, to say the least, and if so, the Court will not investigate as to competency in the case of *de facto* judges."

The report in this case is silent as to whether the newly appointed Senior Judge had actually entered upon the duties of his office as Surrogate Court Judge at the time the Junior Judge delivered his judgment. If he had, it might be difficult to reconcile this decision with the principle that two persons cannot occupy a single office at the same time. But the appointment alone of the Senior Judge, without more, might not be sufficient to divest the Junior Judge of his *de facto* character.¹⁴

§ 118. Classification of officers holding over, based upon the American authorities.— From a perusal of the American decisions, it becomes evident that these officers may be divided into five classes: 1. Those who continue to hold indefinitely after the expiration of their terms, either because no successors or immediate successors are elected or appointed, or the successors neglect to take charge of the offices, entirely or for a considerable time; 2. Those who only temporarily hold over between the expiry of their terms and the assumption of the offices by their successors, but without being lawfully authorized to do so; 3. Those who, under claim of right, refuse to surrender the offices to their successors; 4. Those

¹⁴See *U. S. vs Alexander* (1891), 46 Fed. 728. As to justice of the peace acting after revocation of his commission, see *Hogle vs Rockwell* (1898), 20 Que. R. (S. C.) 309.

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tion of his commission, see *Hogle vs Rockwell* (1898), 20 Que. R. (S. C.) 309.

who continue in office after having been disabled from holding the same, by change of residence, the acceptance of an incompatible office, or the like; and 5. Those who hold over after the abolition of their offices.

Class four evidently comes under the head of officers *de facto* by reason of ineligibility or subsequent disability, and is chiefly dealt with elsewhere. So among those who refuse to surrender their offices, there are many who claim to have been re-elected or re-appointed, and therefore are comprised within the class of officers *de facto* holding under color of an irregular election or appointment, which forms the subject of another chapter. Hence they will be only incidentally treated of here. So it will be with the class of officers last mentioned, as they have already been dealt with when we commented upon the necessity of a *de jure* office to constitute an officer *de facto*.

§ 119. Officers holding over indefinitely—American illustrations.—Where by reason of failure to hold an annual election, the members of the municipal government of an incorporated town continued to hold their offices and exercise the powers incident thereto, during the year succeeding that for which they were elected, they were held to be officers *de facto*.¹⁵ So where persons were appointed to fill vacancies in the city council, and they continued to perform the duties imposed upon them by their office, without being elected at the next regular election, but with the full knowledge and acquiescence of those who had the right to re-appoint them upon the failure to have an election at the proper time, they were likewise held to be *de facto* officers.¹⁶

¹⁵*Garrett vs State* (1892), 89 Ga. 446, 15 S. E. 533; *Bohannon vs State* (1892), 89 Ga. 451, 15 S. E. 496.

¹⁶*Pence vs Frankfort* (1897), 101 Ky. 534, 41 S. W. 1011. Also *Hale vs Bischoff* (1894), 53 Kan. 301, 36 P. 752; *In re Corum*

So where school trustees, who had been duly elected and qualified, acted over six years without any renewal of their election or qualification, though the office was apparently an annual one, they were deemed officers *de facto*.¹⁷ So a registrar of deeds appointed for the period of four years, who continued in office for fourteen years, was held to be an officer *de facto*.¹⁸ So where a person had held the office of constable for several consecutive years, and continued to act after the expiration of his term in a notorious manner, having an office, on the door of which was his name with the addition "constable," he was held to be a constable *de facto* in making the service of a notice during his holding over.¹⁹

So where a county judge tendered an unconditional resignation to Court Commissioners, the effect of which was to create a *legal vacancy* in the office, but he afterwards withdrew the same and continued to act, it was held that his subsequent acts must at least be regarded as those of an officer *de facto*.²⁰

So it has been held that though an expired commission is not color of title to the office of notary public, yet a re-appointment may be presumed from facts which would not justify the presumption of a popular election, and he may be an officer *de facto* after the expiration of his term.²¹ So where the clerk of a circuit court performed official acts, after the

(1900), 62 Kan. 271, 62 P. 661, 84 Am. St. R. 382.

¹⁷Milford vs Zeigler (1890), 1 Ind. App. 138, 27 N. E. 303. Also People vs Bartlett (1831), 6 Wend. (N. Y.) 422.

¹⁸Gilliam vs Reddick (1844), 4 Ired. L. (N. C.) 368.

¹⁹Petersilea vs Stone (1876), 119 Mass. 465, 20 Am. R. 335.

²⁰McGhee vs Dickey (1893), 4 Tex. Civ. App. 104, 23 S. W. 404. As to conditional resignation, see Northrop vs Gregory (1870), 18 Fed. Cas. (No. 10,327) 373, 2 Abb. U. S. 503.

²¹Cary vs State (1884), 76 Ala. 78. See also Smith vs Meador (1885), 74 Ga. 416, 58 Am. R. 438.

term for which he was elected expired by its own limitation, his acts were held good as that of an officer de facto.²²

§ 120. **Same subject—Deputies holding over.**—Among de facto officers indefinitely holding over must generally be classed deputies who act after their authority has ceased. The following are examples:—Where a deputy auditor duly appointed during the first term of his principal's incumbency, continued in office during the auditor's second term without a new appointment, he was held an officer de facto.²³ The same was held where a deputy sheriff continued to act under like circumstances.²⁴ So it was held that where the office of sheriff devolves upon the under-sheriff, and the general deputies of the former sheriff continue to act as the deputies of such under-sheriff, and with his knowledge and assent, but without a new appointment, they should seemingly be considered as deputies de facto of such under-sheriff, so as to make their acts as such deputies valid as to third persons.²⁵ Again, where the incumbent of the office of registrar was removed, but his deputy continued to act, the latter was considered an officer de facto.²⁶

²²Galbraith vs McFarland (1866), 3 Cold. (Tenn.) 267, 91 Am. Dec. 281. For further cases, see also Starr vs United States (1897), 164 U. S. 627, 17 Sup. Ct. R. 223; Ball vs United States (1890), 140 U. S. 118, 11 Sup. Ct. R. 761; Pritchett vs People (1844), 6 Ill. 525; Brown vs Lunt (1854), 37 Me. 423; Hammondsport Law etc. Ass'n vs Kinzell (1904), 43 Misc. (N. Y.) 505, 89 N. Y. S. 534; Oliver vs Jersey City (1899), 63 N. J. L. 634, 44 A. 709, 76 Am. St. R. 228, 48 L.R.A. 412, reversing

63 N. J. L. 96, 42 A. 782; People vs Rosborough (1859), 14 Cal. 180; State vs Brown (1867), 12 Minn. 538.

²³Board of County Comm'rs vs Sullivan (1905), 94 Minn. 201, 102 N. W. 723. But see Smith vs Cansler (1885), 83 Ky. 367.

²⁴Rheinhardt vs State (1875), 14 Kan. 318.

²⁵Boardman vs Halliday (1843), 10 Paige (N. Y.) 223.

²⁶Maley vs Tipton (1859), 2 Head. (Tenn.) 403. As to English cases, see ante, sec. 116.

§ 121. **Officers temporarily holding over until assumption of office by successors.**—It is a general rule in many jurisdictions that public officers hold over until their successors are elected and qualified.²⁷ In modern statutes there is generally a provision to that effect. But even at common law, it seems that the subordinate officers of municipal corporations receiving their appointments from the local government, and acting as the servants and agents of the appointing body, could hold office until their successors were appointed and sworn;²⁸ but it was otherwise with higher officers.²⁹

However, with those officers holding over by statute or at common law we are not concerned, because they are not merely officers *de facto* but *de jure*, while so continuing to hold their offices. We are only interested here with officers discharging the duties of their offices, without authority, after the expiration of their terms either by legal limitation or resignation; and as to those, the general rule is, that they are while so acting, officers *de facto* until their successors actually enter into possession and take charge of their official duties.³⁰

§ 122. **Same subject—Illustrations.**—Thus, where a circuit clerk forwarded his resignation, which was accepted, and on the day of the acceptance a successor was duly appointed, but did not qualify, or enter upon the discharge of

²⁷*City of Central vs Sears* (1875), 2 Col. 588; *People vs Edwards* (1892), 93 Cal. 153, 28 P. 831; *Robb vs Carter* (1886), 65 Md. 321, 4 A. 282; *State vs Harrison* (1888), 113 Ind. 434, 16 N. E. 384, 3 Am. St. R. 663; *State vs Meilike* (1892), 81 Wis. 574, 51 N. W. 875.

²⁸*Foot vs Prowse* (1725), 1 Str. 625; *R. vs Corporation of Durham* (1713), 10 Mod. 146; *Anonymous Case* (1699), 12 Mod. 256.

²⁹*Badger vs U. S.* (1876), 93 U. S. 599.

³⁰*People vs Beach* (1875), 77 Ill. 52.

the duties of the office, until several days thereafter, and meanwhile the old clerk continued to exercise the office, he was held to be an officer de facto while so acting.³¹ So a Superior Court clerk, who held over from the day of a general election in the beginning of August until the following September, when his successor qualified and was installed, was held to be at least an officer de facto.³² So it has been decided that a jury commissioner whose term of office has expired, and whose successor has been appointed by the governor and confirmed by the senate, may continue to discharge the duties of the office as an officer de facto until such successor qualifies according to law³³ So where the legislature alters the law as to the commencement of an official term so as to create a hiatus in the office between the ending of the old term and the beginning of the new one, and the old officer continues to hold until his successor takes charge of the office under the new law, he is an officer de facto during such period.³⁴ Thus, where a justice was elected and commissioned in 1900, making his term of office four years from the first of September after the election, and until his successor should be elected and qualified, and by a change in the election law, the election of his successor was postponed from August until November 1904, it was held that he was, at the time he rendered a judgment,³⁵ at least a de facto officer.³⁶⁻³⁷

And where the holding over is the result of misapprehen-

³¹Cook vs State (1891), 91 Ala. 53, 8 So. 686.

³²Threadgill vs Carolina Central Ry. Co. (1875), 73 N. C. 178.

³³State vs Lee (1891), 35 S. C. 192, 14 S. E. 395. Also State vs McJunkin (1875), 7 Rich. L. (S. C.) 21.

³⁴Read vs Buffalo (1867), 3 Keyes (N. Y.) 447, 4 Abb. Dec.

22. See also Thrower vs State (1875), 52 Ala. 22; Kreidler vs State (1873), 24 Ohio St. 22.

³⁵November 5, 1904.

³⁶⁻³⁷Stephens vs Davis (Ala. 1905), 39 So. 831. It is possible that this case and those cited in note 34, might have been better classed under sec. 119.

sion or innocent mistake, the reason for regarding the unlawful holder as an officer *de facto* derives increased strength from such good faith. Thus, a person was held to be a *de facto* officer while holding over, for the reason, among others, that he acted "under the belief, shared in by the public, which afterwards proved to be a mistake, that such authority still continued."³⁸ So a judge was held to be a *de facto* officer in rendering a judgment at a court held by him on the day after the expiration of his term, where both he and the judge-elect were of opinion that the new term commenced only the following day, so much so that the incoming judge practised before the outgoing judge as an attorney at such court.³⁹

§ 123. Same subject—Officer holding over after qualification of successor.—Again, though an outgoing officer, temporarily holding over, can generally be deemed an officer *de facto* only until his successor qualifies,⁴⁰ this is not always the case. For it has been held that if the old officer, even after the qualification of his successor, is allowed to continue in office, and he does so *bona fide* and with public acquiescence, he may still be a *de facto* officer until the actual assumption of the official duties by the new officer.⁴¹ Thus, where a mayor and council of a city were elected and qualified, but did not actually enter upon their duties as officers for some four weeks thereafter, the outgoing officers, who continued to act during such time publicly and without objec-

³⁸*Cromer vs Boinest* (1887), 27 S. C. 436, 3 S. E. 849.

³⁹*Merced Bank vs Rosenthal* (1893), 99 Cal. 39, 31 P. 849, 33 P. 732.

⁴⁰*State vs Perkins* (1897), 139 Mo. 106, 40 S. W. 650; *Olson vs Trego County* (1898), 8 Kan. App.

414, 54 P. 805; *Steinback vs State* (1872), 38 Ind. 483; *Becker vs People* (1895), 156 Ill. 301, 40 N. E. 944; *State vs Bryce* (1878), 11 S. C. 342; See also *Edison vs Almy* (1887), 66 Mich. 329, 33 N. W. 509.

⁴¹*U. S. vs Alexander* (1891), 48 Fed. 728.

tion, were held officers de facto.⁴² So where two members of a city council sat after their successors had qualified, but before the latter had taken their seats, and they were recognized as councilmen by the other members of the council, as well as by the Mayor and the city clerk, they were held to be de facto officers.⁴³

So where the judge of a municipal court performed official duties between the hours of 11 and 12, while his successor had taken the requisite oath of office at five minutes past 11 of the same day, he was deemed an officer de facto, because he was unaware of the qualification of his successor, and it did not appear that the latter had actually taken possession of the office by the exercise of any of its duties or functions, while he continued to act.⁴⁴ But of course where the new officer has actually taken possession of the office, his predecessor becomes merely a usurper if he attempts further to discharge official duties.⁴⁵

§ 124. Officers who, under claim of right, refuse to surrender the offices to their successors.—The claim of right may be founded on various grounds, but generally those officers assert title to the office through an alleged re-appointment or re-election, or failure to appoint or elect lawful successors. Thus, where a governor continued to hold over after the expiration of his term, and after the taking of the oath

⁴²Waite vs Santa Cruz (Cal. 1898), 89 Fed. 619.

⁴³Magneau vs Freemont (1890), 30 Neb. 843, 47 N. W. 280, 27 Am. St. R. 436.

⁴⁴Flourney vs Clements (1845), 7 Ala. 535. See also State vs Murphy (1893), 32 Fla. 138, 13 So. 705; Barlow vs Standford (1876), 82 Ill. 298; Carter vs State (1884), 43 Ark. 132; Adams vs Mississippi

State Bank (1897), 75 Miss. 701, 23 So. 395.

⁴⁵Olson vs Trego County (1898), 8 Kan. App. 414, 54 P. 805; Hyllis vs State (1885), 45 Ark. 478; State vs Lane (1889), 16 R. I. 620, 18 A. 1035; U. S. vs Alexander (1891), 46 Fed. 728. See also Rodding vs Kane (1888), 14 Daly (N. Y.) 535, 2 N. Y. S. 55.

of office by his successor, on the assumption that he had been re-elected, he was deemed an officer de facto in approving an Act of the legislature.⁴⁶ So where a person held the office of justice of the peace for a term, and he sought re-election but was defeated by another candidate who received the certificate of election, duly qualified and demanded possession of the office, which he refused to surrender on some pretence, he was deemed an officer de facto holding under color of right.⁴⁷ So where a like officer, denying the validity of an Act which ousted him before the expiration of his term, held over after a successor had been elected, and continued to exercise the functions of the office, he was held to be an officer de facto.⁴⁸

So where the trustee of a school district, disputing the legality of an adjourned school meeting at which his successor had been elected, continued to claim and hold the office and all the property of the district, and to act as sole trustee, he was deemed an officer de facto while so acting.⁴⁹ So where a justice of the peace held over, and kept the books and records of the office, and continued to discharge the duties thereof, under claim that no successor had been elected to fill his place, which was a debatable question, he was held to be a de facto officer.⁵⁰ And the Supreme Court of Kansas has gone so far as to hold that a justice of the peace, who, under the pretext of re-election, refused to give up his office to his legally elected and qualified successor, who held the certificate of election, was a de facto justice, although, upon the latter's refusal to surrender the office, the de jure officer obtained a

⁴⁶State vs Williams (1856), 5 Wis. 308, 68 Am. Dec. 65.

⁴⁷Hamlin vs Kassafer (1887), 15 Or. 456, 15 P. 778, 3 Am. St. R. 176.

⁴⁸Fleming vs Mulhall (1880), 9 Mo. App. 71.

⁴⁹Barrett vs Sayer (1890), 34 St. R. 325, 12 N. Y. Supp. 170, affirmed 58 Hun (N. Y.) 608.

⁵⁰Duester vs Zillmer (1903), 119 Wis. 402, 97 N. W. 31.

new docket, and commenced also to act as a justice of the peace, and acted in such capacity until the trial in a quo warranto proceeding.⁵¹

But a person holding over will not be deemed an officer de facto, in proceedings to recover possession of the office, as against a candidate declared elected, who holds the certificate of election, and has duly qualified;⁵² and he will not be permitted to re-open a question already judicially decided adversely to him, in order to establish color of title to the office.⁵³

§ 125. Officers holding over after abolition of their offices.—There are certain authorities holding that a person may be regarded as an officer de facto, while continuing to exercise an office which has been abolished. Thus, where the office of Mayor of a city was abolished by an Act of the legislature, and the office of recorder was substituted in its stead, but the mayor held over until the recorder took his place, he was deemed an officer de facto.⁵⁴ There, however, the statute especially authorized the mayor to hold over until the appointment of the recorder. So where two judges continued to officiate after their offices were put an end to by a legislative enactment, which admitted of reasonable doubt as to its legal effect, they were held to be de facto judges.⁵⁵

⁵¹Morton vs Lee (1882), 28 Kan. 286; State vs Buckland (1880), 23 Kan. 259. See also Blain vs Chippewa (1906), 145 Mich. 59, 108 N. W. 440; Elliott vs Burke (1902), 113 Ky. 479, 68 S. W. 445, 24 Ky. L. R. 292.

⁵²States vs Oates (1893), 86 Wis. 634, 57 N. W. 296, 39 Am. St. R. 912; Butler vs Callahan (1895), 4 N. Dak. 481, 61 N. W. 1025. See post. sec. 443.

⁵³People vs Bd. of Sup'rs (1898), 56 N. Y. Supp. 318. See also LaPointe vs O'Malley (1879), 46 Wis. 35, 50 N. W. 521.

⁵⁴Keeling vs Railway Co. (1903), 205 Pa. St. 31, 54 A. 485.

⁵⁵Ohio vs Alling (1843), 12 Ohio, 16. See also State vs Farrier (1885), 47 N. J. L. 383.

In the above cases, as is obvious, there were circumstances justifying or excusing the holding over, but even in the absence of such circumstances, it has been held that a person exercising an abolished office may be an officer *de facto*.⁵⁶ This doctrine has generally been applied to municipal bodies, in order to sustain their acts in important matters, and prevent great mischief being done to the public or third persons. However, the great preponderance of authority favors the view that there can neither be an officer *de jure* or an officer *de facto* filling an office which has ceased to exist.⁵⁷ But it would be useless to dwell at length upon this subject at the present moment, since it has been thoroughly discussed elsewhere, when we dealt with the necessity of a *de jure* office to constitute an officer *de facto*. The reader is referred to that portion of our work.⁵⁸

§ 126. Holding must be uninterrupted.—As an officer holding over derives his color of right chiefly from his open, notorious, and continued possession of the office after the expiration of his term, it is obvious that if there be any interruption in his unlawful holding, his appearance of right will disappear, and likewise his *de facto* character. Thus, where one attempted to act as a notary public, though his commission had expired two years before, and there was no proof that he had at any other time during that period exercised the office, or had been recognized as such official in the com-

⁵⁶*Perkins vs Fielding* (1893), 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100; *Hilgert vs Barber Asphalt Pav. Co.* (1904), 107 Mo. App. 385, 81 S. W. 496; *Adams vs Lindell* (1878), 5 Mo. App. 197, affirmed in 72 Mo. 198.

⁵⁷*Matter of Quinn* (1897), 152 N. Y. 89, 46 N. E. 175; *In re Hin-*

kle (1884), 31 Kan. 712, 3 P. 531; *State vs Jennings* (1898), 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. R. 723; *Daniel vs Hutcheson* (1893), 4 Tex. Civ. App. 239, 22 S. W. 278. For further cases, see ante sec. 30, et seq.

⁵⁸See ante sec. 30, et seq.

munity in which he lived, it was held that he could not be regarded as a de facto notary public.⁵⁹

⁵⁹Hughes vs Long (1896), 119 518, 39 So. 279; Biencourt vs
N. C. 52, 25 S. E. 743. also Sand- Parker (1864), 27 Tex. 558.
lin vs Dowdall (1905), 143 Ala.

CHAPTER 11.

OFFICERS DE FACTO BECAUSE OF FAILURE TO QUALIFY AS REQUIRED BY LAW.

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| § 127. General rule. | § 140. Failure to qualify when |
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| 129. Failure to take oath of al- | to operate a forfeiture of |
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| thorized persons. | ject. |
| 132. Oath or certificate of oath | 143. Same subject—Same sub- |
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| oath — English illustra- | 145. Same subject—Canadian il- |
| tions. | lustrations. |
| 134. Same subject—Canadian il- | 146. Same subject—Where stat- |
| lustrations. | ute held mandatory. |
| 135. Same subject—Same sub- | 147. Same subject—Same sub- |
| ject. | ject. |
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| lustrations. | ject. |
| 137. Irregularities concerning | 149. Same subject—Authorities |
| official bond. | supporting above doc- |
| 138. Total failure to give bond. | trine. |
| 139. Failure in other matters af- | 150. Same subject—Same sub- |
| fecting official qualifica- | ject. |
| tion. | |

§ 127. **General rule.**—A person who has been lawfully elected or appointed to an office and has entered upon the duties thereof, but has failed to take the official oath, give bond, or otherwise qualify in conformity to law, is generally deemed an officer de facto. In the absence of special circumstances, this proposition has received the unanimous sup-

port of all the authorities, both in England and in America, whenever at least failure to qualify has not been made by statute a ground of forfeiture of office. And properly so, for there is no other instance where the application of de facto principles is so well justified. In other cases, as where the election or appointment is irregular, or the qualification is defective by reason of non-residence, acceptance of another office, and the like, there is generally more or less publicity attaching to such shortcomings; but this is not so, as a rule, where there is merely a failure to comply with the law in matters regarding qualification. The knowledge of the failure is generally confined to one, or at most, to a few public officers, and it would be intolerable were the public or third persons compellable, before recognizing the official character of a person, to search the records of public offices in order to ascertain whether he had qualified in compliance with legal requirements. Apart from this, such officer has, to a certain extent, a superior title to that of other officers de facto. Indeed, it has been pointed out that he is not merely an officer de facto, but "a rightful officer holding by a defeasible title."¹ But this distinction, as we have seen elsewhere, has not generally prevailed, and, we think, with reason.^{1a}

§ 128. **Failure to take proper oath.**—Following the above principle in its application, we find it laid down that a person may be an officer de facto, though he has taken an improper, or even an illegal, official oath. Thus, where the validity of an attachment, made by an infant who had been appointed special deputy by the sheriff, was challenged on

¹Dwight, C., in *Foot vs Stiles* (1874), 57 N. Y. 399. Also *Horton vs Parsons* (1885), 37 Hun (N. Y.) 42.

^{1a}See ante, sec. 24.

the ground of the informality of his commission and of his oath, it was held that such commission and oath, even if informal, were clearly sufficient to constitute him an officer *de facto*.² So where a person during the American civil war was elected clerk of a County Court, and entered into the office, discharging all the duties appertaining thereto, he was held an officer *de facto*, though in addition to his official oath, he had also taken the oath to support the Confederate States, instead of the Constitution of the United States, and State of Tennessee.³

§ 129. **Failure to take oath of allegiance.**—But if an unlawful constitutional oath does not preclude one from becoming an officer *de facto*, a fortiori, this is so where there is merely an omission to take the oath required by the constitution. Thus, where persons were elected burgesses and commissioners of a town, and qualified as such by taking the oath of office prescribed by the charter, but did not take the oath of allegiance required by the State constitution, it was held that admitting the necessity of their taking the latter oath to constitute them officers *de jure*, they were certainly officers *de facto*.⁴

§ 130. **Failure to take oath within time prescribed by law.**—The same is true where the officer does not take the official oath within the prescribed time. Thus, commissioners of highways who had taken the oath before proceeding to lay out a road, but not until after the ten days allowed by law had expired, were deemed officers *de facto*.⁵ But the contrary was

²Moore vs Graves (1826), 3 N. H. 408.

³Ward vs State (1866), 2 Cold. (Tenn.) 605, 91 Am. Dec. 270.

⁴Koontz vs Hancock (1885), 64

Md. 134. Also Ex p. Curry (1898), 1 Can. Crim. Cas. 532.

⁵People vs Covert (1841), 1 Hill (N. Y.) 674.

held in a Canadian case,⁶ under a statute which declared that Commissioners of Sewers shall be sworn into office within one week after their election, or shall be deemed to have refused. The court held that the Act was imperative, and that a commissioner elected on the 2d August could not be legally sworn in on the 8th September—the office at that time being vacant; and that his joining with the other commissioners in making an assessment rendered it void.

§ 131. Taking oath before unauthorized persons.—The same general rule prevails where the official oath is administered by unauthorized persons. Thus, where a deputy marshal took the oath before the clerk of a District Court whose authority to administer the same was questionable, the Court said that “his appointment and service made him a de facto officer, even if the clerk who administered the oath was not empowered to do so.”⁷ So acting directors of an independent school district, who were duly elected, but were sworn by a person having no authority to administer oaths, were deemed officers de facto.⁸

§ 132. Oath or certificate of oath never filed, or not filed in time.—It is likewise where an officer's oath or the certificate thereof has not been filed at all, or not within the time prescribed by law. Thus, a duly appointed special judge, who qualifies and takes possession of the office, becomes an officer de facto, though he has failed to file his official oath.⁹ So with a notary public, who has failed in like re-

⁶R. vs Com'rs. of Sewers (1872), 1 Pug. (N. B.) 161.

⁷Wright vs U. S. (1895), 158 U. S. 232, 15 Sup. Ct. R. 819.

⁸State vs Powell (1897), 101 Iowa, 382, 70 N. W. 592. Also Dows vs Irvington (1883), 66

How. Pr. (N. Y.) 93, 13 Abb. N. C. 162; State vs Perkins (1854), 24 N. J. L. 409; Bansemer vs Mace (1862), 18 Ind. 27. But see sec. 418.

⁹State vs Miller (1892), 111 Mo. 542, 20 S. W. 243.

spect,¹⁰ and with commissioners of highways who have not filed their certificate of oath.¹¹ The same was held where in one case,¹² a deputy city clerk, and in another,¹³ a sheriff had failed to file their oaths within the time allowed therefor.

§ 133. **Total failure to take any oath—English illustrations.**—The same principle applies where there is a total failure to take any oath whatever. Thus, by the Stat. 18 Geo. II., c. 20, it is enacted that no person shall be capable of being a justice, or acting as such for any county, without the qualification by estate therein mentioned, and who shall not take at some general or quarter sessions the oath therein prescribed. And it is further enacted that any person who shall act as a justice without having taken the oath, or without being qualified, shall forfeit £100. Under these provisions, it was held that the acts of a justice of the peace, who had not duly qualified, were not absolutely void; and therefore, persons seizing goods, under a warrant of distress, signed by a justice who had not taken the oaths at the general sessions, were not trespassers, the effect of the Act being “only to make it unlawful in him to act as such; but not to make his acts invalid.”¹⁴

For like reason it was held that mandamus will not lie to the justices in sessions to make a new election of a county treasurer, on the ground that one of the justices who had voted at the election already made had not taken the qualification oath provided by the aforesaid Act.¹⁵ Per Abbott,

¹⁰Davenport vs Davenport (1906), 116 La. 1009, 41 So. 240.

¹¹People vs Collins (1811), 7 John. (N. Y.) 549. Also Williamson vs Lake County (1903), 17 S. Dak. 353, 96 N. W. 702.

¹²Tower vs Welker (1892), 93 Mich. 332, 53 N. W. 527.

¹³Sprague vs Brown (1876), 40 Wis. 612.

¹⁴Margate Pier Co. vs Hannam (1819), 3 B. & Ald. 266, 22 R. R. 378.

¹⁵R. vs Justices of Herefordshire (1819), 1 Chitty, 700.

C. J., "The office is full de facto, and we cannot say that the act of the justice, who had not taken the qualification oath, is void;" and per Holroyd, J., "The statute merely operates as a personal prohibition, declaring that it shall be unlawful for the magistrate himself to act, and he is punishable for doing that which the statute prohibits him from doing; but his acts are not void." ¹⁶

But most of the cases upon this subject arose in England under the "Corporation Act" ¹⁷ and the "Test Act," ¹⁸ of which we speak at a later period. ¹⁹

§ 134. **Same subject—Canadian illustrations.**—The Canadian courts have adopted the same doctrine. The matter came up before the Supreme Court of Canada in a case involving the legality of a criminal seizure made by a deputy high constable. ²⁰ The facts showed that the high constable of the district of Montreal, in 1885, appointed Louis Seraphin Bissonnette as deputy, who thereupon took the oath of office, the attesting magistrate adding in the record of the oath the words "jusqu'au 1^{er} Mai, 1886." The deputy was never re-sworn, but continued to act as such under his appointment, and on the 14th of October, 1893, in execution of a warrant directed to him, seized certain moneys and instruments in a common gaming house. Upon the appeal counsel for appellant strongly insisted that the appointment and oath of the deputy authorized him to act only for one year from the 1st May, 1885, and hence that he was not empowered to make a seizure in 1893. But Strong, C. J., delivering the judgment of the majority of the Court, after

¹⁶See also *Midhurst vs Waite* (1761), 3 Burr. 1259.

¹⁷13 Car. II, Stat. 2, c. 1.

¹⁸25 Car. II, c. 2.

¹⁹See sec. 144 et seq.

²⁰*O'Neil vs Attorney-General of Canada* (1896), 26 Can. Sup. Ct. 122, 1 Can. Crim. Cas. 303.

expressing the view that the deputy under the circumstances was not merely an officer *de facto* but an officer *de jure*, added: "But even were this not so, and if the appellant's contention that Louis Seraphin Bissonnette is only to be regarded as having been properly qualified to act as a regularly appointed and sworn officer for one year from 1st May, 1885, should be strictly correct in point of law, I should still hold that he *de facto* filled the office of deputy, and that being such *de facto* officer, the proceedings taken by him now impeached are not to be vitiated by reason of his not having annually renewed his oath of office." And commenting upon the *de facto* doctrine, later on he said: "And particularly it has been held to apply to officers who have failed to qualify themselves by taking an oath of office prescribed by law." This case is cited under the head of total failure to take an oath, because it is evident that an oath taken for a specified year does not avail for any subsequent year.

§ 135. **Same subject — Same subject.** — Likewise in New Brunswick, it was held that though a person acting as surrogate may not have taken the oath of office, yet his acts will not be invalid if he has been appointed to the office.²¹ So in Ontario, where the sureties of a tax collector sought to escape liability on the ground that their principal had not taken the official oath, the Court held that the omission did not vacate the appointment, nor render him incompetent to discharge the other duties appertaining to it.²² So in another case, where the legality of a distress for taxes was attacked on the ground, among others, that the collector had not subscribed the required declaration of office, it was held that "the effect of the defendant not having made and subscribed

²¹Crookshank vs Macfarlane Flint (1859), 9 U. C. C. P. 449; (1853), 7 N. B. 544. Township of Whitby vs Harrison

²²Municipality of Whitby vs (1859), 18 U. C. Q. B. 603.

the solemn declaration required by R. S. O. ch. 184, sec. 271, was to subject him to the penalty imposed by sec. 277, but it had not the effect of making his acts void.”²³

So in Quebec, it was held that the failure of a deputy recorder to take the oath of allegiance and the oath of office, did not invalidate his judgments, when he was publicly recognized as a duly qualified incumbent and his qualification was not contested at the trial.²⁴ But the contrary was held, where his authority was challenged at the hearing of the case.²⁵

§ 136. Same subject—American illustrations.—The American authorities are generally unanimous in upholding the rule, that the failure of an officer to take the prescribed oath of office will not prevent him from becoming an officer de facto. This principle has been held to apply to a tax collector,²⁶ assessors,²⁷ a county treasurer,²⁸ a city treasurer,²⁹ a city engineer,³⁰ county commissioners,³¹ commissioners of a corporation,³² township supervisors,³³ a judge,³⁴ a judge pro

²³Lewis vs Brady (1889), 17 O. R. 377. See also R. vs Boyle (1868), 4 Ont. Pr. R. 256.

²⁴Ex P. Curry (1898), 1 Can. Crim. Cas. 532; Hogle vs Rockwell (1898), 20 Que. R. (S. C.) 309.

²⁵Ex p. Mainville (1898), 1 Can. Crim. Cas. 528. See also Pinsonnault vs Corp. de Laprairie (1901), 20 Que. R. (S. C.) 525.

²⁶Guyer vs Andrews (1850), 11 Ill. 494; Cavis vs Robertson (1838), 9 N. H. 524; Lyndon vs Miller (1863), 36 Vt. 329; Whiting vs Ellsworth (1893), 85 Me. 301, 27 A. 177.

²⁷Parker vs Luffborough (1823), 10 S. & R. (Pa.) 249; Murphy vs

Shepard (1889), 52 Ark. 356, 12 S. W. 707; Moore vs Turner (1884), 43 Ark. 243.

²⁸Schoharie County vs Pindar (1870), 3 Lans. (N. Y.) 8.

²⁹Mowbray vs State (1882), 88 Ind. 324.

³⁰Akers vs Kolkmeier (1903), 97 Mo. App. 520, 71 S. W. 536.

³¹Keyser vs McKissan (1828), 2 Rawl. (Pa.) 138.

³²Trinity College vs Hartford (1865), 32 Conn. 452.

³³Gregg Township vs Jamieson (1867), 55 Pa. St. 468.

³⁴Angell vs Steere (1888), 16 R. I. 200, 14 A. 81; Powers vs State (1903), 83 Miss. 691, 36 So. 6.

tem,³⁵ members of a board of education,³⁶ the president of a board of school trustees,³⁷ justices of the peace,³⁸ deputy sheriffs,³⁹ a deputy marshal,⁴⁰ deputy clerks of courts,⁴¹ a circuit court clerk,⁴² a constable,⁴³ a deputy constable,⁴⁴ a census enumerator,⁴⁵ and a deputy notary public.⁴⁶

But where a deputy sheriff refused to take an oath and cut the form of oath from the paper constituting his appointment, and there was no showing that he had performed the duties of deputy sheriff, it was held that he could not be considered a *de facto* officer when he attempted to make an arrest.⁴⁷

³⁵In *re Hewes* (1900), 62 Kan. 288, 62 P. 673; *Tower vs Whip* (1903), 53 W. Va. 158, 44 S. E. 179.

³⁶*Rosell vs Board of Education* (1902), 68 N. J. L. 498, 53 A. 398, affirmed in *Rosell vs Borough of Avon* (1904), 70 N. J. L. 336, 57 A. 1132.

³⁷*Rhodes vs McDonald* (1852), 24 Miss. 418.

³⁸*Weeks vs Ellis* (1848), 2 Barb. (N. Y.) 320; *Greenleaf vs Low* (1847), 4 Denio (N. Y.) 168.

³⁹*Alabama etc. Ry. Co. vs Bolding* (1891), 69 Miss. 255, 13 So. 844, 30 Am. St. R. 541; *Buckman vs Ruggles* (1818), 15 Mass. 180, 8 Am. Dec. 98; *Brown vs State* (1901), 42 Tex. Crim. R. 417, 60 S. W. 548, 96 Am. St. R. 806; *Pentecost vs State* (1895), 107 Ala. 81, 18 So. 146; *Lisbon vs Bow* (1839), 10 N. H. 167; *Merrill vs Palmer* (1842), 13 N. H. 184.

⁴⁰*Hyman vs Chales* (1882), 12 Fed. 855, 4 McRary, 246.

⁴¹*Sharp vs Thompson* (1881), 100 Ill. 447, 39 Am. R. 61; *Walker vs State* (1895), 107 Ala. 5, 18 So. 393; *Farmers' & Merchants Bank vs Chester* (1846), 6 Hump. (Tenn.) 458, 44 Am. Dec. 318; *Kelley vs Story* (1871), 6 Heisk. (Tenn.) 202; *Com. vs Arnold* (1823), 3 Litt. (Ky.) 309; *Ledbetter vs State* (1907), 2 Ga. App. 631, 58 S. E. 1106.

⁴²*Douglas vs Neil* (1872), 7 Heisk. (Tenn.) 437.

⁴³*Gunn vs Tackett* (1881), 67 Ga. 725.

⁴⁴*State vs Dierberger* (1886), 90 Mo. 369, 2 S. W. 286; s. c. (1888), 96 Mo. 666, 10 S. W. 168. 9 Am. St. R. 380.

⁴⁵*Gregory vs Woodbery* (1906), 53 Fla. 566, 43 So. 504.

⁴⁶*Citizens Bank vs Bry* (1848), 3 La. Ann. 630.

⁴⁷*Brown vs State* (1902), 43 Tex. Crim. R. 411, 66 S. W. 547.

§ 137. **Irregularities concerning official bond.**—Irregularities relating to the official bond are regarded in the same light as irregularities in connection with the official oath, and are no impediment to a person becoming an officer de facto. This is true where the bond is defective,⁴⁸ as where the bond of a constable is made to the treasurer of a city, instead of to the city itself;⁴⁹ or is insufficient in amount.⁵⁰ The above principle is also applicable where the bond is not given, approved, filed, or renewed within the time, or as, prescribed by law. Thus, the following persons were held officers de facto: A State treasurer whose bond was not approved or filed until after the day designated by statute;⁵¹ county treasurers whose bonds were not approved at all, or not until a date after the time allowed therefor;⁵² a sheriff who did not execute a bond within thirty days after his election, as required by law;⁵³ a constable,⁵⁴ a tax collector,⁵⁵ and a county treasurer,⁵⁶ who similarly failed; a justice of the peace who neglected to deposit his official bond in the manner, and within the time, prescribed by law;⁵⁷ a sheriff, who failed to renew his bond annually, although the Act declared that such failure vacated the office and rendered the officer's acts thereafter void;⁵⁸ a county treasurer, who was re-elected and con-

⁴⁸*Sprague vs Brown* (1876), 40 Wis. 612.

⁴⁹*Elliott vs Willis* (1861), 1 Allen (Mass.) 461.

⁵⁰*State vs Skagit County Superior Court* (1906), 42 Wash. 491, 85 P. 264; *Dolliver vs Parks* (1884), 136 Mass. 499.

⁵¹*State vs Rhoades* (1871), 6 Nev. 352.

⁵²*McMillin vs Richards* (1895), 45 Neb. 786, 64 N. W. 242; *Holt County vs Scott* (1897), 53 Neb. 176, 73 N. W. 681.

⁵³*Crawford vs Howard* (1851),

9 Ga. 314. Also *Monteith vs Commonwealth* (1859), 15 Gratt. (Va.) 172.

⁵⁴*Weston vs Sprague* (1882), 54 Vt. 395.

⁵⁵*State vs Cooper* (1876), 53 Miss. 615.

⁵⁶*Kelly vs State* (1874), 25 Ohio St. 567.

⁵⁷*People vs Payment* (1896), 109 Mich. 553, 67 N. W. 689. See also *Sprague vs Brown* (1876), 40 Wis. 612.

⁵⁸*Clark vs Ennis* (1883), 45 N. J. L. 69.

tinued in office during the second term without giving a new bond; ⁵⁹ a sheriff, under like circumstances; ⁶⁰ a notary public who neglected to renew his bond every five years, as legally required; ⁶¹ and finally, a coroner who also omitted to renew his official bonds.^{61a}

§ 138. **Total failure to give bond.**—The like doctrine prevails where the officer has never at any time attempted to qualify by giving bond. Thus, an acting road commissioner is an officer *de facto*, though he has given no bond whatever.⁶² So is a county treasurer; ⁶³ a tax collector; ⁶⁴ a city engineer; ⁶⁵ a secretary-treasurer of school trustees; ⁶⁶ the president of a board of school trustees; ⁶⁷ a justice of the peace; ⁶⁸ a circuit court clerk; ⁶⁹ a deputy court clerk; ⁷⁰ and a coroner.⁷¹

§ 139. **Failure in other matters affecting official qualification.**—There are many other irregularities liable to occur

⁵⁹County of Wapello vs Bigham (1859), 10 Iowa, 39, 74 Am. Dec. 370.

⁶⁰Springett vs Colerick (1887), 67 Mich. 362, 34 N. W. 683.

⁶¹Davenport vs Davenport, (1906), 116 La. 1009, 41 So. 240.

^{61a}Mabry vs Turrentine (1847), 8 Ired. L. (N. C.) 201.

⁶²Willey vs Windham (1901), 95 Me. 482, 50 A. 281.

⁶³Ex p. Raymond (1872), Stev. Dig. (N. B.) 127.

⁶⁴Aulanier vs Governor (1840), 1 Tex. 653.

⁶⁵Akers vs Kolkmeier (1903), 97 Mo. App. 520, 71 S. W. 536.

⁶⁶School Trustees of Hamilton Tp. vs Neil (1881), 28 Gr. Chy. (Ont.) 408; Ex p. Johnston (1894), 32 N. B. 556.

⁶⁷Rhoades vs McDonald (1852), 24 Miss. 418.

⁶⁸Greenleaf vs Low (1847), 4 Den. (N. Y.) 168.

⁶⁹Douglas vs Neil (1872), 7 Heisk. (Tenn.) 437.

⁷⁰Wheeler &c. Mfg. Co. vs Sterrett (1895), 94 Iowa, 158, 62 N. W. 675; Sharp vs Thompson (1881), 100 Ill. 447, 39 Am. R. 61; Kelley vs Story (1871), 6 Heisk. (Tenn.) 202.

⁷¹Nason vs Dillingham (1818), 15 Mass. 170; McBee vs Hoke (1843), 2 Spears L. (S. C.) 138; State vs Brennan's Liquors (1856), 25 Conn. 278; Bliss vs Day (1878), 68 Me. 201; Powers vs Braley (1890), 41 Mo. App. 556; Gunn vs Tackett (1881), 67 Ga. 725.

in the process of qualifying for an office, which though generally fatal to the acquirement of a *de jure* title, yet do not prevent a person from becoming an officer *de facto*. Thus, it was held that a person who has been duly elected sheriff, has taken the oath of office, executed the proper bond, and entered upon his duties, is a sheriff *de facto*, though he may not have qualified at a regular session of the county board, as prescribed by law, and may not have complied with other statutory provisions requiring the official oath to be subscribed by him and certified on the back of his certificate of election, and filed or recorded in the office of the registrar of deeds, and requiring also the filing of his bond in the registrar's office, with the approval endorsed thereon.⁷² So, if a person is elected to the office of Governor, and takes possession thereof without going through the regular form of installation, he is at least a *de facto* officer.⁷³

Likewise, where there is failure to file or record the appointment, commission, or acceptance of office, in the manner prescribed by law. Thus, one who has been appointed deputy county attorney and has taken the prescribed oath, is a *de facto* officer, though his appointment has merely been deposited in the office of the county clerk instead of being recorded.⁷⁴ So is a deputy sheriff who has entirely neglected to record his appointment.⁷⁵ So where a notary public has been duly appointed by the executive, but has failed to record his commission as required by law, he is a *de facto* notary.⁷⁶ So

⁷²*Ramsey County vs Brisbin* (1871), 17 Minn. 451.

⁷³*Ex p. Norris* (1877), 8 S. C. (8 Rich.) 408.

⁷⁴*Dane vs State* (1896), 36 Tex. Crim. R. 84, 35 S. W. 661.

⁷⁵*Brown vs State* (1901), 42 Tex. Crim. R. 417, 60 S. W. 548, 96 Am. St. R. 806; *Weatherford vs*

State (1893), 31 Tex. Crim. R. 530, 21 S. W. 251. See also *State vs Dierberger* (1886), 90 Mo. 369, 2 S. W. 286, s. c. 1888, 96 Mo. 666, 10 S. W. 168, 9 Am. St. R. 380.

⁷⁶*Kenney vs Leas* (1863), 14 Iowa, 464.

where an individual elected to the office of overseer of highways, omits to file in the office of the Town Clerk a notice of his acceptance of the office, he is nevertheless an officer *de facto* if he proceeds to execute the duties of the office.⁷⁷

§ 140. Failure to qualify when such failure is declared to operate a forfeiture of office.— Where a statute declares that an office shall become vacant or forfeited, upon failure of the person elected or appointed thereto to qualify in a prescribed manner or within a limited time, it is held in some jurisdictions that such provision is merely directory, and does not work a forfeiture until there is a judicial declaration to that effect, or the office has been declared vacant in some other manner provided by law; while, in others, the doctrine maintained is that such legislation is mandatory, and a failure to qualify absolutely vacates the office without recourse to any legal proceeding whatever.⁷⁸

There have been numerous adjudications upon the above question, but we are specially interested here with the cases involving both the construction of statutes of the character above mentioned, and the application of the *de facto* doctrine. The tendency of the courts has been, and some of them have gone far in that direction, to hold statutory provisions of this kind directory rather than mandatory, and non-compliance with them, a cause of forfeiture rather than an *ipso facto* forfeiture, whenever the language used was not such as to make the latter construction absolutely necessary. But the difficulty has been that sometimes identical or similar words have been construed or interpreted differently in different jurisdictions.

⁷⁷*Bentley vs Phelps* (1858), 27 Barb. (N. Y.) 524.

⁷⁸For instructive judgments on both sides of the question, see

State vs Lansing (1895), 46 Neb. 514, 64 N. W. 1104; *Clark vs Ennis* (1883), 45 N. J. L. 69.

The position taken by those adverse to the doctrine of ipso facto forfeiture is well stated by Duvall, J., delivering the judgment of the Court of Appeals of Kentucky in *Stokes vs Kirkpatrick*.⁷⁹ "Those provisions," said the learned judge, "certainly cannot be construed as abrogating the ancient and well established rules and principles applicable to the vacation or forfeiture of offices, according to which such vacancy or forfeiture can be declared only by a direct proceeding, unless a different mode be provided by express statute. And it is also well settled that, until the vacancy or forfeiture shall have been thus regularly determined, by a competent tribunal, and in the appropriate proceeding, the official acts of the incumbent, so far, at least, as those acts may affect third persons, are valid, and cannot be collaterally questioned." It is readily perceivable that the application of de facto principles, meets with no difficulty where statutory provisions respecting qualification are thus construed, inasmuch as the incumbent who fails to qualify, becomes an officer de facto, until it is judicially declared in a direct proceeding, that he has forfeited all right to the office.

§ 141. **Same subject—American illustrations.**—This principle is aptly illustrated by the Kentucky case,⁸⁰ from which is taken the above quotation. There the return to a summons executed by a deputy sheriff had been quashed by the Circuit Court on the ground that the acting sheriff had not given a certain bond called the "official bond" within the prescribed time, the statute declaring that "he shall forfeit his office" in case of such failure. But the Court of Appeals reversed the judgment of the Circuit Court, holding that the latter had no authority to question collaterally the

⁷⁹(1858), 1 Metc. (Ky.) 138.

⁸⁰*Stokes vs Kirkpatrick* (1858),
1 Met. (Ky.) 138.

official act of the sheriff upon the ground that his office was vacant or forfeited before such vacancy had been established by the regular or legal mode.

So where a statute provided that every Master in Equity shall qualify in a specified time and manner "and upon his neglect or failure to do so within the said time, his office shall be deemed absolutely vacant, and shall be filled by election or appointment," it was held that a Master exercising his office under color of his election was an officer de facto, though he had failed to comply with the statutory provision.⁸¹ So a person exercising the office of justice of the peace was held to be an officer de facto, notwithstanding he had failed to qualify under a statute declaring that in such case the "office shall become vacant."⁸² So a sheriff duly elected, who failed to renew his bond but continued in office, was declared a sheriff de facto, though the constitution prescribed that "in default of giving such security his office shall be deemed vacant."⁸³

It was likewise held where a person acted as sheriff without having executed a bond within the time allowed therefor, though the statute declared that he thereby "vacates his office."⁸⁴ So though a statute stipulated that if an officer fails to qualify in a prescribed manner, "he shall forfeit the office to which he may have been elected or appointed, and shall be deemed guilty of a misdemeanor punishable by fine and im-

⁸¹State vs Toomer (1854), 7 Rich. (S. C.) 216; also Stevens vs Treasurers (1822), 2 McCord (S. C.) 107.

⁸²People vs Payment (1896), 109 Mich. 553, 67 N. W. 689.

⁸³Dunphy vs Whipple (1872), 25 Mich. 10.

⁸⁴Sprowl vs Lawrence (1859), 33 Ala. 674. Also State vs Ely

(1869), 43 Ala. 569; Ex p. Candee (1872), 48 Ala. 386. First two cases expressly overruled by State vs Tucker (1875), 54 Ala. 205, but only "so far as they seem to require . . . judicial ascertainment of the vacancy before the appointment of a successor can be made."

prisonment," yet a person who acted as justice of the peace without having complied with this statute, was held to be an officer de facto.⁸⁵ So under the same statute, the failure of an excise commissioner to file a bond, was held not to divest him of a de facto character.⁸⁶

§ 142. **Same subject—Same subject.**—Some New York cases have gone still further, and held that a person duly elected or appointed, but failing to qualify, though enjoined to do so by strict statutory provisions, was not merely an officer de facto, but a de jure officer holding by a defeasible title. This was the conclusion arrived at in one case,⁸⁷ where an overseer of the poor had taken and filed an improper oath, and the statute declared that failure to qualify shall be deemed a refusal to serve, and provided the manner of filling the vacancy in such event. And in another,⁸⁸ where a commissioner of highways had not executed an official bond as required by law, though the statute provided that in case of such failure "he shall forfeit the office to which he may have been elected or appointed." Per Dwight, C., delivering the judgment in the latter case: "It is plain, that the failure to file the bond is a cause of forfeiture. The office in that case, does not become ipso facto vacant, but there must be a direct judicial or other authorized proceeding on the part of the proper authority to enforce the forfeiture. The act resembles a case of forfeiture of a franchise or corporate charter, which is only enforceable by a proceeding in the nature of a quo warranto."⁸⁹

⁸⁵Weeks vs Ellis (1848), 2 Barb. (N. Y.) 320.

⁸⁶Cronin vs Gundy (1879), 16 Hun (N. Y.) 520.

⁸⁷Horton vs Parsons (1885), 37 Hun (N. Y.) 42, affirming 1 How. Pr. (N. S.) 124

⁸⁸Foot vs Stiles (1874), 57 N. Y. 399.

⁸⁹Also Matter of Kerr (1908), 57 Misc. (N. Y.) 324, 108 N. Y. S. 591.

§ 143. Same subject—Same subject.—But the American case which has gone the farthest in the direction of upholding the de facto character of officers failing to qualify in face of most stringent statutory provisions, is *Clark vs Ennis*,⁹⁰ adversely criticized in *State vs Lansing*,⁹¹ but approved by the New York Supreme Court in *Horton vs Parsons*.⁹² There a motion was made to quash the service and return of a summons on the ground that the sheriff had no authority to act, because he had not renewed his bond in time. The Act provided that upon such failure of the sheriff, his office “shall immediately expire, and be deemed and taken to be vacant, and if such sheriff shall thereafter presume to execute the office of sheriff, then all such his acts and proceedings done under color of office shall be absolutely void, and he shall for such offense be liable to be indicted for a misdemeanor, and, on conviction, fined in any sum not exceeding two thousand dollars.” The court, after reviewing numerous authorities bearing on the point, held that the sheriff while acting as such was an officer de facto, and his acts in serving and returning the summons were valid. “It is clear, I think, both upon reason and authority,” said Van Syckel, J., “that a statute declaring an office vacant for some act or omission of the incumbent, after he enters upon his duties, does not execute itself.”⁹³

§ 144. Same subject—English illustrations.—The English courts, like the American courts, have constantly striven to invest with a de facto character persons openly

⁹⁰ (1883), 45 N. J. L. 69.

⁹¹ (1895), 46 Neb. 514, 64 N. W. 1104.

⁹² (1885), 37 Hun (N. Y.) 42, affirming 1 How. Pr. (N. S.) 124.

⁹³ See also *Crawford vs Howard* (1851), 9 Ga. 314; *State vs Jack-*

son (1875), 27 La. Ann. 541; *State vs Carneall* (1849), 10 Ark. 156; *State vs Ruff* (1892), 4 Wash. 234, 29 P. 999; *Hyde vs State* (1876), 52 Miss. 665; *State vs Cooper* (1876), 53 Miss. 615; but see *Bennett vs State* (1880), 58

exercising public offices, though they may not have qualified as required by law. Most of the cases upon this subject arose under the Corporation Act ⁹⁴ and the Test Act,⁹⁵ the first of such Acts affecting the eligibility of a person to an office, and the other, his ability to hold it after having been duly elected or appointed, but having failed to properly qualify. By the last Act it was enacted, among other things, that every officer, save a few exceptions, shall take the several oaths of supremacy and allegiance, and upon his neglect or refusal to do so "shall be ipso facto adjudge incapable and disabled in law" to hold the office, and the same "shall be void, and is hereby adjudged void." Notwithstanding such strong language and the equally strong wording of the other Act, "it hath been strongly holden, that the acts of one under such a disability, being installed in such an office, and executing the same without any objection to his authority, may be valid as to strangers; for otherwise not only those who no way infringe this law, but even those whose benefit is intended to be advanced by it, might be sufferers from another's fault, to which they are in no privy; and one chasm in a corporation, happening through the default of one head officer, would perpetually vacate the acts of all others, whose authority in respect of their admission into their offices, or otherwise, may depend on his." ⁹⁶

In *R. vs Mayor of Cambridge* ⁹⁷ the status of a town clerk, who had neglected to make the declaration prescribed by 9 Geo. 4, c. 17, came into question, and it was decided that notwithstanding his default which according to the Act made

Miss. 556; *Creighton vs Comm.* (1885), 83 Ky. 142, 4 Am. St. R. 143.

⁹⁴13 Car. II, Stat. 2, c. 1.

⁹⁵25 Car. II, c. 2.

⁹⁶Bac. Abr. Tit. Offices and Officers, quoting verbatim Hawk. P.

C. c. 8, and citing 2 Jon. 81, 137; 2 Lev. 184, 242; 2 Mod. 193, 3 Keb. 606, 665, 682, 721; 10 Mod. 185; Ld. Raymond, 299. See however Anon. (1679) Freem. 475.

⁹⁷(1840), 12 Ad. & E. 702.

his election "void" he was an officer de facto. Per Lord Denman, C. J., "I decide . . . upon the ground that, notwithstanding the enactment in stat. 9 Geo. 4, c. 17, which declares the election 'void,' it is clear that the prosecutor could not have been removed without a quo warranto. In the former acts similar words are used, to which effect could be given only by quo warranto. It could not be denied that a person disqualified under those acts was an officer until he was so removed. So, here, we must hold that the prosecutor was an officer de facto, and, as between him and the corporation, de jure, having an opportunity to make the declaration. For, however doubtful it may be whether he could have maintained his office if legal proceedings had been instituted against him, still he held the office until removed."⁹⁸ The former Acts alluded to by the learned judge are evidently the "Test Act" and the "Corporation Act," above referred to.

§ 145. Same subject—Canadian illustrations.—There are a few Canadian cases in point so far as the subject of forfeiture of office is concerned, though not involving any question of failure to qualify. Thus, in *R. vs Mayor of Cornwall*,⁹⁹ the application was for a mandamus to the Mayor of a town to issue his warrant for a new election to replace one of the members of the council, whose seat it was alleged had become vacant by his having applied for relief as an insolvent debtor; and it was held that the vacancy should first be established by quo warranto. The Municipal Institutions Act, then in force,^{99a} declared that in case a member of council applies for relief as an insolvent debtor, or assigns his property for the benefit of creditors, his seat in the coun-

⁹⁸See also *Hardwick vs Brown* (1873), L. R. 8 C. P. 406; *R. vs Mayor of Leeds* (1838), 7 Ad. & El. 963.

⁹⁹(1866), 25 U. C. Q. B. 293.

^{99a}Con. Stat. U. C., c. 54.

cil shall thereby become vacant. The court observed that the fact that the member in question was duly elected to the office, and was never removed nor had resigned his office, and was de facto exercising the office of councillor, *prima facie* showed that the office was filled; and that the matters relating to the insolvency were facts, the truth of which should be ascertained and brought under the notice of the head of the council in some way or other before he could issue his warrant.

In *Chaplin vs School Bd. of Woodstock* ¹⁰⁰ it was alleged that the three defendant trustees had by reason of their being interested in certain contracts with the board ipso facto vacated their seats; that they nevertheless continued to sit and vote, and had voted in favor of certain resolutions which were passed, whereby the principal of the school was dismissed, and another person appointed in his place; and that for the votes of the three defendant trustees the vote would have been different. It was sought by the action to have the seats of the three trustees declared vacant, and the votes and resolutions declared void; and an injunction restraining such trustees from further acting as members of the board was prayed for. The Act under which it was claimed the trustees had forfeited their seats, stipulated that any trustee who has any pecuniary interest in any contract with the corporation, or who receives or expects to receive any compensation for any work, employment, or duty on behalf of such corporation, "shall ipso facto vacate his seat," and every such contract, etc., shall be void, "and the remaining trustees shall declare the seat vacant, and forthwith order a new election." It was held that the seat of a trustee did not actually become vacant under the Act until the other members of the board had declared it vacant; and, as in that case, no action had been taken by the other members of the board, the seats of

¹⁰⁰ (1889) 16 O. R. 728.

the three trustees were full; and being full, the court would not interfere by injunction to restrain the occupants from acting as trustees. It was also held that quo warranto proceedings were the only means by which the seats could be declared vacant by the court.¹⁰¹

§ 146. Same subject—Where statute held mandatory.—But even if failure to qualify be deemed a breach of a condition precedent, and quo warranto be held unnecessary to determine the title of an officer who has failed to qualify pursuant to certain statutory provisions, it seems that such a rigid interpretation is not inconsistent with the application of *de facto* principles under such circumstances. A mandatory provision can only affect the legal title of the officer, but the *de facto* doctrine is not concerned with the legality of an incumbency, but merely with its appearance of legality. Then, is it not possible for a person duly elected or appointed to an office and in possession thereof, to have such color of title or authority (even if he has failed to perform a condition precedent to his becoming a good officer), that the public and third parties will be justified in trusting to his apparent authority? After the great expansion of the *de facto* doctrine during the last century, can it be seriously contended that the acts of a person openly and peaceably performing the duties of an office, with public acquiescence, will be set aside merely because a statute declares that if he fails to take an oath or give a bond, his office shall become vacant or forfeited? There does not appear to be any recent case that has gone to that extent. Some dicta here and there, which might afford support to such doctrine, be-

¹⁰¹This case was followed in *example of ipso facto forfeiture, R. Youville S. District vs Bellemere vs Com'rs of Sewers (1872), 1 (1904), 14 Man. 511. But see for Pug. (N. B.) 161.*

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come of trifling importance when it is borne in mind that in the cases where they are found the judges were discussing the legal title of the officer, and not official acts performed by him while *de facto* in office. Of course, there may be instances where the language of a statute is so imperative and exacting as to avoid both the title and the acts of the incumbent, but generally this should not be taken to be the legislative intent.

§ 147. *Same subject—Same subject.*—A statutory provision, even though dispensing with *quo warranto* to try the title of an officer, does not, and cannot, oust from actual possession. However strong may be the words of a statute they can never have the effect of a judgment in *quo warranto*. The latter is a public judicial act which informs the whole world that the pretended officer has no title, and actually ousts him from office. On the other hand, a statutory declaration always involves a mixed question of law and fact. Everyone may be aware of the existence of a statute providing that if an officer fails to comply with it within thirty days after his election, his office shall become vacant; but the non-compliance with such provision is a fact which the public may ignore. Hence some step must be taken to inform the community of such failure, either by a resolution of a proper board, or by the election or appointment of a successor, or otherwise. Until then, and so long as those entrusted with the supervision of public offices, and whose duty it is to see that they are properly filled, remain inactive and permit the performance of official duties by unqualified incumbents, the public and third persons have a right to rely on the latter's apparent authority. As to them they should be deemed officers *de facto*. This is the only doctrine consistent with justice and public policy.

§ 148. **Same subject—Same subject.**—To accept this view does not mean to go to the point of saying that there is no difference, so far as the de facto doctrine is concerned, between a statute that is directory in its provisions and one that is mandatory. On the contrary, it is submitted that the view expressed here makes it possible to give effect both to the provisions of the statute and to the principles of the de facto doctrine. The title of the officer might be deemed so far legally void, as to allow the filling of his office by election or appointment at any time, or to allow the issue of any summary proceeding against him to recover the insignia or the possession thereof, without the necessity of first having his right thereto tried in a direct proceeding. The statute would still operate as a legislative determination of the legal title to the office; but until some step was taken to notify the public that the incumbent had placed himself within the disabling clause of the enactment, his official acts would be held valid and binding, so far as the public and third persons were concerned.

§ 149. **Same subject—Authorities supporting above doctrine.**—The above views are practically those expounded by the Supreme Court of New Jersey in *Clark vs Ennis*,¹⁰² already referred to, which lays down general principles that appear to us very commendable, whether in that case the very stringent wording of the statute permitted of their application or not. But we also find support for the opinion we express, in several other authorities. Thus, the Court of Errors and Appeals of New Jersey,¹⁰³ while interpreting a similar statutory provision, observes: "It is

¹⁰²(1883), 45 N. J. L. 69.

St. R. 228, 48 L.R.A. 412, reversing 63 N. J. L. 96, 42 A. 782.

¹⁰³*Oliver vs Jersey City* (1899), 63 N. J. L. 634, 44 A. 709, 76 Am.

therefore manifest that the words of the statute ¹⁰⁴ already quoted, declaring that where a commissioner accepts another office, his former office shall become 'vacant,' cannot mean, in a situation like this, that it is corporeally vacant; for the person lawfully elected to fill it remained in possession discharging its duties. Mere words in a statute cannot alone make an office unoccupied which in fact is occupied. The legal meaning of the words, in such circumstances, is that the office has no occupant who holds by a good title in law, and that the appointing power may at once be exercised to fill it, or, if it is an elective office, the people may elect, and no adjudication is required to declare the vacancy, although the newly appointed or elected officer may find it necessary afterwards to resort to quo warranto proceedings to obtain actual possession of the office."

§ 150. **Same subject—Same subject.**—The following cases are also authority in that direction. Thus, in *Monteith vs Commonwealth*,¹⁰⁵ the action was upon the official bond of a Sheriff, which was chiefly defended on the ground that it had been given after the expiration of sixty days after the election, contrary to the Act which provided that in such case the "office shall be deemed vacant." The Court, though seemingly of the opinion that the statute was mandatory, thought that the case could be correctly decided by relying upon the doctrine of estoppel, and the de facto principles. "Was not Monteith," said the Court, "after he gave bond and entered upon the discharge of the duties of the office, sheriff de facto? If he were not in all respects an officer de jure, because of the failure to qualify and give the bond in the time prescribed, was he a mere usurper, undertaking to act without any pretence or color of right? This cannot be main-

¹⁰⁴Gen. Stat. p. 465.

¹⁰⁵(1859). 15 Gratt. (Va.) 172.

tained upon the facts in this record. He had been regularly elected; from that election he derived his title to the office."

So, in *Hull vs Superior Court*,¹⁰⁶ it was contended that a sheriff and tax collector had not qualified according to law, because as was alleged, he had not given bonds for sufficient amounts. The court, however, after affirming the principle that the statutory provisions as to qualification were mandatory, added: "But even if the bonds were insufficient, that circumstance would merely affect his right to the office; it would not touch the question of his incumbency. Being the actual incumbent of the office, he was in possession under color of right; he was at least a de facto officer."

Again, in *Kelly vs State*,¹⁰⁷ it was urged against the validity of the official bond of a county treasurer that at the time he gave it, his office had become vacant, because he had not given it in proper time, and the statute declared that upon such failure the office shall be held vacant. But the Court while agreeing that the "true construction of this statute to be, that upon such failure to give bond or take the oath, the office ipso facto becomes vacant" held nevertheless, that as the treasurer had actually exercised the office he had become an officer de facto, and his bond, though irregular, was valid and binding.¹⁰⁸

¹⁰⁶(1883), 63 Cal. 174.

¹⁰⁷(1874), 25 Ohio St. 567.

¹⁰⁸For cases apparently not sharing foregoing views, see *State vs Lansing* (1895), 46 Neb. 514, 64 N. W. 1104; *Creighton vs Comm.* (1885), 83 Ky. 142, 4 Am. St. R.

143; *R. vs Com'rs of Sewers* (1872), 1 Pug. (N. B.) 161. See also *Bennett vs State* (1880), 58 Miss. 556, which deals with the liability of sureties on the official bond of an officer. See also sec. 330.

CHAPTER 12.

OFFICERS DE FACTO BECAUSE OF INELIGIBILITY, OR LEGAL DISABILITY ARISING DURING CURRENCY OF OFFICIAL TERM.

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| § 151. General rule. | § 163. Same subject. |
| 152. English Illustrations. | 164. Votes cast for ineligible candidate not generally void. |
| 153. Same subject. | 165. Disability arising during currency of term. |
| 154. American illustrations— Lack of age. | 166. Disability through change of residence. |
| 155. Ineligibility through taint in the blood. | 167. Change of residence effected by law. |
| 156. Ineligibility by reason of alienism. | 168. Disqualification by reason of insolvency—Canadian illustrations. |
| 157. Ineligibility by reason of sex. | 169. Disqualification by reason of exhaustion of the constitutional period of holding. |
| 158. Ineligibility by reason of defalcation. | 170. Disqualification by reason of acceptance of incompatible office. |
| 159. Ineligibility through lack of property qualification. | |
| 160. Ineligibility through lack of professional qualification. | |
| 161. Ineligibility by reason of non-residence. | |
| 162. Ineligibility through the holding of an incompatible office. | |

§ 151. **General rule.**—A person who enters into an office and undertakes the performance of the duties thereof by virtue of an election or appointment, is an officer de facto, though he was ineligible at the time he was elected or appointed, or has subsequently become disabled to hold the office. Indeed, “it is settled by a current of authority almost unbroken for over 500 years in England and this country,

that ineligibility to hold an office does not prevent the ineligible incumbent, if in possession under color of right and authority, from being an officer de facto with respect to his official acts, in so far as third persons are concerned.”¹ The reason of the rule is, that “the eligibility of an officer is as difficult of ascertainment as his actual election, and sound policy requires that the public should be no more required to investigate the one than the other, before according respect to his official position.”^{1a}

§ 152. English illustrations.—In *Costard vs Winder*² the action was for debt upon an obligation, conditioned for performance of covenants in a lease. It was shown that one Doctor Longhem, being doctor of the civil law, and never any spiritual person, was admitted, instituted, and inducted to a benefice, and afterwards made a lease for years of the rectory. The patron and ordinary confirmed it. He was afterwards deprived by sentence declaratory, because he was a mere layman; and the question was, whether the lease should bind the successor. It was argued that it should not, because he, being a layman, was never capable, and so the institution was void, and he never was incumbent. In reply, it was urged that he was parson de facto, and such a one

¹Stokes vs Acklen (Tenn. Chy. App., 1898), 46 S. W. 316. Also McCarthy vs Wilson (1905), 146 Cal. 323, 82 P. 243; Dolliver vs Parks (1884), 136 Mass. 499; Monroe vs Hoffman (1877), 29 La. Ann. 651; Ostrander vs People (1883), 29 Hun (N. Y.) 513; Gregg Tp. vs Jamison (1867), 55 Pa. St. 468; Hawke vs McAllister (1894), 4 Ariz. 150, 36 P. 170; In re Corum (1900), 62 Kan. 271, 62 P. 661, 84 Am. St. R. 382; Ex p. Call (1877), 2 Tex. App. (Crim.

Cas.) 497; Lockhart vs Troy (1872), 48 Ala. 579; Oliver vs Jersey City (1899), 63 N. J. L. 634, 44 A. 709, 76 Am. St. R. 228, 48 L.R.A. 412. But see Creighton vs Commonwealth (1885), 83 Ky. 142, 4 Am. St. R. 143.

^{1a}Per Curiam in Dugan v. Farrier (1885), 47 N. J. L. 383, 1 A. 751, affirmed in Farrier vs Dugan (1886), 48 N. J. L. 613, 7 A. 881.

²(1600), Cro. Eliz. 775, 78 Eng. R. 1005.

whereof the law takes cognizance by his induction, and the people cannot take notice of any other, and all acts done by him during that time should bind as well as if he had been a rightful parson; for it would be mischievous, if all his acts should be drawn in question. And every one agreed, that all spiritual acts, as marriages, the administration of the sacraments, etc., by such a person, during the time he is parson, are good. "By the same reason, these temporal acts and this lease being confirmed by the patron and ordinary, shall well bind the incumbent successor." The court adjudged accordingly, but for other reasons the judgment was stayed.

In *Knight vs Corporation of Wells*³ the facts were these: Queen Elizabeth, by letters patent, in the thirty-first year of her reign, incorporated the City of Wells, by the name of Mayor, Masters and Burgesses, etc. Subsequently Charles II., anno. 35 of his reign, incorporated them again, but by the name of Mayor, Aldermen and Burgesses, etc., and directed that the Mayor should be elected out of the most sufficient citizens, in such manner as provided by the letters patent. By virtue of this last charter, one Day was chosen Mayor of the city, but he was not a member of the old corporation and hence was ineligible. He however sealed a bond with the majority of the new corporation, and its validity was challenged on the ground that he was not a lawful officer. But the court resolved "that the bond was good, though it was objected that it was sealed by a Mayor de facto, and one not qualified under the last charter to be Mayor."

§ 153. Same subject.—In *Waterloo Bridge Co. vs Cull*,⁴ it appeared that by sec. 8 of the land tax Act, 38 G. 3, c. 5,

³ (1695), Lutw. 508, Nelson's
Lutw. 156.

⁴ (1858), 1 El. & El. 213, 28 L.
J. Q. B. 70, 5 Jur. (N. S.) 464.

the commissioners were to nominate two assessors from the inhabitants residing in the parish, where the place assessed was situate; that the assessors were to return the names of persons living within those parishes, to be collectors; and the commissioners were to appoint collectors for each parish. Held, that an assessment and levy was not invalidated by reason of the want of qualification in respect of residence, of collectors and assessors appointed and acting in fact. Per Lord Campbell, C. J.: "Objection was likewise taken to the qualification of the assessors and of the collectors. But we are of opinion that, as they were appointed in due form, even if they were not qualified as the act directs, their appointment cannot be treated as a nullity; and their acts as assessors and collectors would be valid."

Again, in *Lancaster & Carlisle Railway Co. vs Heaton*,⁵ which was an action of replevin upon a distress for a sum for which the plaintiffs had been assessed in pursuance of a valuation made under 5 Geo. IV., c. 28, it was contended that the land was not liable, because the title valuer, who was a shareholder in a railway passing through the township, was interested in the tithes and dues, contrary to the said Act, which provided that no person so interested should be appointed as valuer. The valuation, however, was held valid, Coleridge, J., saying: "I am of opinion that, assuming there was an objection to this appointment, such that if it had been properly brought before the Court the appointment would have been set aside, yet, as that course was not taken, as the tithe valuer was de facto appointed, and acted under his appointment, and such appointment has not been set aside, his acts, done in pursuance of such appointment, are not now to be considered as null and void." ⁶

⁵ (1858), 8 El. & Bl. 952, 27 L. J. Q. B. 195, 4 Jur. (N. S.) 707.

⁶ See also *Modstock Mining Co. vs Harris* (1902), 40 Nov. Scot.

§ 154. **American illustrations—Lack of age.**—A person may be an officer de facto, though not lawfully entitled to hold the office by reason of minority, or want of the proper age to fill the same. Thus, where the son of a circuit clerk acts as his father's deputy, and is generally recognized by the public as such, he is a de facto officer, though ineligible to the office owing to his minority.⁷ So a minor, specially appointed by a justice of the peace to execute a particular process, is an officer de facto.⁸ So is a deputy sheriff under age, and a service made by him is not illegal.⁹ Again, where the constitution requires a Circuit Judge to be 30 years of age, and the appointing power confers the office upon one who is not competent by that test, he nevertheless becomes a judge de facto.¹⁰

§ 155. **Ineligibility through taint in the blood.**—A person who is rendered disqualified by law to hold any public office by reason of taint in his blood, may nevertheless be an officer de facto, if he discharges official duties under color of an election or appointment. Thus, where a negro had been elected a constable, though he was constitutionally ineligible, it was held that the grounds of the argument against his official character, could not "alter the stubborn fact that he was elected constable, exercised the duties of the office under color of that election, and thereby became an officer de facto."¹¹

336. As to persons ineligible under the Corporation Act, see ante, sec. 144.

⁷Wimberly vs Boland (1895), 72 Miss. 241, 16 So. 905.

⁸Floyd vs State (1885), 79 Ala. 39.

⁹Irving vs Edrington (1889), 41 La. Ann. 671, 6 So. 177.

¹⁰Blackburn vs State (1859), 40 Tenn. (3 Head.) 690. Also Green vs Burke (1840), 23 Wend. (N. Y.) 490; People vs Dean (1830), 3 Wend. (N. Y.) 438; Bath vs Haverhill (1823), 2 N. H. 555.

¹¹Heath vs State (1860), 26 Ala. 273.

§ 156. **Ineligibility by reason of alienism.**—An alien elected or appointed to an office and performing the functions thereof, is an officer de facto. Thus, a person regularly appointed and commissioned by the Governor a justice of the peace to fill a vacancy, is an officer de facto, notwithstanding that he is not a naturalized citizen of the State.¹² So a Canadian born person, who, though never having renounced his allegiance, is elected school trustee in the State of New York and acts as such, is an officer de facto.¹³ Likewise where an alien is appointed and commissioned as a notary public, qualifies and acts as such.¹⁴ The same principle was applied to a person elected alderman in the City of San Francisco, though a British subject.¹⁵ But a person who at the time he is elected or appointed to office is disqualified on account of alienage, remains always a de facto officer, notwithstanding that after his election or appointment he becomes naturalized.¹⁶

§ 157. **Ineligibility by reason of sex.**—It has been held that a female duly elected and commissioned as a notary public is a de facto officer, and acknowledgments taken by her are valid. “The ineligibility,” said the Court, “of the female notary taking the acknowledgments in this case, caused by the absence of legislation conferring the power upon women to hold the office, did not divest her act of the force and incidents attaching to the act of a de facto officer, the office being one in existence by virtue of law, and she having been regularly elected and commissioned, and inducted into

¹²Fancher vs Stearns (1889), 61 Vt. 616, 18 A. 455.

¹³Morrison vs Sayre (1886), 40 Hun (N. Y.) 465. Also State vs Hart (1901), 106 Tenn. 269, 61 S. W. 780.

¹⁴Wilson vs Kimmel (1891), 109 Mo. 260, 19 S. W. 24.

¹⁵Setterlee vs San Francisco (1863), 23 Cal. 315.

¹⁶Vicksburg vs Groome (Miss. 1898), 24 So. 306.

office and given the apparent sanction of competent authority to discharge its duty.”¹⁷ So where a female was elected to the office of township school inspector, and qualified and acted as such, she was held to be a *de facto* officer, and her acts were considered valid, whether she was eligible or not.¹⁸

§ 158. Ineligibility by reason of defalcation.—A person whose election to an office is irregular and void, because at the time it was made he was a public defaulter, and hence ineligible under a statute providing that the election of a defaulter to any office of trust or profit shall be void, is nevertheless an officer *de facto*, if he discharges the duties of the office under color of such election. This proposition was upheld in two cases, where defaulters were elected and acted as sheriffs.¹⁹

§ 159. Ineligibility through lack of property qualification.—Ineligibility from want of the requisite property qualification to hold an office will not prevent a person from becoming an officer *de facto*. Thus, where upon a trial by jury, a challenge to the array was made on the ground that one of the jury commissioners who had selected the jury, was not a freeholder of the State of Ohio, as presumably required by law, it was held that such commissioner was an officer *de facto*, and his acts as selector could not be assailed.²⁰

¹⁷*Stokes vs Acklen* (Tenn Chy. App. 1898), 46 S. W. 316.

¹⁸*Donough vs Dewey* (1890), 32 Mich. 309, s. c. sub. nom. *Donough vs Hollister*, 46 N. W. 782.

¹⁹*Bates vs Dyer* (1848), 9 Hump. (Tenn.) 162; *Jones vs Scanland* (1845), 6 Hump. (Tenn.) 195, 44 Am. Dec. 300. See also

Sheridan vs St. Louis (1904), 183 Mo. 25, 81 S. W. 1082.

²⁰*Ickes vs State* (1898), 16 Ohio C. C. 31. Also *Trinity College vs Hartford* (1865), 32 Conn 452; *State vs Anderson* (1795), 1 N. J. L. 318, 1 Am. Dec. 207; *R. vs Hodgins* (1886), 12 O. R. 367.

§ 160. **Ineligibility through lack of professional qualification.**— The same principle applies where the ineligibility is due to lack of professional qualification. Thus, where the validity of a judgment was assailed because the court was presided over by a probate judge who was not a lawyer, nor even licensed to practise law, it was held that notwithstanding the judge did not possess the qualification prescribed by law, yet there was no question that at the time the case was tried he was a *de facto* officer.²¹ So where a person was appointed to preside as judge at the trial of an action, under a statute which provided that in case of incompetency of the regular judge to try a case by reason of interest, or the like, an attorney present in Court should be selected to take his place, and the record of the court did not show that such person was an attorney, it was held that even if it could be presumed that he had not the requisite qualification, nevertheless, as the record showed that he was a judge *de facto*, his acts could not be collaterally attacked.²² The same principle applies where a person, though professionally qualified, yet has not exercised his profession for a sufficient length of time to be elected or appointed to the office; as, for example, a member of the bar appointed judge before having practised during the required number of years.²³

§ 161. **Ineligibility by reason of non-residence.**— A person who is ineligible to hold an office because he does not reside, or has not resided a sufficient length of time, in the locality, may nevertheless become an officer *de facto*. Thus, though a person be constitutionally ineligible to the office of sheriff by reason of his not being a resident of the county,

²¹Morford vs Territory (1901),
10 Okla. 741, 63 P. 958.

²³Guilbeau vs Cormier (1880),
32 La. Ann. 930.

²²Hunter vs Ferguson (1874),
13 Kan. 462.

yet if he is elected to the office and discharges the duties thereof, he will be an officer de facto.²⁴ So a person acting as police justice of a town under color of an appointment, is an officer de facto, although he may not have resided in the town a sufficient length of time to make him eligible to the office.²⁵

§ 162. Ineligibility through the holding of an incompatible office.—At common law the acceptance by one who holds an office, of a second office incompatible therewith, operates as an implied resignation and a forfeiture of the first.²⁶ This is also the principle recognized in the United States.²⁷ The result is that the officer acquires a de jure title to the second office, and forfeits his title to the other. But if he continues to discharge the duties of the forfeited office, his acts will not be void, since he will be deemed an officer de facto. This point, however, will be dealt with later on, when we speak of disability arising during currency of term.

But the common law rule obtains only where the first office is such that it can be resigned at pleasure, or the authority which could accept the surrender of it, or remove from it, concurs in the appointment to the second office.²⁸ Therefore, in all other cases an actual resignation of the first office and

²⁴*Patterson vs Miller* (1859), 2 Metc. (Ky.) 493. Also *U. S. vs Mitchell* (1905), 136 Fed. R. 896.

²⁵*State vs Fountain* (1896), 14 Wash. 236, 44 P. 270.

²⁶*Milward vs Thatcher* (1787), 2 Term. (D. & E.) 81, 1 R. R. 431; *R. vs Tizzard* (1829), 9 B. & C. 418.

²⁷*People vs Carrique* (1841), 2 Hill (N. Y.) 93; *State vs Buttz* (1877), 9 Rich. L. (S. C.) 156;

Ex p. Call (1877), 2 Tex. App. (Crim. Cas.) 497; *Biencourt vs Parker* (1864), 27 Tex. 558; *Shell vs Cousins* (1883), 77 Va. 328; *State vs Bus* (1896), 135 Mo. 325, 36 S. W. 636; *Dickson vs People* (1855), 17 Ill. 191; *State vs Goff* (1887), 15 R. I. 505, 9 A. 226.

²⁸*R. vs Patteson* (1832), 4 B. & Ad. 9, 2 L. J. K. B. 33; *Rodman vs Harcourt* (1843), 43 Ky. (4 B. Mon.) 224.

generally an acceptance thereof, are pre-requisites to render one eligible to a second office. In fact, at common law an office is regarded as a burden of which a citizen cannot divest himself without the consent of the proper authority, which is generally the appointing power.²⁹ This is still the rule in England; and though in most of the American States a person is privileged to resign his office at pleasure,³⁰ yet this is not the case in all of them.³¹ But apart from common law, there may be constitutional or statutory limitations or restrictions imposed upon an officer's right to vacate an office, or to hold another before having actually resigned the first one.³² In all such cases, if the officer's holding of the first office cannot be terminated, or is not terminated as required by law, he is ineligible to the new office, that is, disqualified to accept the same. Nevertheless, if he performs the functions thereof under color of an election or appointment, he becomes an officer *de facto*.³³

§ 163. Same subject.—In the following cases both the right to resign and the applicability of the *de facto* doctrine were involved. In one of them a person while acting as district councillor was elected district treasurer, and entered upon the duties of the office, and it was held that, though he was ineligible as the two offices were incompatible, yet that he

²⁹*R. vs Lane* (1710), 2 Ld. Ray. 1304; *R. vs Jones* (1741), 2 Stra. 1146.

³⁰*U. S. vs Wright* (1839), 28 Fed. Cas. (No. 16,775) 792; *Leech vs State* (1881), 78 Ind. 570; *State vs Clark* (1867), 3 Nev. 566; *Gilbert vs Luce* (1851), 11 Barb. (N. Y.) 91; *State vs Fitts* (1873), 49 Ala. 402; *People vs Porter* (1856), 6 Cal. 26.

³¹*Edwards vs U. S.* (1880), 103 U. S. 471.

³²*McWilliams vs Neal* (1908), 130 Ga. 733, 61 S. E. 721.

³³*In re Corum* (1900), 62 Kan. 271, 62 P. 661, 84 Am. St. R. 382; *Missouri Pac. Ry. Co. vs Preston* (1901), 63 Kan. 819, 66 P. 1050; *R. vs Justices of Cheshire* (1840), 4 Jur. 484.

was a treasurer *de facto*.³⁴ With reference to his attempted resignation, Robinson, C. J., remarked: "There is no discretion in the member of the council to avoid his office by his act of resigning, nor any discretion in the other members of the council with whom he is serving, and by whom he was not appointed, to accept his resignation."

So in New Hampshire it was held, that a collector of taxes of a previous year, who had not completed the collection of the taxes on his list, and had not been discharged from his liability to the town as collector, was within the prohibition of General Laws, c. 40 s. 5, and disqualified to hold the office of selectman, but as he had assumed the latter office under color of an election, he was an officer *de facto*.³⁵ Per Curiam: "The defendant's resignation would not divest him of the office of collector unless it was accepted."

So where a State constitution provided that no person holding any office of trust or profit under the United States, shall hold or exercise any office of trust or profit under the State,—the acceptance of the office of justice of the peace by a postmaster, and his performance of the duties thereof, was held not to vacate his postmastership, though nevertheless constituting him a justice *de facto*.³⁶ Per Marshall, J., in the first quoted case: "The common law principle which declares the first office vacated by the acceptance of another, which is incompatible with it, is applicable to cases where the two offices are held under the same authority or under authorities of which one is in strict subordination to the other."³⁷

But in a Mississippi case it was held that the appointment

³⁴R. vs Smith (1848), 4 U. C. Q. B. 322.

³⁵Attorney-General vs Marston (1891), 66 N. H. 485, 22 A. 560, 13 L.R.A. 670.

³⁶Rodman vs Harcourt (1843), 43 Ky. (4 B. Mon.) 224; McGreg-

or vs Balch (1842), 14 Vt. 428, 39 Am. Dec. 231.

³⁷See also Hoglan vs Carpenter (1868), 4 Bush. (Ky.) 89; Johnson vs Saunders (Ky. 1909), 115 S. W. 772.

of a member of the legislature, who was constitutionally ineligible to the office of license commissioner, was so utterly void that he could not even become an officer *de facto*.³⁸

§ 164. **Votes cast for ineligible candidate not generally void.**—Before dismissing the subject of ineligibility, it may be of some interest to refer briefly to the law governing the casting of votes for an ineligible candidate at a popular election. In the United States the rule established “by a strong preponderance of authority is that the votes cast for such person are not to be entirely ignored; that his opponent who has received a minority of the legal votes polled shall not, upon ouster of the disabled candidate, be inducted into the office. In such cases a vacancy is to be declared, and a new election ordered to fill the same.”³⁹ It follows from this principle that an ineligible candidate who receives the highest number of votes is entitled to be declared elected by the election officers, to qualify for the office, and to enter upon the duties thereof as a *de facto* incumbent, until his title thereto is pronounced invalid in a direct proceeding and by a proper tribunal, unless in such case the outgoing incumbent is entitled to hold over.⁴⁰

In England the above rule also prevails, but it is qualified by this: that if it be affirmatively shown that the voters for the

³⁸*Shelby vs Alcorn* (1858), 36 Miss. 273, 72 Am. Dec. 169.

³⁹*Per Helm, J.*—*Darrow vs People* (1885), 8 Col. 417, 8 P. 661; Also *State vs Smith* (1861), 14 Wis. 497; *Chandler vs Wartman* (1883), 6 N. J. Law J. 301; *Stevens vs Wyatt* (1855), 55 Ky. (16 B. Mon.) 542; *State vs Swearingen* (1852), 12 Ga. 23; *Sublett vs Bedwell* (1872), 47 Miss. 266, 12 Am. Rep. 338; *Fish vs Collens* (1869),

De Facto—15.

21 La. Ann. 289; *Privett vs Stevens* (1881), 25 Kan. 275; *State vs Vail* (1873), 53 Mo. 97; *State vs Boyd* (1891), 31 Neb. 682, 48 N. W. 739; *Batterton vs Fuller* (1894), 6 S. Dak. 257, 60 N. W. 1071; *Crawford vs Dunbar* (1877), 52 Cal. 36; *Sweepston vs Barton* (1882), 39 Ark. 549.

⁴⁰*Darrow vs People* (1885), 8 Col. 417, 8 P. 661.

candidate highest in votes had such actual knowledge of his ineligibility that they must be taken to have thrown away their votes wilfully, then the second highest candidate becomes thereby elected. "It is a principle," says Lord Campbell, C. J., "of all election law and of good sense, that persons who knowingly vote for an ineligible candidate, throw away their votes just as much as if they voted for the man in the moon."⁴¹ But nothing short of the clearest proof of actual knowledge or notorious ineligibility will produce that effect.⁴² The English qualification of the rule has apparently been adopted in New York.⁴³

§ 165. Disability arising during currency of term.— Hitherto we have treated of ineligibility existing at the time of the officer's election or appointment, but now we shall deal with disability or disqualification which arises subsequently, that is, during the currency of the officer's term, and thenceforth incapacitates him from legally holding the office. Through the commission of some act on his part, or the happening of certain events, he loses his *de jure* character to become merely an officer *de facto*.

§ 166. Disability through change of residence.— Among such acts or events is change of residence in a manner legally inconsistent with the holding of the office. The rule in such case is, that if the officer ceases to be a resident of the place where he is bound by law to reside, but continues

⁴¹R. vs Coaks (1854), 23 L. J. Q. B. 133, 3 E. & B. 249, 18 Jur. 378. Also R. vs Hawkins (1808), 10 East, 211, affirmed 2 Dow. 124; Claridge vs Evelyn (1821), 5 B. & Ald. 81, 24 R. R. 289.

⁴²R. vs. Mayor of Twekesbury (1868), 9 B. & S. 683, L. R. 3 Q.

B. 629, 37 L. J. Q. B. 288; Hobbs vs Morey (1904), 1 K. B. 74, 73 L. J. K. B. 47.

⁴³People vs Clute (1872), 50 N. Y. 451, 10 Am. Rep. 508, affirming 12 Abb. Pr. (N. S.) 399, and reversing 63 Barb. 356.

to perform the functions of his office, he forfeits his lawful right to the latter, but nevertheless retains the character of an officer *de facto*. Thus, a justice of the peace who, after his removal to an adjoining State, county or district, continues to act in the locality in and for which he was elected or appointed, is an officer *de facto*.⁴⁴ So where a town clerk moves into another town, but continues to keep his office open in the former town, and is recognized as the clerk, he is an officer *de facto*, though the law declares that in such case the office shall be vacant.⁴⁵ The same principle was held to apply, under like circumstances, to a constable,⁴⁶ a member of a municipal council,⁴⁷ and a school trustee.⁴⁸

§ 167. Change of residence effected by law.—The same rule obtains where the change of residence is not the voluntary act of the officer, but is the result of alterations made by law in the boundaries of a county or municipality. In such case if the officer does not, within a reasonable time, move his residence within the newly prescribed territorial limits, he forfeits his legal title to the office,⁴⁹ but is not divested of a *de facto* character, while he continues to discharge official duties with public acquiescence. Thus, where a portion of a township was declared by a proclamation of the Governor to be a city of the second class, it was held that the remainder of such township still retained its organization, and the members of the township board were at least *de facto*

⁴⁴*Prescott vs Hayes* (1860), 42 N. H. 56; *Hinton vs Lindsay* (1856), 20 Ga. 746; *Lexington &c. Turnpike Co. vs McMurtry* (1845), 45 Ky. (6 B. Mon.) 214.

⁴⁵*In re Collins* (1902), 75 N. Y. App. Div. 87, 77 N. Y. S. 702.

⁴⁶*Case vs State* (1879), 69 Ind. 46.

⁴⁷*Roche vs Jones* (1891), 87 Va. 484, 12 S. E. 965.

⁴⁸*State vs Hart* (1901), 106 Tenn. 269, 61 S. W. 780.

⁴⁹*State vs Choate* (1842), 11 Ohio 511.

officers, although they may have resided within the limits of the newly organized city.⁵⁰ So where county commissioners, whose places of residence by the erection of a new county fell within the limits of such county, continued nevertheless to perform their official duties as commissioners of the old county, without changing their residences, they were deemed officers *de facto*.⁵¹ The same was held with respect to county court judges, who persisted to sit in a territory which has been detached from their county.⁵²

§ 168. **Disqualification by reason of insolvency—Canadian illustrations.**—Disqualification may also be the result of some change in the officer's status, civil or financial, which renders him incapable of holding the office. Thus, where a person was elected municipal Councillor and continued to exercise his office after he had made an assignment for the benefit of his creditors, he was held to be an officer *de facto*, although it was provided by the Municipal Act under which he was elected, that in case a member of council applies for relief as an insolvent debtor, or assigns his property for the benefit of his creditors, his seat in the council shall thereby become vacant.⁵³

§ 169. **Disqualification by reason of exhaustion of the constitutional period of holding.**—Where the law or the constitution prescribes a limit to the holding of an office by the same person, if an officer continues to hold beyond such period, he cannot be an officer *de jure*, but he may be an

⁵⁰Walnut Township vs Jordan (1888), 38 Kan. 562, 16 P. 812. But compare People vs Highland Park (1891), 88 Mich. 653, 50 N. W. 660.

⁵¹State vs Jacobs (1848), 17 Ohio, 143.

⁵²State vs Alling (1843), 12 Ohio 16.

⁵³R. vs Mayor of Cornwall (1866), 25 U. C. Q. B. 293. See ante, sec. 145.

officer de facto. Thus, where the constitution provides that no person shall be eligible to the office of Circuit Court Clerk more than eight years in any period of twelve years, one who has been the incumbent of the office during the constitutional limit, cannot lawfully hold over upon the death, without qualifying, of the person chosen to succeed him, and a vacancy arises, yet if he remains in the actual discharge of his official duties, he will be an officer de facto.⁵⁴

§ 170. **Disqualification by reason of acceptance of incompatible office.**—As we have already explained, one who forfeits his right to an office of which he is the incumbent, by accepting another incompatible therewith, but continues to perform the functions of the office forfeited, may be an officer de facto. Thus, if a notary public accepts the office of judge of a criminal court or that of deputy county recorder, but continues to act in his former office, he will be an officer de facto.⁵⁵ So one legally vacating the office of judge or justice of the peace by accepting a seat as member of Congress or of the legislature, may still be an officer de facto, if he persists to discharge judicial functions.⁵⁶ So a judge accepting the incompatible office of code commissioner, becomes an officer de facto in regard to judicial duties performed by him thereafter.⁵⁷

The same principle applies to a city street commissioner, who has accepted the office of colonel;⁵⁸ to a justice of the

⁵⁴Gosman vs State (1885), 106 Ind. 203.

⁵⁵Old Dominion Building & Loan Ass'n. vs Sohn (1903), 54 W. Va. 101, 46 S. E. 222; Davidson vs State (1893), 135 Ind. 254, 34 N. E. 972.

⁵⁶Woodside vs Wagg (1880), 71 Me. 207; Green vs Wardwell (1855), 17 Ill. 278, 63 Am. Dec.

363; Sheehan's Case (1877), 122 Mass. 445, 23 Am. Rep. 374.

⁵⁷State vs Sadler (1899), 51 La. Ann. 1397, 26 So. 390. See also In re Powers (1893), 65 Vt. 399, 26 A. 640.

⁵⁸Oliver vs Jersey City (1899), 63 N. J. L. 634, 44 A. 709, 76 Am. St. R. 228, 48 L.R.A. 412.

peace who has become a constable,⁵⁹ or a court clerk,⁶⁰ or a coroner,⁶¹ to a district court clerk, who has accepted the office of receiver of an insolvent bank;⁶² to a constable or deputy sheriff, after accepting the office of justice of the peace;⁶³ to a township trustee who has accepted the office of postmaster;⁶⁴ to a supervisor of roads, who has become a township trustee;⁶⁵ to a clerk of court after his acceptance of the office of intendant of a town;⁶⁶ and to a school director who has accepted the office of commissioner of an incorporated district.⁶⁷ But where an alderman of the city of New York, was, during his term, elected representative in Congress and accepted such office, it was held that thereby his office of alderman immediately became vacant, and he was no longer alderman *de jure* or *de facto*.⁶⁸ This was decided upon an appeal from an order of Special Term which directed the issuing of a peremptory writ of mandamus against the defendant, the common council, to compel a special election. The statute which prohibited an alderman from holding any other public office, declared that by an election to and acceptance of "such public office" during his term as alderman "his office as such alderman shall immediately become vacant." The court remarked that the office was as vacant as if the alderman "had never been born." There, however, no official act of his was in question.

⁵⁹Com. vs Kirby (1849), 56 Mass. (2 Cush.) 577; Johnson vs McGinly (1884), 76 Me. 432.

⁶⁰Adam vs Mengel (Pa. 1887), 8 A. 606.

⁶¹Maddox vs Ewell (1817), 2 Va. Cas. 59.

⁶²Metropolitan Nat. Bank vs Commercial S. Bank (1898), 104 Iowa, 682, 74 N. W. 26.

⁶³Pooler vs Reed (1882), 73 Me. 129; Wilson vs King (1823), 3 Litt. (Ky.) 457.

⁶⁴State vs Crowe (1897), 150 Ind. 455, 50 N. E. 471.

⁶⁵Creighton vs Piper (1860), 14 Ind. 182.

⁶⁶State vs Coleman (1899), 54 S. C. 282, 32 S. E. 406.

⁶⁷Hagner vs Heyberger (1844), 7 W. & S. (Pa.) 104, 42 Am. Dec. 220.

⁶⁸People vs Common Council (1879), 77 N. Y. 503.

CHAPTER 13.

OFFICERS DE FACTO UNDER COLOR OF IRREGULAR ELECTION OR APPOINTMENT.

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| § 171. General rule. | § 178. Appointment to office not vacant. |
| 172. English illustrations. | 179. Appointment for a term longer than warranted by law. |
| 173. Canadian illustrations. | 180. Certificate of election confers a prima facie title, though result of election wrongfully determined. |
| 174. American illustrations—Irrregular elections. | 181. Irregularities in election or appointment must be bona fide. |
| 175. Same subject—Invalid appointments. | |
| 176. Officers verbally appointed. | |
| 177. Election or appointment held or made at improper time. | |

§ 171. **General rule.**—A person in possession of an office and in the open exercise of its functions, under color of an election or appointment, will be deemed an officer de facto, though he may have been illegally or irregularly elected or appointed thereto. As expressed by one Judge, “all that is required where there is an office, to make an officer de facto, is, that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for that would make him an officer de jure.”¹ To the same effect are the words of the Supreme Court of the United States: “Where an office exists under the law, it matters not how the appointment is made, so far as the valid-

¹Manning, J,—*Carleton vs People* (1862), 10 Mich. 250.

ity of his (de facto officer's) acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions." ²

The above rule has apparently never been questioned in England. Thus, in an old English report, we read: "There is a distinction made in our books, between a person who usurps an office, and one who comes in by color of an election, viz.: The acts of the one are void, but not of the other; and therefore, where two abbots³ were chosen, one by the majority of the monks, and the other by the less number; and he got into possession by color of that undue election, though he was not the lawful abbot, but only abbot de facto, yet his acts are good and shall bind." ⁴

The same principle is recognized by the Canadian Courts. "As a general proposition," says a Quebec judge, "it is undeniable that the acts of officers de facto illegally elected or appointed are valid." ⁵ Likewise an Ontario Judge remarks, that it would be intolerable if the act of a public officer "would invariably depend for its legality upon the validity of his appointment." ⁶

§ 172. English illustrations.—In *R. vs St. Clement's*,⁷ the validity of a church-rate was attacked on the ground that it was levied at a meeting convened by churchwardens irregularly elected. The irregularity seems to have been non-compliance with the statute,⁸ respecting the notices to be

²Field, J., delivering the opinion of Court in *Norton vs Shelby County* (1886), 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed. 178.

³Abbé de Fontaine Case (1431), Year Book, 9 H. 6, fol. 32.

⁴*Knight vs Corporation of Wells* (1695), Nelson's Lutw. 156, Lutw. 508.

⁵Routhier, J.—*Rouleau vs Corporation of St. Lambert* (1896), 10 Que. R. (S. C.) 85.

⁶Meredith, J.—*Turtle vs Township of Euphemia* (1900), 31 O. R. 404.

⁷(1840), 12 Ad. & El. 177, 3 P. & D. 481, 4 Jur. 1059.

⁸58 Geo. III. c. 69.

given and published before a legal vestry meeting could be called. The churchwardens in question were elected at a meeting held pursuant to notice given on the preceding Sunday only, whereas the Act required that the notice should also be affixed on the church door. Notwithstanding such irregularity, they were held to be authorized, as churchwardens de facto, to call vestry meetings and to complain of non-payment of rates, so as to give jurisdiction to justices of the peace.⁹

Likewise in *Scadding vs Lorant*¹⁰ exception was taken to the validity of a rate for the poor on the ground that some of the vestrymen who had concurred in making the same had been irregularly elected. But the objection was overruled, the Court holding that it is as competent for vestrymen de facto to join in making a rate for the relief of the poor as for vestrymen de jure.¹¹

§ 173. Canadian illustrations.—In *Smith vs Redford*¹² one of the questions involved concerned the validity of the payment of taxes. It was urged by Counsel for the defendant that the by-law appointing the collector, to whom the taxes had been paid, should be produced, to establish that he had been regularly appointed. But the Court was of opinion that “if he acted and was recognized as collector, the payment to him was good, even if there was an irregularity in the mode of his appointment.”

Again, in *School Trustees of the Township of Hamilton vs Neil*,¹³ one Turner, who had been acting in the capacity

⁹Under 53 Geo. III, c. 127, s. 7.

¹⁰(1851), 3 H. L. Cas. 418, 5 Eng. L. & Eq. 16, 15 Jur. 955. affirming 13 Q. B. 706.

¹¹See also *R. vs Lisle* (1738), Andr. 163, 95 Eng. R. 345; *Turner*

vs Baynes (1795), 2 H. Bl. 559, 3 R. R. 506; *Penney vs Slade* (1839), 5 Bing. (N. C.) 319, 7 Scott, 484, 8 L. J. C. P. 221.

¹²(1866), 12 Gr. (U. C.) 316.

¹³(1881), 28 Gr. (Ont.) 408.

of Secretary-Treasurer of the plaintiffs, but who had not been appointed in writing, absconded with certain moneys which had been received by him as such Secretary-Treasurer from the defendants. The school trustees sought to make the township responsible, upon the ground that Turner had never been legally appointed Secretary-Treasurer, and therefore that the money paid to him did not get into the proper hands. The plaintiff's contention, however, was overruled, and it was held that if a person acts notoriously as the officer of a corporation, and is recognized by it as such, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is, or can be adduced, of his appointment. "I think," said Proudfoot, V. C., "it is too late now for them to say that he was not legally appointed." From the language of the learned judge, it is manifest that he had in mind the principles of the de facto doctrine as well as of estoppel, though he refers specifically and in terms only to the rule founded on the legal presumption as to official character,—because the latter could not suffice where the appointment of the officer was admittedly invalid, such presumption not being *presumptio juris et de jure*.¹⁴

§ 174. American illustrations—Irregular elections.—

A person acting as justice of the peace under color of an election by the electors of a town and village combined, is an officer de facto, though he should have been elected by

¹⁴R. vs Verelst (1813), 3 Camp. 432, 14 R. R. 775; Wilcox vs Smith (1830), 5 Wend. (N. Y.) 231, 21 Am. Dec. 213. As to other Canadian cases, see Gill vs Jackson (1856), 14 U. C. Q. B. 119; County of Pontiac vs Pontiac Pac. Junction Ry. Co. (1888), 11 Leg. News (Que.) 370, affirmed sub

nom. County of Pontiac vs Ross (1889), 17 Can. Sup. Ct. 406; Paris vs Couture (1883), 10 Que. Law R. 1; Le Boutillier vs Harper (1875), 1 Que. Law R. 4; Lacasse vs Roy (1895), 8 Que. R. (S. C.) 293; Ex p. Renaud (1875), 16 N. B. (3 Pug.) 174; R. vs Burke (1896), 29 Nov. Scot. 227.

the electors of the village alone.¹⁵ So where the law requires an election by joint ballot of two branches of a municipal body, an election by the separate action of each branch is sufficient to give at least color of title to the persons so elected, and to constitute them officers de facto.¹⁶ So persons elected by viva voce vote instead of by ballot as required by law, are officers de facto.¹⁷

So persons elected at a town meeting as selectmen and acting as such, will be officers de facto, though the meeting at which they were elected was invalid by reason of a defect in the constable's return upon the warrant therefor.¹⁸ So where a town is incorporated under general laws, but after the lapse of a certain time, proceedings are again taken to re-incorporate it under the mistaken belief that the temporary non-user of corporate rights has forfeited corporate existence, and officers are elected under the provisions respecting new corporations, the persons so elected are officers de facto, despite the obvious irregularity of their election.¹⁹

So where the office of collector was set up at auction, in town meeting, and struck off to the lowest bidder, and the town afterwards chose the same person as collector, it was held that, though the proceeding was illegal, the collector was to be considered an officer de facto.²⁰ So where upon the failure of the regularly appointed election judges to appear, other persons took their places without being properly

¹⁵Baker vs State (1887), 69 Wis. 32, 33 N. W. 52.

¹⁶Belfast vs Morrill (1876), 65 Me. 580.

¹⁷School Dis. No. 77 vs Cowgill (1906), 76 Neb. 317, 107 N. W. 584.

¹⁸Cushing vs Frankfort (1868), 57 Me. 541.

¹⁹Gore vs Dickinson (1892), 98 Ala. 363, 11 So. 743, 39 Am. St. R. 67.

²⁰Tucker vs Aiken (1834), 7 N. H. 113. Also Odiorne vs Rand (1880), 59 N. H. 504.

selected, but took the regular official oath, they were held to be at least judges de facto.²¹

Again, a board of education, composed of persons actually elected as school trustees at a school meeting, and actually acting as such, is a de facto board, and its status cannot be destroyed by the action of the county superintendent in appointing other trustees upon the supposition that the election was illegally conducted; his contention being that the votes of women were refused in open defiance of a statute giving them the right of suffrage.²² So the validity of the election of town assessors cannot be impeached collaterally on the ground of an omission to use the check-list in the ballot, as required by statute.²³

§ 175. Same subject—Invalid appointments.—A person appointed road surveyor by resolution of the town committee, but not under their hands and seals, as required by law, is a de facto officer.²⁴ So an irregular or informal commission is sufficient to constitute one a deputy sheriff de facto.²⁵ So a person serving a writ as a deputy specially appointed by the sheriff, is an officer de facto for that purpose,

²¹Choisser vs York (1904), 211 Ill. 56, 71 N. E. 940.

²²Kimball vs Hendee (1894), 57 N. J. L. 307, 30 A. 894.

²³Sudbury vs Heard (1870), 103 Mass. 543; Atty.-General vs Crocker (1885), 138 Mass. 214. See also Hawkins vs Jonesboro (1879), 63 Ga. 527; Allen vs Metcalfe (1835), 34 Mass. (17 Pick.) 208; Henry vs Commonwealth (1907), 31 Ky. Law R. 760, 103 S. W. 371; People vs Terry (1887), 108 N. Y. 1, 14 N. E. 815; School Directors vs Nat. School Furnishing Co. (1893), 53 Ill. App. 254; Trenton

vs McDaniel (1859), 7 Jones L. (N. C.) 107; Moore vs Caldwell (1836), Freeman (Miss.) 222; Butler vs Walker (1893), 98 Ala. 358, 13 So. 261; Waller vs Perkins (1874), 52 Ga. 233; Atty.-General vs Megin (1885), 63 N. H. 378. 9 Am. & Eng. Corp. Cas. 68; Duane vs McDonald (1874), 41 Conn. 517. See also Moore vs State (1858), 5 Sneed (Tenn.) 510.

²⁴State vs Meyers (1862), 29 N. J. L. 392.

²⁵Moore vs Graves (1826), 3 N. H. 408.

although his written appointment is not under seal.²⁶ So a referee appointed by a circuit court is a *de facto* officer, though the order appointing him is irregular.²⁷

So the appointment of a judge *pro tem.* at one term of Court, to act at the next term, though irregular, gives such color of right to act at the next term as to constitute him a judge *de facto*.²⁸ So where a judge absent by reason of illness, intending to appoint a certain attorney judge *pro tem.*, inadvertently signed an appointment without filling in the name of the intended appointee, and such appointment was handed to the latter, who *bona fide* inserted his name therein, and acted as judge, it was held that the appointment so filed being regular on its face was sufficient to constitute the appointee a *de facto* judge.²⁹

So one who has been appointed deputy county attorney, and has taken the prescribed oath, is a *de facto* officer, though his appointment has merely been deposited in the office of the county clerk, instead of being recorded, and a formal consent to such appointment has not been obtained from the commissioners' court, as required by law.³⁰ So one who receives a written appointment to be deputy clerk of a Court from the clerk, and discharges the duties of his office, is a *de facto* officer, though the appointment has not been confirmed by the board of supervisors in conformity to law.³¹

Again, one holding the office of deputy sheriff, under a written appointment from the sheriff, is an officer *de facto*,

²⁶Jewell vs Gilbert (1885), 64 N. H. 13, 5 A. 80, 10 Am. St. R. 357, followed in State vs Barnard (1892), 67 N. H. 222, 29 A. 410, 68 Am. St. R. 648.

²⁷Rushing vs Thompson (1884), 20 Fla. 583.

²⁸State vs Murdock (1882), 36 Ind. 124.

²⁹Rogers vs Beauchamp (1885), 102 Ind. 33, 1 N. E. 185.

³⁰Dane vs State (1896), 36 Tex. Cr. R. 84, 35 S. W. 661.

³¹Wheeler Mfg. Co. vs Sterrett (1895), 94 Iowa, 158, 62 N. W. 675.

although there is no record evidence of the approval of his appointment, as prescribed by statute.³² So an order appointing a clerk of a Federal Court as master in chancery without assigning a special reason therefor, as required by 20 U. S. Stat. 415, is sufficient, however irregular, to clothe him with the insignia of the office and to constitute him an officer de facto.³³

§ 176. **Officers verbally appointed.**—The invalidity of the appointment, as appears from one of the Canadian cases quoted a moment ago,³⁴ may be due to the fact that it has been made orally instead of by writing, as prescribed by law. The informality in such case is treated like all other irregularities of a cognate character, and the authorities hold that the verbal appointment affords sufficient color of title to the appointee to constitute him an officer de facto.

In *Viner's Abridgement*,³⁵ we read: "If a corporation retains a steward by parol, and he keeps a Court, punishes offences, decides controversies, takes surrenders, makes admittances, either upon surrenders or descents; these acts, being judicial, shall ever stand for current, though his au-

³²*Youngblood vs Cunningham* (1882), 38 Ark. 571. Also *Commercial Bk. of Augusta vs Sandford* (1900), 103 Fed. 98.

³³*Northwestern Mut. Life Ins. Co. vs Seaman* (1897), 80 Fed. 357; but see *Dolan vs Topping* (1893), 51 Kan. 321, 32 P. 1120.—For further examples of irregular appointments, see *State vs Elliott* (1893), 13 Utah 471, 45 P. 346; *Olson vs Hawkins* (1908), 135 Wis. 394, 116 N. W. 18; *Overall vs Madisonville* (1907), 31 Ky. Law R. 278, 102 S. W. 278; *Landes vs Walls* (1903), 160 Ind. 216, 66 N.

E. 679; *Rice vs Commonwealth* (1867), 3 Bush. (Ky.) 14; *Ander-son vs Morton* (1903), 21 App. Cas. (D. C.) 444; *Boehme vs Monroe* (1895), 106 Mich. 401, 64 N. W. 204; *Tower vs Welker* (1892), 93 Mich. 332, 53 N. W. 527; *In re Mason* (1898), 85 Fed. 145; *Lee vs Wilmington* (1895), 1 Marv. (Del.) 65, 40 A. 663; see also *Jones vs French* (1846), 18 N. H. 190.

³⁴*School Trustees of Hamilton Tp. vs Neil* (1881), 28 Gr. (Ont.) 408.

³⁵*Title, Steward of Courts* (G)

thority be grounded upon a wrong foundation; for a corporation cannot institute any such officer without writing: and so if the King's auditor or receiver retain a steward by parol, he may lawfully execute any judicial act."

Accordingly, a water commissioner verbally appointed by a proper board is an officer *de facto* for the purpose of making an assessment, though such appointment is invalid as not being in writing.³⁶ So a deputy clerk of a circuit court holding office continuously for a year or more under a verbal appointment from the duly constituted clerk, is an officer *de facto*.³⁷ So where a trustee of a school district verbally appoints a collector, and issues to him a warrant to collect a tax assessed for school purposes in his district, such collector is an officer *de facto*.³⁸

So where a statute provides for the filing of the appointment and hence impliedly requires it to be in writing, such provision will be construed as merely directory, and a verbal appointment will constitute the appointee a *de facto* officer.³⁹ So where a deputy clerk of a court is required to be appointed by an order of the Court, and he is only verbally appointed by the clerk, he is an officer *de facto*.⁴⁰ So one orally appointed a deputy county auditor, to whom the usual oath is orally administered and who thereafter performs the duties of the auditor, is a *de facto* officer.⁴¹

³⁶*Canaseraga vs Green* (1903), 88 N. Y. S. 539.

³⁷*Haskell vs Dutton* (1902), 65 Neb. 274, 91 N. W. 395.

³⁸*Hamlin vs Dingman* (1871), 5 Lans. (N. Y.), 61, reversing 41 How. Pr. 132.

³⁹*Buis vs Cooper* (1895), 63 Mo. App. 196.

⁴⁰*Com. vs Arnold* (1823), 3 Litt. (Ky.) 309.

⁴¹*Murphy vs Lentz* (1906), 131 Iowa, 328, 108 N. W. 530. Also *State vs Sellers* (1854), 7 Rich. L. (S. C.) 368; *Sharp vs Thompson* (1881), 100 Ill. 447, 39 Am. Rep. 61; *Cockerham vs State* (Miss. 1895), 19 So. 195; *Greenwood vs State* (1889), 116 Ind. 485, 19 N. E. 333; but see *Herbster vs State* (1881), 80 Ind. 484.

§ 177. **Election or appointment held or made at improper time.**— Again, though the manner of electing or appointing an officer may be regular in form, yet the election or appointment may nevertheless be invalid because held or made at an improper time, that is, before or after the date fixed by law, or even before the coming into force of the enactment under or pursuant to which it is assumed to be held or made. In such case the person so elected or appointed cannot as a rule be an officer *de jure*, because he derives his authority from a power either irregularly exercised, or exercised at a time when it had merely a potential existence. But he can be, and is in fact, an officer *de facto* under color of irregular election or appointment,—the rule being that “if the power to appoint exists in any state of case, an appointment though made in circumstances not warranted by law, constitutes the appointee a *de facto* officer.”⁴²

Accordingly, where a statute created certain navigation commissioners, making their term of office begin April 15, 1907, and directing the Governor to appoint them on or before April 5, of the same year, and they were appointed on March 13, 1907, it was held that they were *de facto* officers, even if their appointment was premature.⁴³ So where an election for town officers was held on the day prescribed by law, but owing to some error, real or supposed, the officers elected refused to qualify, and another election was holden two weeks thereafter, at which all those elected at the former election were re-elected, save one who was substituted by another person; and thereupon the persons so elected at the second election qualified and entered upon the duties of their office, it was held that they were at least officers *de facto*.⁴⁴

⁴²*Vicksburg vs Lombard* (1875), 51 Miss. 111.

State vs Martin (1878), 46 Conn. 479.

⁴³*St. George vs Hardie* (1908), 147 N. C. 88, 60 S. E. 920. Also

⁴⁴*Coles County vs Allison* (1860), 23 Ill. 437. See also

In a New Jersey case the court went still further, and, relying on its discretionary power, refused to allow an information in the nature of quo warranto against a person who was chosen as alderman at an election held on a wrong day, without objection, and by a pure mistake.⁴⁵ There, however, inasmuch as all the officers of the municipal corporation had been elected on the same day, a successful prosecution of the quo warranto proceedings would have resulted in the suspension of municipal government for nearly a year. The court remarked that the persons elected were officers *de facto*, and as such could act without peril for the corporation, since their acts could not be collaterally assailed.

Again, where a governor before the coming into force of a law creating a county, appointed a sheriff therefor, it was held that the latter was at least an officer *de facto* after the law became effective.⁴⁶ So it was held that, although at the time of the election of the judge and the clerk of a municipal county, the law establishing the same was not in force, yet as the persons respectively elected as judge and as clerk had been declared duly elected and had entered upon the actual discharge of their duties, they were officers *de facto* after the law took effect by publication.⁴⁷ So where under an Act passed in February, 1859, an election of officers was authorized to take place in "April next" and the election was holden in April, 1859, it was held that the officers chosen, whether lawfully elected or not, were officers *de facto*, though the Act took effect only in May, 1859.⁴⁸

Chambers vs Adair (1901), 110 Ky. 942, 23 Ky. Law R. 373, 62 S. W. 1128.

⁴⁵Mitchell vs Tolan (1868), 33 N. J. L. 195. See post, sec. 467.

⁴⁶Fowler vs Bebee (1812), 9 Mass. 231, 6 Am. Dec. 62.

De Facto—16.

⁴⁷In re Boyle (1859), 9 Wis. 264, followed in Dean vs Gleason (1862), 16 Wis. 1, and Yorty vs Paine (1885), 62 Wis. 154, 22 N. W. 137.

⁴⁸Carleton vs People (1862), 10 Mich. 250.

§ 178. **Appointment to office not vacant.**—Likewise, a person appointed to an office by an official person or body having a *prima facie* right to make the appointment, may become an officer de facto, though the office be not legally vacant.⁴⁹ The principle of the rule is that where apparent authority exists to make an appointment under particular circumstances, the Courts will not collaterally inquire into the facts leading to such appointment to ascertain whether the power has been properly exercised or not. But of course the de jure officer must not be in possession of the office during the incumbency of the second appointee, as there cannot be two officers holding the same office at the same time.⁵⁰

According to the above principle, where a Commissioners' Court in the exercise of its statutory power, appointed an overseer of a public road, but, subsequently, the judge of the County Court, who had power only to fill vacancies occurring after the Commissioners' Court had appointed, appointed another person who assumed to act (though there was no vacancy), it was held that such person was an overseer de facto.⁵¹ So an order of the circuit court, made by the presiding judge on the last day of the term, by which a person named therein is appointed "to act as solicitor pro tem. of this court until further orders" and the acceptance of the appointment by the person named, constitute him the county solicitor de facto, so long as he acts under the appointment, although there is no vacancy in the office of county solicitor at the time the order is made.⁵²

So an appointment to the office of chairman of the board

⁴⁹Diggs vs State (1873), 49 Ala. 311.

⁵¹Thompson vs State (1852), 21 Ala. 48.

⁵⁰Somerset vs Somerset Banking Co. (1900), 109 Ky. 549. 60 S. W. 5. See also ante, sec. 75.

⁵²Diggs vs State (1873), 49 Ala. 311.

of supervisors of a town, made by the appointing board thereof, authorized to appoint only in case of vacancy, and the acceptance of the appointment by the appointee, constitute him the chairman of the board de facto, although no vacancy in fact exists.⁵³ So where a board of county commissioners improperly declared the office of county treasurer vacant and appointed to fill the supposed vacancy a person who was not the regularly elected treasurer, such person was held to be a treasurer de facto.⁵⁴ Again, where a person exercised the office of judge under an appointment by the Governor made without authority of law, there being at the time another person legally entitled to the office, the person so appointed was held to be a judge de facto.⁵⁵

§ 179. Appointment for a term longer than warranted by law.—An officer appointed for a longer term than that to which he could have been lawfully appointed, will be an officer de facto during the whole period he exercises the office under color of such appointment. Thus, in *Cocke vs Halsey*,⁵⁶ the regularity of the recording of a deed was challenged, on the ground that the same had been recorded by one who had no color of authority to perform the duties of Clerk of the Probate Court. The latter had recorded the

⁵³*Fulton vs Andrea* (1897), 70 Minn. 445, 73 N. W. 256.

⁵⁴*Watkins vs Inge* (1880), 24 Kan. 612.

⁵⁵*State vs Bloom* (1863), 17 Wis. 521; *Brady vs Howe* (1874), 50 Miss. 607. Also *State vs Martin* (1878), 46 Conn. 479; *State vs Constable* (1835), 7 Ohio (pt. 1) 7; *Ellison vs Aldermen* (1883), 89 N. C. 125; *Nichols vs Maclean* (1886), 101 N. Y. 526, 5 N. E. 347, 54 Am. R. 730; *Chowning vs*

Boger (1885), 2 Tex. App. (Civ. Cas.) 650, 9 Am. & Eng. Corp. Cas. 91; *Gregg vs Jamison* (1867), 55 Pa. St. 468; *School Dis. No. 8 vs Root* (1886), 61 Mich. 373, s. c. sub nom. *Tallmadge School Dist. vs Town Treasurer*, 28 N. W. 132; *People vs Lieb* (1877), 85 Ill. 484; *Turney vs Dibrell* (1873), 62 Tenn. (3 Bax.) 235.

⁵⁶(1842), 16 Pet. (U. S.) 71, 10 L. ed. 891.

deed after the session of the Court at which he had been appointed to act as clerk during the absence of the lawful clerk, and the contention was that the power of the judge of the Probate Court to appoint a "clerk pro tem." was limited to the term of the Court, and did not extend beyond that term. The objection was declared untenable upon several grounds, one of which was based upon the *de facto* doctrine. Mr. Justice Daniel, delivering the opinion of the Court, said: "That the judge had power to appoint a clerk *pro tempore*, seems never to have been questioned; that he did not appoint is equally indisputable; the irregularity alleged is in the failure to limit the appointment to the term of the Court. Admit, for the present, that the appointment should have been thus limited, and that the clerk has admitted the deed to probate after the term; yet, in his character of clerk, was he not within the very definition of the authorities, and within the concessions of the counsel, clerk *de facto*, acting *colore officii*?" Evidently, an affirmative answer to this question is unavoidable.

The same principle was upheld by the Supreme Court of Tennessee.⁵⁷ By the constitution of Tennessee of 1835, on the resignation of a Supreme Court Judge, the Governor had no power to fill the vacancy longer, than until the office could be filled by election (which election he was bound to order within a specified time); nevertheless, where the Governor appointed by commission a person to fill the unexpired term of a judge who had resigned, without calling an election, it was held that the appointee acting under color of the irregular commission, was a judge *de facto*.⁵⁸

⁵⁷*Calloway vs Sturm* (1870), 1 (1901), 109 Wis. 393, 85 N. W. Heisk. (Tenn.) 764. 358.

⁵⁸Also *Trogman vs Grower*

§ 180. Certificate of election confers a *prima facie* title, though result of election wrongfully determined.—

As is obvious, an election, though lawfully held and conducted, may yet not be the expression of the will of the people because of irregularities, illegalities, or errors in determining and declaring the result of it. Nevertheless the rule in such case is, that the determination by the proper officers in favor of one of several candidates, however erroneous it may be, furnishes him with *prima facie* evidence of his election, and if he acts upon that evidence and takes charge of the office under color of the certificate issued to him, he becomes an officer *de facto*, although he may not have obtained the plurality of the votes cast at such election.

Thus it was held in *Morgan vs Quackenbush*,⁵⁹ where the validity of an election for the office of Mayor came collaterally into question. The two rival candidates were one Perry and one Quackenbush, and although the latter had apparently received the higher number of votes, yet his adversary was declared elected. The irregularity arose this way: At its next meeting after the election the common council proceeded to canvass the inspector's return of votes, and to determine and declare who was elected to the office of Mayor; and they determined and declared that Perry had received the greater number of votes, and was duly elected Mayor, and made and filed a certificate of that determination. But the day Perry qualified and entered upon his duties, the new common council proceeded to re-canvass the votes for Mayor, and upon such re-canvass it was determined and declared that Quackenbush was duly elected Mayor, and a certificate of that determination was made and filed. The difference in the two results arose from the fact that the old common council contrary to their duty which was purely ministerial,

⁵⁹ (1856), 22 Barb. (N. Y.) 72.

and consisted in a simple matter of arithmetic, received evidence tending to show fraudulent practices at the polls, and omitted on that ground to canvass the votes of two electoral districts. Apprised of this mistake, Quackenbush, after the second determination which apparently gave the real result of the votes, attempted to discharge the duties of Mayor. On an application for an injunction to restrain him from acting, it was held, that the determination of the first board in favor of Perry, however erroneous it might be, had furnished him with *prima facie* evidence of his election, and that, having acted upon that evidence, qualified, and entered upon the discharge of the duties of the office, he became Mayor *de facto*, and could not be displaced, except by an action brought for that purpose by some person claiming to be entitled to the office. Said the judge: "If the certificate of the canvassers declaring Mr. Perry elected, vested him with colorable title to the office, as I think it did, so that he had a right to enter upon the discharge of its duties, another effect of that decision was, to exclude the defendant Quackenbush, as well as everybody else, from the office."⁶⁰

§ 181. **Irregularities in election or appointment must be bona fide.**—In conclusion, it may be further observed that in order that an irregular election may constitute one a *de facto* officer, at least so far as to render his title questionable only by *quo warranto*, the same must be carried on bona fide, and not fraudulently and with a dishonest intent, or with a culpable disregard of the law. "While it is true," says a learned judge, "that the illegality of the election, by virtue of which an incumbent has gained entrance to an office,

⁶⁰Also *Blain vs Chippewa* 17 Wash. 12, 48 P. 741, 61 Am. St. (1906), 145 Mich. 59, 108 N. W. R. 893; *R. vs Burke* (1896), 29 440; *State vs Superior Ct.* (1897), N. S. 227.

does not prevent the office from being full of him *de facto*, it is also to be noted that from the earliest periods it has been held requisite that the illegality in question must be consistent with honesty of purpose. Elections based upon mistakes of fact or misconceptions of law may impart a color of right which will bar the allowance of a *mandamus*, but palpable disregard of law renders the action by which an office is seized merely colorable, and, in a clear case, will be brushed aside as affording no obstruction to the exercise of a plain legal duty."⁶¹ Thus, it has been held in England, that if the election is merely colorable, so as to be really no election at all, the office is not full in the sense that the incumbent can be ousted only by *quo warranto*.⁶²

It should not be assumed, however, that none of the acts performed by officers fraudulently elected may not sometimes have to be sustained in order to protect innocent third persons, ignorant of the fraud, even if the title of such officers be so far defective, that it can be declared invalid in proceedings other than *quo warranto*.

It must also be noted that fraud will not generally invalidate an election, where it is only the act of persons who are merely agents in recording the votes or giving expression to the wishes of those having power to elect; the general rule, in such case, being that the misconduct or fraud of election officers will not vitiate an election unless it is shown that the result was thereby affected.⁶³

⁶¹Per Garrison, J.—*Leeds vs Atlantie City* (1890), 52 N. J. L. 332, 19 A. 780.

⁶²*R. vs Bankes* (1764), 3 Burr. 1452, 1 W. Bl. 452; *R. vs Cambridge* (1767), 4 Burr. 2008. See also *Rouleau vs Corporation of St. Lambert* (1896), 10 Que. R. (S.

C.) 85; *Turtle vs Township of Euphemia* (1900), 31 O. R. 404.

⁶³*Motley vs Wilson* (1904), 26 Ky. Law R. 1011, 82 S. W. 1023; *Dial vs Hollandsworth* (1894), 39 W. Va. 1, 19 S. E. 557; *Knight vs Town of West Union* (1898), 45 W. Va. 194, 32 S. E. 163.

CHAPTER 14.

OFFICERS DE FACTO UNDER COLOR OF IRREGULAR ELECTION OR APPOINTMENT BY AN UNAUTHORIZED OFFICIAL PERSON OR BODY.

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| § 182. General rule. | § 189. Appointment without concurrence of all having authority to appoint. |
| 183. English illustrations. | |
| 184. Same subject. | 190. Same subject—Apparently conflicting cases distinguished. |
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| 186. American illustrations. | 191. Where authority to appoint exists only in particular cases. |
| 187. Conflicting doctrine. | |
| 188. Elective office filled by appointment or vice versa. | |

§ 182. **General rule.**—Where an official person or body assumes the power to appoint or elect to public office, and the person appointed or elected enters upon the office and performs its duties, he will be an officer de facto, notwithstanding want of power to appoint or elect in the body or person who professed to do so. “It is a mistake,” says a judge, “to assume that to constitute a good officer de facto, he must be appointed or elected by the proper authority.”¹

This principle was apparently recognized in the first reported English case on the de facto doctrine. In *The Abbé de Fontaine*² Babington, C. J., says: “If an abbacy or church be vacant, and a man who had no right pretended to be patron, and preferred one A, by force whereof he is installed, and then he is ousted by legal process inasmuch as

¹McFarland, J.—McLean vs ²(1431), Year Book 9 H. VI, State (1873), 8 Heisk. (Tenn.), fol. 32.
22.

the patron had no right; yet a deed which was made before him is good." And Chief Justice Butler,³ after exhaustively dealing with the question, concludes, "that upon the review of all the material English authorities running through four centuries, it will be seen that the idea that color can only be conferred by a body or person having power, *or prima facie power*, to elect or appoint in the particular case, has never been broached in England, but that the contrary has been holden."

§ 183. **English illustrations.**— In *The Abbé de Fontaine case*, above referred to, the court was apparently of the opinion, although it was not finally decided, that an obligation for goods sold for the use of a religious house, made by one who acted as abbot though he had obtained only a minor part of the votes at an election held to fill the office, was not voidable by the true abbot (after his recovery of the office), that is, by the one who had secured the majority of the votes, because the former had color of title when he made the obligation, and he who sold the goods was not bound to examine his title to the office. There the body that held the election was evidently invested with power to elect, but by a plurality of its votes, and not by a minority. The person, therefore, who took possession of the abbacy, as he had obtained only 8 votes as against his adversary 24, held under color of an election by a minority that had no right to elect. Yet the court did not seem to entertain any doubt as to the sufficiency of his color of authority, the only perplexing question being apparently whether the office was not already full of the abbot *de jure*, so that it could not be filled at the same time by an abbot *de facto*.

³State vs Carroll (1871), 38 Conn. 449, 9 Am. Rep. 409.

In *Lord Dacres case* ⁴ the steward of a manor appointed his servant to hold a manorial court. He had no authority to do so, yet the servant was holden a good officer de facto.

In *Leak vs Howel* ⁵ which was a case of an information for bringing certain merchandise into the country, without paying, or agreeing for the payment of, the custom and subsidy due for them to the collector of the custom in London, or in any other port, or to his deputy, it was held that an agreement made at the custom-house in a particular port, with a person who had there exercised the office of deputy of one who was deputy of the collector of the customs there, was valid, although the person with whom such agreement was made was not a lawful officer, the deputy having no authority to appoint a deputy.

In *Harris vs Jays* ⁶ a steward for one of the manors of the county, who could only be appointed by the lord, was appointed by the auditor and surveyor of the county, without any authority whatever, and acted as such; and it was held that he was steward de facto, and although he could not grant a copyhold which had escheated, because it was in prejudice to the Queen, nevertheless other acts done by him were good.

§ 184. Same subject.—In *Parker vs Kett* ⁷ it was again holden that the deputy of a deputy, although his appointment was wholly without authority of law, derived sufficient color from it to constitute him an officer de facto. Hall, C. J., said: “Osman Clarke is agreed to be a good deputy, and

⁴ (1584), 1 Leonard, 288, 74 Eng. R. 263.

⁵ (1591), Cro. Eliz. 533, 78 Eng. R. 780.

⁶ (1599), Cro. Eliz. 699, 78 Eng. R. 934.

⁷ (1701), 12 Mod. 466, 83 Eng. R. 1454, 1 Ray. (Ld.) 658, 91 Eng. R. 1338.

takes upon himself to appoint a deputy; suppose it is so, which he cannot do, no more than an under-sheriff can make an under-sheriff, or a bailiff make a bailiff; but still it gives a color, and here is the appearance and form of a legal proceeding, and he is reputed to have an authority; and in such case, if surrender be taken and duly presented, it will be well, beyond dispute."

In *Seymour vs Bennett* ⁸ the principal registers in the prerogative office disagreeing about the appointment of a clerk, the deputy appointed one Abbot, who for a twelvemonth officiated, and Lord Hardwicke held that he was an officer *de facto*.

Again, in *Penney vs Slade*,⁹ the action was trespass for seizing the goods of the plaintiff, under color of a warrant signed by the defendants, who were magistrates of the borough of Poole (one of them being the Mayor), for the purpose of enforcing the payment of a poor-rate, which was alleged by the plaintiff to be void, on the ground that the overseers, by whom it was made, had not been duly appointed. The facts were as follows: Seven borough magistrates, including the Mayor, assembled to appoint overseers. The Mayor drew from his pocket two blank forms, with three seals ready attached, filled them up with the names of two persons of his own political party, handed them to the two magistrates sitting next to himself, and, on their being signed, immediately despatched them by a constable to be served. As soon as the constable had left the room, the four magistrates, who had not observed the Mayor's proceedings, requested him to nominate two other overseers, and, upon his refusal to put the question, appointed them without his concurrence. The Mayor afterwards caused a distress to be levied on plaintiff

⁸ (1742), 2 Atk. 482.

⁹ (1839), 5 Bing. (N. C.) 319, 7 Scott, 484, 8 L. J. C. P. 221.

for refusing to pay a rate made by the overseers appointed by the Mayor. Plaintiff having sued the Mayor in trespass, the jury were directed that they might find for plaintiff, if they thought the Mayor's appointment of overseers was fraudulent. The jury having found it not fraudulent, the Court refused a new trial, which was moved for on the ground that, whether the appointment was fraudulent or not, it was void, as being a judicial act done by the minority of the justices assembled, without opportunity of deliberation afforded to the entire body.¹⁰

§ 185. **Canadian illustrations.**— In *Lacasse vs Roy*¹¹ the facts, as they were made to appear to the court, were substantially as follows: A vacancy having occurred in a municipal council, three of the councillors, without whom no quorum could be had, persisted in absenting themselves from the council board, in order to prevent the appointment of a proper person to fill the vacancy, their intention being to hinder and obstruct the transaction of municipal affairs. After repeated but vain efforts of the three other councillors to obtain the co-operation of their fellow councillors in making an appointment to fill the vacancy, they determined, owing to the urgency of certain municipal business, to make the appointment themselves, and one Romuald Vallière was appointed and took possession of the office. Subsequently, the three absentee councillors having forfeited their offices by their continued absence, the remaining councillors, including Romuald Vallière, appointed other persons in their places. The case came before the court upon quo warranto, to determine the title of one of the three last appointees. It was urged that Vallière who had joined in making the appointments had no

¹⁰See also *Turner vs Baynes* (1795), 2 H. Bl. 559, 3 R. R. 506.

¹¹(1895), 8 Que. R. (S. C.) 293

right to do so since he had himself been appointed by a body lacking power to appoint, the three councillors who had chosen him not forming a quorum of the municipal council. The court, however, relying on *State vs Carroll*,¹² held that notwithstanding the want of power in the appointing body, he was a de facto councillor, and as such had authority to join with the other councillors in making the disputed appointments.¹³

In subsequent cases, however, it was held that Vallière could not be regarded as an officer de facto, on the ground that his appointment was a notorious fraud and illegality of which everyone had notice, and therefore there was no room for the application of the de facto doctrine.¹⁴ Even Routhier, J., who had delivered the first judgment, concurred in the latter opinion, while sitting in Revision. He observed that he saw no contradiction between his two rulings, inasmuch as in the first case he was not cognizant of all the circumstances, and he had decided in the light of the facts which were before him. To the same effect were the remarks of Sir L. N. Casault, C. J. He pointed out that when the case was heard by his Brother Routhier, in the first instance, there was sufficient to justify the latter in holding that Vallière was an officer de facto, since he was not aware of the circumstances, but that this could not be so after the same were known. It is evident, therefore, that upon the question of law involved, the decision in *Lacasse vs Roy* was considered sound, and it was not intended in the subsequent cases to disagree with the principle it laid down.

¹²(1871), 38 Conn. 449, 9 Am. Rep. 409.

¹³See to the same effect two American decisions: *Dingwall vs Detroit* (1890), 82 Mich. 568, 46 N. W. 938; *Overall vs Madisonville*

(1907), 31 Ky. Law R. 278, 102 S. W. 278.

¹⁴*Rouleau vs Corp. of St. Lambert* (1896), 10 Que. R. (S. C.) 69, 85; *Lacasse vs Labonté* (1896), 10 Que. R. (S. C.) 97, 104.

§ 186. **American illustrations.**—There are numerous American authorities upholding and sanctioning the rule enunciated in this chapter. Thus, it was held that a district judge acting in another district in which the office of judge is vacant, by virtue of an appointment made by a circuit judge, is an officer *de facto*, and his acts cannot be questioned on the ground that the circuit judge has no power of appointment in the case of a vacancy in the office of district judge.¹⁵ So a judge elected by a county, having no power whatever under the constitution to elect him, is an officer *de facto*.¹⁶ So a person appointed justice of the peace by the selectmen of a county, who had no power to make such appointment, and commissioned by the Governor who was authorized to issue commissions to persons elected to such offices, is an officer *de facto*.¹⁷ So where the Governor issues a commission to one of the judges of the Superior Court, authorizing him to hold certain terms of the Superior Court, and the judge undertakes to discharge the duties required of him, he is a *de facto* judge so long as he assumes to act in that capacity, even though the commission was issued without authority of law.¹⁸

Again, though a legislature has no power to appoint a board of election commissioners, yet if it does so, and the persons thus appointed act and are recognized as commissioners, they are *de facto* officers.¹⁹ So where a probate judge appoints

¹⁵*McDowell vs United States* (1895), 159 U. S. 596, 16 Sup. Ct. R. 111, 40 L. ed. 271. Also *Ball vs United States* (1890), 140 U. S. 118, 11 Sup. Ct. R. 761, 35 L. ed. 377.

¹⁶*Campbell vs Commonwealth* (1880), 96 Pa. St. 344.

¹⁷*Mallett vs Uncle Sam Gold etc. Mining Co.* (1865), 1 Nev. 188, 90 Am. Dec. 484.

¹⁸*State vs Lewis* (1890), 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L.R.A. 100; followed in *State vs Turner* (1896), 119 N. C. 841, 25 S. E. 810. See also *In re Manning* (1891), 139 U. S. 504, 11 Sup. Ct. R. 624, 35 L. ed. 264; *State vs Bloom* (1863), 17 Wis. 521.

¹⁹*Pratt vs Breckinridge* (1901), 112 Ky. 1, 65 S. W. 136, 23 Ky. Law R. 1356, 66 S. W. 405. Also

managers to hold a stock-law election, and they act under color of such appointment, they are *de facto* officers, though the probate judge had no authority to appoint.²⁰ So assessors appointed by a board of commissioners are officers *de facto*, though such board had no authority whatever to appoint, the power of appointment being vested in the County Court, or, in certain cases, in the chairman.²¹

So, where the law provides that certain drainage commissioners shall be appointed by the County Court, and they are appointed by the County Judge who has no authority to make the appointment, the commissioners so appointed are officers *de facto*.²² So where a board of prison commissioners appoints a superintendent of a territorial prison, and he qualifies and acts as such until it is found that the appointive power is not in the board but in the Governor, who appoints a superintendent in his stead, the former superintendent is until then an officer *de facto*.²³ So a deputy chamberlain appointed by the chamberlain, who assumes to possess the power to make the appointment, is an officer *de facto*, though the chamberlain may not have any such power.²⁴

Brown vs O'Connell (1870), 36 Conn. 432, 4 Am. Rep. 89; *Roche vs Jones* (1891), 87 Va. 434, 12 S. E. 965.

²⁰*Martin vs Crook* (1908, Ala.), 46 So. 482.

²¹*McLean vs State* (1873), 8 Heisk. (Tenn.) 22.

²²*People vs Orleans County court* (1882), 28 Hun (N. Y.) 14.

²³*Behan vs Davis* (1892), 3 Ariz. 399, s. c. sub nom. *Behan vs Prison Comm'rs*. 31 P. 521.

²⁴*Palmer vs Foley* (1873), 36 N. Y. Super. Ct. 14, 45 How. Pr. 110, reversing 44 How. Pr. 308. Also *State vs Carroll* (1871), 38 Conn. 449, 9 Am. Rep. 409; *State*

vs Barnard (1892), 67 N. H. 222, 29 A. 410, 68 Am. St. R. 648; *Brown vs Flake* (1897), 102 Ga. 528, 29 S. E. 267; *State vs Seavey* (1894), 7 Wash. 562, 35 P. 389; *State vs Superior Court* (1908), 49 Wash. 392, 95 P. 488; *Justices vs Clark* (1824), 1 T. B. Mon. (Ky.) 82; *Calloway vs Sturm* (1870), 1 Heisk. (Tenn.) 764; *Parker vs Baker* (1840), 8 Paige (N. Y.) 428, reversing s. c. *Clarke Ch.* 223; *People vs Cook* (1853), 8 N. Y. 67, 59 Am. Dec. 451, affirming (1852), 14 Barb. 259; *Dolan vs New York* (1877), 68 N. Y. 274, 23 Am. R. 168; *Hamilton vs County of San Diego* (1895),

§ 187. **Conflicting doctrine.**—However, the foregoing doctrine has not received the unanimous support of all the authorities. For instance, the New York decisions do not seem to be in harmony with each other. Some, as can be seen from the above citations, maintain the general principle laid down by us, while others uphold a different doctrine. Thus, in *People vs Carter*,²⁵ where the Governor, without authority, had issued a commission to a person appointing him a justice of the peace in the place of a former incumbent, resigned, it was held that, as the Governor had no power to fill the vacancy, he could not bestow upon the appointee the outward signs and symbols of the office so as to give him color of title. This decision was approved and followed in *People vs Brennan*,²⁶ where it was held that commissioners of taxes and assessments, appointed by the comptroller of the City of New York, under a supposed but invalid authority, were not officers de facto.²⁷

Again, we find some authorities declaring that there must be *apparent or prima facie authority* in the official person or body making the appointment. Thus, in an Alabama case, the following rule is laid down: "The true distinction between those irregular appointments of office which are void, and those which are voidable only, I apprehend to be this: where the authority under which the officer assumes to act,

108 Cal. 273, 41 P. 305; *People vs Sassovich* (1866), 29 Cal. 480; *Ex p. Strang* (1871), 21 Ohio St. 610; *Hawkins vs Jonesboro* (1879), 63 Ga. 527; *Ex p. Tracey* (Tex., 1905), 93 S. W. 538. As to appointments made by the governments of American rebellious states, see *Simpson vs Loving* (1867), 66 Ky. (3 Bush) 458, 96 Am. Dec. 252; *Donegan vs Wood* (1873), 49 Ala. 242, 20 Am. R. 275.

²⁵(1859), 29 Barb. (N. Y.) 208.

²⁶(1866), 30 How. Pr. (N. Y.) 417.

²⁷See also *Burgess vs Pue* (1844), 2 Gill. (Md.) 11; *Ex p. Lewis* (1903), 45 Tex. Crim. R. 1, 73 S. W. 811, 107 Am. St. R. 970. Also *Humphreys vs Stevens* (1875), 49 Ind. 491.

shows, upon its face, that it emanates from a power which had no right to confer it, it is void; but where it is regular on its face, and emanates from a source which has the legal or constitutional right to bestow it, and it requires a reference to facts not disclosed in the commission or order of appointment, to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only. In the former case, all the acts of the appointee, done in reference to such appointment, are void for every purpose, while in the latter they are valid as to the public and third persons.”²⁸

If this language means, as we assume it does, that *prima facie authority* is required in all cases, it is an attempted modification of the general rule which is not sanctioned by the current of authorities, old or modern, and is opposed to the great leading case of *State vs Carroll*.²⁹ Of course, it is conceivable that an appointment may be so manifestly illegal and absurd on its face so as to deceive no one, and under such circumstances it could hardly constitute the appointee an officer *de facto*.

§ 188. Elective office filled by appointment or vice versa.—But be this as it may, it is indisputable, notwithstanding the foregoing conflicting decisions and a few others which will be noticed later on, that the great weight of authority sustains the principle laid down at the beginning of this chapter. We shall proceed to further illustrate the same, by dealing with cases which exhibit particular circumstances.

²⁸*Thompson vs State* (1852), 21 Ala. 48. See also *Erwin vs Jersey City* (1897), 60 N. J. L. 141, 37 A. 732, 64 Am. St. R. 584.

²⁹(1871), 38 Conn. 449, 9 Am. Rep. 409.

Following the general doctrine, it is declared that a person appointed to an elective office, or elected to an appointive office, and discharging the duties of the same under color of such unauthorized appointment or election, will generally be deemed an officer de facto. Thus, where the trustees of a village assumed the right, under the charter, to appoint a person justice of the peace to fill a vacancy, and he in good faith undertook the duties of the office, it was held that he was an officer de facto, even if the office could only have been legally filled by election.³⁰ So a person appointed by the Governor to fill a vacancy in the office of Mayor, is an officer de facto, though the appointment was made without authority, the law requiring such vacancy to be filled by election.³¹

Likewise, where a person was elected to a prudential committee by the inhabitants of a district, to fill a vacancy, and obtained the papers and records appertaining to the office, and discharged the duties thereof, it was held that he was an officer de facto, whether the district had a right to elect a person to fill the vacancy (if it existed), or whether the vacancy should have been filled by appointment of the selectmen of the town.³²

But in a New York case it was held that a person appointed justice of the peace, who under the constitution could only be elected, did not derive any color of title from

³⁰*Laver vs McGlachlin* (1871), 28 Wis. 364.

³¹*Monroe vs Hoffman* (1877), 29 La. Ann. 651.

³²*Goodwin vs Perkins* (1867), 39 Vt. 598. See also *Chicago & North Ry. Co. vs Langlade County* (1883), 56 Wis. 614, 14 N. W. 844; *Watson vs McGrath* (1904), 111

La. Ann. 1097, 36 So. 204; *Pratt vs Breckinridge* (1901), 112 Ky. 1, 65 S. W. 136, 23 Ky. Law R. 1356, Id. 112 Ky. 1, 66 S. W. 405; *In re Ali Lee* (1880), 6 Sawy. (U. S.) 410, 5 Fed. 899; *State vs Collector of Ocean Tp.* (1876), 39 N. J. L. 75; *State vs Whitney* (1879), 7 Or. 386.

his unauthorized appointment.³³ This case, however, is adversely criticised in *In re Ah Lee*, above quoted, the court observing that "no authorities are cited, and, so far as appears, the distinction attempted to be made by it is not found in the books. The case was decided in the County Court, and the opinion delivered by the county judge."³⁴

§ 189. Appointment without concurrence of all having authority to appoint.—It is also held that where power to appoint is vested in a specified number of, or in designated, persons, the exercise of such power without the concurrence of all having authority, will give sufficient color of title to the appointee to make him an officer *de facto*. Thus, where a temporary appointment of inspectors of election was made by the supervisor, the town clerk, and one justice only, whereas the statute contemplated that at least two justices should sign it, without which in the county towns, there would not be a majority of the appointing body, it was held that, though such appointment was defective, yet it gave colorable authority to the inspectors so appointed and made them *de facto* officers.³⁵

So, under certain laws of the late Territory of Dakota, the organization of counties was effected by the Governor appointing three commissioners, who in turn were empowered to appoint the necessary public officers to complete the county organization. Three commissioners were appointed by the Governor under the above provisions, but only two received their commissions and qualified. These two proceeded to appoint a registrar of deeds, who was by statute *ex officio* county clerk. He qualified and entered upon the duties of his office,

³³*People vs Albertson* (1853), 8 How. Pr. (N. Y.) 363.

³⁴But see also *Canaseraga vs Green* (1903), 88 N. Y. S. 539.

³⁵*People vs Cook* (1853), 8 N. Y. 67, 59 Am. Dec. 451, affirming (1852), 14 Barb. 259.

and it was held that such registrar of deeds and ex officio county clerk was a de facto officer.³⁶ "The appointment," said the Court, "may not have been valid, being made by only two commissioners, when three had been appointed by the Governor, but the person appointed was not an intruder. He was in under color of title, and that is all that is required to constitute an officer de facto." In the same case, the two commissioners, and the registrar of deeds, as ex officio county clerk, appointed the third county commissioner under the provision of the statute which provided that a failure to qualify, as required by law, constituted a vacancy in the office, and was by law to be filled in the case of a county commissioner, by the remaining commissioners and county clerk, and probate judge. And it was held that, notwithstanding the non-concurrence of the probate judge, the commissioner so appointed was an officer de facto.

Again, as we have already seen, appointments made by members of a public body not forming a quorum, have sometimes been held sufficient to constitute the appointees de facto officers.³⁷

§ 190. Same subject—Apparently conflicting cases distinguished.—But in *Kempster vs Milwaukee*³⁸ it was held that where the incumbent of the office of health commissioner is wrongfully removed, and the vacancy can by the charter only be filled by appointment of the Mayor and consent of the common council, an appointment by the Mayor alone, without the consent of the council, of a person as acting

³⁶*Merchants Nat. Bank vs McKinney* (1891), 2 S. Dak. 106, 48 N. W. 841.

³⁷*Overall vs Madisonville* (1907), 31 Ky. Law R. 278. 102 S. W. 278; *Dingwall vs Detroit*

(1890), 82 Mich. 568, 46 N. W. 938; *Lacasse vs Roy* (1895), 8 Que. R. (S. C.) 293.

³⁸(1897), 97 Wis. 343, 72 N. W. 743.

commissioner, to perform the duties of that office, does not make that person an officer de facto. There, however, the court remarked that there had been no attempt to fill the office of health commissioner, but only to appoint a person to the office of "acting commissioner" with duties identical with those of commissioner, an office which had no legal existence.

So in *Brumby vs Boyd*,³⁹ under a city charter providing that in case of vacancy in any elective office, the council, upon nomination by the Mayor, shall fill the same by selecting some person by a majority vote of the aldermen, it was held that the power to fill vacancies being vested in the council, consisting of the Mayor and board of aldermen, an appointment made by the Mayor alone, or by the aldermen, without the consent of the Mayor, was void and could not constitute the appointee an officer de facto; the ground taken being that where an appointment to office is not merely irregular or informal, but is absolutely void, the appointee, though attempting to discharge the duties of the office, is not an officer de facto. However, the result of that decision was undoubtedly sound, because two health officers had been appointed to fill a vacancy, one by the Mayor, and the other by the aldermen, but neither had ever obtained exclusive possession and control of the office, and hence neither could be deemed an officer de facto. The court could have rested its decision on that ground without going any further, because it is indeed difficult to conceive that if a single person had been appointed health officer, either by the Mayor or the aldermen, and had taken possession and exercised the duties of the office under color of such defective appointment, he could not have been considered a de facto officer.

³⁹ (1902), 28 Tex. Civ. App. 164, laid down by this authority, was 6 S. W. 874. The broad principle recently approved in a case in-

§ 191. **Where authority to appoint exists only in particular cases.**—It is almost superfluous to say that it is immaterial whether the illegality of the appointment arises from a general want of power in the appointing body to make the appointment, or from a want of power to make the appointment in the particular case. Indeed, if total want of power affords color of title, a fortiori, partial lack of power or want of authority under particular circumstances will be sufficient to bestow color of authority on the appointee. Thus, in one case the board of police had under the statute power to appoint commissioners to classify lands, in the first instance, but seemingly no provision was made for the appointment of a successor, in case of the death or resignation of the commissioner. The board appointed a commissioner as provided by the statute, but he resigned his office after he had commenced, and before he had completed the classification of the lands of the county, and the board accepted his resignation, and appointed a successor, who qualified, and proceeded to complete the classification; and it was held that, notwithstanding the absence of power to fill the vacancy thus occurring, yet as the board of police had power to appoint to the office under given circumstances, their appointment of a successor imparted sufficient color of authority to the appointee to constitute him an officer *de facto*.⁴⁰

Again, where a statute provided that in case of the judge of the circuit court being interested in a case or otherwise disqualified to act, the parties to the suit should appoint an attorney to preside in his place, and upon their failing to do so, the appointment should be made by the clerk of the court, it was held that an attorney, appointed by the clerk and who

volving the appointment of a special judge: *Oates vs State* (Tex. Crim. App. 1909), 121 S. W. 370.

⁴⁰*Ray vs Murdock* (1859), 36 Miss. 692.

had presided over the court pursuant to such appointment, was an officer *de facto*, even if the circumstances giving the clerk authority to appoint did not exist in the particular instance.⁴¹

This subject has already been incidentally dealt with in the preceding chapter where we spoke of appointments made to offices not legally vacant. The cases there quoted, though given as illustrations of irregular appointments, might likewise be cited here to exemplify the present subject.⁴²

⁴¹*Hunter vs Ferguson* (1874), 13 Kan. 462. See also *Hoagland vs Culvert* (1845), 20 N. J. L. 387; *Usher vs Telegraph Co.* (1906), 122 Mo. App. 98, 98 S. W. 84.
⁴²See ante, sec. 178.

CHAPTER 15.

DE FACTO OFFICERS UNDER COLOR OF AN ELECTION OR APPOINTMENT BY OR PURSUANT TO AN UNCONSTITUTIONAL LAW.

§ 192. General rule.

193. No distinction between laws manifestly unconstitutional and laws of doubtful constitutionality.

194. General rule illustrated.

195. Same subject—De facto judicial officers.

196. Same subject—Same subject.

197. Conflicting authorities.

§ 198. Unconstitutional Act removing an officer and appointing a successor.

199. Unconstitutional Act appointing to an office which is and remains full in law and in fact.

200. Same subject.

201. Unconstitutional Act altering constitution of office.

202. Unconstitutional Act altering mode of filling an office.

§ 192. General rule.—One performing official duties under color of an election or appointment, by or pursuant to a public unconstitutional law before the same is adjudged to be unconstitutional, is generally regarded as an officer de facto. "While," says a Judge, "there can be no such thing as a de facto office, there may be a de facto officer, whose apparent right arises out of action taken by the electorate or the appointing power under the supposed authority of an unconstitutional law before the same is declared unconstitutional."¹ Another court declares, that "from a review of the authorities bearing directly on the question, it clearly appears that it

¹Montgomery, J.—Thompson vs Couch (1906), 144 Mich. 671, 108 N. W. 363.

is sufficient if the officer claims and holds the office under some power having color to appoint, and that a statute, though it shall be found repugnant to the constitution, will give such color.”²

§ 193. No distinction between laws manifestly unconstitutional and laws of doubtful constitutionality.—In the application of the above principle, the degree of unconstitutionality of the law is immaterial, since any law enacted by a legislature is sufficient to impart color of title. Such, however, has not always been the unanimous opinion of the courts. Thus, in *Brown vs O’Connell*,³ an attempt was made to establish a rule of much inconvenience and impracticability for the guidance of the public, especially with reference to the legal status of public officers. It was to the effect that a law passed by the legislature cannot have color of authority, or the semblance of authority, unless it appears *prima facie* to be law, and that it cannot so appear if it is manifestly repugnant to the constitution; that a law of doubtful constitutionality may be presumed to be constitutional until it is judicially decided to be otherwise; but that a law manifestly unconstitutional is void upon its face, and unable to confer appearance or color of title.⁴

These views are thus criticized by Chief Justice Butler:⁵ “The inference to be drawn from these assumptions necessarily is, that a manifestly unconstitutional law is without any force whatever, and that whether manifestly unconstitutional or not, and whether to have the appearance and force of law or not, are questions for the private judgment of the

²*Walcott vs Wells* (1890), 21 Nev. 47, 24 P. 367, 37 Am. St. R. 478, 9 L.R.A. 59.

³(1870), 36 Conn. 432, 4 Am. R. 89.

⁴See to the same effect, *Vandenberg vs Connolly* (1898), 18 Utah, 112, 54 P. 1097.

⁵*State vs Carroll* (1871), 38 Conn. 449, 9 Am. Rep. 409.

citizen. If these assumptions were true they would dispose of this case, but they are of novel impression, and fundamentally erroneous. Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but must be received and obeyed, as to all intents and purposes as law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society. It has never been questioned by any jurist to my knowledge. . . . The doctrine that a law of doubtful constitutionality may be presumed to be constitutional until judicially decided otherwise, and that a law manifestly unconstitutional cannot be so presumed, has no existence as applicable to the citizen." We may add that such a rule of construction would be entirely subversive of de facto principles. For where the private citizen cannot rely on color or appearance of right, but is compelled to inquire into an officer's title at his peril, the de facto doctrine disappears.

§ 194. General rule illustrated.— There are numerous rulings upholding the general proposition laid down at the beginning of this chapter. Thus, it was held that a person appointed corporation attorney by a board of finance under an Act empowering them to do so, was an officer de facto, even if it should be subsequently adjudged that the Act was unconstitutional.⁶ So where a person was appointed city treasurer to fill a vacancy caused by death, it was held that he was a de facto treasurer, even assuming that the charter provision for the appointment of a treasurer by the Mayor

⁶Erwin vs Jersey City (1897), 60 N. J. L. 141, 37 A. 732, 64 Am. St. R. 584.

was unconstitutional, and he should have been elected by the people.⁷

Again, it was held that, notwithstanding the want of power of a legislature to appoint a board of election commissioners (its assumption of such authority being an invasion of the powers of the executive), yet, as its appointees had acted and been recognized as commissioners, they were de facto officers.⁸ So where an Act provided for the appointment by the Governor of all county officers, except the chairman and members of the county board, to hold their respective offices during a designated period, it was held that even if such suspension of the right of the people of the county to elect their own officers was invalid, and the appointments made by the Governor were consequently illegal, yet as the offices had been properly created and existed de jure, and the persons appointed thereto had entered upon their official duties, they were officers de facto.⁹ Like principles were held to apply to senators and representatives elected under an unconstitutional law;¹⁰ and to a female elected to an office to which she was made eligible by a void enactment.¹¹

§ 195. Same subject—De facto judicial officers.—In *State vs Carroll*¹² a conviction for a libel and breach of the peace was attacked on the ground of illegality. The matter came before the Supreme Court upon a case reserved. It

⁷Watson vs McGrath (1904), 111 La. Ann. 1097, 36 So. 204.

⁸Pratt vs Breckinridge (1901), 112 Ky. 1, 66 S. W. 405, 23 Ky. Law R. 1356, 65 S. W. 136.

⁹Chicago & North Ry. Co. vs Langlade County (1883), 56 Wis. 614, 14 N. W. 844.

¹⁰Parker vs State (1892), 133 Ind. 178, 31 N. E. 1114.

¹¹Donough vs Dewey (1890), 82 Mich 309, s. c. sub. nom. Donough vs Hollister, 46 N. W. 782. See also Atty.-Gen. vs Parsell (1894), 99 Mich. 381, 58 N. W. 335.

¹²(1871), 38 Conn. 449, 9 Am. R. 409.

appeared that the court that had made the conviction was not presided over by its regular judge, but by a justice of the peace, who had been requested by the clerk of the court to act as judge during the absence of the former. This request was made in accordance with a statute providing that, in case of the sickness or absence of the judge of a city court, a justice of the peace should be called in by the clerk to hold a court. Upon argument, several irregularities were complained of, but the main objection was that the Act permitting the temporary appointment of a justice of the peace was unconstitutional; and that it being in direct violation of the city charter, the justice who presided the inferior court was a mere usurper. However, Butler, C. J., in an interesting judgment, where both the English and American authorities are exhaustively reviewed, held that whether the law was unconstitutional or not, the acting justice was an officer *de facto*, if not *de jure*, and judgments rendered by him were valid.

So where under the provisions of a municipal code, the Mayor, in the absence or disability of the police judge, was authorized to select a member of the bar to hold the police court, who, it was declared, should have, for the time being, the jurisdiction and powers conferred upon judges of police courts, the person acting under such appointment was held to be a judge *de facto*, even assuming that the power of appointment thus conferred on the Mayor was unauthorized by the constitution.¹³

Likewise where an Act authorized the Governor to appoint and commission some fit and proper person to sit as judge, in case of the sickness, indisposition or inability of the circuit judges, it was held that a decree pronounced by

¹³Ex p. Strang (1871), 21 Ohio St. 610. To the same effect: *State vs Bartlett* (1874), 35 Wis. 287.

a judge so appointed and commissioned was valid and binding, although the Act was subsequently declared unconstitutional. "The public acts of officers *de facto*," said the court, "are often valid although the authority under which they act is void."¹⁴

§ 196. **Same subject—Same subject.**—Again, where the legislature, by a special law, made the aldermen of the City of New York *ex officio* judges of the oyer and terminer, and a prisoner was convicted of murder before that court, while two of the aldermen sat with the other judges, it was held that the aldermen were judges *de facto*, notwithstanding the unconstitutionality of the Act under which they acted.¹⁵

So where an Act of the legislature established a justice's court in one of the wards of the City of St. Paul, and authorized the Mayor to appoint the first justice to hold the office until the next election, it was held that a justice so appointed was a *de facto* officer, even if the Act was unconstitutional so far as it invested the Mayor with power to appoint.¹⁶

So where a State constitution authorized the legislature, when the population of the State should equal 200,000, to provide by election for separate judges of the Supreme and Circuit Courts, and the legislature passed an Act providing for the election of such judges in June, 1880, and for their appointment by the Governor in the meantime, it was held that, admitting that the Act was unconstitutional because the population was less than 200,000 and the legislature could not lawfully authorize the Governor to make the appoint-

¹⁴Taylor vs Skrine (1815), 2 Tread. (S. C.) 696.

¹⁵People vs White (1840), 24 Wend. (N. Y.) 520, reversing s. c. 22 Wend. 167.

¹⁶State vs McMartin (1889), 42 Minn. 30, 43 N. W. 572.

ment of such judges, nevertheless the acts of the latter while holding office under the Governor's commission, were valid and conclusive as the acts of officers de facto. The Court said: "Thus it will be seen that the almost unbroken current of authority is against the claim made for the petitioner, that no one can be an officer de facto under a void law or an illegal appointment; and, admitting that the judges who tried and heard the action against the petitioner in the state courts were appointed judges of these courts under an unconstitutional Act, yet they were at the least such judges under color of right and authority, and therefore they were and are judges de facto, and their acts are valid and binding as to third persons."¹⁷

§ 197. **Conflicting authorities.**— There are a few cases in conflict with the foregoing principles. Thus, in *Fenelon vs Butts*,¹⁸ it appeared that the village of Waupun was organized out of territory situated in two counties and in two judicial circuits, and for that reason an Act provided for the appointment of a court commissioner residing in the village, who might act in both counties, and exercise authority in each county to the same extent that a court commissioner properly appointed for such county might do. Pursuant to such enactment one Jacobs, a resident of Fond du Lac county, was appointed court commissioner by the circuit judge of

¹⁷In *re Ah Lee* (1880), 6 Sawy. 410, 5 Fed. 899. For further cases, see *Brown vs O'Connell* (1870), 36 Conn. 432, 4 Am. Rep. 89; *Clarke vs Commonwealth* (1858), 29 Pa. St. 129; *Morris vs People* (1846), 3 Denio (N. Y.) 381; *Meagher vs Storey County* (1869), 5 Nev. 244; *In re Parks* (1880), 3 Mont. 426; *Curtin vs Barton* (1893), 139 N. Y. 505, 34 N. E. 1093; *People vs*

Nelson (1890), 133 Ill. 565, 27 N. E. 217; *Walker vs State* (1905), 142 Ala. 7, 39 So. 242; *Gitsky vs Newton* (1898), 17 Ohio Cir. Ct. 484; *Ex p. State* (1905), 142 Ala. 87; s. c. sub nom. *State vs Judge*, 38 So. 835. See also *Toney vs Harris* (1887), 85 Ky. 453, 3 S. W. 614, 9 Ky. Law R. 36.

¹⁸(1880), 49 Wis. 342, 5 N. W. 784.

that county. Acting under this appointment, Jacobs issued an order requiring the female plaintiff in the case, who was a resident of Dodge county, to appear before him, and answer concerning her property. She having refused to answer certain questions, he committed her to the jail of Dodge county for contempt. An action for false imprisonment was brought against him, and it was held that the proceedings before him were void, and afforded no justification for the imprisonment complained of, since he could not be regarded as an officer *de facto*. Cole, J., delivering the opinion of the court, said: "We are all perfectly agreed that Jacobs could not properly be said to be a court commissioner *de jure*, and my brethren think he was not even one *de facto*. I have had some doubt upon the latter point, . . . but I defer to their judgment on the question."

In *Ex p. Lewis*¹⁹ it was held that an ordinance passed by a board of commissioners, three of whom had been appointed by the Governor of Texas under a charter provision violating the principles of the constitution, was a nullity, and that the acts of the officers so appointed, holding, according to the words of the court, by absolutely void commissions, were open to collateral attacks. Henderson, J., delivering the judgment of the Court, said: "But we do not know that it has ever been held, where a pretended officer is acting by virtue of a commission which is absolutely void, his acts cannot be questioned in a collateral proceeding. If such should be the case, the result would follow that if one assumed to act as judge, and undertook to try a person, although his commission be absolutely void, a person so arraigned and tried would be driven to some procedure to stay the trial, in order to enable him to resort to a writ of *quo warranto* to question the authority of the officer trying him."

As is evident, the learned judge was of opinion that one holding a *de jure* office by virtue of an appointment made under an unconstitutional Act, was a mere intruder. The inconvenience of denying the application of the *de facto* doctrine under such circumstances, is amply demonstrated by the case itself, for it contains a powerful dissenting judgment maintaining the constitutionality of the Act. But if judges cannot agree upon questions of this kind, how can a person unskilled in the law be expected to pass upon the constitutionality of an Act before invoking the action of, or submitting to, a public officer elected or appointed under it?

In *State vs Fritz* ²⁰ it was held that a statutory provision empowering a judge to appoint a lawyer to preside in his court, being repugnant to the constitution, was void from the beginning of its enactment; and that an appointment made pursuant thereto was a nullity, and therefore the appointee could not be considered an officer *de facto*. A similar decision is found in Wisconsin.²¹

In the last two cases, however, it is to be noted that the appointments were for a particular occasion or purpose only, *i. e., pro hac vice*. Had the persons been appointed to a vacant office, with general duties to perform, it is possible that the decisions would have been different.

§ 198. Unconstitutional act removing an officer and appointing a successor.—It seems that if an unconstitutional law unlawfully deprives an officer of his office and confers the same on another, who enters upon and discharges the duties thereof, the latter will be regarded as an officer *de facto*, though the former is only temporarily ousted and re-

²⁰(1875), 27 La. Ann. 689.

(1876), 39 Wis. 390, 20 Am. Rep.

²¹*Van Slyke vs Trempealeau* 50.
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mains an officer de jure. A case in point is *Carland vs Custer*.²² There an Act of the legislature declared the offices of County Commissioners of Custer County vacant, and appointed persons to fill the same in the place of those who were in possession at the time the Act was passed. The new officers took charge of the offices, and exercised the same to the exclusion of those who were unlawfully dispossessed; and it was held that they were de facto officers, since the Act in question, whether constitutional or not, was sufficient to afford them color of title.²³

§ 199. Unconstitutional act appointing to an office which is and remains full in law and in fact.—A different doctrine, however, should prevail where the unconstitutional appointment or election is to fill an office already filled by an officer de jure, and which remains so while the new appointee attempts to perform the duties attached to it. For, as we have seen elsewhere, there cannot be an officer de jure and an officer de facto holding the same office at the same time.²⁴ Accordingly, it was held that the members of a board of excise commissioners who were appointed by an unconstitutional method, did not become de facto officers by assuming to act as such when it appeared that there was a de jure board, which, during the same time, were holding official meetings and claiming to be the only legal board.²⁵

Nevertheless, the courts in their settled policy of supporting the acts of officers appointed or elected under an unconstitutional law, will at times strain the same in order to give it a construction capable of affording such officers color of title. And when embarrassed by such a principle as that just

²² (1885), 5 Mont. 579, 6 P. 24.

²³ See also *People vs Bangs* (1860), 24 Ill. 184.

De Facto—18.

²⁴ See ante, sec. 74.

²⁵ *Dienstag vs Fagan* (1907), 74 N. J. L. 418, 65 A. 1011.

adverted to, or that an unconstitutional law can create no office, they will sometimes indulge in the most ingenious and refined distinctions, in order to attain the end desired, without infringing such principles. A case apposite is *Walcott vs Wells* ²⁶ where the facts were these: By statute of 1885, the State of Nevada was made one judicial district with but one judicial office in connection therewith, to wit, the office of district judge, and three district judges, each having equal and co-extensive jurisdiction and powers throughout the State to hold district courts in any county and to exercise all duties pertaining to the office of district judge. While this statute was in operation, the legislature by a statute of 1889, increased the number of judges to four, and the Governor, as by the latter Act empowered to do, appointed an additional district judge, who held the office jointly with the others and exercised the functions thereof for more than a year before his authority was questioned, and this with the acquiescence and recognition of the State, county officers, and people generally. Upon this state of facts it was held that, irrespective of the question of the constitutionality of the statute of 1889, such district judge was an officer de facto. Hawley, C. J., in a well considered judgment, among other things, said: "This act did not create any new court or new officer. It simply provided for an increase of judges. . . . There was no first, second, third, or fourth judge. But there were four district judges, each commissioned to fill the one office of district judge; each apparently at least, authorized to hold court, not in any particular county, but in each and every county in the state. . . . Respondent did not take the place of either of the three other judges, for there was no separate place for either to fill, except by the assignment of the presiding judge. He was acting by virtue of his com-

²⁶ (1890), 21 Nev. 47, 24 P. 367, 37 Am. St. R. 478, 9 L.R.A. 59.

mission, in his own right by the consent of the other judges, and was assigned to the place by the presiding judge, and was the only judge presiding in the district court of the state in and for the county of White Pine. He acted as a district judge, filled the office, and presided in court, under as much color of authority as either of the temporary judges in the cases referred to. Why should not the same shield of protection to the public be given to his acts?"

The opinion of the learned chief justice was concurred in by Murphy, J., who, not having heard the oral arguments, founded his decision upon an examination of the briefs filed, and the authorities bearing on the subject. Presumably Bigelow, J., also concurred. But the other judge, Belknap, J., dissented, declaring that in all the cases cited by the Chief Justice the question was, "whether an officer appointed or elected under an unconstitutional Act to a vacant office was a *de facto* officer. This question is not involved in the present case, because there was no vacancy in the legal organization of the court to be filled."

The ground upon which is founded this dissenting opinion is undoubtedly entitled to much consideration, for if an office required to be filled by three persons can be filled by four, we see no reason why one capable of being held by one person only, cannot be jointly holden by two or more, which is manifestly against law.

§ 200. *Same subject.*— The doctrine laid down in *Walcott vs Wells*, however, was upheld by the Supreme Court of Colorado in *Butler vs Phillips*.²⁷ There the constitution provided for the election in each county of a judge of the county court, but the Denver City Charter increased the number of judges of the county of Denver to two, and changed

²⁷ (1907), 38 Col. 378, 88 P. 480.

the time of the election. It was held that though the charter provision was unconstitutional, yet a county judge elected thereunder was an officer de facto. The Court said: "The charter did not create or attempt to create the office of judge of the county court, such office being a constitutional office, created and existing by virtue of the sections of the Constitution above referred to. The charter simply attempted to provide for an increase of the number of persons who should exercise the functions and discharge the duties of such office." ²⁸ For somewhat analogous cases, the reader is referred to the next section.

§ 201. **Unconstitutional act altering constitution of office.**—Where an office legally exists, but its constitution or outward form is modified or altered by an unconstitutional law, without the same being thereby destroyed, persons holding the office in its altered form, in pursuance of such law, have been held to be officers de facto. Thus, in *Leach vs People*,²⁹ it was shown that the legislature had passed an Act which proved to be in violation of the constitution, whereby the management of the affairs of a county, acting under township organization, was attempted to be taken from the supervisors of the several towns, and vested in a board of supervisors consisting of only five members, instead of fifteen as before, to be elected in five districts, and hold their offices for five years. Supposing the Act to be valid, the new board were elected, and for a time acted without question, as the legally constituted tribunal having charge of the county affairs, and they were held to be de facto officers. The court said: "Wherever township organization prevails, there is, in every

²⁸Case followed in *Rude vs Sisack* (Col., 1908), 96 P. 976.

²⁹(1887), 122 Ill. 420, 12 N. E. 726.

county, a board of supervisors for the transaction of the affairs of the county. The Act in question merely changed the number of the members of the board from fifteen to five, and the mode of election from towns singly, to two or more towns unitedly, and the term of office. Nothing was added to or taken from the powers or duties of the board. After the passage of the Act there still remained the board of supervisors of Wayne County." . . . And later on, after quoting the definition of Chief Justice Butler, it added: "It appears to us that the case at bar is one which comes within the category last named. There was such a legal official body known to the law as the board of supervisors of Wayne County, the powers and duties of which official body were in the present case exercised by persons, under color of an election, as members thereof, in pursuance of a public unconstitutional law. The real cause of complaint is, that the office legally existing was illegally filled."³⁰

So where by an unconstitutional Act, boards of public improvements were abolished in certain cities, and replaced by boards of city affairs, and all the powers and duties of the boards of public improvements were vested in the boards of city affairs, and the latter were made in all respects the successors of the boards of public improvements, it was held that the members of a board of city affairs in the City of Cincinnati, were officers *de facto*. The reasons given by the court were that "the Act did not in a legal sense create a new office. The board of city affairs was clothed with the same functions as the board of public improvements. If then, as can hardly be questioned, the identity of an office is to be determined by the functions that belong to it, the board of city affairs is, in law, the same as the board of public improvements:

³⁰See also ante, sec. 38.

For there is nothing in a name by which the essence of things can be changed.”³¹

§ 202. **Unconstitutional act altering mode of filling an office.**—Again, notwithstanding the unconstitutionality of a law, altering the mode of filling a legal office, the persons elected or appointed by or pursuant thereto, will nevertheless be deemed officers de facto. Thus, in Wisconsin, where a village was a properly organized municipality under laws passed in 1866, and a subsequent Act (1871), which purported to amend the Act of 1866, provided for filling the village offices in an unconstitutional manner, and was to that extent invalid, it was held that, assuming that the officers of the village had been elected in the illegal manner prescribed by the Act of 1871, yet they were officers de facto.³²

So in a New York case, the plaintiff and his assignors, who claimed to have been elected aldermen pursuant to chapter 137, Laws of 1870, as amended by chapter 574, Laws of 1871, urged that section 4 of chapter 335, Laws of 1873, under which other persons were elected, acted and were paid salaries, and which Act repealed the Acts of 1870 and 1871, was unconstitutional in that it provided for a system of minority representation by restraining the right of a voter to vote for all the aldermen to be elected; that consequently no legal office of alderman was created thereby, and there could be no incumbency under that Act. But it was held that, as the elective office of alderman already existed, and was not created by the Act of 1873, the fact that such office was actually assumed by persons other than the plaintiff and his

³¹Kirker vs Cincinnati (1891), 48 Ohio St. 507, 27 N. E. 898.

³²Cole vs Black River Falls (1883), 57 Wis. 110, 14 N. W. 906. Members of a high school commit-

tee may be de facto officers, though elected by unqualified voters under the provisions of an unconstitutional Act: Kyle vs Abernethy (Col. 1909), 102 P. 746.

assignors rendered such incumbents de facto officers, even though the provisions of law regulating their compensation and mode of election might have been unconstitutional.³³

³³Demarest vs New York 405, affirming (1893), 74 Hun, 517, (1895), 147 N. Y. 203, 41 N. E. 26 N. Y. S. 585.



BOOK IV.

OF THE RIGHTS, POWERS, DUTIES, AND LIABILITIES OF DE FACTO OFFICERS, INCLUDING LIABILITY OF THEIR SURETIES.

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CHAPTER 16.

INTRODUCTORY.

§ 202a. Preliminary remarks and divisions of this book.

§ 202a. Preliminary remarks and divisions of this book.—In a former portion of this work ¹ we referred briefly to the general characteristics of that “notional creature erected by the law,” called an officer de facto. These will become more apparent and be better understood, when his rights, powers, duties, and liabilities have been discussed at length and clearly set forth, which is the object of this book. It will then be perceived what status or character is to be attributed to him under various circumstances.

In this part we shall also deal with the liabilities of an officer de facto’s sureties, inasmuch as the same are closely connected with his own. The treatment of these several subjects will be in the following order and under the following heads:—

1. Officer de facto not generally entitled to any personal advantage or privilege, but enjoys rights for the benefit of the public.

¹See ante sec. 23.

2. Right of officer de facto to protection of criminal law in execution of his duties.

3. Respective rights of officers de jure and officers de facto in regard to salary and emoluments of office.

4. Duties and civil liabilities of officer de facto.

5. Criminal responsibility of officer de facto.

6. De facto officer liable to penalties for usurpation and to damages when sued as a trespasser for acting without authority.

7. Liability of sureties on official bond of de facto officer.

CHAPTER 17.

OFFICER DE FACTO NOT GENERALLY ENTITLED TO ANY PERSONAL ADVANTAGE OR PRIVILEGE, BUT ENJOYS RIGHTS FOR THE BENEFIT OF THE PUBLIC.

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| § 203. Officer de facto has no personal privileges. | § 208. Right to recover property of office. |
| 204. Same subject. | 209. Same subject. |
| 205. Right of officer de facto to act on behalf of public. | 210. Right to recover money pertaining to office. |
| 206. Injunction or prohibition not granted to prevent officers de facto from acting. | 211. Same subject—Conflicting decisions. |
| 207. Officers de facto protected by injunction. | 212. Right of officer de facto to defeat quo warranto proceedings by perfecting his title. |

§ 203. Officer de facto has no personal privileges.—The rule that validates the acts of de facto officers obtains only to protect the public and third parties, not to benefit the officer himself. Indeed, the de facto doctrine being the offspring of public necessity, must be strictly limited to its object. "The incumbent himself has no privileges and is shielded from no responsibility. If he attempts to enforce a right grounded upon and flowing out of his office, his title is put in question and he must show a legal right."¹ The Supreme Court of Illinois uses similar language. "We believe," says the Court, "the rule to be, when one claims rights as an officer by virtue of his office he must show that he is legally entitled to act; that he is an officer de jure

¹Simrall, J., in *Kimball vs Alcorn* (1871), 45 Miss. 151.

as well as de facto. . . . The acts of a de facto officer are valid only so far as the rights of the public, or of third persons having an interest in such acts, are involved. But such officer can claim nothing for himself.”²

This principle is stated by English authority as follows: “The act of an officer de facto, where it is for his own benefit, is void, because he shall not take advantage of his own want of title which he must be cognizant of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good.”³

§ 204. **Same subject.**—The above rule is aptly illustrated by the case of *Kimball vs Alcorn*.⁴ The facts there briefly were these: The legislature, in joint convention of

²*People vs Weber* (1877), 86 Ill. 283.

³*R. vs Lisle* (1738), Andr. 163, 95 Eng. R. 345, 2 Stra. 1090, 93 Eng. R. 1051. Also *R. vs Mayor of Shrewsbury* (1735), Cas. Temp. Hard. (Lee) 147, 95 Eng. R. 94; *People vs Weber* (1878), 89 Ill. 347; *Stott vs Chicago* (1903), 205 Ill. 281, 68 N. E. 736; *Andrews vs Portland* (1887), 79 Me. 484, 10 A. 458, 10 Am. St. R. 280; *Plymouth vs Painter* (1846), 17 Conn. 585, 44 Am. Dec. 574; *Harbaugh vs Winsor* (1866), 38 Mo. 327; *State vs Dierberger* (1886), 90 Mo. 369, 2 S. W. 286, s. c. 1888, 96 Mo. 666, 10 S. W. 168, 9 Am. St. R. 380; *Lyndon vs Miller* (1863), 36 Vt. 329; *McGregor vs Balch* (1842), 14 Vt. 428, 39 Am. Dec. 231; *Keyser vs McKissan* (1828), 2 Rawle (Pa.) 138; *Riddle vs County of Bedford* (1821), 7 S. & R. (Pa.) 386; *Fylpaa vs Brown County* (1895), 6 S. D. 634, 62 N.

W. 962; *Patterson vs Miller* (1859), 2 Metc. (Ky.) 493; *Oregon vs Pyle* (1854), 1 Or. 149; *Neale vs Overseers* (1836), 5 Watts. (Pa.) 538; *Dillon vs Myers* (1844), Bright (Pa.), 426; *Hoglan vs Carpenter* (1868), 4 Bush. (Ky.) 89; *Rhodes vs McDonald* (1852), 24 Miss. 418; *Nichols vs MacLean* (1886), 101 N. Y. 526, 5 N. E. 347, 54 Am. R. 730; *People vs Nostrand* (1871), 46 N. Y. 375; *Olmstead vs Dennis* (1879), 77 N. Y. 378; *People vs Hopson* (1845), 1 Den. (N. Y.) 574; *Green vs Burke* (1840), 23 Wend. (N. Y.) 490; *People vs Anthony* (1875), 6 Hun (N. Y.) 142; *Bentley vs Phelps* (1858), 27 Barb. (N. Y.), 524; *Colton vs Beardsley* (1860), 38 Barb. (N. Y.) 29; *Devlin's Case* (1857), 5 Abb. Pr. (N. Y.) 281; *Adams vs Tator* (1886), 42 Hun (N. Y.) 384.

⁴(1871), 45 Miss. 151.

the two houses, elected Fisher and Kimball State printers, who entered upon the office, and for a short time performed its duties. Shortly afterwards they resigned. Thereupon, in May, 1870, the Governor nominated to the Senate the plaintiffs, who were confirmed. They continued to discharge the duties of the office until June, 1871, when they were removed by the Governor, and Alcorn and Fisher were appointed in their stead. The plaintiffs, claiming to be the rightful public printers, notwithstanding the act of the Governor in displacing them, and appointing successors, attempted to obtain an injunction to restrain the latter from doing the public printing, and also a mandamus to compel the Secretary of State to deliver to them, the plaintiffs, all matter to be printed. But the court held, that the plaintiffs could not succeed, because their election should have been by a joint convention of the two houses instead of by the Governor by and with the advice and consent of the Senate; that therefore they were only officers de facto, and as such could not claim any benefit for themselves or take advantage of their want of title of which they should have been cognizant.

So it has been held that if an officer de facto sues for the recovery of damages for an injury received in the discharge of his assumed duties, such as an assault, it is a good defense that he was not a legal officer, but a wrongdoer, who might be lawfully resisted.⁵ Again, though the possession of an officer de facto may sometimes be protected by law on account of the public, yet courts will not further the personal interests of claimants by assisting them in gaining or being restored to possession, unless they show a valid title.⁶ How-

⁵People vs Hopson (1845), 1 Den. (N. Y.) 574; Creighton vs Piper (1860), 14 Ind. 182.

⁶Moon vs Mayor (1905), 214 Ill. 40, 73 N. E. 408; Kenneally vs Chicago (1906), 220 Ill. 485, 77 N.

ever, as we shall hereafter see, a *de facto* officer may sometimes derive benefit from his unlawful holding by being allowed, under certain circumstances, the fees or salary attached to the office. This subject is treated at length in a subsequent chapter.⁷

§ 205. **Right of officer *de facto* to act on behalf of public.**—But however well founded is the principle that a *de facto* officer cannot derive any personal advantage from his intrusion, the rule is very different when he asserts rights or claims benefits as a public officer, not for himself, but for the public and third parties. Despite his defective title, he is as much the agent or trustee of the public, while acting on its behalf, as if he were an officer *de jure*, and hence the law invests him with all the rights and powers which it deems essential for the protection of public interests. The policy of the law is that the functions of an office shall not cease or be suspended because of a doubt about the title of the incumbent, and in furtherance of such policy it acknowledges the apparent right of the officer, until he is ousted therefrom by proper proceedings. Until then, he is entitled to hold the office and to act on behalf of the public as if he were an officer *de jure*.⁸ Thus, churchwardens *de facto* may convene a vestry for laying a church-rate, and a rate laid at such a vestry is valid.⁹ They may also complain of non-pay-

E. 155; *Justices vs Clark* (1824), 1 T. B. Mon. (Ky.) 82.

⁷See sec. 237.

⁸*Conover's Case* (1857), 5 Abb. Pr. (N. Y.) 73; *Belfast vs Morrill* (1876), 65 Me. 580; *Hull vs Superior Ct.* (1883), 63 Cal. 174; *Satterlee vs San Francisco* (1863), 23 Cal. 315; *Kingsbury vs Ledyard*

(1841), 2 W. & S. (Pa.) 37; *People vs Lieb* (1877), 85 Ill. 484; *State vs Fahey* (1903, Md.), 70 A. 218. As to the validity of acts performed by officers *de facto*, see post, sec. 301, et seq.

⁹*R. vs St. Clement's* (1840), 12 Ad. & El. 177.

ment of a rate,¹⁰ so as to give jurisdiction to justices of the peace.¹¹

So in a proceeding by a road supervisor to recover a penalty against a person for obstructing a road, the defendant cannot defeat the action by showing that the supervisor is only an officer de facto.¹² By the Court: "The suit having for its object the recovery of a penalty imposed by a public statute, plainly concerned the public, who, alone, were interested. He must, therefore, so far as he acted in bringing this suit, be held a supervisor de facto. It follows that a recovery, in this instance, cannot be legally resisted on the ground that his title to the office is defective." So the power of a de facto Mayor of a city (who acts under color of a legal appointment), to represent the city in a legal proceeding, cannot be called in question collaterally.¹³ So it was held that to enable the commissioner of Public Charities of the City of New York to maintain an action upon an undertaking in the nature of a bail, it is sufficient that he is proven to be a de facto officer; it is not necessary that he is shown to hold the office de jure.¹⁴

So a de facto board of education may order the payment of school accounts, and if the township collector refuses to honor the warrants of such board, he will be compelled to do so by mandamus.¹⁵ So upon the principle that pending litigation to determine the title to an office, the officer de facto has a right to discharge the duties thereof,¹⁶ an auditor was

¹⁰Under stat. 53 G. 3 c. 127, s. 7.

¹¹Idem. Also *Turner vs Baynes* (1795), 2 H. Bl. 559, 3 R. R. 506.

¹²*Creighton vs Piper* (1860), 14 Ind. 182.

¹³*Monroe vs Hoffman* (1877), 29 La. Ann. 651.

¹⁴*Tully vs Lewitz* (1906), 50 De Facto—19.

Misc. (N. Y.) 350, 98 N. Y. S. 829. See also *Jones vs Gibson* (1818), 1 N. H. 266.

¹⁵*Kimball vs Hendee* (1894), 57 N. J. L. 307, 30 A. 894.

¹⁶*Henderson vs Glynn* (1892), 2 Col. App. 303, 30 P. 265.

compelled to recognize the official character of a school trustee de facto, whose title was being litigated.¹⁷

§ 206. Injunction or prohibition not granted to prevent officers de facto from acting.—Upon the above principle, courts will not interfere by injunction or prohibition to restrain officers de facto from exercising the duties and functions of their office, while the title thereto is in dispute. “It may very well be, and indeed there is no doubt, that a man, being a public officer, may be restrained in a proper case from doing a particular act of an official character, but it by no means follows that a public office may be restrained from dispensing its benefits to the public. That is a very different matter. The practical utility or benefit to the public of an office cannot be questioned before a court. The legislature, by creating it, have settled that question, and from that decision courts of justice entertain no appeal. The office itself is not only an emanation from sovereignty, but it represents, and in a measure embraces the principle of sovereignty itself. Courts, therefore, will not undertake to restrain the action or operation of it, which they would in effect do if they should restrain generally the incumbent, he, of necessity, being for the time, the only person through whom the public can have the benefit of the functions of the office.”¹⁸

¹⁷Leach vs Cassidy (1864), 23 Ind. 449.

¹⁸Peabody, J., in *People vs Draper* (1857), 24 Barb. (N. Y.) 265, 14 How. Pr. 233, 4 Abb. Pr. 333. Also *People vs Farley* (1884), 1 How. Pr. (N. S.) (N. Y.) 71; *Tappan vs Gray* (1843), 7 Hill (N. Y.) 259, affirming s. c. (1842), 9 Paige, 507, reversing (1841), s. c. 3 Edw. Ch. 450; *Hartt vs Harvey* (1860), 32 Barb. (N. Y.) 55,

19 How. Pr. 245, 13 Abb. Pr. 332; *Breslin vs Quinn* (1888), 2 N. Y. S. 577; *Patterson vs Hubbs* (1871), 65 N. C. 119; *Campbell vs Wolfenden* (1876), 74 N. C. 103; *McAllen vs Rhodes* (1886), 65 Tex. 348; *Voisin vs Leche* (1871), 23 La. Ann. 25; *Terry vs Stauffer* (1865), 17 La. Ann. 306; *Harding vs Eichinger* (1898), 57 Ohio St. 371, 49 N. E. 306; *Landes vs Walls* (1903), 160 Ind. 216. 63

Though the above language was used upon an application for an injunction, the same principle evidently applies where prohibition is sought. In fact, in *State vs Allen*,¹⁹ the court observed that it had met with no case, ancient or modern, where the Court of King's Bench in England had issued a writ of prohibition, pending a dispute between competitors for a public office, to prohibit those, who were de facto in possession of the office, from exercising the functions thereof.

But apart from the public necessity of having always some one in possession of the office to exercise the same, there is a further reason why courts of law or equity will not interfere by prohibition or injunction with officers de facto. It is that they could not grant the relief sought without determining the question of title to the office, and this, as we amply explain elsewhere, can be effected only by proceedings in the nature of quo warranto. For this express reason, courts have sometimes refused to restrain by injunction the payment of the official salary to the de facto incumbent, pending the contest of his title.²⁰

§ 207. Officers de facto protected by injunction.—On the other hand, courts of equity will sometimes protect by injunction officers de facto, and prevent them from being disturbed or molested in the exercise of their official duties, so long as their title is not adversely determined. Thus, in

N. E. 679; *State vs Durkee* (1873), 12 Kan. 308; *Cochran vs McCleary* (1867), 22 Iowa, 75; *State vs Alexander* (1899), 107 Iowa, 177, 77 N. W. 841; *Hagner vs Heyberger* (1844), 7 W. & S. (Pa.) 104, 42 Am. Dec. 220; *State vs Herreid* (1897), 10 S. D. 16, 71 S. W. 319; *Chaplin vs Woodstock School Bd.* (1889), 16 O. R. 728; *Beebe vs Robinson* (1875), 52 Ala. 66, over-

ruling (1874), 50 Ala. 522. See also sec. 446.

¹⁹ (1841), 2 Ired. L. (N. C.) 183.

²⁰ *Lawrence vs Leidigh* (1897), 58 Kan. 676, 50 P. 889; also cases quoted under sec. 446. Compare also *Keating vs Fitch* (1895), 14 Misc. (N. Y.) 128, 35 N. Y. S. 641. But see contra, *George vs Tucker* (1875), 27 La. Ann. 67. See also post, sec. 228.

Brady vs Sweetland,²¹ the office of school-district treasurer was in dispute between two persons, one of whom was in possession and the other not, but both claimed to be legally entitled to the office. The claimant not in possession commenced an action of quo warranto against the other to obtain possession of the office. Nevertheless the clerk of the school-district, and the disputant in office, who was really treasurer de facto, if not treasurer de jure, hired a school teacher. The director and the other claimant hired another teacher. These three persons last mentioned took possession of the district school-house and prevented the other three from occupying, using or controlling the same. Under those circumstances, it was held that an injunction would lie in favor of the clerk and the treasurer de facto to restrain the director and the other two persons acting with him, from further interfering during the pendency of the action of quo warranto with the right of said clerk and treasurer de facto (they being a majority of the school-district board, and acting for the board), to take charge of and use and control said school house.

So in another case, where a de facto incumbent, apprehending disturbance in the enjoyment of his office, applied to the court for an injunction to prevent a claimant from interfering with his possession, it was held that he was rightly entitled to the remedy asked.²² The court observed that, while proceedings by injunction cannot be used as a means of determining disputed title, yet they may properly be used to protect the possession of officers de facto against the interference of claimants whose title is disputed, until the latter shall have established their title by the proper judicial proceeding provided by law.²³ Undoubtedly the same protec-

²¹ (1874), 13 Kan. 41.

²² *Guilotte vs Poincy* (1889), 41 La. Ann. 333, 6 So. 507, 5 L.R.A. 403.

²³ Also *Goldman vs Gillespie* (1891), 43 La. Ann. 83, 8 So. 880; *Blain vs Chippewa* (1906), 145 Mich. 59, 108 N. W. 440; *Elliott*

tion would be granted to a de facto officer, under like circumstances, by the English and Canadian courts.²⁴

§ 208. **Right to recover property of office.**—The right to exercise an office, involving, as it must necessarily, the right to the means requisite to such exercise, it is manifest that an officer de facto is entitled to recover the insignia, books, records and all other property pertaining to the office, and which are necessary for a proper discharge of the duties thereof.²⁵ Thus, where a person, who had been appointed municipal treasurer though ineligible, took possession of the office and entered upon its duties, it was held that notwithstanding the unlawfulness of his election, he, as officer de facto, could compel by mandamus his predecessor to deliver to him the books and papers of the office.²⁶ “If by any disregard of the law,” said the Court, “accidental or otherwise, a person has been placed in office, who cannot by law hold it, things must take their due course—the illegality must be ascertained and pronounced upon in a proper proceeding instituted to try the question; and in the meantime, the person whom the District Council has actually elected treasurer, and who is treasurer for other purposes, must be treasurer also

vs Burke (1902), 113 Ky. 479, 68 S. W. 445, 24 Ky. Law R. 292; Scott vs Sheehan (1905), 145 Cal. 691, 79 P. 353; Reemilin vs Mosby (1890), 47 Ohio St. 570, 26 N. E. 717; State vs Superior Ct. (1897), 17 Wash. 12, 48 P. 741, 61 Am. St. R. 893; Rhodes vs Driver (1901), 69 Ark. 606, 65 S. W. 106; Seneca Nation of Indians vs Jameson (1909), 114 N. Y. S. 401. See also sec. 446.

²⁴Aslatt vs Corp. of Southampton (1880), L. R. 16 Ch. D. 143, 43 L. T. 464, 45 J. P. 111, 29 W.

R. 117; Mearns vs Petrolia (1880), 28 Gr. (Ont.) 98; Smith vs Peterstville (1881), 28 Gr. (Ont.) 599. Mandamus sometimes also lies to protect de facto officers from interference: Grondin vs Logan (1891), 88 Mich. 247, 50 N. W. 130. ²⁵Hull vs Superior Court (1883), 63 Cal. 174; Desmond vs McCarthy (1864), 17 Iowa, 525; Ward vs Cook (1898), 78 Ill. App. 111.

²⁶R. vs Smith (1848), 4 U. C. Q. B. 322.

so far as the custody of the books and documents and moneys is concerned, which are required to be in the office of the treasurer.”

So where one, claiming to be the lawful county treasurer, wrongfully entered the office of his opponent, who was de facto in possession of the treasurership and carried off the tax duplicate, leaving a receipt therefor, it was held that the de facto treasurer had a right to compel the other claimant to return the tax duplicate to him, and that mandamus was the proper remedy.²⁷

Likewise, on analogous principle, it was held that where a county clerk delivers the assessor's book and blanks of a town to one who is at least an assessor de facto, he has discharged his duty, and cannot be compelled to deliver the same to another person claiming the same office. In proceedings by mandamus to compel him to make such delivery, the only question is as to the fact of the appointment of the person who has received the book, and not as to the rightfulness of it.²⁸

§ 209. **Same subject.**—But an officer de facto cannot retain an office and the records thereof by virtue of his possession only, as against one who has a superior title to the same, though the contrary seemingly was held in a New York case.²⁹ Thus, in *State vs Johnson*,³⁰ which was a petition for a mandamus to compel the surrender of the office, and books and papers thereof, to the claimant, the Court said:

²⁷*Runion vs Latimer* (1874), 6 Rich. (S. C.) 126.

²⁸*People vs Lieb* (1877), 85 Ill. 484.

²⁹*Conover's Case* (1857), 5 Abb. Pr. (N. Y.) 73; but see criticism of this decision in *People vs Allen*

(1884), 42 Barb. (N. Y.) 203; *Devlin's Case* (1857), 5 Abb. Pr. (N. Y.) 281; *People vs Peabody* (1858), 6 Abb. Pr. (N. Y.) 228.

³⁰(1895), 35 Fla. 2, 16 So. 786, 17 So. 650, 31 L.R.A. 357.

"We see no foundation in reason for the claim of the defendant, that the writ does not lie against him because he is an officer de facto. We do not think he can take advantage of a tenure of office which is *prima facie* wrongful, and stand upon the bare fact of such tenure when he is called upon to surrender the property of the office to the officer de jure." Hence, whether the proceedings be by mandamus or by summary remedy under statute, the general rule is that the applicant is entitled to succeed as against the officer de facto, whenever he can show a clear *prima facie* title to the office, free from all reasonable doubt. "A *prima facie* title to a public office," says a learned judge, "confers a right to exercise its functions, and a right to the possession of the insignia and property thereof. On this *prima facie* title the court will compel a delivery of the insignia and property, that the functions and duties of the office may be exercised." ³¹

§ 210. Right to recover money pertaining to office.—
The courts are divided in opinion as to whether an officer de

³¹Per Brickell, C. J., Thompson vs Holt (1875), 52 Ala. 491. Also In re Whiting (1848), 2 Barb. (N. Y.) 513, 1 Edm. 498; People vs Allen (1884), 42 Barb. (N. Y.) 203; People vs Stevens (1843), 5 Hill (N. Y.) 616; In re Baker (1855), 11 How. Pr. (N. Y.) 418; Matter of Bradley (1894), 141 N. Y. 527, 36 N. E. 598, 57 St. R. 816, affirming 49 St. R. 530. Matter of Brenner (1902), 170 N. Y. 185, 63 N. E. 133; Crowell vs Lambert (1865), 10 Minn. 369; Atherton vs Sherwood (1870), 15 Miss. 221, 2 Am. R. 116; People vs Head (1861), 25 Ill. 325; Ewing vs Turner (1894), 2 Okla. 94, 35

P. 951; Cameron vs Parker (1894), 2 Okla. 277, 38 P. 14; Eldodt vs N. Mexico (1900), 10 N. Mex. 141, 61 P. 105; Ex p. Whipper (1890), 32 S. C. 5, 10 S. E. 579; Verner vs Seibels (1901), 60 S. C. 572, 39 S. E. 274; Curran vs Norris (1885), 58 Mich. 512, 25 N. W. 500; People vs Scannell (1857), 7 Cal. 432; Manor vs State (1898), 149 Ind. 310, 49 N. E. 160; State vs Saxon (1889), 25 Fla. 792, 6 So. 858; State vs Johnson (1892), 30 Fla. 433, 10 So. 686; State vs Johnson (1895), 35 Fla. 2, 16 So. 786, 17 So. 650, 31 L.R.A. 357. See also sec. 431.

facto can recover moneys pertaining to his office. There would seem to be, however, no valid reason why an officer in the possession and exercise of an office, and holding under color of right, should not be empowered to demand and enforce payment of any moneys which should be deposited in his hands as trustee for the public. We submit that it might even become, under special circumstances, his clear duty to collect such moneys, since without them he might not be in a position to perform the functions of his office satisfactorily, and public interests might suffer detriment. The only occasion when it might be proper to refuse payment to an officer de facto is, where he is such because of failure to give bond as payment to him might then entail loss to the public. In no other case, we apprehend, can a satisfactory reason be assigned to preclude him from recovering such moneys, inasmuch as in any proceedings instituted by him for the purpose, he is, we submit, not acting for his own benefit, but solely in the interest of the public.

Of this opinion, substantially at least, are several authorities. Thus, in *Turner vs Baynes*,³² it was held that churchwardens de facto may maintain an action against a former churchwarden, for money received by him for the use of the parish, though the validity of the election of the plaintiffs to the office be doubtful. So in *R. vs Smith*³³ mandamus was granted at the instance of a treasurer de facto to compel his predecessor to deliver to him the books and monies appertaining to the office. Again in another case, where two boards of school commissioners were in dispute as to which was the de jure board, the court held that it ought to aid the old board in obtaining the money which had been set apart for the maintenance of the public schools, so long as it was in

³² (1795), 2 H. Bl. 559, 3 R. R. 506. ³³ (1848), 4 U. C. Q. B. 322.

actual and visible possession of the office, in order that there should not be any stoppage of the public business.³⁴ The Court observed that "it could never be tolerated that the course of public education should be arrested, while a contest was waged to determine what individuals should administer the system. It is on considerations of this kind that the law recognizes a de facto officer, and not from any regard to his personal interests."

The same doctrine was maintained in Mississippi, where it was held that a de facto president of a school board could sue upon a note payable to him as such officer.³⁵ The decision was based upon the principle that "the acts of an officer de facto, done in regard to the public and to strangers" are valid. Likewise in Maine, it was held that a collector of taxes was legally bound to pay over to the treasurer de facto all taxes paid to him by the taxpayers.³⁶

§ 211. Same subject—Conflicting decisions.—But in New York a contrary doctrine has been upheld, upon the ground that when a person sets up a title to property, by virtue of an office and comes into court to recover it, he must show an unquestionable right. Thus, it was held that road commissioners were not entitled to mandamus to enforce payment to them of the moneys collected by a supervisor for the construction of a road, where one of their number was only an officer de facto by reason of his having accepted an incompatible office, and that such defective title was a justification to the supervisor in refusing payment.³⁷ The same

³⁴County Commissioners vs School Comm. (1893), 77 Md. 283, 26 A. 115.

³⁵Rhodes vs McDonald (1852), 24 Miss. 418.

³⁶Trescott vs Moan (1862), 50 Me. 347. To same effect, see

Moiles vs Watson (1886), 60 Mich. 415, 27 N. W. 553; Leach vs Cassidy (1864), 23 Ind. 449; Manor vs State (1898), 149 Ind. 310, 49 N. E. 160.

³⁷People vs Nostrand (1871), 46 N. Y. 375.

principle was laid down in a later case in the same State.³⁸ Like views were entertained by the Supreme Court of Illinois in *People vs Weber*,³⁹ where an application for a writ of mandamus to compel a county collector to pay over to a treasurer de facto taxes collected by him, was refused owing to the treasurer's want of title.

§ 212. Right of officer de facto to defeat quo warranto proceedings by perfecting his title.—Before leaving this chapter, we might call attention to a subject which, though more or less foreign to the topics herein treated, yet deserves special mention. It has reference to a de facto officer's supposed right to perfect his title after the commencement of quo warranto proceedings in order to defeat the same. This privilege was accorded a de facto officer by the Supreme Court of Pennsylvania in *DeTurk vs Commonwealth*,⁴⁰ though this is apparently contrary to the general rule, that quo warranto proceedings may be prosecuted to final judgment, notwithstanding that the usurpation has not continued until the trial.⁴¹

The facts of the case were as follows: One DeTurk was elected county commissioner, while he held the office of postmaster, the two offices being incompatible under the constitution of Pennsylvania. A writ of quo warranto was granted and served upon him, the object being to oust him from the office of county commissioner. By his answer he admitted his election as commissioner, and his holding the office of postmaster at the time he was elected, but averred as a de-

³⁸*Horton vs Parsons* (1885), 37 Hun (N. Y.) 42, affirming 1 How. Pr. (N. S.) 124.

³⁹(1877), 86 Ill. 283.

⁴⁰(1889), 129 Pa. St. 151, 18 A. 757.

⁴¹*R. vs Williams* (1757), 1 W.

Bl. 93; *R. vs Blizzard* (1866), L. R. 2 Q. B. 55, 7 B. & S. 922, 36 L. J. Q. B. 18, 15 L. T. 242, 15 W. R. 105; *People vs Loomis* (1832), 8 Wend. (N. Y.) 396, 24 Am. Dec. 33; *Hammer vs State* (1882), 44 N. J. L. 667.

fence that since the commencement of quo warranto proceedings he had resigned the office of postmaster. To this answer the relator demurred that it was insufficient in law, and prayed judgment. But the court held that it was sufficient, saying: "Did his formal resignation and complete surrender of it, before answer, place him in accord with the constitution, and perfect his title to the office of county commissioner? By accepting it, and entering upon its duties, he elected to hold it. This election was confirmed by his express resignation of the office of postmaster, and the appointment of his successor, before issue was joined. When he appeared, in obedience to the mandate of the writ, he was not holding an office of trust or profit under the United States. . . . We are of opinion that when issue was joined in this case the respondent had a valid title to the office of county commissioner, and that it was error to enter judgment of ouster."

CHAPTER 18.

RIGHT OF OFFICER DE FACTO TO PROTECTION OF CRIMINAL LAW IN EXECUTION OF HIS DUTIES.

§ 213. General rule.

214. Resisting officer de facto.

215. Killing de facto officer.

216. De facto officer killing person resisting him.

§ 217. Persons assisting de facto officers protected.

218. Escaping from officer de facto.

§ 213. **General rule.**—The criminal law, according to the better opinion, affords an officer de facto, while engaged in the execution of his duties, the same protection from assault, obstruction or interference, as if his title were undisputed. At first sight, this may seem rather inconsistent with the principle that whenever an officer prosecutes or defends in any action or proceeding, and asserts personal rights as a public officer, it is not sufficient that he be merely an officer de facto, but he must show that he is an officer de jure. It must be pointed out, however, that in criminal prosecutions, unlike in civil actions, the interests of the public only are really at stake, and not those of the officer himself, who merely occupies the position of a third party. This distinction is clearly drawn in *People vs Hopson*,¹ which was a prosecution for assaulting and beating a constable named Lascells. “The next question,” says Bronson, C. J., “is on the offer to show that Lascells had not taken the oath of office, or given security, and so was not a legal officer. The evidence would be proper if Lascells, instead of the people, was the party com-

¹(1845), 1 Denio (N. Y.) 574.

plaining of an injury. If he were suing to recover damages for the assault, it would probably be a good answer to the action that he was not a legal officer, but a wrongdoer, who might be resisted. . . . Now here, although Lascells is a witness, he is not a party; nor is this a proceeding for his benefit. The people are prosecuting for a breach of the public peace; and it is enough that Lascells was an officer de facto, having color of lawful authority." This case has generally been quoted approvingly by the courts,² but has also sometimes been adversely criticized.³ We submit, however, that the distinction is a sound one, and is well grounded.

§ 214. **Resisting officer de facto.**—Following the above principle, as clearly expressed and applied in the above New York case, an officer de facto entrusted with the execution of a warrant or other court process is entitled to the same protection in the eye of the criminal law, as an officer de jure. Thus, in *Andrews vs State*,⁴ where resistance to an officer de facto was charged, the court said: "This decision is in harmony with the principle, that a third person is, according to the better opinion, indictable for resisting one who is merely an officer de facto, or one who has the reputation of being a lawful officer, and yet is not a good officer in point of law."

So where, under an indictment for resisting the execution of process by a constable, it was shown that the constable was exercising the duties of that office under color of an election, and that the process in his hands was such as it is the right and duty of constables to execute, the defend-

²*State vs Dierberger* (1886), 90 Mo. 369, 2 S. W. 286, s. c. (1888), 96 Mo. 666; 10 S. W. 168, 9 Am. St. R. 380; *R. vs Gibson* (1896), 29 N. S. 4.

³*Creighton vs Commonwealth* (1885), 83 Ky. 142, 4 Am. St. R. 143.

⁴(1885), 78 Ala. 483.

ant was not permitted to prove that, by reason of taint in his blood, the constable was constitutionally incapacitated to hold any civil office.⁵ So, though a minor is not eligible to the office of constable, nevertheless when he is specially appointed by a justice of the peace to execute a particular process, he is an officer de facto, and a person indicted for resisting him, cannot question the validity of his appointment.⁶ The same principle applies where the officer has not been appointed by proper authority,⁷ or has failed to qualify as required by law,⁸ or is holding over.⁹

But in order to succeed in a prosecution of this kind, the facts must clearly establish that the person resisted was at least an officer de facto. Therefore, where a deputy sheriff, on being appointed, refused to take the oath, and cut the same off from his appointment, and it was not shown that he had exercised the duties of the office, or had the reputation in the community of being a deputy sheriff, it was held that he was not an officer de facto, and that a person could not be convicted of an assault for resistance to him.¹⁰

§ 215. Killing de facto officer.—It follows as a corollary from the foregoing proposition, that if one kills an officer de facto, while resisting or obstructing him in the discharge of his official duties, he is guilty of murder. Hence, upon an indictment of this nature, it is not necessary for the prosecution to prove that the officer killed was duly appointed or elected, or had duly qualified. It is sufficient to prove that

⁵Heath vs State (1860), 36 Ala. 273.

⁶Floyd vs State (1885), 79 Ala. 39.

⁷R. vs Gibson (1896), 29 N. S. 4.

⁸Brown vs State (1901), 42 Tex. Crim. R. 417, 60 S. W. 548, 96

Am. St. R. 806; People vs Hopson (1845), 1 Denio (N. Y.) 574.

⁹Garrett vs State (1892), 89 Ga. 446, 15 S. E. 533.

¹⁰Brown vs State (1902), 43 Tex. Crim. R. 411, 66 S. W. 547.

he was an officer de facto. Thus, in *R. vs Gordon*,¹¹ the indictment was for the murder of a constable in the execution of his office, and the prisoners being found guilty, the judgment was respited and a case was reserved for the opinion of the judges on two points. The first point, and the only one which interests us here, was: "Whether, as the indictment alleged that Linnel, the deceased, was the constable of the parish, it was not incumbent, on the prosecutors to prove that fact, by showing that he had been duly elected into the office?" From the evidence at the trial, it appeared that Linnel had been generally known as constable of the parish, and that he had properly given notice of his official character and of his intentions, at the time of the attempted arrest. Under these circumstances, the judges (twelve in number) were of the unanimous opinion that the evidence before the court was sufficient, although there was no proof of the constable's appointment, or of his having been sworn into the office.

So where a person, who was exercising the office of city marshal, was fatally wounded by two other persons while attempting to arrest them, for an offence, and one of them, being tried alone, was found guilty of murder, the court upon a review of objections raised to the conviction, in part said: "The official character of Page at that time became material, and it is well settled that record evidence of official character in such cases is not necessary, but it may be shown by evidence that he was so acting and was such officer de facto."¹²

In the above cases, as is evident, the courts relied on the principle of presumptive evidence to found their decisions. But assuredly their conclusions could not have been otherwise, even had it been shown that defects existed in the offi-

¹¹ (1789), 1 Leach C. C. 515, 1 East, P. C. 352.

¹² *State vs Zeibart* (1874), 40 Iowa, 169.

cers' title, unless such defects were of a character to deprive the officers of a de facto status.¹³

§ 216. De facto officer killing person resisting him.—

On the other hand, an officer de facto who kills a person resisting or obstructing him, is entitled to set up the same defence as a de jure officer. Thus, in *State vs Dierberger*,¹⁴ the defendant, who was charged with murder, had been appointed a deputy constable but had not taken the oath or filed his appointment with the city registrar. His defense was that the homicide was justifiable, having been committed without resort to unnecessary force while attempting to arrest the deceased for a breach of the peace. It was held that he should be treated as an officer, he being de facto such, and that his trial should proceed on that theory.

§ 217. Persons assisting de facto officers protected.—

Persons assisting de facto officers are entitled to the same protection as the officers themselves; and it is therefore murder to kill such persons while so engaged. Thus, in *Weatherford vs State*,¹⁵ on a trial for murder, the testimony showed that one Edwards had been acting under written appointment from the sheriff as deputy for some four or five months (which was known to defendant), and that he had recorded his oath of office but not his appointment. It was further shown that Edwards, seeing the defendant making a negro stand at the muzzle of his six-shooter, summoned the person killed to assist him arresting the defendant, which order he obeyed, whereupon defendant shot the deceased and attempted to shoot the officer. One of the questions involved the valid-

¹³See *Creighton vs Commonwealth* (1885), 83 Ky. 142, 4 Am. St. R. 143.

¹⁴(1886), 90 Mo. 369, 2 S. W.

286, s. c. (1888), 96 Mo. 666, 10 S. W. 168.

¹⁵(1893), 31 Tex. Crim. R. 530,

21 S. W. 251.

ity of Edwards' appointment as deputy sheriff, and the trial court charged the jury that the arrest or attempted arrest was illegal. But it was held that the charge was erroneous; and that the court should have charged the jury, that if Edwards was known and recognized in the community as deputy sheriff, and deceased was summoned by him to assist, and in good faith attempted to assist in the arrest of the defendant, deceased was justifiable in making the arrest; and if defendant shot him while so acting in an orderly manner, it could not be less than murder. It was remarked that "it surely can not be maintained that citizens who are summoned to assist known and recognized officers in the discharge of their duties act at their own peril in case of the defective or nonrecord of the deputation of the officer."

§ 218. **Escaping from officer de facto.**— A person may be indicted for escaping or attempting to escape from the custody of a de facto officer the same as if such officer had a valid title. "The resisting of an officer de facto," says a learned judge, "or escaping from his custody, while under arrest, was as much a violation of law as if the officer were one de jure. . . . If every culprit were permitted to collaterally assail the personal eligibility of officers of the law, while in their custody, by attempts to resist or escape from them, a most dangerous obstruction would frequently be raised to the orderly administration of justice." ¹⁶

¹⁶Somerville, J., in *Floyd vs State* (1885), 79 Ala. 39.
De Facto—20.

CHAPTER 19.

RESPECTIVE RIGHTS OF OFFICERS DE JURE AND OFFICERS DE FACTO IN REGARD TO SALARY AND EMOLUMENTS OF OFFICE.

- § 219. De jure officer generally entitled to emoluments of office.
- 220. De jure officer's right not dependent upon his performance of official duties.
- 221. Conflicting doctrine.
- 222. Extent of recovery by de jure officer from public body.
- 223. De jure officer's right to recover not affected by any distinction between fees and salary.
- 224. Rule protecting public bodies from paying a second time salary already paid to a de facto officer.
- 225. Same subject.
- 226. Foregoing rule not followed by certain courts.
- 227. Same subject.
- 228. Injunction sometimes granted to restrain payment of salary to de facto incumbent pending contest of title.
- § 229. De jure officer may recover salary from de facto officer.
- 230. Same subject—English rule.
- 231. Amount recoverable from the de facto officer.
- 232. Same subject—Assumpsit or tort.
- 233. Right to salary pending determination of title to office.
- 234. Good faith of de facto officer of no avail to him.
- 235. Clear title must be shown by officer de jure to recover salary from State or intruder.
- 236. De facto officer cannot recover salary.
- 237. Conflicting doctrine as to right of officer de facto to recover salary.
- 238. Doctrine that officer de facto entitled to compensation when there is no de jure officer.
- 239. Same subject.
- 240. Salary paid to a de facto officer cannot presumably be recovered back.

§ 219. De jure officer generally entitled to emoluments of office.—The general rule is that the salary, fees

and emoluments of an office are incident to the true title, and not to the mere usurpation or colorable possession, of the office.¹ "Possession under color of right may well serve as a shield for defence, but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office."² "It is the settled doctrine in this state," says the Court of Appeals of New York, "that the right to the salary and emoluments of a public office, attach to the true and not the mere colorable title, and in an action brought by a person claiming to be a public officer for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation."³ "The case of a de

¹*Arris v. Stukely* (1673), 2 Mod. 260; *Crosbie vs Hurley* (1833), 1 Al. & Nap. (Ir.) 431; *Lawlor vs Alton* (1873), 8 Ir. R. C. L. 160; *Pack vs U. S.* (1906), 41 Ct. Cl. 414; *Fitzsimmons vs Brooklyn* (1886), 102 N. Y. 536, 2 St. R. 475; *Nichols vs McLean* (1886), 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; *McManus vs Brooklyn* (1889), 5 N. Y. Supp. 424; *State vs Carr* (1891), 129 Ind. 44, 28 N. E. 88, 28 Am. St. R. 163, 13 L.R.A. 177; *Glascocock vs Lyons* (1863), 20 Ind. 1, 83 Am. Dec. 299; *Mayfield vs Moore* (1870), 53 Ill. 428, 5 Am. Rep. 52; *Kreitz vs Behrensmeyer* (1894), 149 Ill. 496, 36 N. E. 983, 24 L.R.A. 54; affirming 52 Ill. App. 291; *Dorsey vs Smyth* (1865), 28 Cal. 21; *Stratton vs Oulton* (1865), 28 Cal. 44; *Carroll vs Sienbenthaler* (1869), 37 Cal. 193; *Chubbuck vs Wilson* (1907), 151

Cal. 162, 90 P. 524; *People vs Miller* (1872), 24 Mich. 458, 9 Am. Rep. 131; *Sheridan vs St. Louis* (1904), 183 Mo. 25, 81 S. W. 1082; *Garfield Tp. vs Crocker* (1901), 63 Kan. 272, 65 P. 273; *Whitaker vs Topeka* (1900), 9 Kan. App. 213, 59 P. 668; *Meagher vs Storey* (1869), 5 Nev. 244; *Memphis vs Woodward* (1873), 12 Heisk. (Tenn.) 499, 27 Am. R. 750; *Beard vs Decatur* (1885), 64 Tex. 7, 7 Am. & Eng. Corp. Cas. 145; *Philadelphia vs Rink* (1886), 1 Sad. (Pa.) 390, 2 A. 505, 2 Cent. R. 289; *Baxter vs Brooks* (1874), 29 Ark. 173; *Tanner vs Edwards* (1906), 31 Utah, 80, 86 P. 765; *McFarlane vs Damon*, 18 Hawaii, 19.

²*People vs Tieman* (1859), 30 Barb. (N. Y.) 193, 8 Abb. Pr. 359.

³*Dolan vs New York* (1877), 68 N. Y. 274, 8 Hun, 440, 23 Am. Rep. 168.

facto officer is not unlike that of one in possession of land without right or title. He may in many things lawfully act as the owner of the realty, but he must account to the person holding the title for the rents and profits.”⁴

§ 220. **De jure officer's right not dependent upon his performance of official duties.**—According to the above rule, and generally the authorities supporting it, all that is required to entitle an officer de jure to recover the official compensation is, that he be always ready and willing to perform the services, but no actual performance is essential; for it is held that the circumstance that he is unlawfully kept out of possession should not work to his prejudice. “The salary,” says the Supreme Court of Michigan, “belongs to the person who is rightfully and legally entitled to the office, and if he is ready and willing to perform the duties thereof, he cannot be deprived of the salary by an intruder when it has not been already paid.”⁵ It has been suggested that the officer de jure may treat the services rendered by the officer de facto as having been rendered for him, and recover upon that assumption.⁶

It does not follow, however, that a de jure officer out of possession may remain passive, and devote his time to earning money from other sources, and then sue for the accumulated salary. He is bound to take active steps to recover

⁴Beck, J., in *McCue vs Wapello County* (1881), 56 Iowa, 698, 10 N. W. 248, 41 Am. Rep. 134.

⁵*Comstock vs Grand Rapids* (1879), 40 Mich. 397. See also *State vs Carr* (1891), 129 Ind. 44, 28 N. E. 88, 28 Am. St. R. 163, 13 L.R.A. 177; *Rasmussen vs Com'rs of Carbon County* (1899), 8 Wyo. 277, 56 P. 1098; *Sutcliffe*

vs New York (1909), 117 N. Y. S. 813, and other cases quoted before.

⁶*Dolan vs New York* (1877), 68 N. Y. 274, 8 Hun, 440, 23 Am. Rep. 168; *McVeany vs New York* (1880), 80 N. Y. 185, 36 Am. Rep. 600, reversing 1 Hun. 35; *Beard vs Decatur* (1885), 64 Tex. 7, 7 Am. & Eng. Corp. Cas 145.

possession of the office, which is unlawfully withheld from him. For instance, an officer illegally removed must assert his right to the office and his salary promptly, to the end that upon his restoration to the office, if that should follow a favorable decision, he may discharge the duties for which he is to be paid. Otherwise his acquiescence and laches may debar him from making any claim.⁷ Moreover, it is to be noted that in dealing with the principle laid down here, we leave out of consideration the effect of the bona fide payment of salary by a public body to a de facto officer. This subject will be discussed at a later period.

§ 221. **Conflicting doctrine.**—The above rule, however, has not been universally approved by the authorities. Thus, in *Farrell vs Bridgeport*,⁸ it was declared that “as a rule, so far forth as public officers are concerned, those only are entitled to the salary who both obtain and exercise their offices. Payment follows the actual discharge of duty, and not the formal offer to do it, no matter how honestly or persistently made.”⁹ Following this principle, it has been held that a suspended officer cannot recover the salary during the period of his suspension, even if the suspension was unauthorized.¹⁰

The same doctrine is sustained by some New York cases. Thus, in *Smith vs New York*,¹¹ it was held that no claim could be brought for salary or perquisites against a municipal corporation, covering any period when the claimant was not actually in office, and the court so held on the ground, that

⁷*Gorley vs Louisville* (1900), 108 Ky. 789, 55 S. W. 886; *Hagan vs Brooklyn* (1891), 126 N. Y. 643, 27 N. E. 265, affirming (1889), 5 N. Y. S. 425; *Byrnes vs St. Paul* (1899), 78 Minn. 205, 80 N. W. 959, 79 Am. St. R. 384.

⁸(1877), 45 Conn. 191.

⁹See also *Jump vs Spence* (1867), 28 Md. 1.

¹⁰*Steubenville vs Culp* (1882), 38 Ohio St. 18, 43 Am. R. 417; *Shannon vs Portsmouth* (1874), 54 N. H. 183.

¹¹(1868), 37 N. Y. 518, affirming (1862), 1 Daly, 219.

salary and perquisites are the reward of express or implied services, and, therefore, cannot belong to one who could not lawfully perform those services, although wrongfully hindered from occupying a position in which he might render them.¹² Judge Cooley, however, commenting on this decision and that of *Conner vs New York*,¹² proceeded to remark that "the general language employed in these cases, that the right to fees grows out of the rendition of the services, is on all logical rules to be understood with reference to the particular facts then before the court, and cannot be applied universally."¹³

It may also be observed that the principles laid down in *McVeany vs New York*,¹² are apparently rather inconsistent with one another. The court first declares, that it is "to be deduced from the cases in this state that, as a general principle, the rendition of official service must precede a right to demand and recover the compensation given by law to the officer;" but then it goes on to say that, after the judicial determination of the title favorably to the rightful officer, any amount of compensation for services rendered, not paid to the de facto officer, is due and payable to the one adjudged to be officer de jure, and may be recovered by the latter of the municipality. But if the rendition of services must precede the right to recover salary, in what better position is an officer de jure because the salary has not been paid to the de facto officer? This is an illogical distinction. It would seem, therefore, that this whole theory as to the neces-

¹²Also *Conner vs New York* (1851), 5 N. Y. 285, 2 Sand. 355; *McVeany vs New York* (1880), 80 N. Y. 185, 36 Am. R. 600; *Wood vs New York* (1878), 12 J. & S. (N. Y. Sup. Ct.) 321; *Deane vs Sup'rs of Greene County* (1884), 66 How. Pr. (N. Y.) 461.

¹³Judge Cooley's dissenting opinion in *Wayne County vs Benoit* (1870), 20 Mich. 176, 4 Am. R. 382, where, however, Campbell, C. J., of the majority of the court, cited with approval the two New York cases in question.

sity of service, is merely a pretext put forth to exonerate a public body from paying a salary twice over. Hence, there is no doubt that the true New York doctrine, and that which is supported by the latest current of authority,¹⁴ is accurately expressed in *McManus vs Brooklyn*,¹⁵ where it is said: "The rule in this state is that an officer who is illegally kept out of his office cannot recover the salary of the state or municipality until there has been a judicial determination establishing his right to the office, and then he is entitled to recover the salary during the time he was prevented from performing the service, unless the same has been paid to an officer de facto, performing the duties."

§ 222. **Extent of recovery by de jure officer from public body.**—Whenever the right of recovery is conceded to a de jure officer, he is entitled to recover the full amount of salary withheld from him by the public body, without any deduction for any amount he may have earned during the period he did not discharge the official duties. The relations existing between him and the State or municipality are not at all analogous to those between master and servant in the ordinary sense. In the latter case, the servant's "discharge without just cause is not a license for voluntary idleness at the expense of the master. If he can obtain other employment he is bound to do so, and, if he engages in other service, what he thus earns reduces his loss flowing from the broken contract. But this rule of damages has no application to the case of an officer suing for his salary, and for the obvious reason that there is no broken contract or damages for its breach where there is no contract. We have often

¹⁴*Nichols vs McLean* (1886), 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; *Dolan vs Mayor* (1877), 68 N. Y. 274, 23 Am. Rep. 168; *Fitzsimmons vs Brooklyn* (1886), 102 N. Y. 536, 2 St. R. 475.
¹⁵(1889), 5 N. Y. Supp. 424.

held that there is no contract between the officer and the state or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it.”¹⁶

§ 223. **De jure officer's right to recover not affected by any distinction between fees and salary.**—There is apparently no difference in principle, so far as concerns a de jure officer's right of recovery, between the case where the official compensation is paid by means of a fixed salary, payable at stated times, and where the sum is paid by fees depending upon the amount of work done. This was the opinion of the Court of Appeals of New York in *McVeany vs New York*,¹⁷ where it is said: “The learned counsel for the appellant, in the case in hand, sought to distinguish between cases, where the compensation was by fixed fees for the specific service rendered, and where it was by an annual salary, payable at recurring periods. We are not able to perceive such a distinction as will affect the applicability of the cases cited.”¹⁸

But the Court pointed out that if the compensation was by fees, a specific fee, payable to the officer for each particular official act done or service rendered for any private person, there could be no basis for an action against the corporate

¹⁶Per Curiam, in *Fitzsimmons vs Brooklyn* (1886), 102 N. Y. 536. 2 St. Rep. 475. Also *Andrews vs Portland* (1887), 79 Me. 484. 10 A. 458, 10 Am. St. Rep. 280; *United States vs Addison* (1867), 6 Wall. (U. S.) 291, 18 L. ed. 919. —See, however, what is said in sec. 220.—Rule is different where the position is not strictly an office, but more in the nature of an em-

ployment: *Sutcliffe vs New York* (1909), 117 N. Y. S. 813.

¹⁷(1880), 80 N. Y. 185, 36 Am. Rep. 600.

¹⁸Also *Glascock vs Lyons* (1863). 20 Ind. 1, 83 Am. Dec. 299; *Beard vs Decatur* (1885), 64 Tex. 7, 7 Am. & Eng. Corp. Cas. 145; *Kreitz vs Behrensmeyer* (1894), 149 Ill. 496, 36 N. E. 983, 24 L.R.A. 59.

body, for it could not be said that the service was rendered for it, or that it received the money from the private person for the use of the officer *de jure*. Therefore, to make any ground for an action against the municipality, the official emolument must have been so collected, if by fees, as to go to the municipal treasury, or be in terms payable therefrom. Then the difference would be only that by salary was a fixed and certain sum, and that by fees uncertain.

§ 224. Rule protecting public bodies from paying a second time salary already paid to a *de facto* officer.—A rigid adherence to the rule that the salary is incident to the true and not to the mere colorable title to the office, would evidently render illegal any payment of salary to a *de facto* officer, and afford no protection from liability for a subsequent payment of the same salary to the rightful officer. To obviate such inequitable consequences, the courts have generally recognized a limitation to the enforcement of the above rule, as between the *de jure* officer and the public body paying the compensation, and held that payment of salary to a *de facto* officer, while he is holding the office and discharging its duties, is a defence to an action brought by the *de jure* officer against the State, county or municipality to recover the same salary.¹⁹ Especially is this so where an officer *de*

¹⁹*People vs Howe* (1904), 177 N. Y. 499, 69 N. E. 1114, 66 L.R.A. 664; *McManus vs Brooklyn* (1889), 5 N. Y. S. 424; *Terhune vs New York* (1882), 88 N. Y. 247; *McVeany vs New York* (1880), 80 N. Y. 185, 36 Am. Rep. 600; *Stemmler vs New York* (1904), 179 N. Y. 473, 72 N. E. 581; *Demarest vs New York* (1895), 147 N. Y. 203, 41 N. E. 405, affirmed (1893), 74 Hun, 517,

26 N. Y. S. 585; *McAffee vs Russell* (1855), 29 Miss. 84; *Brown vs Tama County* (1904), 122 Iowa, 745, 98 N. W. 562; *Parker vs Dakota County* (1860), 4 Minn. 59; *Gorman vs Boise County* (1877), 1 Idaho, 655; *State vs Milne* (1893), 36 Neb. 301, 54 N. W. 521, 38 Am. St. R. 724, 19 L.R.A. 689; *Wayne County vs Benoit* (1870), 20 Mich. 176, 4 Am. R. 382; *State vs Babcock* (1904), 106 Mo. App.

jure sleeps upon his rights, and neglects to take charge of the office.²⁰

The reason of this limitation is expounded at length by the Court of Appeals of New York in *Dolan vs New York*.²¹ "If fiscal officers," says the court, "upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer de jure, they must act at the peril of being held accountable in case it turns out that the de facto officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer de jure, without inquiring whether another has the better right. Public policy accords with this view. Public offices are created in the interest and

72, 80 S. W. 45; *Michel vs New Orleans* (1880), 32 La. Ann. 1094; *Saline County vs Anderson* (1878), 20 Kan. 298, 27 Am. Rep. 171; *Whitaker vs Topeka* (1900), 9 Kan. App. 213, 59 P. 668; *Henderson vs Glynn* (1892), 2 Col. App. 303, 30 P. 265; *Bradley vs Georgetown* (1904), 26 Ky. Law R. 614, 82 S. W. 303; *Wagner vs Louisville* (Ky., 1909), 117 S. W. 283; *Chandler vs Hughes Co.* (1896), 9 S. Dak. 24, 67 N. W. 946; *Fuller vs Roberts County* (1896), 9 S. Dak. 216, 68 N. W. 308; *Shaw vs Pima County* (1888), 2 Ariz. 399, 18 P. 273; *Meehan vs*

Freeholders of Hudson County (1884), 46 N. J. L. 276, 50 Am. Rep. 421; *Samuels vs Harrington* (1906), 43 Wash. 603, 86 P. 1071; *Coughlin vs McElroy* (1902), 74 Conn. 397, 50 A. 1025, 92 Am. St. R. 224; *Nall vs Coulter* (1904), 117 Ky. 747, 78 S. W. 1110; *Stearns vs Sims* (Okla. 1909), 104 P. 44.

²⁰*Chandler vs Hughes County* (1896), 9 S. Dak. 24, 67 N. W. 946; *Rasmussen vs Com'rs of Carbon County* (1899), 8 Wyo. 277, 56 P. 1098.

²¹(1877), 68 N. Y. 274, 23 Am. Rep. 168.

for the benefit of the public; such, at least, is the theory upon which statutes creating them are enacted and justified. Public and individual rights are, to a great extent, protected and enforced through official agencies, and the State and individual citizens are interested in having official functions regularly and continuously discharged. The services of persons clothed with an official character are constantly needed. They are called upon to execute the process of the courts and to perform a great variety of acts affecting the public and individuals. It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the de facto officer, except at the peril of paying it a second time, if the title of the contestant should be subsequently established, it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions."

§ 225. **Same subject.**—In accordance with the foregoing principle, it is held that payment to a de facto officer will shield the public body from further liability, notwithstanding the fact that its officers may have known, at the time they paid the salary, that the question of title to office was in litigation.²² So the same protection will be afforded even if the

²²Com'rs of Saline County vs Anderson (1878), 20 Kan. 298, 27 Am. Rep. 171; Fuller vs Roberts County (1896), 9 S. Dak. 216, 68 N. W. 308; Scott vs Crump

(1895), 106 Mich. 288; 64 N. W. 1, 58 Am. St. R. 478; Chandler vs Hughes County (1896), 9 S. Dak. 24, 67 N. W. 946.

de facto officer is an insolvent.²³ And the Kansas courts have gone to the extent of holding that a claimant to a public office suing for its possession, is not entitled to an injunction restraining the payment to the incumbent of the fees and salary of the office pending the determination of the contest, although he alleges insolvency on the part of the incumbent.²⁴ Again, public bodies will be protected when their fiscal officers pay the salary to one adjudged to be lawfully entitled to the office by a competent tribunal, even if afterwards the judgment should be reversed by an appellate court.²⁵ But no protection is afforded where the salary is paid to a mere usurper,²⁶ or to one against whom a judgment of ouster has been pronounced.²⁷

§ 226. Foregoing rule not followed by certain courts.

—The soundness of the above rule is disputed by some courts and jurists. In a note to *Andrews vs Portland*,²⁸ the editor commenting on the cases quoted in the preceding section observes: "These decisions have been placed partly upon the ground that the officer de jure had no property rights in the office, and partly upon the ground that his right to the

²³*Com'rs of Saline County vs Anderson* (1878), 20 Kan. 298, 27 Am. Rep. 171; *Bradley vs Georgetown* (1904), 26 Ky. Law R. 614, 82 S. W. 303.

²⁴*Lawrence vs Leidigh* (1897), 58 Kan. 676, 50 P. 889; also cases quoted under sec. 446. But see *George vs Tucker* (1875), 27 La. Ann. 67; also post, sec. 228.

²⁵*People vs Brennan* (1865), 1 Abb. Pr. (N. S.) (N. Y.) 184.

²⁶*Warden vs Bayfield County* (1894), 87 Wis. 181, 58 N. W. 248; *Kempster vs Milwaukee* (1897), 97 Wis. 343, 72 N. W. 743; *Larsen*

vs St. Paul (1901), 83 Minn. 473, 86 N. W. 459.

²⁷*Scott vs Crump* (1895), 106 Mich. 288, 64 N. W. 1, 58 Am. St. R. 478; *M'Veany vs New York* (1880), 80 N. Y. 185, 36 Am. Rep. 600; *People vs Brennan* (1866), 30 How. Pr. (N. Y.), 417; *Fylpaa vs Brown County* (1895), 6 S. Dak. 634, 62 N. W. 962; *Wayne County vs Benoit* (1870), 20 Mich. 170, 4 Am. Rep. 382; *Michel vs New Orleans* (1880), 32 La. Ann. 1094.

²⁸(1887), 10 Am. St. R. p. 284.

salary or emoluments of his office was not dependent upon the office, but upon the actual performance of his services as a public official; and further, that while there was an officer de facto in actual possession of the office, the disbursing officers were not entitled to consider the question of who ought to be in such possession, nor to question the title in any other way than by a proceeding in quo warranto. It is believed that none of these grounds are well taken, and most courts which yet maintain the general rule have substantially admitted in subsequent cases that the grounds for it did not in fact exist. . . . If it is true, as must be admitted, that an officer de jure, though he performs none of the duties of the office, may maintain an action against the officer de facto for fees or salary actually collected by him, or against the city or county, for salary accruing during the incumbency of the officer de facto, but not in fact paid to him, then it must be that the officer de jure has some property rights in the emoluments of the office, and that these rights are not dependent upon his performance of its duties, but upon his title to the office, and it is difficult to understand how the wrongful payment of his salary to a person not entitled to receive it can, in any respect, impair his right to recover it, as though no payment whatever had been made."

§ 227. **Same subject.**—Acting upon these principles, it was held in California, in *Dorsey vs Smith*,²⁹ that the payment of the salary to one in possession of the office without title, will not prevent the one having the title from recovering the same. This case is adversely criticized by Campbell, C. J., in *Wayne County vs Bénéoit*,³⁰ where the learned Chief Justice says: "This authority is based entirely upon

²⁹ (1865), 28 Cal. 21.

³⁰ (1870), 20 Mich. 176, 4 Am. R. 382.

New York cases which are not law in the latter state, and which were made in disregard of the previous decision in *Conner's case*.³¹ It has no reasoning of its own and does not seem warranted by principle." However, *Dorsey vs Smith* was quoted with approval and followed in several other cases.³² But the California doctrine has recently been altered by statute, and now the payment of salary to one holding the certificate of election exonerates from further payment to the de jure officer.³³

In other States, however, the rule formerly in vogue in California is still maintained. Thus, in *Tanner vs Edwards*,³⁴ it was held that a State officer is entitled to his salary for a portion of the term of office for which he was appointed and commissioned, and for which he had duly qualified, though during such portion of the term he had not personally assumed charge of the office, and compensation for such time had been paid the de facto incumbent. The court remarked, that "if the disbursing officer of a State or municipality wrongfully pays the salary annexed to a public office to a de facto officer, he does so at his peril, he having no right to assume that such salary belongs to any one except the person who holds the legal title."

So in *Rasmussen vs Com'rs of Carbon County*³⁵ it is broadly stated that payment made by a county to a de facto officer, is no defense to an action brought by a de jure officer for the salary of an office to which he has been declared legally

³¹ N. Y. 285.

³² *Stratton vs Oulton* (1865), 28 Cal. 44; *People vs Potter* (1883), 63 Cal. 127; *Carroll vs Sienbenthaler* (1869), 37 Cal. 193.

³³ *Merkley vs Williams* (1906), 3 Cal. App. 268, 84 P. 1015; *Wilson vs Fisher* (1903), 140 Cal. 188, 73 P. 850; *Anderson vs Browning*

(1903), 140 Cal. 222, 73 P. 986.

See further as to scope of statute, *Bledsoe vs Colgan* (1902), 138 Cal. 34, 70 P. 924.

³⁴ (1906), 31 Utah, 80, 86 P. 765.

³⁵ (1899), 8 Wyo. 277, 56 P. 1098.

entitled from the commencement of the term.³⁶ But in the same case it is also held that where, after having been legally declared entitled to the office, and no opposition is made to his taking the office, the de jure officer neglects to qualify by giving the required bond within a reasonable time, although he may have taken the oath of office, he can not recover the salary of the office for the period of such neglect when the salary has been paid to the de facto officer who actually performed the duties of the office during such period.³⁷

§ 228. Injunction sometimes granted to restrain payment of salary to de facto incumbent pending contest of title.—It has been held that pending contest of title, an injunction may be obtained at the suit of one claiming the office de jure, to restrain the payment of the official fees or salary to a de facto incumbent.³⁸ The reason given by the court in that case was, that the State having instituted proceedings to oust the intruder from the office and to install the claimant therein, there was no good reason why the claimant should not have taken all necessary steps to pursue his rights to the fees of the office to which he had the legal title. The State was interested in seeing that no one should intrude into a public office, but it had no interest in the fees of the office. Though this doctrine is undoubtedly opposed to the preponderance of authority,^{38a} yet in New York it was held

³⁶See likewise, *Blydenburgh vs Com'rs Carbon County* (1899), 8 Wyo. 303, 56 P. 1106; *Kendall vs Raybould* (1896), 13 Utah, 226, 44 P. 1034; *Memphis vs Woodward* (1873), 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *Andrews vs Portland* (1887), 79 Me. 484, 10 Am. St. R. 280, 10 A. 458; *State vs*

Carr (1891), 129 Ind. 44, 28 N. E. 88, 28 Am. St. R. 163, 13 L.R.A. 177.

³⁷*Rasmussen vs Com'rs of Carbon County* (1899), 8 Wyo. 277, 56 P. 1098.

³⁸*George vs Tucker* (1875), 27 La. Ann. 67.

^{38a}*Lawrence vs Leidigh* (1897),

that even a corporation may obtain an injunction to restrain its disbursing officers from paying salary under similar circumstances.³⁹

In some States, also, there are statutory provisions forbidding the payment of salary to public officers while their title is being litigated.⁴⁰

But, notwithstanding such legislation, it has been held that a de facto officer would be entitled to receive the necessary expenses incident to the discharge of the duties of the office, that is, the expenses incurred in earning the fees and emoluments received, as those would belong to him even as against the officer de jure.⁴¹

§ 229. De jure officer may recover salary from de facto officer.—Again although, as we have seen, the great preponderance of authority holds that a de jure officer cannot recover from a public body salary bona fide paid to a de facto officer, this does not impair his right to recover the same from the person who unlawfully received it. As between the officer de jure and the officer de facto, the latter is a mere intruder who is responsible to the former for the damages resulting to him from the intrusion.⁴² The Su-

58 Kan. 676, 50 P. 889, and cases cited under secs. 225, 446. See also and compare *Keating vs Fitch* (1895), 14 Misc. (N. Y.) 128, 35 N. Y. S. 641; *Henderson vs Glynn* (1892), 2 Col. App. 303, 30 P. 265.

³⁹*New York vs Flagg* (1858), 6 Abb. Pr. (N. Y.) 296.

⁴⁰*Idaho Rev. Stat.* (1887), § 380; *Cal. Polit. Code* (1887) § 936, but see new amendment of 1891.

⁴¹*Havird vs Boise County Com'rs* (1890), 2 Idaho, 687, s. c. sub nom. In re Havird, 24 P. 542.

⁴²*Nichols vs McLean* (1886), 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; *Terhune vs New York* (1882), 88 N. Y. 247; *Dolan vs New York* (1877), 68 N. Y. 274, 23 Am. Rep. 168; *Platt vs Stout* (1862), 14 Abb. Pr. (N. Y.) 178; *United States vs Addison* (1867), 6 Wall. (U. S.) 291, 18 L. ed. 919; *Mayfield vs Moore* (1870), 53 Ill. 428, 5 Am. Rep. 52; *Hunter vs Chandler* (1870), 45 Mo. 452; *State vs Clark*

preme Court of Illinois, after showing that this doctrine owes its origin to the common law, observes: "On the basis of a sound public policy the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, if no benefit, but a loss, would result from such wrongful retention or usurpation of an office. The question has frequently been before the courts of the different States and of the United States, and the great weight of authority sustains the doctrine of the common law, as shown by the opinions of the judges in different States, and which, in most of the States, are based on the common law, without reference to any statute."⁴³ And it is generally held that failure to qualify on the part of the rightful claimant, will not defeat his right to recover against the intruder.⁴⁴

But in *Stuhr vs Curran*⁴⁵ it was held by a divided court, that a de jure officer could not recover from a de facto officer who held in good faith. Beasley, C. J., however, in a

(1873), 52 Mo. 508; *Stoddard vs Williams* (1884), 65 Cal. 472, 4 P. 452; *Chubbuck vs Wilson* (1907), 151 Cal. 162, 90 P. 524; *Coughlin vs McElroy* (1902), 74 Conn. 397, 50 A. 1025, 92 Am. St. R. 224; *Fenn vs Beeler* (1902), 64 Kan. 67, 67 P. 461; *Douglass vs State* (1869), 31 Ind. 429; *Glascock vs Lyons* (1863), 20 Ind. 1, 83 Am. Dec. 299; *Sigur vs Crenshaw* (1855), 10 La. Ann. 297; *People vs Miller* (1872), 24 Mich. 458, 9 Am. Rep. 131; *Wayne County vs Benoit* (1870), 20 Mich. 176, 4 Am. Rep. 382; *Bier vs Gorrell* (1887), 30 W. Va. 95, 3 S. E. 30, 8 Am. St. R. 17; *Chowning vs Boger* (1885),

De Facto—21.

2 Tex. Civ. App. 650, 9 Am. & Eng. Corp. Cas. 91; *Sandoval vs Albright* (N. Mex., 1908), 93 P. 717.

⁴³*Kreitz vs Behrensmeyer* (1894), 149 Ill. 496, 36 N. E. 983, 24 L.R.A. 59, affirming 52 Ill. App. 291.

⁴⁴*Booker vs Donohoe* (1897), 95 Va. 359, 28 S. E. 584; *Philadelphia vs Rink* (1886), 1 Sad. (Pa.) 390, 2 A. 505; *Kreitz vs Behrensmeyer* (1894), 149 Ill. 496, 36 N. E. 983, 24 L.R.A. 59; but see contra, *Hubbard vs Crawford* (1878), 19 Kan. 570.

⁴⁵(1882), 44 N. J. L. 181, 43 Am. Rep. 353. See also sec. 237.

forcible dissenting judgment said: "With regard to the American cases, I can say, after an extended research, that not one of them that has come to my attention, denies the right of the de jure officer to recover, in some form, for an intrusion into his office."

§ 230. **Same subject—English rule.**—The English rule is the same as the American rule with respect to the de jure officer's right to recover from the officer de facto. In fact, as already intimated, the American authorities upon this subject are generally founded upon the English common law, and the English decisions. In *Selwyn*⁴⁷ it is said, "that where a person has usurped an office belonging to another, and takes the known and established fees of office, an action for money had and received will lie at the suit of the party really entitled to the office, against the intruder for the recovery of such fees." Likewise in *Arris vs Stukely*,⁴⁸ a head-note reads: "If a man receive the profits of an office on pretence of title, the person who has a right to the profits may recover them by an action of *indebitatus assumpsit*, as for monies had and received to his use." An action in tort for damages will also lie at the suit of a de jure officer against an intruder for unlawful intrusion of the office.⁴⁹ But where an office has no fixed salary or regular fees attached to it, and the profits derived therefrom consist merely in gratuities given voluntarily by the public to the incumbent, no right of action exists to recover the same.⁵⁰

⁴⁷1 *Selwyn*, N. P. 81.

⁴⁸(1678), 2 Mod. 260. Also *Spry vs Emperor* (1840), 6 M. & W. 639; *Green vs Hewett* (1793), 1 Peake, N. P. 182; *Howard vs Wood* (1679), 2 Lev. 245; *Craig vs Norfolk* (1675), 1 Mod. 122. 86 Eng. R. 780; *Boyter vs Dodsworth* (1796),

6 Term. (D. & E.) 681; *Crosbie vs Hurley* (1833), 1 Al. & Nap. (Ireland) 431.

⁴⁹*Lawlor vs Alton* (1873), 8 Ir. R. C. L. 160; *Arris vs Stukely* (1678), 2 Mod. 260.

⁵⁰*Boyter vs Dodsworth* (1796),

§ 231. Amount recoverable from the de facto officer.

—Where there is a fixed salary annexed to the office, the amount recoverable by the officer de jure from the intruder is the whole official salary received by such intruder during his incumbency, without any deduction for the services performed by him, or for what the de jure officer may have earned himself while ousted.⁵¹ “A person,” says a learned judge, “who usurps a public office commits a punishable misdemeanor, where the public and not the person excluded is the party directly injured. The perquisites are annexed to the office as such on grounds of public policy, and do not change their legal character by the amount of labor involved in the official duties. There are sinecure or honorary offices, there are offices which may be fulfilled entirely or chiefly by deputy, and there are offices where everything must be done in person. The assize lay in the one case as well as in the other, and lay for the deprivation of office and official perquisites. It sounded in tort and not in assumpsit, and recognized no relation between the party wronged and the wrong-doer. The right to a deduction can only spring from a duty dependent on a legal relation. The mere wrong-doer must be regarded as acting throughout in defiance of his adversary, and as a stranger to him in all respects.”⁵²

But where the compensation attached to the office depends upon fees for specific services rendered, the de jure officer is entitled to recover from the de facto incumbent only the profits of the office; that is, the fees and perquisites, less the necessary expenses in earning them.⁵³

6 Term. (D. & E.) 681; *Spry vs Emperor* (1840), 6 M. & W. 639, 651.

⁵¹*People vs Miller* (1872), 24 Mich. 458, 9 Am. Rep. 131; *United States vs Addison* (1867), 6 Wall. (U. S.) 291, 18 L. ed. 919; *Fenn vs*

Beeler (1902), 64 Kan. 67, 67 P. 461; *Crosbie vs Hurley* (1833), 1 Al. & Nap. (Ir.) 431.

⁵²Per Campbell, J. in *People vs Miller* (1872), 24 Mich. 458, 9 Am. R. 131.

⁵³*Bier vs Gorrell* (1887), 30 W.

But under no other circumstances will an intruder be permitted to retain a portion of the emoluments. He cannot reap a benefit from his wrong.⁵⁴

§ 232. **Same subject—Assumpsit or tort.**—It seems that the measure of damages is generally the same, whether the action against the intruder is founded on assumpsit or tort. In the latter case, the court or jury in assessing the damages will be guided by the amount of actual loss that resulted to the plaintiff by reason of the intrusion, which will be the entire salary where a fixed salary is affixed to the office, but only the net profits of the office where the emoluments consist of fees.⁵⁵

Sometimes, however, a person has no choice between the two kinds of action, but his only remedy is in tort. Especially is this so, when it is sought to recover from the intruder salary or fees not actually received by him. Thus, in *Lawlor vs Alton*,⁵⁶ the defendant, who had been illegally elected to the office of surgeon of a County Infirmary, entered into the office, and, though cautioned, kept out the plaintiff, who

Va. 95, 3 S. E. 30, 8 Am. St. R. 17; *Chowning vs Boger* (1885), 2 Tex. Civ. App. 650, 9 Am. & Eng. Corp. Cas. 91; *Havird vs Com'rs of Boise County* (1890), 2 Idaho, 687, s. c. sub. nom. In re *Havird*, 24 P. 542; *Atchison vs Lucas* (1885), 83 Ky. 451; *Kreitz vs Behrensmeyer* (1894), 149 Ill. 496, 36 N. E. 983; affirming 52 Ill. App. 291; *Mayfield vs Moore* (1870), 53 Ill. 428, 5 Am. Rep. 52; *Sandoval vs Albright* (N. Mex. 1908), 93 P. 717; *Arris vs Stukely* (1878), 2 Mod. 260. But see contra, *Douglass vs State* (1869), 31 Ind. 429.

⁵⁴*Wenner vs Smith* (1886), 4 Utah, 238, 9 P. 293; *Glascock vs Lyons* (1863), 20 Ind. 1, 83 Am. Dec. 299; *Douglass vs State* (1869), 31 Ind. 429; *Crosbie vs Hurley* (1833), 1 Al. & Nap. (Ir.) 431.

⁵⁵*Dolan vs New York* (1877), 68 N. Y. 274, 23 Am. Rep. 168; *People vs Nolan* (1886), 101 N. Y. 539, 5 N. E. 446, affirming (1884) 32 Hun, 612; *Nichols vs McLean* (1886), 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; *Wayne County vs Benoit* (1870), 20 Mich. 176, 4 Am. Rep. 382; *Rule vs Tait* (1888), 38 Kan. 765, 18 P. 160.

⁵⁶(1873), 8 Ir. R. C. L. 160.

had been lawfully elected. At the Spring Assizes, 1872, the Grand Jury of the county made a presentment for the sum of £47 to be paid to the defendant as salary for his services; the fiat of which the plaintiff, as a rate-payer, opposed, and, at the suggestion of the judge, the defendant signed an undertaking that, in case the presentment should then be fiat, he would abide by such order as to the dispossession or refunding of the £47 as should be made upon or after the hearing of quo warranto proceedings then pending against him. Later on, the defendant being ousted by such proceedings, the plaintiff took possession of the office, and at the Summer Assizes the Grand Jury presented a further sum of £47 to be paid to him for his half-yearly salary as surgeon. The defendant opposed the fiat of that presentment, and claimed so much of the sum of £47 as represented his salary up to the 16th of May, 1872, the day upon which the quo warranto had been granted; but the judge rejected the presentment on the ground that the plaintiff had not discharged the duties of the office during that period, which, according to the statute, precluded him from recovering salary from the county.⁵⁷ Subsequently, the plaintiff sued the defendant, the plaint containing two counts, one in tort, claiming damages for his exclusion from office; and the other for money had and received by the defendant to the plaintiff's use; and the parties agreed that a case should be stated for the decision of the court, the questions submitted being:—First, whether the plaintiff was entitled to recover from the defendant the sum of £47 which the plaintiff would have obtained at the Spring Assizes, 1872, if he had been in occupation of the office, but which the defendant had received under the circumstances above mentioned; and, secondly,

⁵⁷ 6 & 7 Wm. IV, c. 116, s. 86.

whether the plaintiff was entitled to the further half-year's salary of £47, which he would have obtained at the Summer Assizes, 1872, if he had previously discharged the duties of surgeon, or to any and what other sum under the circumstances above stated.

On behalf of the defendant, it was contended that the plaintiff could not succeed on the count for money had and received, because, as the money which the defendant had received could not have been obtained by the plaintiff by reason of the express statutory provision, it could not be held that it was money received to his use. And as to the count in tort, the argument was that the defendant had not prevented the plaintiff from exercising his office, but that this had been done by the governors of the Infirmary. It was held that the plaintiff could not recover upon the count for money had and received, but was entitled to succeed upon the count in tort. Whiteside, C. J., said: "When the first presentment was made at the Spring Assizes, 1872, the defendant obtained the money. The plaintiff was quite willing to discharge the duties, but was prevented by the defendant, and it seems a very reasonable thing that he should recover the sum which was then given to a person who was not entitled to it. At the Summer Assizes of the same year the plaintiff claimed the presentment, but the defendant interposed; the result was that neither got the money. I can make no distinction between the two sums of £47. The question is, what injury has the plaintiff sustained from the act of the defendant? . . . The person who was the active agent in the whole matter, and for whose benefit this illegal election was held, and who insisted upon his supposed right, and who held the office for ten months, must bear the responsibility. *The question is not what has the defendant received, but what has the plaintiff lost?* If he had obtained what he was legally

entitled to he would have received the amount of both presentments. Whether the defendant has received these sums is of no consequence; the plaintiff has lost them, and should now recover them. Upon these grounds we think judgment should be given for the plaintiff."

It must not, however, be deduced from the above case that a person unlawfully excluded from an office, may always recover unpaid salary from the intruder by suing him in tort. There the statute prevented the *de jure* officer from recovering from the county salary earned by his unlawful predecessor, but the reverse is generally the rule; and, therefore, the intruder is usually liable only for salary actually received by him. Thus, in an Arkansas case, decided under a statute which provided that "if the contestant shall succeed in his action (in the nature of *quo warranto*), he shall not only have a judgment of ouster, but for damages, not exceeding the salary and fees of the office during the time he was excluded therefrom, with costs of suit," it was held to be error to render judgment against the incumbent of an office for the salary, where there was no evidence that he had received it.⁵⁸

§ 233. **Right to salary pending determination of title to office.**—The general rule is that the right to recover the official salary is not affected by the fact, that the services for which it is the compensation were *bona fide* performed during the pendency of the legal proceedings to determine the title to the office; and after the final adjudication the person declared the rightful officer is entitled to demand and recover the same.⁵⁹ And this is so, even if the salary or fees were

⁵⁸*Merritt vs Hinton* (1891), 55 La. Ann. 239; *Coltharp vs Holmes* (1891), 43 La. Ann. 1185, 10 So. Ark. 12, 17 S. W. 270.

⁵⁹*Petit vs Ronssean* (1860), 15 172; *State vs Holmes* (1891), 43

earned by the usurper while put in possession of the office by the judgment of a court of competent jurisdiction, if such judgment turns out to be erroneous and is finally reversed by an appellate court.⁶⁰ The reason given is, that "the case is not like one where rights acquired at a judicial sale are protected. The court did not appoint to office, nor did the appellant take anything on the faith of its order. On his invocation the court declared that he was already entitled to the office, and sought to remove the obstruction to its enjoyment. The subsequent reversal shows that declaration to have been a mistaken one—that he had in fact no title, and its effect was to leave the status of his adversary as it was before the action and himself in no better condition than if his claim to office had never been heard or decided by any court. Of course he can claim no advantage by virtue of the erroneous judgment."

But in a Virginia case,⁶¹ where the plaintiff had been ousted upon quo warranto from a city office at the instance of a claimant, who, pending an appeal by the former, resigned his office, leaving a vacancy which was filled by the appointment of the defendant, who exercised the office without objection until the plaintiff asserted his right thereto after winning in appeal, it was held that as the plaintiff had made no demand for the office, or attempt to perform its duties, until the final decision in his favor, when it was promptly delivered to him, he could not recover from the defendant the fees received by him in his official capacity during the pendency of the appeal. In this case, however, the court did not deny

La. Ann. 1185, 10 So. 172; Currey vs Wright (1882), 77 Tenn. (9 Lea.) 247; State vs McAllister (Tex. Civ. App. 1895), 31 S. W. 679; Mayfield vs Moore (1870), 53 Ill. 428, 5 Am. Rep. 52.

⁶⁰Kessel vs Zeiser (1886), 102 N. Y. 114, 6 N. E. 574, 55 Am. R. 769.

⁶¹Nicholls vs Branham (1888), 84 Va. 923, 6 S. E. 463

the soundness of the general principle above laid down, but distinguished the case from others on account of its special circumstances.⁶²

§ 234. **Good faith of de facto officer of no avail to him.**—The fact that an officer de facto has entered into an office and performed its duties bona fide, believing himself rightfully entitled to it, will be of no assistance to him in an action by or against him to recover the official salary. It “is not a question of intention, but a question of legal title to the sum in dispute,” and claimed as the compensation annexed to the office.⁶³ “The right of the intruder to recover is denied, not upon the ground of actual fraud on his part, for it often happens that he is in not only under a claim of right, but under a prima facie title, which he cannot or may not know to be invalid; nor upon the ground that he is a mere volunteer, and that the government should not be obliged to pay him for his services, for in most cases they are rendered in good faith, and under the expectation, both on his part and on the part of the public, that he is to receive the emoluments of the office. The principle is, that the right follows the true title, and the courts will not aid the intruder by permitting him to recover the compensation which rightfully belongs to another.”⁶⁴

§ 235. **Clear title must be shown by officer de jure to recover salary from State or intruder.**—As the right of the officer de jure to the compensation of the office depends

⁶²See also *Luzerne County vs Trimmer* (1880), 95 Pa. St. 97.

⁶³*Mayfield vs Moore* (1870), 53 Ill. 428, 5 Am. Rep. 52.

⁶⁴*Andrews, J., in Dolan vs New York* (1877), 68 N. Y. 274, 23 Am.

R. 168; *Petit vs Rousseau* (1860), 15 La. Ann. 239; *Comstock vs Grand Rapids* (1879), 40 Mich. 397; *People vs Potter* (1883), 63 Cal. 127. But see ante, sec. 229.

upon the validity of his title, it follows that he is bound to prove a clear legal title in order to succeed in an action for the recovery of salary, either from the State or municipality, or from the intruder. This rule is aptly expressed in a Nebraska case,⁶⁵ where it is said: "Another proposition, which we regard as well settled by authority, is that the plaintiff below must recover upon the strength of his own title to the office, and not on account of any defect in that of his adversary. To state the same proposition differently, the fact that plaintiff in error may have been a *de facto* officer merely will not avail the defendant in error in this action, unless the latter was the *de jure* officer."⁶⁶ Hence, where the *de jure* officer's title is in dispute, his right to the office must be judicially determined in a proper proceeding, before an action for the salary can be successfully maintained by him.⁶⁷

But a different rule obtains in England, where the official title may be tried collaterally in an action for the recovery of salary. This subject, however, is treated elsewhere under the heading of collateral attacks on *de facto* officers.⁶⁸

§ 236. *De facto* officer cannot recover salary.—Upon the principle explained in the preceding section, that an officer suing for salary must show a clear legal title, it is manifest that an officer *de facto* cannot recover the compensation

⁶⁵*Richards vs McMillin* (1893), 36 Neb. 352, 54 N. W. 566.

⁶⁶*McMillin vs Richards* (1895), 45 Neb. 786, 64 N. W. 242.

⁶⁷*Hagan vs Brooklyn* (1891), 126 N. Y. 643, 27 N. E. 265; *McManus vs Brooklyn* (1889), 5 N. Y. S. 424; *Meredith vs Sacramento County* (1875), 50 Cal. 433; *Carroll vs Sienbenthaler* (1869) 37 Cal. 193; *Gorley vs Louisville* (1900), 108

Ky. 789, 55 S. W. 886; *Wagner vs Louisville* (Ky. 1909), 117 S. W. 283; *Stone vs Canfield* (Ky. 1900), 55 S. W. 924; *Selby vs Portland* (1886), 14 Or. 243, 12 P. 377, 58 Am. Rep. 307; *Dickerson vs Butler* (1887), 27 Mo. App. 9; *Lee vs Wilmington* (1895), 1 Mary. (Del.) 65, 40 A. 663.

⁶⁸See post, sec. 433.

annexed to an office, and such is the rule almost universally recognized.⁶⁹ This declaration may seem almost superfluous after all that has been said in the foregoing pages. "While," says a learned judge, "the acts of an officer *de facto* are valid, so far as they concern the public or the rights of third persons who are interested in the things done, and his title to the office cannot be inquired into collaterally, yet when he sues in his own right, to recover fees which he claims are due to him personally, by virtue of his office, his title to the office may be put in issue; and, to recover, he must show that he is an officer *de jure*. In such a suit, no rights of the public or of third persons are concerned. The question of title to the office is directly raised; and he can recover no benefit to him-

⁶⁹Runkle vs United States (1884), 19 Ct. Cl. 379, & 396; Romero vs United States (1889), 24 Ct. Cl. 331, 5 L.R.A. 69; Pack vs United States (1906), 41 Ct. Cl. 414; People vs Hopson (1845), 1 Den. (N. Y.) 574; New York vs Flagg (1858), 6 Abb. Pr. 296; People vs Tieman (1859), 30 Barb. (N. Y.) 193, 8 Abb. Pr. 359; Dolan vs New York (1877), 68 N. Y. 274, 23 Am. Rep. 168, quoted approvingly in People vs Howe (1904), 177 N. Y. 499, 69 N. E. 1114, 66 L.R.A. 664; People vs Potter (1883), 63 Cal. 127; Burke vs Edgar (1885), 67 Cal. 182, 7 P. 488; Phelon vs Grenville (1886), 140 Mass. 386, 5 N. E. 269; Christian vs Gibbs (1876), 53 Miss. 314. Matthews vs Copiah County (1876), 53 Miss. 715, 24 Am. R. 715; Vicksburg vs Groome (Miss. 1898), 24 So. 306; Sheridan vs St. Louis (1904), 183 Mo. 25, 81 S. W. 1082; McCue vs Wapello County (1881), 56 Iowa, 698, 10 N. W.

248, 41 Am. Rep. 134; Samis vs King (1873), 40 Conn. 298; Meagher vs Storey County (1869), 5 Nev. 244; State vs Newark (1898), 8 Ohio S. & C. Pl. Dec. 344, 6 Ohio (N. P.) 523; Dillon vs Myers (1844), Bright (Pa.) 426; Cobb vs Hammock (1907), 82 Ark. 584, 102 S. W. 382; Stephens vs Campbell (1900), 67 Ark. 484, 55 S. W. 856; Eubank vs Montgomery County (1907), 32 Ky. Law R. 91, 105 S. W. 418; Yorks vs St Paul (1895), 62 Minn. 250, 64 N. W. 565; Home Ins. Co. vs Tierney (1893), 47 Ill. App. 600; Stott vs Chicago (1903), 205 Ill. 281, 68 N. E. 736; Allen vs McNeel (1817), 1 Mill. (S. C.) 229; Garfield Tp. vs Crocker (1901), 63 Kan. 272, 65 P. 273; Meehan vs Freeholders of Hudson County (1844), 46 N. J. L. 276, 50 Am. Rep. 421; Blore vs Board of Freeholders (1900), 64 N. J. L. 262, 45 A. 633, 81 Am. St. R. 495.

self from an office he holds de facto only.”^{69a} Thus, a person who has been appointed to and has accepted an office to which he is ineligible, is not entitled to maintain an action for the salary of such office.⁷⁰ So where a statute provides that an officer shall be appointed in a certain way, if such officer be appointed in a way different from that provided by statute, he cannot recover for his services as an officer de facto.⁷¹ So where an officer fails to give bond or take the oath, as required by law, he is not entitled to recover the official salary.⁷²

§ 237. **Conflicting doctrine as to right of officer de facto to recover salary.**—There are a few cases, however, which acknowledge in the de facto officer the right to recover the official salary, as against the State or the public corporation responsible for the same. Thus, in Alabama and in Missouri, the courts have held that a person who has a *prima facie* title to an office, is entitled to its emoluments, and may enforce the payment thereof by legal proceedings.⁷³ But if such officer loses his *prima facie* title, such as by surrendering possession, he cannot recover afterwards.⁷⁴ Besides, the right of the officer de facto to be paid the official compensation from the State or public body, will not interfere with the

^{69a}Colburn, J., in *Dolliver vs Parks* (1884), 136 Mass. 499.

⁷⁰*State vs Newark* (1898), 8 Ohio S. & C. Pl. Dec. 344, 6 Ohio (N. P.) 523; *Vicksburg vs Groome* (Miss. 1898), 24 So. 306.

⁷¹*Phelon vs Grenville* (1886), 140 Mass. 386, 5 N. E. 269.

⁷²*Com. vs Slifer* (1855), 25 Pa. St. (1 Casey) 23, 64 Am. Dec. 680; *Philadelphia vs Given* (1869), 60 Pa. St. 136; *Riddle vs Bedford* (1821), 7 S. & R. (Pa.) 386; *State*

vs Schram (1901), 82 Minn. 420, 85 N. W. 155. But see *Houston vs Estes* (1904), 35 Tex. Civ. App. 99, 79 S. W. 848.

⁷³*Reynolds vs McWilliams* (1873) 49 Ala. 552; *State vs John* (1883), 81 Mo. 13; *State vs Clark* (1873), 52 Mo. 503; *State vs Draper* (1871), 48 Mo. 213. But see *Sheridan vs St. Louis* (1904), 183 Mo. 25, 81 S. W. 1082

⁷⁴*Dickerson vs Butler* (1837), 27 Mo. App. 9.

right of action of the de jure officer to recover the same from him.⁷⁵

In New Jersey, it is declared that one who becomes a public officer de facto, without dishonesty or fraud on his part, and renders the services required of such public officer, acquires as against the public and the de jure officer an indefeasible right to the salary and fees accruing during his possession.⁷⁶ But this rule will not be applied in favor of one who, by force, retains possession of a public office after the expiration of his term, against the lawful demand of his legally appointed successor;⁷⁷ nor in favor of one who has intruded into a public office by force and fraud.⁷⁸

So in Colorado, it was held that a de facto officer could maintain mandamus against the State auditor to compel the payment of the salary incident to the office, notwithstanding the fact that his election was contested in a pending action.⁷⁹

Likewise in Idaho, it was held that the right to compensation being an incident to the services rendered and not to the office, the incumbent of an office, though only an officer de facto, is alone entitled to compensation for the services performed by him.⁸⁰ Such a broad holding, however, was not necessary for the decision of the case, as the question involved was simply whether a county could be compelled to pay a second time, salary already bona fide paid to a de facto officer.

⁷⁵State vs Clark (1873), 52 Mo. 508.

⁷⁶Erwin vs Jersey City (1897), 60 N. J. L. 141, 37 A. 732, 64 Am. St. R. 584; Stuhr vs Curran (1882), 44 N. J. L. 181, 43 Am. Rep. 353; Brinkerhoff vs Jersey City (1900), 64 N. J. L. 225, 46 A. 170.

⁷⁷Blore vs Board of Freeholders

(1900), 64 N. J. L. 262, 45 A. 633, 81 Am. St. R. 495.

⁷⁸Meehan vs Freeholders of Hudson Co. (1844), 46 N. J. L. 276, 50 Am. R. 421.

⁷⁹Henderson vs Glynn (1892), 2 Col. App. 303, 30 P. 265.

⁸⁰Gorman vs Boise County Com'rs (1877), 1 Idaho, 655.

§ 238. Doctrine that officer de facto entitled to compensation when there is no de jure officer.—Certain courts, while denying to the de facto officer the right to recover salary when there is a de jure officer entitled to the office, have thought that the rule should be different when there is no such officer in existence. This doctrine may undoubtedly be supported on equitable grounds, since it seems unjust that the public should benefit by the services of an officer de facto, and then be freed from all liability to pay anyone for such services. Thus, in *Behan vs Davis*,⁸¹ the Supreme Court of Arizona, after admitting that it is almost elementary that the right to the emoluments of an office are incident to the title to the office, and that as between an officer de facto and one de jure, notwithstanding the de facto officer may have performed all the duties of the office, the de jure officer is entitled to the legal compensation, pointed out that the question presented to them was however essentially different, because in the case under their consideration there was no dispute as to the title to the office; no adverse contestant for it; there was no de jure officer. Therefore, the Court held that under such circumstances the de facto officer could recover the salary earned by him during his incumbency, and before the appointment of a de jure successor. This decision was followed in a later case, where a de facto officer was held entitled to recover, although the salary had been already paid to another person, who, however, was neither a de jure nor a de facto officer.⁸²

⁸¹ (1892), 3 Ariz. 399, s. c. sub. nom. *Behan vs Board of Prison Com'rs* (1892), 31 P. 521.

⁸² *Adams vs Directors of Insane*

Asylum (1895), 4 Ariz. 327, 40 P. 185. But see contra *Eubank vs Montgomery County* (1907), 32 Ky. Law. R. 91, 105 S. W. 418.

§ 239. **Same subject.**— An apparently analogous case in England is that of *Seymour vs Bennett*.⁸³ There the principal registers in the prerogative office disagreeing about the appointment of a clerk, the deputy nominated Abbott, who for twelve months officiated, and received the fees, amounting to £500. The plaintiff, who was one of the registers, sued Abbott for a recovery of the fees, on the ground that he should be allowed only a small salary, as an under officer, and that he was liable to account to him and the other principal register, for the whole profits. Lord Hardwicke, however, held that as Abbot was the officer de facto, he had a right to the stated fees, and to retain them without account; and he dismissed the bill against him. And the learned Chancellor remarked, that there was no other person besides Abbot who could maintain an action for such fees. Hence, although this suit was not between a public body and an officer de facto, yet the language of Lord Hardwicke might possibly countenance the theory, that where there is no other person having a superior title and capable of suing for the salary, the de facto incumbent of an office may be entitled to recover compensation for the services performed by him as a public officer.

There is a further English case which might lend support to the doctrine laid down by the Arizona Supreme Court, although decided wholly on other grounds.⁸⁴ By statute 5 & 6 Wm. IV, c. 76, ss. 65, 66, power is given to municipal corporations to remove existing officers and appoint others, upon compensating the officers so removed. The council of a borough, under the above Act, removed a town clerk who had been elected to hold during good behaviour, but had not made the declaration prescribed by 9 Geo. IV, c. 17, s. 2, and it was held that, as having been an officer de facto, he was entitled

⁸³ (1742), 2 Atk. 482.

(1840), 12 Ad. & El. 702, 4 P. &

⁸⁴R. vs Mayor of Cambridge

D. 294, 10 L. J. Q. B. 25.

to compensation. In this case, as in others of a cognate character, the corporation was face to face with an officer de facto, when there was no third party, a de jure officer, to whom it might be claimed the office and its compensation rightfully belonged.

Again, there is a New York case, which has some analogy to *Behan vs Board of Prison Com'rs*,⁸⁵ so far at least as concerns the equitable grounds upon which it may be urged that an officer de facto is entitled to receive compensation. The decision affected the office of coroner, and there were two rival claimants, but the Supreme Court held that as the de jure officer, for reasons assigned in its judgment, could not recover the compensation of the office from the corporation, they would not grant a mandamus to cancel the audit of the de facto officer's account and thereby exempt the county from paying for his services of which it had had the full benefit.⁸⁶ There, there was a de jure officer, but in view of the position taken by the Court, the case stood as if there had been none.

§ 240. Salary paid to a de facto officer cannot presumably be recovered back.—It is a settled rule of the common law, that money paid by one with full knowledge of the circumstances, or the means of such knowledge in his hands, cannot be recovered back on account of such payment having been made under an ignorance of the law.⁸⁷ Whether such rule applies to governments and public bodies as well as to individuals, is a much debated question.⁸⁸ But whatever

⁸⁵(1892), 31 P. 521.

⁸⁶*Deane vs Sup'rs of Greene County* (1884), 66 How. Pr. (N. Y.) 461.

⁸⁷*Bilbie vs Lumley* (1802), 2 East, 469, 6 R. R. 479; *Lowry vs Bourdieu* (1780), 1 Doug. 468.

⁸⁸*McElraths' Case* (1876), 12 Ct. Cl. 201; *Hartson vs United States* (1886), 21 Ct. Cl. 451; *Badreau vs United States* (1888), 130 U. S. 439, 9 Sup. Ct. R. 579; *Ellis vs Board of State Auditors* (1895), 107 Mich. 528, 65 N. W. 577; Cin-

may be the result of the decisions on this point, we think it can be safely asserted that, in the absence of statutory provisions declaring a different rule, money paid as fees or salary by the State or a public corporation to a de facto officer, cannot in general be recovered back as money paid under a mistake of law. Indeed, it seems inferable from the authorities that a de facto officer will be allowed to retain such salary, either under the general principle above referred to, or merely upon equitable grounds, where the application of the principle in question is denied. For it must be borne in mind, that the payment of the legal salary of an office to a de facto officer for services performed by him, stands on a different footing from payment of an unlawful salary to a public officer;⁸⁹ or a lawful salary to one who is neither a de jure nor a de facto officer.⁹⁰ Still in some such cases,⁹¹ it has been held that fees paid to an officer by a public corporation, under the erroneous supposition that he was lawfully entitled thereto, could not be recovered back as money paid under a mistake of law. A fortiori, payment of a lawful salary to a de facto officer, should be upheld as coming at least within the scope of those decisions.

However, the only case really in point is that of *Badeau vs United States*.⁹² There the court, though claiming that

cinnati vs Gas Light Co. (1895), 53 Ohio St. 278, 41 N. E. 239; *Peterborough vs Lancaster* (1843), 14 N. H. 382; *Livermore vs Peru* (1867), 55 Me. 469; *Snelson vs State* (1861), 16 Ind. 29; *Painter vs Polk County* (1890), 81 Iowa, 242, 47 N. W. 65; 25 Am. St. R. 489; *Wayne County vs Randall* (1880), 43 Mich. 137; *Anondaga Sup'rs vs Briggs* (1846), 2 Den. (N. Y.) 26.

⁸⁹*Ellis vs Board of State Aud-De Facto*—22.

itors (1895), 107 Mich. 528, 65 N. W. 577.

⁹⁰*McElrath's Case* (1876), 12 Ct. Cl. 201.

⁹¹*Painter vs Polk County* (1890), 81 Iowa, 242, 47 N. W. 65, 25 Am. St. R. 489; *Anondaga Sup'rs vs Briggs* (1846), 2 Den. (N. Y.) 26; *Wayne County vs Randall* (1880), 43 Mich. 137.

⁹²(1889), 130 U. S. 439, 9 Sup. Ct. 579.

the rule precluding the recovery of money paid under a mistake of law did not apply to the United States, nevertheless held that inasmuch as the officer in question, if not an officer de jure, had acted as an officer de facto, he was not bound *ex equo et bono* to return money which he had received as salary, and that the same could not be recovered back by the United States. In *McElrath's Case* ⁹³ the same principle *ex equo et bono* was applied, and it can be clearly inferred that if the officer there had been an officer de facto, he would have been allowed to retain the salary paid to him.

We may finally observe that the equities favoring the retention of salary under such circumstances, will not be impaired or diminished by any consideration of the rights of the officer de jure, as such rights are not involved in those cases. For, although the officer de facto may have a valid equitable defence as against the State, or the public body, suing for the recovery of the salary paid to him, this does not mean that he would stand in a like position towards the officer de jure.

⁹³ (1876), 12 Ct. Cl. 201.

CHAPTER 20.

DUTIES AND CIVIL LIABILITIES OF OFFICER DE FACTO.

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| § 241. General rule. | § 247. Not liable for moneys he could not collect. |
| 242. Officer de facto may be compelled to act by mandamus. | 248. Not liable for moneys lawfully expended by him. |
| 243. Where mandamus directed to officer de facto in his official name. | 249. Liable for funds unlawfully expended. |
| 244. Officer de facto cannot be compelled to act after he disavows his authority. | 249a. Liable in damages for permitting escapes. |
| 245. Officer de facto may sometimes be civilly liable for acts of omission as well as of commission. | 250. Liable for acts of his deputy. |
| 246. Officer de facto liable for money received by virtue of his office. | 251. Liable on his official bond. |
| | 252. Contracts inconsistent with duties and responsibilities of officer de facto, void. |

§ 241. **General rule.**—An officer de facto is generally charged with the same duties, and is subject to the same responsibilities, as an officer de jure. While he holds himself out to the public as a duly qualified officer, and is in the enjoyment of the authority conferred by the office, it is only reasonable to expect that his intrusion should not be an impediment or a detriment to the transaction of official business. Reason, justice, and public policy alike demand that he be not allowed to shirk obligations and responsibilities, that are simply correlatives of the rights and powers openly usurped and exercised by him. The courts therefore, applying the doctrine of estoppel, will deny him the right to assume, in proceedings against him, a position to the prejudice of the public

or third parties, inconsistent with a previous course of conduct. In other words, they will not permit him to plead the invalidity of his title to escape liabilities, or avoid the performance of official duties. "It is," says a learned judge in one case, "too clear for argument that appellant cannot remain undisturbed in office and claim that he is not a de jure officer. While in office he can be compelled to perform every official act in behalf of another which the duties of such an office dictate."¹ Another court declares, that "it is the general rule upon grounds of plain justice and public policy that a de facto officer is forever estopped in civil or criminal actions from denying that he holds the office, and from escaping any of the responsibilities which attach to his incumbency."²

§ 242. Officer de facto may be compelled to act by mandamus.—According to the above principle, an officer de facto may be forced to act by legal process. Thus, where proceedings were taken against a town treasurer to compel him by mandamus to pay certain warrants drawn upon him by the Mayor, in satisfaction of an indebtedness due by the town, and he pleaded, among other things, that not having given bond, as provided by law, he was not the treasurer of the town, but he nevertheless admitted holding about one hundred dollars of the public funds of the corporation, it was held that though only an officer de facto, he was bound to pay the warrants, and mandamus was allowed to issue.³

So in *Chumasero vs Potts*,⁴ the application was for a per-

¹Chalmers, J., in *Kelly vs Wimberly* (1884), 61 Miss. 548.

²*Buck vs Eureka* (1895), 109 Cal. 504, 42 P. 243. See also *Fortenberry vs State* (1879), 56 Miss. 286; *State vs McEntyre* (1842), 3 Ired. L. (N. C.) 171; *Runion vs Latimer* (1874), 6 Rich. (S. C.)

126; *Mockett vs State* (1903), 70 Neb. 518, 97 N. W. 588; *State vs Stone* (1875), 40 Iowa, 547; *Joliet vs Tuohey* (1877), 1 Ill. App. 483.

³*Kelly vs Wimberly* (1884), 61 Miss. 548.

⁴(1875), 2 Mont. 242.

emptory writ of mandamus against the Governor, the secretary and the marshal of Montana Territory to compel them to perform certain acts in relation to a vote taken upon a bill passed by the Legislature, removing, subject to the approval of the inhabitants, the capital from the city of Virginia to the town of Helena. One of the contentions of defendants was that they being federal officers, the legislature had no power to impose upon them duties, such as had reference to the canvassing of votes in the Territory. They had, however, assumed the powers conferred upon them by the legislature. And Wade, C. J., in answering the objection observed, that even "if the Act did create a new office for the Governor, secretary and marshal, they are *de facto* officers, and cannot, in mandamus, deny that they are officers, as they have entered upon the performance of their duties."

Likewise, the New York Court of Appeals held that a writ of mandamus would issue against justices of the peace, to enjoin them to discharge certain duties having reference to election proceedings, notwithstanding that one of them might be a *de facto* officer.⁵ "The writ here," says the Court, "finds him in the possession of the office, assuming to perform its duties, and is therefore rightfully directed to him among others."

§ 243. **Where mandamus directed to officer *de facto* in his official name.**—But where a writ of mandamus is directed to an officer *de facto* in his official name, he is bound to perform the acts enjoined upon him only while he holds office, and may at any time surrender the office to the *de jure* officer, upon whom will devolve the obligation of continuing to discharge the duties commanded by the court. This was expressly decided in New York, upon an appeal from an or-

⁵People vs Schiellein (1884), 95 N. Y. 124.

der made at Special Term, directing a peremptory mandamus to issue against a de facto commissioner of highways, commanding him to proceed to the opening and working of a highway. Soon after the order was made, the commissioner gave up possession of the office and was succeeded by a de jure officer. And the court held, that the order being directed to the commissioner de facto as "commissioner of highways" he was only bound to observe the directions of the order so long as he continued nominally to fill the place, and that it was the duty of his successor to take up the subject where he had left it, and observe the order of the court in the matter of opening the road.⁶

§ 244. Officer de facto cannot be compelled to act after he disavows his authority.—It follows that, though an officer de facto may be compelled to discharge all the duties of the office, while retaining the same, yet, unless constrained by legal process, he is not bound to remain in office for the benefit of the public and third persons, and may at any time surrender possession of it and disavow his authority, without being compellable to act in future.⁷ A fortiori, persons who have never taken charge of an office, cannot be forced to act. Thus, persons elected supervisors of a town, but who refuse to qualify or serve, cannot be treated as supervisors de facto, and commanded to levy a tax.⁸

§ 245. Officer de facto may sometimes be civilly liable for acts of omission as well as of commission.—However, the language of some of the judges in the New York cases

⁶People vs Brown (1888), 47 Hun (N. Y.) 459.

⁷Olmstead vs Dennis (1879), 77 N. Y. 378; Farman vs Ellington (1887), 46 Hun (N. Y.) 41.

⁸State vs Supervisors of Beloit (1866), 21 Wis. 280, 91 Am. Dec. 474.

quoted in the preceding section, might appear wider in scope than the proposition we laid down, and to be comprehensive enough to relieve from duty to act, and consequently from liability for not acting, all officers de facto, whether disavowing their authority or not. Thus, in *Farman vs Ellington*,⁹ which was an action brought against the defendant town, to recover damages occasioned by the non-repair of a highway, it is intimated that if it had been shown that the commissioner of highways was only an officer de facto, he would have had no duty to perform, and could not be chargeable with negligence for mere failure to act or omission to act. But assuredly such language must be read with reference to the facts before the court, and cannot be taken as intended to establish a general proposition. Indeed, that an officer de facto who disclaims all title to an office and ceases to act, thereby frees himself from all liability for the future performance of official duties, is too reasonable to admit of doubt. But that such officer may undertake to exercise the functions of an office and remain in the undisturbed possession of it, and nevertheless be at liberty to perform certain duties and omit others as he pleases, without incurring any liability for his omissions, is essentially opposed to all principles of justice, and manifestly against public policy. As already pointed out, while an officer de facto holds himself out to the world as a rightful officer, the public and third persons have a right to consider him so, and hence he ought to be liable for acts of omission as well as of commission. He has the choice between acting or refusing to act, but if he chooses the first alternative, he should discharge all the duties of the office, and not merely those he may choose to perform. It seems, therefore, that in principle and reason, an officer de facto, while in office, may not only be com-

⁹ (1887), 46 Hun (N. Y.) 41.

pelled by mandamus to discharge official duties, but may likewise be held responsible for omissions of duty, if thereby he causes damages to others.¹⁰

§ 246. **Officer de facto liable for money received by virtue of his office.**—An officer de facto is not absolved on the ground of defective title, from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of his holding a public office.¹¹ And no irregularities in his appointment or lack of qualification will enable such officer to take refuge behind them, and thereby empower him to hold money to which he is not entitled.¹² Thus, where a person was sued for the recovery of taxes collected by him the court observed, that “it not appearing that the defendant was duly chosen collector, he can only be treated as collector de facto. As such, he would be accountable to the town for the payment of taxes actually collected by him. He could not be heard to deny that such taxes were committed to him.”¹³

There is also a Canadian case which, by analogy, lends support to the above principle, though involving only a question of authority and not of title. It is *Todd vs Perry*,¹⁴ where Burns, J., one of the Court, says: “It would be, so far as the collector is concerned, a monstrous thing to hold that because the clerk neglected his duty, and delivered the roll a day or two after he was directed to do it to the collector,

¹⁰*State vs McEntyre* (1842), 3 Ired. L. (N. C.) 171. See also *People vs Brown* (1888), 47 Hun (N. Y.) 459, 464.

¹¹*United States vs Maurice* (1823), 2 Brock. (U. S.) 96.

¹²*Trescott vs Moan* (1862), 50 Me. 347.

¹³*Lincoln vs Chapin* (1882), 132

Mass. 470. Also *Nason vs Fowler* (1900), 70 N. H. 291, 47 A. 263. See further *Chicago vs Burke* (1907), 226 Ill. 191, 80 N. E. 720, reversing 127 Ill. App. 161; *State vs Dorton* (1898), 145 Mo. 304, 46 S. W. 948; *People vs Bunker* (1886), 70 Cal. 212, 11 P. 703.

¹⁴(1861), 20 U. C. Q. B. 649.

the collector might collect the year's taxes and then turn round upon the corporation and say he was not the collector, and that he received the taxes under no legal authority, and he should keep the whole money."

§ 247. Not liable for moneys he could not collect.—

An officer de facto, however, is not accountable for moneys refused to be paid to him on the ground that he had no legal authority to collect them. This is expressly held in *Lincoln vs Chapin*,¹⁵ where the court exonerated the defendant from liability for his failure to collect taxes, and asserted argumentatively that "there is nothing in the statement of facts to show that the defendant, at any time while he was acting as collector, or afterwards, was able to collect the taxes in question. It does not appear that they were legally committed to him, or that he had power to enforce the payment of them by the persons assessed therefor, or that he could have collected them as he collected the other taxes. On the other hand, it appears that the persons who have not paid their taxes refused to pay them on the ground that the defendant had no legal authority to collect them. As to such taxes, and under such circumstances, the defendant cannot be held responsible under the statute."

§ 248. Not liable for moneys lawfully expended by him.—Public funds expended by an officer de facto for lawful purposes cannot afterwards be recovered from him. Thus, where a village supervisor de facto collected a certain sum, which the law provided could be applied towards the support of schools and he did so apply the same, it was held that the mere fact that it was received and paid out by a de

facto officer would not authorize a judgment against him, the money having been paid out by him in pursuance of law.¹⁶

§ 249. **Liable for funds unlawfully expended.**—But the expenditure of funds coming into the hands of a de facto officer for an unauthorized purpose, is no defence to an action to recover the same, though such expenditure is for a useful purpose. In the case cited in the next preceding section, the supervisor de facto had collected certain moneys derived from the sale of commons, in addition to those received by him for the lease of commons. Only the funds obtained from the leases and the interest arising from the sales, could be lawfully expended by the supervisor. Defendant, however, applied the principal moneys collected by him from the sale of commons, together with other sums, to the support of the village schools. Held, that no authority existed in anyone to use the said principal moneys, and the use of the same being unauthorized for any purpose, it could not help the case of defendant that he paid such sum for a purpose that was useful.

§ 249a. **Liable in damages for permitting escapes.**—An officer de facto permitting a prisoner to escape is as liable in damages as if he were an officer de jure. This principle was recognized in *Contant vs Chapman*,¹⁷ which, though decided on other grounds, contains some interesting comments on this subject. Lord Denman, C. J., said: "A passage from Lord Coke's commentary on the Statute of Westminster 2, c. 11 (2 Inst. 382) was cited: that 'this Act extends to all keepers of gaols, and therefore if one hath the keeping of a goal by wrong, or *de facto*, and suffereth an es-

¹⁶*McCracken vs Soucy* (1888), 29 Ill. App. 619.

¹⁷(1842), 2 Q. B. 771.

cape, he is within this statute, as well as he, that hath the keeping of it *de jure*.' But this statute and the commentary both suppose a committal by proper authority: and Lord Coke only asserts that in such a case the wrongful officer shall not protect himself from answering to the lord in damages for the escape of his defaulting accomptant by his own wrongful usurpation. This is but just: the lord must have the party committed to the lawful goal within the county, and ought not to suffer by the fact that there is an usurping gaoler."¹⁸

§ 250. **Liable for acts of his deputy.**—The responsibility of an officer de facto extends to all official acts, and to any default or misconduct in office, of his deputy. The maxim, *qui facit per alium facit per se*, applies to him as much as if he were an officer de jure. Thus, where a sheriff de facto appointed a deputy, who, while acting as such, levied on the goods of B. as the property of A. (under an execution against the latter) and sold them, it was held that the sheriff was liable to B. as for a conversion of the goods.¹⁹ It seems that in cases of this kind, the officer de facto is estopped from denying the validity of the deputy's appointment, or his qualifications. As put by the Court in the above case: "It is very doubtful whether a sheriff can be heard to allege that one whom he has appointed his deputy, and who, he knows, is acting as such, is not his deputy, and thus shield himself from responsibility for the official acts of his appointee."

§ 251. **Liable on his official bond.**—A bond given by an officer de facto to secure the faithful performance of the duties of the office, is of the same validity as one given by a

¹⁸See also post, sec. 261.

¹⁹Sprague vs Brown (1876), 40 Wis. 612.

de jure officer; and he is estopped by such instrument from denying the official character which he assumes and solemnly acknowledges therein. Thus, where the constable of a town, which had voted that the taxes should "on the 1st of October pass into the hands of the constable for collection," gave a bond of that date to the town, reciting that he had been chosen "collector of taxes," and obliging him to pay over to the town treasurer all the taxes which he should be legally required to collect by the assessors, it was held that, he being a collector de facto, his bond was valid, and estopped him and his sureties to deny the legality of his appointment and the sufficiency of his warrant in an action on the bond to recover money received by him for taxes and not accounted for.²⁰ So where a person had been acting deputy marshal for several months, it was held that he was estopped, in an action on his official bond for damages for unlawfully beating the plaintiff, from denying that he was an officer de jure.²¹

§ 252. **Contracts inconsistent with duties and responsibilities of officer de facto, void.**— Finally, it must be noted, and this is clearly inferable from the foregoing pages, that no act of his or of any other person can, so far as the public and third persons are concerned, relieve an officer de facto from the obligation of performing all the duties, and assuming all the responsibilities, which attach to his office. This is a logical deduction from the principle that, while in office, his duties and responsibilities are co-extensive and

²⁰Wendell vs Fleming (1857), 8 Gray (Mass.) 613.

²¹State vs Frentress (1906), 37 Ind. App. 245, 76 N. E. 821. See also United States vs Maurice (1823), 2 Brock. (U. S.) 96; Billingsley vs State (1859), 14 Md.

369; Sprague vs Brown (1876), 40 Wis. 612; Keyser vs McKissan (1828), 2 Rawl. (Pa.) 138; Tresscott vs Moan (1862), 50 Me. 347; Sprowl vs Lawrence (1859), 33 Ala. 674; State vs Rhoades (1871), 6 Nev. 352.

identical with those of an officer de jure. A different rule would make the condition of an officer de facto better than that of an officer de jure. He would be allowed to profit by his defective title, and enjoy privileges that would be denied to a strictly legal officer. Hence any contract, convention, or understanding made or entered into with an officer de facto, with a view to lessen, mitigate, or otherwise change the nature or extent of, his official duties and responsibilities, will be utterly void. Thus, in *Buck vs Eureka*,²² it was held that a city attorney, who is required by virtue of his office, to attend to all suits and matters in which the city is interested, and who is precluded by the constitution from receiving any compensation therefor, beyond his fixed salary, is estopped from setting up any contract or understanding with the city, whereby his duties were to be different or lesser than those imposed by law, and hence he cannot be heard to say that it was agreed he should be paid extra compensation for all important duties, and this is so even if he has only a de facto title to his office, as he cannot on that ground escape any of the responsibilities which attach to its incumbency.²³

So in *Mockett vs State*,²⁴ it appeared that Mockett, the respondent, was employed by one of the parties to a proceeding had before the city council of the city of Lincoln sitting as a board of equalization, to appear at such hearing and take down the evidence in shorthand. The clerk of the board, who claimed the right to employ a reporter, and others interested, relying on the presence of Mockett, who was a competent reporter, made no further arrangements for a

22 (1895), 109 Cal. 504, 42 P.
243.

24 (1903), 70 Neb. 518, 97 N. W.
588.

23 For an analogous case, see
Pack vs United States (1906), 41
Ct. Cl. 414.

record of the proceeding, regarding him as the official reporter, to whom stipulations between the parties were dictated, and exhibits in the case delivered, and by whom all the evidence was taken down. It was held, that Mockett was under the circumstances an officer de facto, and that mandamus would lie to compel him to deliver a transcript of the evidence to the complainant in the proceeding, notwithstanding a secret agreement by the terms of which he was to deliver a transcript only to one of the parties, he being estopped from pleading a private contract inconsistent with his duty to all.

CHAPTER 21.

CRIMINAL RESPONSIBILITY OF OFFICER DE FACTO.

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| § 253. Theory of criminal responsibility of de facto officer. | § 258. Same subjects—American authorities. |
| 254. Officer de facto in general not criminally liable for non-feasance in office. | 259. Extortion by officer de facto. |
| 255. When liable for non-feasance. | 260. Officer de facto accepting bribe. |
| 256. Same subject. | 261. Permitting escapes—English authorities. |
| 257. Malfeasance in office—Embezzlement—English authorities. | 262. Same subject—American authorities. |
| | 263. Misconduct in office. |

§ 253. Theory of criminal responsibility of de facto officer.— It is said in Hawkins that an officer de facto is punishable the same as as officer de jure, “for that the crime is in both cases of the very same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favor than a rightful officer, and that for no other reason but because he is a wrongful one.”¹ Although this language is used with reference to the commission of a particular crime, that of permitting an escape, yet the reasons assigned in support of the principle apply with equal force to the commission of any other crime by an officer de facto.

This is also the theory sanctioned by American authority. Thus, in *State vs Goss*,² the Court, after declaring that there is no good reason why an officer de facto should not be pun-

¹ 2 Hawk. P. C. c. 19, secs. 23 & 28.

² (1878), 69 Me. 22.

ished as an officer de jure, adds: "The moral wrong, the wickedness of the act, must be as great in the one as in the other; and if we punish the latter and allow the former to escape, we make it an object for men to obtain office by illegal rather than legal means; thus encouraging instead of repressing illegalities. Nor are we aware of any authority for such a distinction."

§ 254. **Officer de facto in general not criminally liable for non-feasance in office.**—As a rule, however, a person cannot be held criminally liable for refusing to serve or stopping to act in an office, to which he has been illegally elected or appointed. Thus, in *State vs McIntyre*,³ the defendants were indicted on two counts. The first one charged them with refusal to qualify and take possession of the offices to which they were elected; and the second, with failure to perform certain duties annexed thereto. It was held that they could not be found guilty on the first count, because the statute under which they were elected did not make it compulsory for them to accept the offices; but even were it otherwise, their position would not be altered, inasmuch as their election was irregular and invalid. Neither could they be found guilty on the second count, because they had never entered upon the offices. So in *Commonwealth vs Rupp*,⁴ it is pointed out that where an indictment is preferred against a constable for not serving, proof of his election or appointment must be given, because if not legally elected or appointed he is not bound to take the office.

Again in *Bentley vs Phelps*,⁵ which was an action at the suit of commissioners of highways against a de facto overseer for the penalty prescribed by statute for his neglect of

³ (1842), 3 Ired. L. (N. C.) 171.

⁵ (1858), 27 Barb. (N. Y.) 524.

⁴ (1839), 9 Watts (Pa.) 114.

duty as such officer, it was held that he was not liable. "The defendant," said the Court, "having no lawful authority to act as overseer of the highways, cannot be liable for omissions of duty. He might be liable to the penalty for not accepting the office, but not for omitting to act when he expressly disavowed his authority, and omitted to act because he was doubtful of his right to do so." And in *Olmstead vs Dennis*,⁶ it is said: "A de facto officer can never be compelled to act. He may stop short at any time in his official actions, and will incur no liability by his mere omission to act."⁷

§ 255. **When liable for non-feasance.**—But, as we have already explained when speaking of the civil liability of de facto officers, the broad language of the New York courts must be taken to apply only to the case where the illegal officer has openly disavowed his authority, and entirely ceased to act; for he could not remain in office, and perform certain duties and neglect others, without incurring liabilities for his omissions.⁸ This is clearly pointed out in the case of *State vs McEntyre*,⁹ above referred to, where the Court says: "There is an essential difference between failing to perform a duty of an office, into which a person has entered and which he is de facto filling, and refusing or failing to accept the office, and qualify himself. A person who undertakes an office and is in office, though he might not have been duly appointed, and, therefore, may have a defeasible title or not have been compellable to serve therein, is yet, from the possession of its authorities, and the enjoyment of its emoluments, bound to perform all the duties, and liable for their

⁶ (1879), 77 N. Y. 378.

⁸ See ante, sec. 245.

⁷ See also *Farman vs Ellington* (1887), 46 Hun (N. Y.) 41, 47.

⁹ (1842), 3 Ired. L. (N. C.) 171.

omission, in the same manner as if the appointment were strictly legal, and his right perfect.”

In a foot-note in Mr. Bishop's work on Criminal Law,¹⁰ the opinion is expressed, that this language lays down a doctrine quite too broad, but we cannot share that opinion. When it is proven that a person has been acting in an official capacity, which is sufficient evidence of his title in criminal prosecutions,¹¹ he should not be allowed to say, to the detriment of others, that he was not what he publicly assumed and pretended to be. Thus, in *State vs Long*,¹² the defendant was indicted as an overseer of a public road for failing to keep it in repair and was convicted. From the conviction he appealed on the ground that his appointment was proved by parol evidence and not by the court record. The proof was that he had professed to be overseer for three or four years, had summoned the road hands repeatedly, in other words had acted as overseer in all respects, except that he had failed to keep the road in good order at all times. It was held, reversing the court below, that the proof was sufficient, and that he was estopped from denying the legality of his appointment.

§ 256. **Same subject.**— It seems further upon principle, that there may be cases where an officer de facto might be compelled to act even after he disavows his claim to the office, under penalty of being held liable for omission of duty. This may occur where an officer de facto, who might have declined to act at all, undertakes to perform an official act or transaction, proceeds with it to a certain point, and then

¹⁰Sec. 464.

¹¹*R. vs Borrett* (1833), 6 Car. & P. 124; *R. vs Gardner* (1810), 2 Camp. 513, 11 R. R. 784; *Dean vs*

Gridley (1833), 10 Wend. (N. Y.) 254; *State vs Maberry* (1848), 3 Strob. L. (S. C.) 144.
¹²(1877), 76 N. C. 254.

refuses to take any further step to complete it on the ground of lack of authority and this to the detriment of the public or third parties. It seems just that in such case he should not, in the course of carrying out the official action, be allowed to disclaim title; he should have done so before acting at all.¹³

§ 257. **Malfeasance in office—Embezzlement—English authorities.**—But whatever may be the criminal responsibility of an officer de facto for non-feasance in office, there is not the slightest doubt as to his liability to punishment for malfeasance. In some English cases bearing on the subject, only a principle of evidence was involved, but obviously the delinquents would not have been permitted to escape liability by impeaching that evidence. In fact those cases are quoted by several American authorities, to illustrate the principle that an officer de facto is criminally responsible. Thus, in *R. vs Borrett*,¹⁴ the prisoner was indicted under Stat. 2 Will. 4, c. 4, as a "person employed in the public service of His Majesty" for embezzling the overcharge of a letter which came to his hands as a letter-carrier. No evidence was offered of the prisoner's appointment as a letter-carrier; but one of the witnesses proved incidentally that he acted as such. Upon objection raised on the ground that the prisoner's appointment ought to have been proven, the judges were all of opinion that evidence of his having acted as a letter-carrier was sufficient. So, on a trial of a person under 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, he being at the time employed under the Postoffice, it was held sufficient to prove that such

¹³See Bishop's New Criminal Law, sec. 464, sub. sec. 4.

¹⁴(1833), 6 Car. & P. 124.

person acted in the service of the Postoffice, and it was not necessary to go into proof of his appointment.¹⁵

§ 258. **Same subjects — American authorities.** — In *State vs Goss*¹⁶ it is laid down that a de facto collector of taxes is punishable for the embezzlement of money which comes into his possession by virtue of his office, the same as if his election or appointment was in all respects legal and formal.¹⁷ So in *Bartley vs State*¹⁸ it was held that in a prosecution for embezzlement, one who has filled out his entire term of office cannot be heard to urge as a defense that when the embezzlement took place he was not an officer de jure, since it is immaterial in such case whether he was an officer de jure or de facto.¹⁹ So it has been decided that where one has been duly elected to an office and assumes the functions thereof, he cannot defend against the charge of embezzlement in office on the ground that having failed to take the oath of office prescribed by law, he was a mere usurper and not an officer de facto.²⁰

But in *Wood vs State*,²¹ it was held that the indictment for embezzlement against a public officer must allege that he took the oath of office. This case, however, can be explained by the peculiar wording of the statute under which it was decided. The Court said: "No doubt it was a piece of folly to insert in the Act the qualifying clause 'who has taken an oath of office,' but having been inserted, the words become essential in the description of the offence and cannot be safe-

¹⁵R. vs Rees (1834), 6 Car. & P. 606. See also R. vs Townsend (1841), Car. & M. 178.

¹⁶(1878), 69 Me. 22.

¹⁷See to same effect, *State vs Stone* (1875), 40 Iowa, 547.

¹⁸(1898), 53 Neb. 310, 73 N. W. 744.

¹⁹See as to sufficiency of evidence in such cases, *People vs Cobler* (1895), 108 Cal. 538, 41 P. 401.

²⁰*Fortenberry vs State* (1879), 56 Miss. 286.

²¹(1886), 47 Ark. 488, 1 S. W. 709.

ly omitted from the indictment. For an indictment upon a statute must state all the circumstances which constitute the statutory offence, no case being brought by construction within a statute unless it is completely within its words."

§ 259. **Extortion by officer de facto.**—Where one elected to an office engages in the exercise of its duties, and misbehaves by taking unlawful and extortionate fees, he will be liable for such misbehaviour, and may be indicted therefor, though he has failed to take the oath of office. Thus it was held in a case where a justice of the peace was charged with extortion of this character.²² "It would be strange," said the Court, "if one who is in office and exercises the duties thereof could excuse himself for committing a crime in the manner of exercising the duties by showing that he had committed another crime in getting into the office." Such was also the ruling where a deputy constable was indicted for a like offence.²³

But the incumbent of an office attempted to be created by an unconstitutional statute,^{23a} and especially of one that has never been in existence even under color of legislative enactment, cannot be guilty of extortion, as he is neither a de jure nor a de facto officer. Thus, in *Kirby vs State*,²⁴ license commissioners, whose offices were purported to be created by an unconstitutional Act, were indicted for extortionately demanding and receiving money from an individual to grant him a license to sell liquor, and it was held on the above ground that they could not be convicted. The same conclusion was reached where a county policeman was

²²State vs Cansler (1876), 75 N. C. 442.

²³Commonwealth vs Saulsbury (1893), 152 Pa. St. 554, 25 A. 610.

^{23a}It would of course be held

differently in a jurisdiction where an unconstitutionally created office is recognized.

²⁴(1894), 57 N. J. L. 320, 31 A. 213.

charged with extortion, and it was shown that his supposed office was created by the commissioners of roads and revenues of a county, without any legislative authority whatever.^{24a}

§ 260. **Officer de facto accepting bribe.**—A de facto officer is criminally liable for accepting a bribe given to him for the purpose of influencing him in the discharge of his duties. Thus, where an order of the Circuit Court was made by the presiding judge on the last day of the term whereby the person named therein was appointed “to act as solicitor pro tem. of this Court until further orders,” and the appointment was accepted by the person named, it was held that this constituted him an officer de facto, and that he was indictable for accepting a bribe given to him to prevent a prosecution against a certain person for notoriously living in a state of adultery. Brickell, J., one of the court, said: “If the defendant accepted the appointment, and exercised the duties of the office, he was an officer de facto, though there may have been a solicitor de jure claiming the office. The law, so long as he kept in the line of his official duty, would have extended him the protection afforded the rightful officer. Official responsibility, civil and criminal, is but just compensation for this protection.”²⁵ So in Indiana, it was held that a gravel-road engineer, appointed under the provision of the Act of 1895,^{25a} is an officer de facto, although he was not a resident of the county when appointed, and in a prosecution for bribery could not raise the question as to whether or not he was an officer de jure.²⁶

Likewise in Massachusetts, it was held that Rev. Laws

^{24a}Herrington vs State (1898),
103 Ga. 318, 29 S. E. 931, 68 Am.
St. Rep. 95.

²⁵Diggs vs State (1873), 49 Ala.
311.

^{25a}Acts of 1895, p. 143.

²⁶State vs Duncan (1899), 153
Ind. 318, 54 N. E. 1066.

1902, c. 210, s. 7, declaring that a municipal officer who corruptly requests or accepts a gift or gratuity, or promise to make a gift or do any act beneficial to him, under an agreement or with an understanding that his opinion or judgment shall be given in any particular manner, etc., shall forfeit his office, and be forever disqualified to hold any public office, trust, appointment, etc., and shall be punished by fine or imprisonment, is applicable to de facto as well as de jure officers.²⁷

§ 261. Permitting escapes—English authorities.—Hawkins²⁸ says: "I shall take it for granted at this day that whoever de facto occupies the office of gaoler is liable to answer for such an escape; and that it is no way material whether his title to the office be legal or not."²⁹ So in Bacon's Abridgment,³⁰ it is said "that a jailer de facto, who takes upon him without any legal authority to keep prisoners, as also feme coverts and infants, is answerable for their miscarriages." Again in the same work,³¹ after the quotation of several authorities,³² it is observed that in those cases "it is said in general that jailers are liable for escapes; but the question being there touching the escape of a person committed for a criminal offence, must be understood of escapes in those cases for which whoever de facto occupies the office of a jailer is liable to answer; nor is it material whether his title to the office be legal or not."³³

§ 262. Same subject—American authorities.—A person who, without having taken the oath prescribed by law,

²⁷Com. vs Wotton (Mass. 1909),
87 N. E. 202.

²⁸2 Hawk. P. C. c. 19, sec. 23.

²⁹See also Id., sec. 23.

³⁰Gaol and Gaoler (D).

³¹Sheriff (H), (5).

³²2 Lev. 159; 2 Jon. 62; 2 Mod. 124; and vide 5 Mod. 414, 416.

³³See ante, sec. 249a.

acts under appointment from the sheriff, as a deputy sheriff, in making an arrest, cannot defend against an indictment for a voluntary escape on the ground that he had not taken the oath required by law, since his appointment and acts thereunder constitute him a de facto officer.³⁴ So it is no valid objection to an indictment for an escape that the defendant, who, though not formally appointed and qualified as a constable, had assumed to act as such, was charged therein with negligence as a lawful officer.³⁵ The ground taken by the court was that he was a lawful officer, so far as his official acts affected the public, and so far as his responsibility was concerned.

But in *Kavanaugh vs State*³⁶ it was held that a special deputy "employed in particular cases" by a sheriff, is the mere agent of his principal in the particular case, and is not an officer within the meaning of the term as used in the constitution, and hence is not punishable for permitting an escape. This case, however, does not seem to meet with the entire approval of the court in *Andrews vs State*,³⁷ where it is observed: "In *Kavanaugh vs State*,³⁸ it was said, that a special deputy, employed by a sheriff in particular cases, was not an officer within the meaning of section 4126 of the Code of 1876, prior to the amendment of January 24, 1876, relating to negligent escapes by sheriffs and other officers. This was a dictum, however, and whatever may be our view as to its soundness in that particular case, we decline to follow it in construing the statute now before us."

§ 263. **Misconduct in office.**—Again, an officer de facto is responsible for general misconduct in office and liable

³⁴*Pentecost vs State* (1895),
107 Ala. 81, 18 So. 146.

³⁵*State vs Maberry* (1848), 3
Strob. L. (S. C.) 144.

³⁶(1868), 41 Ala. 399.

³⁷(1885), 78 Ala. 483.

³⁸41 Ala. 399.

under the provisions of the criminal law on the subject. Thus, where a jailer was indicted for official misconduct in furnishing the prisoners under his charge with spirituous liquors, and in being habitually drunk himself, it was held that he could not show in defence that his appointment was not in writing as required by statute.³⁹

³⁹State vs Sellers (1854), 7 Rich. (S. C.) 368.

CHAPTER 22.

DE FACTO OFFICER LIABLE TO PENALTIES FOR USURPATION, AND TO DAMAGES WHEN SUED AS A TRESPASSER FOR ACTING WITHOUT AUTHORITY.

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| § 263a. Introductory remarks. | § 271. Officer de facto liable for acts done by his order. |
| 264. De facto officer punishable for usurpation. | 272. What damages recoverable. |
| 265. Not punishable when acting bona fide. | 273. Person executing process issued by de facto officer not liable—English authorities. |
| 266. Officer de facto liable as a trespasser. | 274. Same subject—American authorities. |
| 267. Same subject—Illustrations. | 275. Persons assisting de facto officers not liable. |
| 268. Evidence of official reputation insufficient. | |
| 269. Conflicting authorities. | |
| 270. Same subject. | |

§ 263a. Introductory remarks.—As we have seen in the last two chapters, an officer de facto may be treated as a good officer, and be subjected to the same responsibilities, civil and criminal, as an officer de jure. But his liabilities do not end there. He may also be looked upon as a mere usurper, and then, in addition to the ordinary responsibilities attaching to his office, must be added those arising from his usurpation and his unlawful performance of official duties. He is therefore, so to speak, at the mercy of the public and third persons, who may, at their pleasure and as it suits their purposes, treat him as a lawful officer or as an unlawful one. And the result is, that he is laboring under the double disadvantage of being unable to escape liabilities, either by pleading his defective title in the first instance, or by setting up his official character in the second.

§ 264. De facto officer punishable for usurpation.—

In most of the American States, it is an offence punishable by fine and imprisonment to falsely assume to be and to act as an officer.¹ Accordingly, it has been held that one elected to and exercising the office of county attorney, but wholly ineligible thereto, from not having been a licensed practising attorney for two years, was guilty of usurpation of office, and might be proceeded against by indictment for the fine imposed as a penalty.² So to act before giving a bond has been held to be criminally punishable.³ But merely to assume to be an officer, without acting as such, is not an offence.⁴ Nor is it an offence to assume to exercise an office which has no lawful existence.⁵

Again, the American statutes relating to quo warranto generally provide that, in addition to the judgment of ouster against a usurper, a fine may be imposed on him.⁶ The imposition of such fine is usually in the discretion of the court.⁷ In England, the common law practice of fining an unlawful incumbent when ousted upon an information in the nature of quo warranto, has long ago become obsolete.⁸ But by some English, as well as Canadian, statutes, persons exercising certain public offices without the proper qualifications, are liable to penalties.⁹

¹People vs Bates (1894), 79 Hun (N. Y.) 584, 29 N. Y. S. 894; Wayman vs Commonwealth (1879), 77 Ky. (14 Bush.) 466; Com. vs Bush (Ky. 1909), 115 S. W. 249.

²Commonwealth vs Adams (1860), 60 Ky. (3 Metc.) 6.

³United States vs Evans, 1 Cranch. (C. C.) 149.

⁴People vs Cronin (1890), 80 Mich. 646, 45 N. W. 479; Commonwealth vs Wolcott (1852), 10 Cush. (Mass.) 61.

⁵Buckner vs Veuve (1883), 63 Cal. 304, 3 P. 862.

⁶Davis vs Davis (1894), 57 N. J. L. 203, 31 A. 218; People vs Miller (1867), 16 Mich. 205; People vs Nolan (1883), 65 How. Pr. (N. Y.) 468.

⁷People vs Miller (1867), 16 Mich. 205.

⁸Quo warranto is now a civil proceeding in England. See post, sec. 453.

⁹Margate Pier Co. vs Hannam

§ 265. **Not punishable when acting bona fide.**—But whenever in the United States, it is sought to punish a person for usurping a public office, it is generally a good defence that the defendant held the office under a bona fide claim of right, which he might reasonably believe entitled him to take or retain possession.¹⁰ Thus it has been held in New York that, to justify the imposition of a fine, under Code, § 1956, on one who has been adjudged guilty of usurping an office, the court should have before it evidence showing that defendant has been guilty of some act in taking or holding the office which was criminal, or at least grossly improper.¹¹ So in Ohio, it has been decided that an officer legally appointed and qualified, continuing to act as such officer after the expiration of his term, in good faith, reasonably believing it to be his duty to discharge the duties of the office until his successor is qualified, is not to be regarded as criminally usurping the office within the meaning of a statute, which makes it punishable for any person to “take upon himself to exercise or officiate in any office or place of authority in this State, without being legally authorized.”¹² But in Kentucky, under Gen. St. c. 29, art. 25, § 1, making it a misdemeanor, “if any person shall usurp any office,” “or shall knowingly hold and pretend to exercise such office,” it has been held that the usurpation is punishable, without regard to the usurper’s motives.¹³

§ 266. **Officer de facto liable as a trespasser.**—The general rule is that, when an officer sets up his title to an

(1819), 3 B. & Ald. 266, 22 R. R. 378; R. vs Hodgins (1886), 12 O. R. 367.

¹⁰People vs Bates (1894), 79 Hun (N. Y.) 584, 29 N. Y. S. 894.

¹¹People vs Nolan (1883), 65 How. Pr. (N. Y.) 468.

¹²Kreidler vs State (1873), 24 Ohio St. 22. See also State vs Dean (1892), 49 Kan. 558, 31 P. 145.

¹³Wayman vs Commonwealth (1879), 77 Ky. (14 Bush.) 466.

office in defence of an action against him for his acts, he puts in issue his title to the office, and to justify must show that he has the legal title. It is not sufficient for him to show that he is exercising the duties of the office as an officer de facto.¹⁴ From some of the numerous authorities supporting this proposition, we quote the following pertinent extracts which explain the reason of the rule: "An officer de facto merely, without the legal right, has himself the benefit of a legal recognition as such, only in suits to which he is not a party. As to himself he is a mere usurper, though an officer de facto as to third persons interested in his acts."¹⁵ "The officer himself is bound to know whether he has a good title to the office; and if he undertakes to perform its duties without legal right he does so at his peril."¹⁶ "The sound distinction is that the office is void as to the officer himself, but valid as to strangers."¹⁷ "Upon general principles a public officer who, in the name of the law, claims the right to intrude upon the private rights of his fellow citizens, and the power to force them to obey his commands, must be prepared, when required, to satisfy them of his authority."¹⁸

¹⁴Grace vs Teague (1888), 81 Me. 559, 18 A. 289; Pooler vs Reed (1882), 73 Me. 129; Conover vs Devlin (1857), 15 How. Pr. (N. Y.) 470, 6 Abb. Pr. 228; Burditt vs Barry (1876), 6 Hun (N. Y.) 657; Green vs Burke (1840), 23 Wend. (N. Y.) 490; Case vs Hall (1859), 21 Ill. 632; Outhouse vs Allen (1874), 72 Ill. 529; Cummings vs Clark (1843), 15 Vt. 653; Kimball vs Alcorn (1871), 45 Miss. 151; Plymouth vs Painter (1846), 17 Conn. 585, 44 Am. Dec. 574; Gourley vs Hankins (1855), 2 Iowa, 75; Roberts vs Holmes (1874), 54 N. H. 560; Miller vs Callaway (1878), 32 Ark. 666;

Rice vs Commonwealth (1867), 3 Bush. (Ky.) 14; Shepherd vs Stat-en (1871), 5 Heisk. (Tenn.) 79; Venable vs Curd (1859), 2 Head (Tenn.) 582; McBee vs Hoke (1843), 2 Speers (S. C.) 138; Peck vs Holcombe (1836), 3 Port. (Ala.) 329; also cases cited in the next section.

¹⁵New York vs Flagg (1858), 6 Abb. Pr. (N. Y.) 296.

¹⁶People vs Peabody (1858), 6 Abb. Pr. (N. Y.) 228.

¹⁷Riddle vs Bedford (1821), 7 S. & R. (Pa.) 386.

¹⁸Per Taschereau, J.,—Town of Trenton vs Dyer (1895), 24 Can. Sup. Ct. 474.

§ 267. **Same subject—Illustrations.**—This rule is exemplified by numerous decisions. Thus, where a person is constitutionally ineligible to the office of sheriff by reason of lack of residential qualification and he is notwithstanding elected, takes the oath of office, and executes the bond provided by law, he will not be protected in actions against him for trespass on person or property.¹⁹ Nor will a constable,²⁰ or a tax collector,²¹ likewise disqualified by reason of ineligibility. So where selectmen are sued in trespass for taking the plaintiff's goods, and causing them to be sold for payment of taxes, it is not sufficient to show that they were properly elected, but it must also appear that they were duly qualified, by taking the oath prescribed by law.²²

So a surveyor of highways, chosen at a town meeting holden in pursuance of a warrant issued by a justice of the peace, who under the circumstances had no authority to issue a warrant for the purpose, has no legal title to the office of surveyor, and cannot, in an action of trespass, justify the taking of goods, as such surveyor, for a tax assessed upon the plaintiff.²³ Likewise, persons attempting to justify their acts as town officers, are bound to show the legality of the meeting at which they were elected, inasmuch as, if that was not a legal meeting, they have no official position, and have no greater rights than the other inhabitants of the town when defending as such officers.²⁴

So a person, in order to justify his arrest and imprisonment of another, by virtue of his authority as a justice of the peace, must show himself to have been at the time, not

¹⁹Patterson vs Miller (1859), 2 Metc. (Ky.) 493.

²⁰Pearce vs Hawkins (1852), 2 Swan (Tenn.) 87, 58 Am. Dec. 54.

²¹Morgan vs Vance (1868), 4 Bush. (Ky.) 323.

²²Blake vs Sturtevant (1842), 12 N. H. 567.

²³Brewster vs Hyde (1834), 7 N. H. 206.

²⁴Bearce vs Fossett (1852), 34 Me. 575.

only de facto, but a de jure justice.²⁵ Therefore, he cannot justify his arrest or other official acts when he has failed to take the oath prescribed by the constitution,²⁶ or is acting while holding the incompatible office of postmaster,²⁷ or after his commission has expired.²⁸ So in a suit against a pound-keeper, he cannot justify as such pound-keeper, without showing that his bond was approved before the acts complained of were done.²⁹

§ 268. Evidence of official reputation insufficient.—

It follows that when an officer de facto is sued in trespass, he will not be permitted to rely on evidence of reputation to establish his official character, though, as we have seen, such evidence is sufficient in ordinary cases to clothe the person acting with a *prima facie* de jure title. Thus, in an action for false imprisonment, where the defendant justified his arrest of the plaintiff on the ground that it was properly made by him as a public officer, and there was evidence that he met the plaintiff and said to him, "I am a public officer, and I arrest you," for an offence named by him, and that he made a return upon a warrant issued upon a complaint subsequently made by him against the plaintiff for that offence, which return recited the arrest, and was signed by him as a public officer; it was held that there was no evidence sufficient to warrant a finding that the defendant was a police officer.³⁰ So where a person attempts to justify his act by pleading that he was deputy sheriff, if the fact that he was such officer be

²⁵Newman vs Tiernan (1862), 37 Barb. (N. Y.) 159.

²⁶Courser vs Powers (1861), 34 Vt. 517.

²⁷Rodman vs Harcourt (1843), 4 B. Mon. (Ky.) 224.

²⁸Grace vs Teague (1888), 81 Me. 559, 18 A. 289.

²⁹Rounds vs Mansfield (1854), 38 Me. 586; Rounds vs Bangor (1859), 46 Me. 541, 74 Am. Dec. 469. See also cases cited in preceding section.

³⁰Short vs Symmes (1889), 150 Mass 298, 23 N. E. 42, 15 Am. St. R. 204.

not admitted by the issue, proof that he acted as deputy sheriff will be insufficient.³¹

So in trespass for false imprisonment, the justice of the peace who issued the warrant, and the constable who made the arrest, are not allowed to justify by proving that they were recognized as officers by general reputation, but they must establish a strict legal title to their offices.³² Again, where a defendant in a replevin suit sets up the defence that he was a constable, and took the property under an execution in his hands against the owner of the property, and the direct question is raised as to whether he was a constable or not, he must show that he was a constable *de jure*; evidence that he was an acting constable is not sufficient.³³

§ 269. **Conflicting authorities.**—There are a few cases which are opposed in toto or in some particulars to the doctrine announced in the foregoing sections. Thus, it was held by the New York Court of Appeals, that the omission of one elected to the office of Commissioners of Highways to execute and file an official bond as required by the statute, § 3, chap. 180, Laws of 1845, did not make his official acts void, in such a sense as to make him liable as trespasser therefor, as he was not simply an officer *de facto*, but held by a defeasible title; and until, in and by a strict judicial or other authorized proceeding the forfeiture was judicially declared, he was rightfully in office, and the question could not be raised collaterally. However, as is obvious, the decision in that case is not adverse to the principle that a mere officer *de facto* is liable for the consequences of his official acts, but

³¹Hughes vs James (1830), 26 Ky. (3 J. J. Marsh.) 699.

³²Schlencker vs Risley (1842), 4 Ill. 483, 38 Am. Dec. 100.

³³Outhouse vs Allen (1874), 72 Ill. 529. See also cases cited in next preceding two sections.

it holds that the commissioner there was for the time being a rightful officer.³⁴ So in *Kingsbury vs Ledyard*,³⁵ which was an action against a tax collector for seizing, converting and disposing of the plaintiff's property, it was held that an officer who performs a public duty by the authority of process issued by those who have jurisdiction of the subject, is not a trespasser, although his appointment and qualification may not be in all respects according to law.³⁶

§ 270. **Same subject.**—There are also other authorities which, though acknowledging that an officer when justifying as such must prove his title, yet hold that he may establish the same by evidence of official reputation. Thus, in *Londogan vs Hammer*,³⁷ the action was against a justice of the peace for false imprisonment, and it was held that evidence on the part of defendant that he was such and had been acting as a justice of the peace, was admissible, and that until the contrary was shown he should be presumed to have been duly appointed to the office. So in *Potter vs Luther*,³⁸ the defendant pleaded that as one of the deputy sheriffs of Washington County, he took the goods for which the action was brought upon a fieri facias, and offered to prove by reputation that he was a general deputy to the sheriff. This testimony was objected to, but the Court admitted the evidence.³⁹ Again, in *Johnson vs Stedman*,⁴⁰ which was an action of trespass against a constable for taking and convert-

³⁴See also *Lewis vs Brady* (1889), 17 O. R. 377.

³⁵(1841), 2 W. & S. (Pa.) 37.

³⁶See also *Varner vs Thompson*, (1908), 3 Ga. App. 605, 60 S. E. 216, where it is declared that a de facto judicial officer is not liable for his acts. See also dictum in *Johnston vs Wilson* (1820), 2 De Facto—24.

N. H. 202, 9 Am. Dec. 50; but see *Cavis vs Robertson* (1838), 9 N. H. 524.

³⁷(1870), 30 Iowa, 508.

³⁸(1808), 3 John. (N. Y.) 431.

³⁹See also *Colton vs Beardsley* (1860), 38 Barb. (N. Y.) 29.

⁴⁰(1827), 3 Ohio 94.

ing goods, proof of general reputation and acting as constable was considered competent evidence to *prima facie* establish the constable's title.⁴¹

§ 271. **Officer de facto liable for acts done by his order.**—An officer de facto is liable for acts done by another, at his request and by his order, when the acts are such that he would be responsible had he acted in person. This was directly decided in a case of trespass for seizing goods.⁴² The defendants had been illegally chosen assessors and the plaintiff sued them for acts done by one Jones, the collector, under their direction. They had made the assessments on the polls and estates of the residents of a school district and delivered the warrant with the tax bills and their certificate to the collector. The plaintiff refused to pay and his property was seized by Jones. In the judgment which was given against the defendants, the Court says: "The precise time of taking is not material, if it was within the statute of limitations. Nor is it material whether the defendants took the oxen by their own hands, or by the hands of the collector, acting under their direction. The proof in the case shows satisfactorily that the taking by Jones was the act complained of in the plaintiff's writ, and was done by direction of the defendants."

§ 272. **What damages recoverable.**—When the acts performed by an officer de facto are within the scope of the duties annexed to his office, and their invalidity is merely due to his defective title, only nominal damages are recoverable

⁴¹Also *Eldred vs Sexton* (1831), 5 Ohio, 216; but see *Barrett vs Reed* (1826), 2 Ohio 409, and *Carothers vs Scott* (1817), *Tappan* (Ohio) 227.

⁴²*Allen vs Archer* (1860), 49 Me. 346.

against him. Thus, in *Cavis vs Robertson*,⁴³ a collector of taxes was sued in trespass for taking and carrying away the plaintiff's oxen. The defendant had been duly elected, but he had failed to take the oath of office. He was held liable in damages, but as the taxes collected by him were justly due, only nominal damages were awarded to the plaintiff. The Court said: "But a further question arises—what damages is the plaintiff entitled to recover? His property has been taken from him by one who had not, legally, authority to take it—his action is well founded—but it by no means follows that he is now entitled to recover the full value of the oxen, or the whole amount of the tax for which they were sold. The damages he recovers are to be commensurate with the injury he has suffered. If the tax for which they were taken was legally assessed, and the defendant has proceeded according to the provisions of the law, in all respects, except in not taking the oath, what damage has the plaintiff sustained by that? The provision that he should take an oath, was intended to ensure legal proceedings by him, and to add the sanction of conscience to the other obligations to perform his duty. But if it appears affirmatively that the duty has been performed, in the manner in which an officer duly qualified might have performed it; although, by the neglect to take the oath, the defendant must be regarded as acting without sufficient legal authority, and as liable to the plaintiff's action; the plaintiff is certainly not injured to the extent he would have been, had the defendant stepped aside from the prescribed duty, and been guilty of fraud or oppression."

§ 273. Person executing process issued by de facto officer not liable—English authorities.—Persons who

⁴³ (1838), 9 N. H. 524.

execute the commands or mandates of de facto officers, and perform acts which are not unlawful in themselves, are protected from all personal liability. This was directly decided in England in *Margate Pier Co. vs Hannam*,⁴⁴ where it was held that the acts of a justice of the peace, who has not duly qualified, are not absolutely void; and therefore, persons seizing goods, under a warrant of distress, signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required by 51 Geo. 3, c. 36, are not trespassers. Per Abbott, C. J.: "It is obvious that if the act of the justice, issuing a warrant, be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority; a constable who arrests, and a gaoler who receives a felon, will each be a trespasser; resistance to them will be lawful; everything done by either of them will be unlawful; and a constable, or persons aiding him, may, in some possible instances, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered themselves bound to obey, and of the invalidity whereof they were wholly ignorant. An exposition of these statutes, pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction." This case has often been quoted with approval by the English and American Courts; and in a Canadian case,⁴⁵ Morrison, J., thus refers to it: "I perfectly concur in that decision and the grounds upon which the judgment is rested, viz: that the acts of a justice of the peace who has not duly qualified himself are not absolutely void, so that a seizure under

⁴⁴(1819), 3 B. & Ald. 266, 22 R. R. 378.

⁴⁵R. vs Boyle (1868), 4 Ont Pr. R. 256.

a warrant signed by him would not make the parties who executed it trespassers.”⁴⁶

§ 274. Same subject—American authorities.—All the American authorities are in harmony with the English rule on this subject. Thus, in an action of trespass for taking and driving away a mare belonging to the plaintiff, defendant justified under a rate bill of an assessed tax, with a warrant annexed for the collection of the same. Plaintiff, however, claimed that said rate bill was illegal and void because it was made by one Andrus who was not the legal prudential committee of the school district at the time of making up and certifying the same. But the court held that Andrus was prudential committee in fact, if not of right, and this was all that was necessary to enable the defendant, as the legal collector of the district, to justify under his acts.⁴⁷ So in *Rodman vs Harcourt*⁴⁸ the court held that a constable may justify under an execution issued by one who holds the commission and has qualified as a justice of the peace, though such person be not de jure a justice, and could not himself justify the issuing of the execution as such.⁴⁹

So overseers of the poor, who have obtained from a magistrate de facto a warrant in case of bastardy, can defend themselves under such warrant against an action of trespass for assault and battery and false imprisonment, in like manner as if the warrant had been issued by a magistrate de jure.⁵⁰ And evidence establishing the fact that the officer issuing the

⁴⁶See also *Morgan vs Hughes* (1788), 2 Term. (D. & E.), 225.

⁴⁷*Goodwin vs Perkins* (1867), 39 Vt. 598.

⁴⁸(1843), 4 B. Mon. (Ky.) 224.

⁴⁹Also *Laver vs McGlachlin* (1871), 28 Wis. 364; *Com. vs Kir-*

by (1849), 56 Mass. (2 Cush.) 577.

⁵⁰*Weeks vs Ellis* (1848), 2 Barb. (N. Y.) 320. Also *People vs Cook* (1853), 8 N. Y. 67, 59 Am. Dec. 451, affirming (1852), 14 Barb. 259.

process is an officer de facto, is not merely *prima facie* that he is an officer de jure, but it is conclusive for the protection of a ministerial officer required to execute such process.⁵¹

§ 275. **Persons assisting de facto officers not liable.**—Persons assisting de facto officers in the discharge of their duties and acting at their request, are afforded the same protection as if there were no defects in the officer's title. This principle was fully discussed and recognized in *Soudant vs Wadhams*.⁵² The defendant was charged in trespass with breaking and entering into the plaintiff's house and seizing and carrying away certain liquors. He justified by alleging that he was commanded to make the seizure by a lawful constable of the town. But objection was raised to the qualification of the officer because of his neglect to give the bond required by law. The objection, however, was overruled, and it was held that the defendant was justified in assisting the constable by reason of his de facto official character. And the court, after reviewing several authorities, said: "Upon these authorities it is quite certain that the defendant, knowing that Adams was exercising the office of a constable of the town of Goshen under such apparent circumstances of continuance and reputation as would lead men to presume that he was the officer he assumed to be, could submit to his command without instituting an inquiry into his title; and the law will hold the acts of Adams valid, by holding him to be an officer de facto, so far as to protect the defendant against this action for having obeyed him; and this irrespective of the question whether or not the defendant was a party to the original proceeding."⁵³

⁵¹*Wilcox vs Smith* (1830), 5 Wend. (N. Y.) 231, 21 Am. Dec. 213.

⁵²(1878), 46 Conn. 218.

⁵³See also *Schlencker vs Risley* (1842), 4 Ill. 483, 38 Am. Dec. 100.

CHAPTER 23.

LIABILITY OF SURETIES ON OFFICIAL BOND OF DE FACTO OFFICER.

§ 276. General rule.

277. Official acts of officer de facto binding on his sureties.

278. Sureties of officer de facto estopped from denying his title.

279. Same subject—Irregularity of appointment.

280. Same subject—Same subject—English authorities.

281.—Same subject—Defective qualification.

282. Same subject—Same subject—Canadian authorities.

283. Liability of sureties where appointment declared void by statute.

284. Liability of sureties where statute declares forfeiture of office on non-performance of certain requirements.

285. Where forfeiture judicially declared, but officer de facto in office.

286. Same subject—Special duties of sheriffs.

§ 287. Liability of sureties of officer de facto by reason of holding over—General principles.

288. Rule of construction of official bonds—English authorities.

289. Same subject—American authorities.

290. Where the statute provides for holding over.

291. Same subject.

292. Jurisdictions where sureties of holding over officers held liable—Officers de jure.

293. Same subject.

294. Jurisdictions where sureties of holding over officers held not liable—Officers de facto.

295. Same subject.

296. Same subject.

297. Same subject.

298. Liability of sureties where the bond provides for holding over.

299. De facto officer's sureties not liable to de jure officer for official salary or fees.

§ 276. General rule.—The sureties on the bond of a de facto officer cannot avail themselves of his defective title to

escape liability for his misbehavior in office during the term covered by the bond,—the general rule being that the sureties are liable in all cases where they would be so liable, if their principal was an officer de jure. This rule rests chiefly upon two principles of law, though minor reasons and grounds are likewise advanced in support of it. The first one, based upon the de facto doctrine itself, is that the official acts of an officer de facto are binding on all persons, including his sureties. The other, not in any wise specially connected with the de facto doctrine but involving a general principle of jurisprudence, is the doctrine of estoppel, which precludes the sureties on an official bond from disputing their principal's title. This rule, however, will not generally operate to make sureties responsible for the misbehavior in office of their principal after the expiration of his official term. Hence, they will not be liable for his breaches of duty while he holds over merely as a de facto officer.

§ 277. **Official acts of officer de facto binding on his sureties.**—This proposition is undisputed among the American authorities. “As to the general public,” says one of the courts, “an intruder under color of title is a de facto officer; and to this class the bond is liable as much so as if he was an officer de jure.”¹ Thus, in a suit against a defaulting town collector and his sureties for funds embezzled by him, one of the chief defences was that the collector had not been legally elected. But the court held that that question could not be raised in a collateral manner; that since the principal on the bond had acted as collector, at least under color of authority, he was bound to account for the monies collected by him and the sureties were obliged to do so, if he did not.² So in

¹Curry vs Wright (1888), 86 Tenn. 636, 8 S. W. 593.

²Homer vs Merritt (1875), 27 La. Ann. 568.

another case, it was held that although a constable ceases to be a resident of the county in which he holds his office, yet he is still an officer *de facto*, and until he is removed from office by direct proceedings, his authority cannot be collaterally assailed and his sureties remain liable for his misfeasance in office.³

But, as a person cannot be an officer *de facto* of an office which has no legal existence, it has been held that the sureties on a bond for the faithful performance of the supposed duties of an office having no *de jure* status, could not be held responsible.⁴ The court said: "It is true that under some circumstances the sureties of an officer *de facto* will be held liable just as if he were an officer *de jure*. But the surety will not be held liable in such case, unless the office in reference to which the transaction takes place actually exists. A party who volunteers to perform the duties of an office which does not exist, and which, in the manner assumed, is in fact prohibited by law, can not, in any just sense of the term, be called an officer *de facto*, but a mere usurper."⁵

§ 278. Sureties of officer *de facto* estopped from denying his title.—As already explained, the sureties upon the official bond of a *de facto* officer cannot plead his lack of title in avoidance of their liability, they being in technical lan-

³Case vs State (1879), 69 Ind. 46. See also *St. Helena vs Burton* (1883), 35 La. Ann. 521; *Weston vs Sprague* (1882), 54 Vt. 395; *Holt County vs Scott* (1897), 53 Neb. 176, 73 N. W. 681; *Lyndon vs Miller* (1863), 36 Vt. 329; *State vs Bates* (1863), 36 Vt. 387; *People vs Beach* (1875), 77 Ill. 52; *Green vs Wardwell* (1855), 17 Ill. 278, 63 Am. Dec. 366; *Sprowl vs*

Lawrence (1859), 33 Ala. 674; *Ramsey County vs Brisbin* (1871), 17 Minn. 451; *Monteith vs Commonwealth* (1859), 15 Grat. (Va.) 172.

⁴*Tinsley vs Kirby* (1881), 17 S. C. 1.

⁵See also *United States vs Maurice* (1823), 2 Brock. (U. S.) 96; but see *Hoboken vs Harrison* (1862), 30 N. J. L. 73.

guage estopped from so doing. The recital in their bond is a solemn acknowledgment of their principal's official character, which the doctrine of estoppel precludes them from controverting in any action brought against them upon such instrument. "No rule of the common law is better supported by reason and sound policy, than that which declares, that when a man solemnly admits a fact, and the admission is acted upon, he shall not be heard to gainsay it, with a view of escaping from liability."⁶

§ 279. Same subject—Irregularity of appointment.—Upon the foregoing principle, sureties cannot set up any irregularity in the election or appointment of their principal.⁷ Thus, where an action on the bond of a county assessor was resisted by the sureties upon the ground, among others, that the official's election was absolutely void, the court remarked that "the principal obligor and his sureties are in no condition to question the regularity of the election of the principal, or his responsibility for acts done in an official capacity. The

⁶Per Curiam, in *Williamson vs Woolf* (1861), 37 Ala. 298. Also *Sprowl vs Lawrence* (1859), 33 Ala. 674; *Holt County vs Scott* (1897), 53 Neb. 176, 73 N. W. 681; *Hoboken vs Harrison* (1862), 30 N. J. L. 73; *Cox vs Thomas* (1852), 9 Gratt. (Va.) 312; *Chapman vs Commonwealth* (1875), 25 Gratt. (Va.) 721; *Shaw vs Havekluft* (1859), 21 Ill. 127; *Hall vs Luther* (1835), 13 Wend. (N. Y.), 491; *Horn vs Whittier* (1833), 6 N. H. 88; *Norris vs State* (1861), 22 Ark. 524; *State vs Swigart* (1861), 22 Ark. 528; *Borden vs Houston* (1847), 2 Tex. 594; *Ford vs Clough* (1832), 8 Me. 334, 23 Am. Dec. 513; *Byrne vs State*

(1874), 50 Miss. 688; *State vs Rhoades* (1871), 6 Nev. 352.

⁷*Taylor vs State* (1875), 51 Miss. 79; *People vs Huson* (1889), 78 Cal. 154, 20 P. 369; *Borden vs Houston* (1847), 2 Tex. 594; *Billingsley vs State* (1859), 14 Md. 369; *State vs Clark* (1858), 1 Head. (Tenn.) 369; *Boone County vs Jones* (1880), 54 Iowa, 699, 37 Am. Rep. 229; *Green vs Wardwell* (1855), 17 Ill. 278, 63 Am. Dec. 366; *Allbee vs People* (1859), 22 Ill. 533; *Kellar vs Savage* (1841), 20 Me. 199; *Wendell vs Fleming* (1857), 8 Gray (Mass.) 613; *Police Jury vs Haw* (1830), 2 La. 41, 20 Am. Dec. 294.

principal had at least the color of office by his appointment, and the bond estops him and his sureties signing it from denying his official character.”⁸ So where a person was illegally appointed tax collector of a county, and executed a bond for the faithful performance of his duties, though, by some strange omission, the statute did not require a tax collector to execute a bond, and he collected the taxes and made default, it was held that he and his sureties were precluded from setting up as a defense, that the bond was not required by the statute.⁹

Again, in *United States vs Maurice*,¹⁰ the sureties on a bond sought to escape liability by urging that the Secretary of War, who had appointed their principal, James Maurice, agent of fortifications, had no power to make such appointment. But the court (Chief Justice Marshall) overruled the objection, saying: “The appointment of James Maurice having been irregular, is this bond absolutely void, or may it be sustained as a contract entered into by a person not legally an officer, to perform certain duties belonging to an office? . . . If this contract does not bind the parties according to its expressed extent, its failure must be ascribed to some legal defect or vice inherent in the instrument. . . . In such a case, neither James Maurice, nor those who undertook for him, can claim anything more than positive law affords them. . . . The justice of the case requires, I think, very clearly, that the defendants should be liable to the extent of their undertaking, and I do not think the principles of law discharge them from it.”

§ 280. Same subject—Same subject—English authorities.—While it is indubitable that the English courts will, as

⁸*People vs Jenkins* (1861), 17 Cal. 500.

⁹*Taylor vs State* (1875), 51

Miss. 79. But see *Hoeg vs Pine* (Iowa, 1909), 121 N. W. 1019.

¹⁰(1823), 2 Brock. (U. S.) 96.

a general rule, hold a de facto officer's sureties responsible, and will not relieve them by reason of any irregularity in his appointment or election, yet it cannot be denied that the English authorities construe very strictly the obligation of official sureties, and sometimes protect them to an extent which seemingly would not be warranted by the American decisions. A reference to a few cases which, even if not altogether in point, are at least analogous, will illustrate our statement. Thus, in *Kepp vs Wiggett*,¹¹ the condition in a bond recited that A. "had been duly nominated and appointed a collector for the year ending," etc.; and that "duplicates of the assessments had been delivered and given in charge" to him, with a warrant or warrants for collecting the same; and it was held, in an action against the sureties, for A.'s default, that they were not estopped by these recitals from showing that there had been no complete appointment of A. as collector, and that the duplicate assessments and warrant to collect had not been delivered to him. It must not be supposed, however, that the judges in this case denied the application of the doctrine of estoppel in suits on bonds, but they held that, under the circumstances, the same was not infringed.¹²

In *Holland vs Lea*¹³ the facts were as follows:—In March, 1845, R. L. was nominated and elected assistant overseer of the poor of the parish of W., by the inhabitants in vestry assembled, at the yearly salary of £27. In May following he entered into a bond, with two sureties, as a security for the faithful execution of the office, under the 59 Geo. 3, c. 12. The condition of this bond, which was in the usual form, recited that statute, and that R. L. had been duly nominated

¹¹ (1850), 10 C. B. 35, 20 L. J. C. P. 49, 14 Jur. 1137.

¹² See also *Webb vs James* (1840), 7 M. & W. 279, 9 D. P. C.

315, 10 L. J. Ex. 89; *Nares vs Rowles* (1811), 14 East, 510.

¹³ (1854), 9 Ex. 430, 2 C. L. R. 532, 23 L. J. Ex. 122.

and elected at the annual salary of £27. R. L. then proceeded to perform the duties of the office. In March, 1846, at a vestry duly held, a resolution was come to, that the permanent overseer's salary (meaning R. L.'s) should be raised from £27 to £35 a year, including all other extra charges. In June, 1846, a warrant of the appointment of R. L. as assistant overseer was signed and sealed by two justices of the peace. This warrant recited that R. L. had been nominated and elected in March, 1846, at the yearly salary of £35. Subsequently to June, 1846, R. L. had acted as assistant overseer, but had become a defaulter to a considerable amount. In an action on the bond by the succeeding overseers against the sureties, it was held, that there never had been an appointment by the justices upon the nomination and election of March, 1845, at an annual salary of £27, upon which the bond had been given, inasmuch as the appointment was made in pursuance of the resolution of March, 1846, at the increased salary of £35; and therefore, that R. L. had never been duly appointed assistant overseer, and the sureties were not liable.

The majority of the court were of opinion that the resolution of the 19th of March, 1846, had the effect of creating a new office, different from the former, and that to such new office, and to that alone, the justices had appointed the assistant overseer; and that therefore, the bond was not really given for the discharge of the duties of the new office, but of another, and for that reason the sureties could not be held liable.

The reasoning, however, of Martin, B., who dissented, was that R. L. having been really appointed assistant overseer at the vestry meeting of the 27th March, 1845, the resolution of the 19th March, 1846, could only have the effect of increasing his salary; and that such increase of salary,

coupled even with the false recital or misrecital in the appointment by the justices, could not affect the liability of the sureties on the bond. He relied on *Franks vs Edwards*,¹⁴ where a reduction in an assistant overseer's salary had been held not to relieve the sureties.

§ 281. Same subject—Defective qualification.—Again, sureties are precluded from pleading lack of qualification of their principal, or his failure to qualify as required by law, or any irregularity whatever in the mode of or attempt at qualifying on his part, whether such failure or irregularity be attributed to his own fault or to that of any other officer or public body. Thus, they are estopped from raising the question of his eligibility.¹⁵ Neither can they set up his failure to take the official oath.¹⁶ The same is also held with reference to other objections relating to the bond itself, such as its filing, sufficiency, or approval, or to other matters more remotely connected with it, all of which are liable more or less to affect the official character of the principal.¹⁷

§ 282. Same subject—Same subject—Canadian. Authorities.—There are two Canadian cases upholding the

¹⁴(1852), 8 Ex. 214, 22 L. J. Ex. 42.

¹⁵*Jones vs Gallatin County* (1879), 78 Ky. 491; *School Directors vs Judice* (1887), 39 La. Ann. 896, 2 So. 792.

¹⁶*State vs Findley* (1840), 10 Ohio, 51; *Green vs Wardwell* (1855), 17 Ill. 278, 63 Am. Dec. 366; *Lyndon vs Miller* (1863), 36 Vt. 329; *State vs Bates* (1863), 36 Vt. 387.

¹⁷*Boone County vs Jones* (1880), 54 Iowa, 699, 37 Am. Rep. 229; *Wendell vs Fleming* (1857), 8

Gray (Mass.) 613; *People vs Huson* (1889), 78 Cal. 154, 20 P. 369; *Trescott vs Moan* (1862), 50 Me. 347; *Ford vs Clough* (1832); 8 Me. 334, 23 Am. Dec. 513; *Lane vs Harrison* (1820), 6 Munf. (Va.) 573; *Kelly vs State* (1874), 25 Ohio St. 567; *County Com'rs vs Gray* (1895), 61 Minn. 242, 63 N. W. 635; *Ramsey County vs Brisbin* (1871), 17 Minn. 451; *Pritchett vs People* (1844), 6 Ill. 525; *People vs Slocum* (1866), 1 Idaho, 62.

above principle. In *Township of Whitby vs Harrison* ¹⁸ the sureties set up the failure of the officer, a tax collector, to subscribe the oath prescribed by statute, in defence of the action, but the court overruled the objection, saying: "It is possible, though not certain, that the defendant, when he became surety for the collector, looked upon this oath, which he might have supposed the collector must have taken, or must take, as affording some security for his integrity. We must not suppose that a sworn officer would not have more scruples about acting unfaithfully than one who was not sworn, otherwise it would be altogether idle in the legislature to exact such oaths. But we can find no authority that would warrant our holding that the omission to take the oath on the part of the collector furnished a legal excuse to the collector for not paying over money that he had collected, or that it could be set up by his surety as a claim to exemption from liability on his part." And in another case, apparently upon the same bond, it was held that a corporation is not bound to see that their collectors take the oath of office; it is a duty which the statute imposes a penalty upon the collector himself for not fulfilling.¹⁹

§ 283. Liability of sureties where appointment declared void by statute.—Again, though an appointment be made in violation of statutory provisions which declare it void, yet if the appointee enters upon the duties of the office, gives a bond, and incurs liabilities as an officer, he and his sureties are liable upon the bond. Thus, in violation of a statute, which provided "that no person shall be eligible to any office of profit or trust, who is a defaulter to the treasury, at the time of his election, and that the election of any such person

¹⁸(1859), 18 U. C. Q. B. 603.

¹⁹*Municipality of Whitby vs Flint* (1859), 9 U. C. C. P. 449.

shall be void," a defaulter was elected sheriff, he gave bond and was inducted into office. He collected taxes and failed to pay them over. Suit was brought upon his official bond, and judgment rendered against him and his sureties. On appeal it was urged that his election being void, the bond given by him was equally void. It was held, however, that though the election of the defaulter as sheriff was void, and his induction into the office illegal, yet by intruding himself therein, and assuming its duties, he became sheriff *de facto*; and that those who voluntarily bound themselves for the faithful performance of his duties could not absolve themselves from their obligation by insisting that he was no sheriff.²⁰

Likewise in Kentucky, an Act passed in 1844 enacted, "that no person shall be appointed constable in any district, unless such person shall have been a citizen of the district at least six months next before his appointment," and the Act declared any appointment made contrary to its provisions null and void. Nevertheless, one Teal was appointed constable in a district in which he did not reside, and he and his sureties were held liable upon his official bond. The judgment of the Court which is rather instructive contains the following reasoning: "It is obvious, that under the provisions of this Act, the appointment of Teal, as constable, was null and void, and that the bond sued upon is not valid as a statutory bond. But it does not necessarily ensue that it is not obligatory as a common law bond on the parties who executed it. It was entered into voluntarily, and by its execution Teal was enabled to assume the character, and act in the capacity of constable, and thus get into his hands the money of the plaintiff. This constitutes a sufficient consideration to uphold the bond; and public policy, instead of prohibiting, requires the adoption of

²⁰Jones vs Scanland (1845), 6 Humph. (Tenn.), 195, 44 Am. Dec. 300.

the principle that makes such bonds binding on all the obligors, both principal and sureties.”²¹

§ 284. Liability of sureties where statute declares forfeiture of office on non-performance of certain requirements.—As we have seen elsewhere,²² a statutory provision declaring that the office shall be vacant upon failure or neglect on the part of the person elected or appointed there-to to comply with certain requirements, in regard to the giving of bond, the taking of the official oath, or the like, does not *ipso facto* create a vacancy in fact, whatever effect it may have upon the legal title of the officer. It seems, therefore, that so long as those in authority allow a person, who has failed to qualify as required by law, to discharge the duties of the office, he should be regarded as an officer *de facto*, and his sureties should not benefit by his failure or neglect to escape liability. The authorities supporting these views are quite numerous.²³

They generally proceed upon the principle that the statutory requirements, however stringent may be the language of the Act, are merely directory. Others claim that it is no part of the contract of the sureties to an official bond, that, before their liability shall attach, their principal shall strictly

²¹Com. vs Teal (1853), 14 B. Mon. (Ky.) 29.

²²See sec. 140 et seq.

²³State vs Toomer (1854), 7 Rich (S. C.) 216; Stephens vs Treasurers (1822), 2 McCord (S. C.), 107; McBee vs Hoke (1843), 2 Speers L. (S. C.) 138; Kottman vs Ayer (1848), 3 Strob. (S. C.) 92; Chicago vs Gage (1880), 95 Ill. 593; McElhanon vs Washington County (1870), 54 Ill. 163; State vs Porter (1840), 1 Ala. 688;

De Facto—25.

Crawford vs Howard (1851), 9 Ga. 314; Stephens vs Crawford (1846), 1 Kelly (Ga.) 574, 44 Am. Dec. 680, s. c. (1847), 3 Kelly 499; Sprowl vs Lawrence (1859), 33 Ala. 674; Williamson vs Woolf (1861), 37 Ala. 298; State vs Cooper (1876), 53 Miss. 615. But see McNutt vs Lancaster (1848), 9 S. & M. (Miss.) 570; Bennett vs State (1880), 58 Miss. 556; State vs Tucker (1875), 54 Ala. 205.

comply with all the requirements of the law, so as to constitute himself, before entering upon the duties of the office, an officer de jure, and not an officer de facto merely. Again others invoke the doctrine of estoppel. Some also hold that if the bond cannot be enforced as a statutory bond, it can as a common law bond.

In *State vs Toomer*,²⁴ which was an action against one of the sureties of a late Master in Equity, who had failed to comply with an Act in several important particulars, it was held that this constituted no defence to the suit, though the Act provided that upon such failure his office was to be "deemed absolutely vacant." The Court said: "In all these cases the doctrine is affirmed, that the statutory provisions prescribing the manner of executing the bond, suing out the commission, or taking the oaths of office, are merely directory; and that the omission to qualify, by giving the bond, suing out the commission or taking the oaths of office, is cause of forfeiture; but so long as the officer appointed continues to exercise the duties of his office, his official acts as to third persons are legal." So in another case, a sheriff gave a bond after the expiration of thirty days, and it was held that he was an officer de facto, and his sureties were liable, although the statute declared, that if the bond was not given within thirty days, the office shall be vacant.²⁵

But it seems that even a mandatory construction is not inconsistent with responsibility on the part of the sureties, so long as their principal de facto occupies and exercises the office. This may be inferred from some of the cases above quoted, where the reasons given for the rulings would apply equally, whatever construction was placed upon the statute. In fact, a learned judge says: "The best considered of these

²⁴(1854), 7 Rich. (S. C.) 216.

²⁵*Crawford vs Howard* (1851),
9 Ga. 314.

cases hold the bond valid, not because the statute fixing the time was directory merely, but because the officer became a *de facto* officer, or because the officer and his sureties were estopped from asserting the invalidity of the bond, they having tendered it and it having been accepted and the officer having acted under it.”²⁶

§ 285. Where forfeiture judicially declared, but officer *de facto* in office.—It has also been held in one case, that the sureties on the official bond of a sheriff are responsible for his misbehavior in office after his office is declared forfeited, but before the writ of discharge is served upon him.²⁷ There the sureties were sued for the recovery of moneys received by the sheriff from a debtor under a *fi. fa.*, placed in his hands after the declaration of forfeiture but before he had given possession to his successor. The forfeiture, however, was under a statute which made his acts valid until he was actually removed.²⁸ “I am of opinion,” said Draper, C. J., “he continued *de facto* in the possession of the office of sheriff, and answerable for all the acts done by him in that character.” And further on, he added: “The words used, that Mercer ‘shall well and truly pay over to the person or persons entitled to the same of all such moneys as he shall receive by virtue of his said office of sheriff,’ are by no means necessarily limited to moneys received by him during his tenure of office, and would certainly apply to a case where he had received a *fi. fa.*, and commenced execution while he was in office, and had completed the same and made the money after his removal and the appointment of his successor. In such a case I feel no

²⁶Irvine, C. J., in *State vs Lansing* (1895), 46 Neb. 514, 64 N. W. 1104.

²⁷*Kent vs Mercer* (1862), 12 U. C. C. P. 30.

²⁸5 & 6 Ed. VI, c. 16; 49 Geo. III, c. 126.

doubt the sureties would be liable under the covenant, and I cannot satisfy myself that his removal in the manner stated in this case makes any difference."

§ 286. *Same subject—Special duties of sheriffs.*—It must be borne in mind, however, that sheriffs stand on a different footing from ordinary officers. They are authorized by common law to complete after the expiration of their term, duties commenced by them while in office. Thus, the same sheriff who commences execution is bound to perfect it, for the law regards it all as one act.²⁹ Accordingly, "though the sheriff is out of his office, yet he is bound to sell the goods" seized by him while in office.³⁰ And in *Boucher vs Wiseman*,³¹ it is said that the right of a sheriff to continue *de facto* in office "until he has regular notice of his discharge," has been long ago established.

In view of this state of the law, it is evident that there is nothing improper or unjust in sometimes extending the liability of the sureties on a sheriff's bond beyond his fixed official term, for they are presumed to have contracted with knowledge of and subject to such law. This principle is fully recognized in the United States, where it is held that a sheriff's bond covers his official acts performed after the expiration of his term of office, when it is part of his duty to perform such acts. The undertaking of the sureties, it is said, must be co-extensive with the duties of the principal.³²

²⁹*Tiffany vs Miller* (1850), 6 U. C. Q. B. 426.

³⁰*Per Holt, C. J.*—*Clerk vs Withers* (1705), 2 Ld. Ray. 1072, 6 Mod. 290. Also *Doe vs Donston* (1818), 1 B. & Ald. 230, 19 R. R. 300.

³¹(1595), Cro. Eliz. 440.

³²*Baker vs Baldwin* (1880), 48 Conn. 131; *State vs Roberts* (1830), 12 N. J. L. 114, 21 Am. Dec. 62; *State vs Hamilton* (1837), 16 N. J. L. 153; *Barker vs Munroe* (1834), 4 Dev. L. (N. C.) 412; *Elkin vs People* (1841), 4 Ill. 207, 36 Am. Dec. 541.

Otherwise it is, where the common law duties of sheriffs are altered by statute, and limited to the term of office.³³

§ 287. Liability of sureties of officer de facto by reason of holding over—General principles.—So far it has been shown that the sureties of an officer de facto are generally under the same responsibility for the defaults of their principal, as if he were an officer de jure. One of the plausible arguments in favor of this doctrine, is that it is immaterial to the sureties whether their principal is an officer de jure or an officer de facto, so long as their liability is not increased or extended. But this reasoning evidently can apply only to the sureties of an officer filling a regular term, and not to those of one who is merely holding over as an officer de facto. The de facto doctrine cannot be permitted to override the principles of contract, and create responsibilities never intended to be assumed by the contracting parties. The liability of a surety is *strictissimi juris*, and cannot be extended by construction beyond the fair scope of the agreement entered into by him. No doubt the official acts of an officer holding over may be valid and binding, but it does not follow that his bondsmen must guarantee their faithful performance.

Attention is called to this distinction in the leading case of *Chelmsford vs Demarest*,³⁴ where the Court points out that different considerations prevail when it is sought to charge the sureties of an officer holding over, and when only his official acts are drawn into question. As the court was dealing there with a private corporation, only the doctrine of estoppel was given as a reason for upholding official acts, but as it is well known, the acts of de facto public officers are sus-

³³McDonald vs Bradshaw (1847), 2 Kelly (Ga.) 248, 46 Am. Dec. 385; Wood vs Lowden (1897), 117 Cal. 232, 49 P. 132;

State vs Parchmen (1859), 3 Head. (Tenn.) 609.

³⁴(1856), 7 Gray (Mass.) 1.

tained on grounds of necessity and public policy. But if public policy can be invoked to validate the acts of de facto public officers, it would certainly be directly against such public policy to violate the sacredness of contract, in order to prevent occasional losses to the public by reason of the defaults of their agents. If parties to a bond undertake to be responsible for the misbehavior in office of a person for a fixed period, their responsibility should not be extended by reason of the failure or neglect of the public or those in authority to appoint a successor, or to take steps to remove the unlawful incumbent. These principles are so consonant with reason that they never were seriously doubted.

It is true that there are a few cases³⁵ which might be said to lend support to a different doctrine, but they are not well considered decisions. In some of them the conflict is merely to be found in some *obiter dicta*, which were unnecessary in view of the facts before the court; while in others it is difficult to grasp the exact principles upon which they were decided. Possibly the Nevada case, cited below,³⁵ is the only one directly opposed to the doctrine universally accepted. But at all events, whatever weight these authorities may have, it can safely be concluded, and laid down as a general proposition, that, in the absence of a clear and positive intention to the contrary, to be gathered from the bond itself, or from the law under which it was given, sureties will not be bound during their principal's holding over, inasmuch as this would be extending their liability beyond the period contracted for.

§ 288. Rule of construction of official bonds—English authorities.—The above will be apparent from an examination of the principles governing the interpretation of official

³⁵Dunphy vs Whipple (1872), vs Dickerson (1872), 45 Cal. 12; 25 Mich. 10; State vs Wells People vs Beach (1875), 77 Ill. 52. (1872), 8 Nev. 105; Placer County

bonds. The English rule of construction is, that where the condition of an official bond contains general words apparently extending the liability of the sureties for an indefinite period, such words must not be construed according to their literal and grammatical meaning, but must be restricted and narrowed down by reference to the regular term of office fixed by law, or where no definite term exists, then to the official period specified in the bond; and they are not to be understood as creating a continuance of liability beyond the official term so fixed by law or so recited in the instrument, as the case may be.

The leading case upon this subject is *Lord Arlington vs Merrick*.³⁶ There the bond recited that the Postmaster-General had appointed Thomas Jenkins to be his deputy postmaster for the period of six months, but the condition in the instrument was for the faithful performance of the duties of the office by Jenkins "during all the time that he shall continue deputy postmaster." The whole Court was of the opinion that the words "during all the time" should be intended only for the six months mentioned in the recital. This authority has constantly been followed by the English courts. Thus, where the bond was for the due performance of the duties of tax collector "from time to time and at all times thereafter" the surety was held not liable beyond a year, the office being an annual one.³⁷

So where a bond, after reciting the appointment of J. B. by churchwardens and overseers, as a collector of church and

³⁶ (1673), 2 Saund. 403.

³⁷ Peppin vs Cooper (1819), 2 B. & Ald. 431. Also Hassell vs Long (1814), 2 M. & S. 363; St. Savours, Southwark vs Bostock (1806), 2 Bos. & P. (N. R.) 175; Bamford vs Iles (1849), 3 Ex. 380. 18 L. J. M. C. 49; Liverpool

Waterworks vs Atkinson (1805), 6 East, 507, 2 Smith, 654; Keith vs Fenelon Falls United School Section (1883), 3 O. R. 194; Kitson vs Julian (1855), 4 El. & Bl. 854, 24 L. J. Q. B. 202, 1 Jur. (N. S.) 754, 3 W. R. 371.

poor rates, was conditioned for the duly accounting to the obligees and their successors for money received pursuant to and in execution of the office of collector; it was held, that the obligors were not responsible for receipts on account of any year subsequent to that during which the obligees were in office.³⁸ But of course the above rule of interpretation will not prevail, where by the bond it appears clearly that the intention was to extend the liability for an indefinite period.³⁹

§ 289. Same subject—American authorities.—When untrammelled by the provisions of their own statutes, the American authorities have been practically unanimous in adopting the English rule of interpretation. “Where the term of an officer,” says one of the courts, “is for a definite or fixed period, the surety is only liable for his faithful performance during that period. This is clearly so when the bond itself specifies the period. If the bond is silent as to the length of the term, but the statute under which the bond is given fixes the term, the statute, in that regard, will be taken as a part of the contract.”⁴⁰ Thus, in *United States vs Kirkpatrick*,⁴¹ the suit was upon a bond given to the United States, conditioned for the faithful discharge of the duties of a collector of direct taxes, by one Reed who was appointed to

³⁸Leadley vs Evans (1824), 2 Bing. 32, 2 L. J. C. P. (O. S.) 108.

³⁹Peppin vs Cooper (1819), 2 B. & Ald. 431; Oswald vs Mayor of Berwick-upon-Tweed (1856), 5 H. L. Cas. 856, 25 L. J. Q. B. 383, 2 Jur. (N. S.) 743, 4 W. R. 738, affirming 3 El. & Bl. 653; Curling vs Chalklen (1815), 3 M. & S. 502; Augero vs Keen (1836), 1 M. & W. 390, 2 Gale, 8, 1 Tyr. & G. 709, 5 L. J. Ex. 233.

⁴⁰People vs Toomay (1887), 122 Ill. 308, 13 N. E. 521. Also *United*

States vs Boyd (1841), 15 Pet. (U. S.) 187; *Miller vs Stewart* (1824), 9 Wheat. (U. S.) 680; *United States vs Spencer* (1840), 27 Fed. Cas. (No. 16,367) 1281, 2 McLean, 265; *Bigelow vs Bridge* (1811), 8 Mass. 275; *Rany vs Governor* (1835), 4 Blackf. (Ind.) 2; *Moss vs State* (1847), 10 Mo. 338, 47 Am. Dec. 116; *Patterson vs Freehold Tp.* (1876), 38 N. J. L. 255.

⁴¹(1824), 9 Wheat (U. S.) 720.

that office. Reed was afterwards appointed for a succeeding term, but never gave any other bond or security; and after his re-appointment he became a defaulter. It was held that the new commission revoked and vacated the first; and that his sureties were only bound for his acts under the first commission, and not under the second. So where the term of an officer was limited to four years, it was held that he could not act by virtue of his original appointment and qualification after the expiration of the term, and hence that his sureties could not be held liable if he was permitted to unlawfully continue in office.⁴²

So it is held that where the legislature has extended the term of an officer beyond the limit fixed by law at the time of his election and qualification, the sureties upon his bond cannot be held liable for his official acts during such extended term.⁴³ Again, where an officer takes a bond from his deputy to indemnify him during his continuance in office, such bond only covers the term of the principal's office then current, and cannot be held to embrace defaults during a succeeding term of the principal, whether the deputy continues to act without a new appointment or not.⁴⁴

However, as already pointed out, the bond itself, or the statute under which it is given, and sometimes the character of the office, may indicate that the liability of the surety is to be extended for an indefinite period, or at least beyond the fixed official term.⁴⁵ Thus, a county treasurer and his

⁴²*Offutt vs Commonwealth* (1874), 10 Bush. (Ky.) 212.

⁴³*King County vs Ferry* (1893), 5 Wash. 536, 32 P. 538, 34 Am. St. R. 880, 19 L.R.A. 500; *Sparks vs Cherokee County* (1907), 76 Kan. 280, 91 P. 89; *Brown vs Lattimer* (1860), 17 Cal. 93.

⁴⁴*Thomas vs Summey* (1854), 1

Jones L. (N. C.) 554; *Hubert vs Mendheim* (1883), 64 Cal. 213, 30 P. 633; *Tyler vs Nelson* (1858), 14 Gratt. (Va.) 214. But see *Hughes vs Smith* (1808), 5 Johns. (N. Y.) 168.

⁴⁵*Camden vs Greenwald* (1900), 65 N. J. L. 458, 47 A. 458; *Krutt-schnitt vs Hauck* (1870), 6 Nev.

sureties were held liable for a defalcation committed by such treasurer more than two years after the execution of his official bond, there being at that time no law in the State where he held office, limiting the tenure of office of the county treasurers.⁴⁶

§ 290. Where the statute provides for holding over.—

But though the American courts have generally acknowledged the correctness of the English doctrine, yet they have not all applied it with equal rigidity in the construction of their own statutes. Constitutional and statutory provisions, which to some appeared sufficient to exclude certain bonds from the operation of the rule, were construed differently by others. For instance, where the law provides that an officer shall hold the office for a fixed period, and until his successor is chosen, or is chosen and qualified, there is a great diversity of judicial opinion as to whether or not these words operate to make his sureties liable during his holding over. Both views are supported by many weighty and respectable authorities. The solution of the question would seem to depend on the character which is to be attributed to the officer, while he so holds over. If he is to be regarded as an officer *de jure*, then his sureties are answerable; if merely as an officer *de facto*, they are not. In other words, the determinative test would seem to be, whether the period of holding over is to be considered as part of the official term or not. As pointed out by a learned judge, the authorities holding the officers' sureties responsible "appear rather to sustain the position that he continues in office; for, if the courts had entertained the opinion that the officers whose securities were sued, were out

163. See also *Laurium vs Mills* 46*State vs Baldwin* (1880), 14 (1902), 129 Mich. 536, 89 N. W. S. C. 135.
362.

of office at the expiration of the term of office specified, there would appear to be no difficulty or hesitation in declaring that the securities were not liable for defaults after the official powers of the principal had ceased.”⁴⁷ And another judge, commenting on the same cases, says that such courts hold, “that the bond is given not only for the statutory term, but for the further time which may elapse between the end of the expressed statutory term and the time when the successor is elected and qualified; that the law becomes incorporated into the bond; that the sureties are bound to know that his right of office may extend beyond the year, and that this possible extension is taken into consideration and provided for in the bond.”⁴⁸

§ 291. **Same subject.**—It would be foreign to the purpose of this work to enter upon a close criticism of the cases to ascertain which of the two principles of construction, is better supported by authority and sound reasoning. Moreover, the current of decision on both sides not only is unopposed, but generally sustains the proposition we have previously enunciated, to the effect that the sureties of an officer holding over merely as a *de facto* officer, cannot be saddled with responsibility for his defaults. In fact, as already pointed out, we could discover but three or four cases that might to any possible degree, countenance a different theory. Again, generally speaking, the subject involves a question of more academical than practical interest at this late day, when the views of the several courts upon the subject are known; for the recognized judicial interpretation of a statute, being part of the case-law, is as much the law of the land as

⁴⁷Gamble, J., in *State vs Lusk* (1853), 18 Mo. 333.

⁴⁸Dunbar, C. J., in *King County*

vs Ferry (1893), 5 Wash. 536, 32 P. 538, 34 Am. St. R. 880, 19 L.R.A. 500.

the statute itself. Then, inasmuch as a surety who becomes a party to a bond given under or pursuant to a statute, must be presumed to have contracted subject to such statute as judicially interpreted in his jurisdiction, he cannot complain if afterwards he is held strictly to the terms of his contract as thus settled. Both views of the question, however, are given below with the authorities supporting them.

§ 292. Jurisdictions where sureties of holding over officers held liable—Officers de jure.—The Missouri courts are among those that favor a liberal construction of constitutional or statutory provisions authorizing holding over, by assigning to the words their full literal and grammatical import. Thus, in *Long vs Seay*,⁴⁹ it was held that the sureties on the bond of an officer, who by law holds until his successor is elected and qualified, remain liable so long as he continues to hold the office, though that be beyond the term for which he was elected. In another case the Court, referring to this subject, says: "The doctrine now well settled in this State is, that an officer elected or appointed to hold for a definite period of time and until his successor shall be duly elected and qualified, holds his office for the specified term, and if no successor be elected or appointed at the expiration of the time, his term of office continues until such appointment or election, and that the time during which he holds, after that specified time has expired and until a successor is elected and qualified, is as much a part of his term of office as the preceding time."⁵⁰

Similarly, in Indiana it was held that the sureties upon

⁴⁹ (1880), 72 Mo. 648.

State vs Auditor (1866), 38 Mo.

⁵⁰ *Savings Bank of Hannibal vs Hunt* (1880), 72 Mo. 597, citing *State vs Lusk* (1853), 18 Mo. 333;

192. Also *State vs Kurtzborn* (1883), 78 Mo. 98. affirming (1880), 9 Mo. App. 245.

the bond of a township trustee were bound to know that his right to the office might extend beyond the year, and they bound themselves for whatever time he might continue in office by virtue of such election. "As long as he continued in the office, his successor not having been elected and qualified, he was such officer, not *de facto* merely, but *de jure*."⁵¹

In West Virginia, a person was elected by the council of the City of Wheeling collector of the city for the unexpired portion of the current term of said office, and continued to hold and exercise the duties of the office after the expiration of the term, and until his successor was elected and qualified. It was held that he was collector *de jure* of the city until his successor was elected and qualified; and that his sureties were bound to the same extent for his default while thus in office, after the expiration of the current term, as they were for defaults committed before.⁵²

§ 293. **Same subject.**—In California it is laid down, that sureties on an official bond are liable for a breach of official duty committed by their principal during the term of office for which the bond was given, or committed by him after the expiration of his official term, and before he yields up the office to his successor.⁵³ In *People vs Aikenhead*,⁵⁴ however, a distinction was taken between the case where the officer is re-elected and the case where he is succeeded by another. The action was upon the official bond of a county treasurer, and the Court observed: "The appointment of Aikenhead as Treasurer was to continue until his successor

⁵¹State vs Berg (1875), 50 Ind. 496, following Butler vs State (1863), 20 Ind. 169. See also Akers vs State (1856), 8 Ind. 484.

⁵²Wheeling vs Black (1884), 25 W. Va. 266.

⁵³Priet vs De la Montanya (Cal., 1889), 22 P. 171.

⁵⁴(1855), 5 Cal. 106.

was qualified, and until this took place, ordinarily, his sureties would be bound. But Aikenhead was elected for a new term and ought to have given a new bond. It devolved upon another officer of the law to see to this, and the sureties upon the bond may well have rested in security under the impression that the obligations of the law had been fulfilled. If another than Aikenhead had been elected and failed to qualify, so as to have continued the latter in office, the defendants would have been chargeable with notice, and indeed their continued liability would have been but an incident of their contract."

And in *Placer County vs Dickerson*⁵⁵ there is language that might be interpreted as meaning that even if a principal holds over merely as a de facto officer, yet his sureties might be liable. The suit was also upon the bond of a county treasurer, and the Court said: "Dickerson was at that time still acting in his official capacity, and was de facto, at least, the County Treasurer of Placer County. Whether he was rightfully so or not is not material. The defendants were still held for his breaches of official duty, and could not be permitted to claim in their defence that de jure the office belonged to Hollenbeck, who had not then entered upon the discharge of his duties." ⁵⁶

In Oregon, it is declared that "whatever the rule at common law may have been, it is clear that where by the constitution or law, officers are elected or appointed for a term, and until their successors are elected and qualified, they are thereby authorized to hold and exercise their offices until their successors are duly elected or appointed under some existing provision of the law." ⁵⁷

⁵⁵ (1872), 45 Cal. 12.

⁵⁶ For a similar dictum, see *Peo-
ple vs Beach* (1875), 77 Ill. 52.

⁵⁷ *Bean, J., in State vs Simon*
(1891), 20 Or. 365, 26 P. 170. Also
Eddy vs Kincaid (1895), 28 Or.

The same principle of statutory interpretation has been adopted in North Carolina,⁵⁸ in South Carolina,⁵⁹ in Mississippi,⁶⁰ in Georgia,⁶¹ and in Nebraska.⁶²

§ 294. Jurisdictions where sureties of holding over officers held not liable—Officers de facto.—On the other hand, there is quite a formidable array of authorities holding that, where one is elected to an office under a law which provides that he shall hold the office for a fixed term, and until his successor is elected and qualified, and he is either re-elected at the expiration of the term, but fails to give a new bond, or a successor is regularly elected, but fails to qualify, and he is permitted to hold over, the sureties on his bond are not liable for a defalcation occurring after the expiration of the first term. "But these authorities," says a learned judge, "seem to proceed generally upon the theory that his holding over is wrongful, because his own re-election or that of his successor, and a failure to qualify, terminated his right to the office, and created a vacancy which should have been filled by the proper appointing power."⁶³

In those cases, as is evident, the statutory language is construed strictly by reference to the fixed term of office, and the meaning ascribed to it is that a reasonable time only is to be allowed, at the expiry of the official term, during which the outgoing officer may legally hold, in order that his suc-

537, 41 P. 157; *Baker City vs Murphy* (1895), 30 Or. 405, 42 P. 133, 35 L.R.A. 88.

⁵⁸*Gulley vs Daniel* (1859), 6 Jones L. (N. C.) 444; *Snuggs vs Stone* (1860), 7 Jones L. (N. C.) 382.

⁵⁹*Treasurers vs Lang* (1831), 2 Bailey (S. C.) 430.

⁶⁰*McAffee vs Russell* (1855), 29

Miss. 84; *Thompson vs State* (1859), 37 Miss. 518.

⁶¹*Cuthbert vs Brooks* (1873), 40 Ga. 179.

⁶²*United States vs Jameson* (1882), 16 Fed. R. 331.

⁶³*Per Bean, C. J., in Eddy vs Kincaid* (1895), 28 Or. 537, 41 P. 157.

cessor may be appointed and may qualify and take charge of the office; and after the expiration of such time, the reasonableness of which depends in each case upon statutory requirements and other circumstances, the officer holding over ceases to be an officer *de jure*, to become merely an officer *de facto*, whose sureties from that moment are relieved from all further liability.

Notwithstanding that the opposite theory may have the balance of convenience on its side, it must be admitted in view of the rules generally controlling the interpretation of bonds, that this construction of the statutes can be supported by very strong and weighty arguments. "Certainly," says one judge, "a plausible argument can be made on each side of the question; but, upon mature reflection I have inclined to the view that it is more in harmony with the general principle ruling this subject, and which has been already stated, to refuse to give to the stipulation in question the latitude requisite to support the action of the plaintiff." And further on, he adds: "Can we presume that virtually the city officials said to those sureties, this treasurer is appointed for a year, and you become his surety for that year; it is our duty to appoint his successor at the end of this year, but if we fail to perform that duty, you thereby become his surety for all such time as we shall persist in such neglect, even though it may cover the whole life of the incumbent? It seems to me that, in the language of the case cited from Saunders, this it is 'unreasonable to suppose.'"⁶⁴

§ 295. *Same subject.*— Of the same opinion was Chief Justice Shaw, in a suit involving the liability of sureties on a bond of a treasurer who was to be "chosen annually," and

⁶⁴Per Beasley, C. J., in *Rahway vs Crowell* (1878), 40 N. J. L. 207, 29 Am. R. 224.

who was to hold his office until another should have been chosen and qualified in his stead.⁶⁵ Said the learned judge: "The law having directed that such officer shall be chosen annually, or at the annual meeting, it assumes and presupposes that such direction will be complied with, and then the words in question must be construed to mean, till the next annual meeting, or meeting at which such annual election is to be made, and such reasonable time afterwards as shall be sufficient to enable the officer-elect to procure and deliver his bond, and do whatever else is required to complete his qualification; or if he fails thus to qualify, until the corporation can elect another and cause him to be qualified."

And in *Harris vs Babbitt*⁶⁶ Judge Dillon concurred in the above views, and observed that the courts which support a different interpretation "do not seem, in general, to have had their attention called to the reasoning on the other side," and that their decisions are not as fully considered as the other line of adjudications.

§ 296. **Same subject.**—Upon the above principles, it was held in New Jersey that a clause in a bond of suretyship for a public official, guaranteeing the faithful discharge of his duties for a specified term and "until his successor is appointed," will not hold the surety for defaults occurring beyond a reasonable time after the expiration of his term; but, what is a reasonable time is a question of fact for the jury, and not a question of law.⁶⁷

In Minnesota, the Supreme Court declared that the statutory provision for a contingent holding over was a precau-

⁶⁵*Chelmsford vs Demarest* (1856), 7 Gray (Mass.) 1.

⁶⁶(1877), 4 Dill. C. C. (U. S.) 185.

⁶⁷*Camden vs Greenwald* (1900), 65 N. J. L. 458, 47 A. 458. Also *Rahway vs Crowell* (1878), 40 N. J. L. 207, 29 Am. R. 224.

tionary one, to prevent a possible vacancy or lapse in the office, but was not intended to create an unlimited term, or to indefinitely extend the prescribed term.⁶⁸ But one of the judges dissented, remarking that "the term of the treasurer, as an officer *de facto* and *de jure*, continues until his successor is elected and qualified. The interval between the end of the two years, and the election and qualification of the successor, is just as much a part of the term as is the period of two years itself."

In Iowa, where a treasurer was re-elected and continued in office during a second term without being re-qualified, it was held that after the expiration of the term fixed for qualification he did not legally hold over, but remained treasurer *de facto* only; and that the sureties on the bond executed by him, when he qualified for his first term, were not liable beyond that period.⁶⁹

§ 297. **Same subject.**—In Wisconsin, it has been judicially remarked that "as time must necessarily elapse after an election to enable the officer-elect to express his acceptance and qualify, it must be presumed that the sureties contracted that the old officer would perform his duty until a reasonable period was allowed for doing those things."⁷⁰

In Delaware, it is held that a surety in the official bond of an officer whose appointment is annual, is not liable beyond the year, though the officer continues by law until a successor is appointed.⁷¹ By the Court: "It is another general principle, that if a person is surety for the fidelity of another in an office of limited duration, or the appointment

⁶⁸Scott County vs Ring (1882), 29 Minn. 398.

⁶⁹Wapello County vs Bigham (1859), 10 Iowa, 39, 74 Am. Dec. 370.

⁷⁰Omro vs Kaine (1876), 39 Wis. 468.

⁷¹Wilmington vs Horn (1837), 2 Harr. (Del.) 190.

to which is only for a limited period, he is not obliged beyond that period."

In Kansas, the same principle of interpretation prevails. In an action upon a bond, which was not expressly limited as to time, the Court observed: "The silence of the bond as to its own duration, is immaterial. The law fixes the length of the principal's term, and the obligation of the sureties extends only to the term existing, and for which the bond is given. Nor does the failure of the people to elect a successor, or of the successor elected to qualify, extend the term for which the principal was appointed. He may, it is true, be continued in office, as the statute has provided, for preventing a vacancy between the close of the one term and the election and qualification of a successor; but he is simply filling a part of his successor's term."⁷²

There are several other authorities maintaining the same doctrine in regard to the strict interpretation of bonds.⁷³

§ 298. Liability of sureties where the bond provides for holding over.—Where the official bond contains stipulations similar to the statutory provisions as to holding over, there is as much conflict in regard to the interpretation of such clauses among the Courts, as there is with reference to the construction of the statutes. Some assign to the words their grammatical meaning, and hold that the sureties are

⁷²Riddell vs School District No. 72 (1875), 15 Kan. 168. See also Sparks vs Cherokee County (1907), 76 Kan. 280, 91 P. 89.

⁷³Dover vs Twombly (1860), 42 N. H. 59; Hewes vs People (1892), 48 Ill. App. 439; Heuitt vs State (1823), 6 Har. & J. (Md.) 95; State vs Crooks (1836), 7 Ohio (pt. 2) 221; State vs Powell (1888), 40 La. Ann. 241; State vs Lake (1893), 45 La. Ann. 1207, 14

So. 126; Board of Administrators vs McKowen (1896), 48 La. Ann. 251, 19 So. 328, 55 Am. St. R. 275; Montgomery vs Hughes (1880), 65 Ala. 201; King County vs Ferry (1893), 5 Wash. 536, 32 P. 538, 34 Am. St. R. 880, 19 L.R.A. 500; Ballard vs Thompson (1899), 21 Wash. 669, 59 P. 517; Offutt vs Commonwealth (1874), 10 Bush. (Ky.) 212.

liable until a successor to their principal has duly qualified and entered upon the duties of the office.⁷⁴ Others limit the liability of the sureties to the default accruing within a reasonable time after the expiry of the official term.⁷⁵ And finally, some wholly deny any effect to such stipulations, and hold that the bondsmen cannot be liable beyond the specified term of office. "The fact that the bond contains the clause which in terms extends the liability 'until another is chosen and sworn in his stead,' does not, like a statutory clause of the same import, extend the legal liability beyond the expiration of the municipal year."⁷⁶

§ 299. **De facto officer's sureties not liable to de jure officer for official salary or fees.**—It is held that the sureties on the official bond of an officer de facto are not liable to the officer de jure, upon his recovery of the office, for the fees, salary or emoluments thereof, which were received by the former while wrongfully exercising the functions of the office. "No case can be found" says one Court, "where the excluded party has sought to hold the sureties upon the official bond of the de facto officer liable for damages for such wrongful detention or for fees collected for services rendered by such intruder. This affords a strong presumption that there is no such liability."⁷⁷ It is further said that the bond is not an undertaking binding the sureties "to guarantee the validity of the title of their principal to the office he was exercising."⁷⁸

⁷⁴*Laurium vs Mills* (1902), 129 Mich. 536, 89 N. W. 362; *Akers vs State* (1856), 8 Ind. 484.

⁷⁵*Camden vs Greenwald* (1900), 65 N. J. L. 458, 47 A. 458.

⁷⁶*Per Virgin, J., in Norridge-wock vs Hale* (1888), 80 Me. 362. See also *Com. vs Fairfax* (1809), 4 Hen. & M. (Va.) 208.

⁷⁷*Curry vs Wright* (1888), 86 Tenn. 636, 8 S. W. 593.

⁷⁸*Id.*; also *People vs Jackson* (1901), 16 Colo. App. 308, 64 P. 1051; but see *Morris vs People* (1896), 8 Colo. App. 375, 46 P. 691.

BOOK V.

OF THE VALIDITY OF THE OFFICIAL ACTS OF
DE FACTO OFFICERS.

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CHAPTER 24.

INTRODUCTORY.

§ 300. Scope of this book.

§ 300. Scope of this book.— In dealing with this subject, it will be impossible to refer to every instance where the acts of de facto officers have been held valid, as this would involve the repetition in another form of all the cases already considered in the preceding books. Therefore, after laying down general principles, we shall content ourselves with referring, by way of illustrations, to the decisions which are most likely to be of interest. There are, however, subjects which have a special importance, or about which there is conflict among the authorities. These will require to be treated separately. With these considerations in view, we shall investigate the subject-matter of this book under six heads, which will form so many chapters, as follows:—

1. Acts of de facto officers valid—Rule explained and illustrated.
2. Acts of de facto officers in relation to the levy and collection of taxes—Tax titles.
3. Appointment or election to office by de facto officers.
4. Acts of de facto officers in relation to elections.
5. Validity of oaths taken before de facto officers—Perjury.
6. Validity of acts of de facto judicial officers—De facto courts.

CHAPTER 25.

ACTS OF DE FACTO OFFICERS VALID—RULE EXPLAINED AND ILLUSTRATED.

- § 301. General rule.
302. Acts not valid when official character notoriously bad.
303. Acts not valid as to persons aware of the officer's want of title.
304. Same subject.
305. Knowledge of defective title of appointees not generally imputable to appointors—Liability of appointors for acts of appointees discussed.
306. Same subject—English authority.
307. Same subject—American authorities.
308. Where ignorance of defective title is due to gross negligence, de facto rule cannot be invoked.
309. Conflicting ruling in New York in regard to effect of knowledge of defective title.
310. De facto rule does not apply where same would work injury.
311. Acts of de facto Governors and Legislators in relation to the passing of laws.
312. Ordinances or other measures passed by de facto municipal bodies.
- § 313. Bonds signed or issued by de facto municipal officers.
- 313a. Contracts made by de facto officers binding on corporation.
314. Acts of de facto municipal officers in relation to various matters.
315. Payments by or to officer de facto, valid and binding on all parties.
- 315a. Validity of marriages performed by de facto officers.
316. Validity of instruments acknowledged before or registered by de facto officers.
317. Acts of de facto clerks and deputy clerks of courts.
318. Acts of de facto sheriffs and constables, and de facto deputies.
319. Acts of de facto prosecuting attorneys.
320. Validity of acts of de facto officers in relation to the selection and swearing of jurymen.
321. Validity of bonds or recognizances taken or approved by officers de facto.

§ 301. **General rule.**—It is manifest from what has already been said, that the acts of officers *de facto*, performed by them within the scope of their assumed official authority,¹ in the interest of the public or third persons, and not for their own benefit,² are generally as valid and binding as if they were the acts of officers *de jure*. "This doctrine dates as far back as the Year-Books, and it stands confirmed, without any qualification or exception, by a long line of adjudications, both in England and in the United States."³ "Acts done by an officer *de facto*, and not *de jure*, are good," says Viner.⁴ "There is no distinction in law," observes one judge, "between the official acts of an officer *de jure*, and those of an officer *de facto*. So far as the public and third persons are concerned, the acts of the one have precisely the same force and effect as the acts of the other. The only difference between the two is, that the latter may be ousted from his office by a direct proceeding against him in the nature of *quo warranto*, and the former can not. Their official acts are equally valid. The rule is one which is dictated alike by principles of justice and public policy. It would be a great hardship if innocent persons were made to suffer by the unknown negligence of officials, who, under color of office, were daily holding themselves out to the public as officers *de jure*."⁵ Upon this principle, a third party *bona fide* procuring the services of a *de facto* officer, is no more responsible for his acts than if he were an officer *de jure*.⁶

In fact, the question for determination in cases involving

¹Bailey vs Fisher (1874), 38 Iowa, 229.

²R. vs Lisle (1738), Andr. 163; Pack vs United States (1906), 41 Ct. Cl. 414; Jordan vs Ry. Co. (1904), 25 Pa. Sup. Ct. 564.

³Heath vs State (1860), 36 Ala. 273.

⁴Vin. Abr. Tit. Officer and Offices (G. 4).

⁵Somerville, J., in Joseph vs Cawthorn (1883), 74 Ala. 411. See also Com. vs Wotton (Mass. 1909), 87 N. E. 202.

⁶Berry vs Hart (1871), 1 Col. 246.

the application of the de facto doctrine, is not as a rule whether the challenged acts, assuming the officer to be de facto such, are valid, but whether the person whose title is questioned, is or was really a de facto officer. As stated by a learned judge: "The rule that the acts of a de facto officer are valid as to the public and third persons is firmly established, although it is sometimes difficult to determine whether the evidence is such as to warrant a finding that a particular act or acts, the legality of which may be in issue in a given case, were those of a de facto officer."⁷ It follows from this, that the numerous cases referred to in previous parts of this work, upholding a de facto character in persons assuming to hold office under various circumstances, are equally authority for the proposition laid down in this section. Nevertheless, for the sake of convenience and ready reference, it has been thought advisable to collect in this place a few authorities, selected from an overwhelming number of others of like import.⁸

⁷De Haven, J., in *Waite vs Santa Cruz* (Cal. 1898), 89 Fed. 619.

⁸*Scadding vs Lorant* (1851), 3 H. L. Cases 418, 5 Eng. L. & Eq. 16, 15 Jur. 955, affirming 13 Q. B. 706; *Parker vs Kett* (1701), 12 Mod. 466, 1 Ray. (Ld.) 658; *R. vs Lisle* (1738), Andr. 163; *Milward vs Thatcher* (1787), 2 Term. (D. & E.) 81, 1 R. R. 431; *R. vs St. Clement's* (1840), 12 Ad. & E. 177, 3 P. & D. 481, 4 Jur. 1059; *De Grave vs Corp. of Monmouth* (1830), 4 C. & P. 111; *Costard vs Winder* (1600), Cro. Eliz. 775; (for other English cases see ante, sec. 6)—*O'Neil vs Atty.-Gen. of Canada* (1896), 26 Can. Sup. Ct. 122, 1 Can. Crim. Cases 303; *Pon-*

tiac County vs Ross (1889), 17 Can. Sup. Ct. 406, affirming s. c. sub nom. *Pontiac County vs Pontiac Pac. Junction Ry. Co.* (1888), 11 Leg. News (Que.) 370; *Speers vs Speers* (1896), 28 O. R. 188; *Turtle vs Euphemia Tp.* (1900), 31 O. R. 404; *Hamilton School Trustees vs Neil* (1881), 28 Gr. (Ont.) 408; *Kent vs Mercer* (1862), 12 U. C. C. P. 30; *R. vs Smith* (1848), 4 U. C. Q. B. 322; *Rouleau vs Corp. of St. Lambert* (1896), 10 Que. R. (S. C.) 69 & 85; *LeBoutillier vs Harper* (1875), 1 Que. L. R. 4; *Hogle vs Rockwell* (1898), 20 Que. R. (S. C.) 309; *R. vs Gibson* (1896), 29 Nov. Scot. R. 4; *Crookshank vs McFarlane* (1853), 7 N. B. 544; *Cawley vs*

§ 302. Acts not valid when official character notoriously bad.—The acts of an illegal officer, however, are valid only when the defects in his title are unknown, for when the public or third persons have or should have a knowledge that the officer is not an officer *de jure*, there is no reason for validating his acts, and the law will no longer protect those

Branchflower (1884), 1 B. C. (Pt. 2) 35; (for other Canadian cases see ante, sec. 11)—*Nofire vs United States* (1897), 164 U. S. 657, 17 Sup. Ct. 212, 41 L. ed. 588; *Gonzales vs Ross* (1887), 120 U. S. 605, 7 Sup. Ct. 705; *McDowell vs United States* (1895), 159 U. S. 596, 16 Sup. Ct. 111, 40 L. ed. 271; *Cardoza vs Baird* (1907), 30 App. (D. C.) 86; *Masterson vs Matthews* (1877), 60 Ala. 260; *Miller vs Callaway* (1878), 32 Ark. 666; *Monahan vs Lynch* (1903), 2 Alaska, 132; *Jeffords vs Hins* (1886), 2 Ariz. 162, 11 P. 351; *Snsanville vs Long* (1904), 144 Cal. 362, 77 P. 987; *Darrow vs People* (1885), 8 Colo. 417, 8 P. 661; *State vs Carroll* (1871), 38 Conn. 449, 9 Am. Rep. 409; *State vs Gleason* (1869), 12 Fla. 190; *Gunn vs Tackett* (1881), 67 Ga. 725; *Sharp vs Thompson* (1881), 100 Ill. 447, 39 Am. Rep. 61; *Parker vs State* (1892), 133 Ind. 178, 31 N. E. 1114; *State vs Powell* (1897), 101 Iowa, 382, 70 N. W. 592; *State vs Perkins* (1854), 24 N. J. L. 409; *Morton vs Lee* (1882), 28 Kan. 286; *Patterson vs Miller* (1859), 2 Metc. (Ky.) 493; *Citizens Bank vs Bry* (1848), 3 La. Ann. 630; *Belfast vs Morrill* (1876), 65 Me. 580; *Abbott vs Chase* (1883), 75 Me. 83; *Koontz vs Hancock* (1885), 64 Md. 134;

Petersilea vs Stone (1876), 119 Mass. 465, 20 Am. Rep. 335; *Auditor-Gen. vs Sup'rs* (1891), 89 Mich. 552, 51 N. W. 483; *Ramsey County vs Brisbin* (1871), 17 Minn. 451; *Vicksburg vs Lombard* (1875), 51 Miss. 111; *Perkins vs Fielding* (1893), 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100; *State vs Cook* (1896), 17 Mont. 529, 43 P. 928; *Dredla vs Baache* (1900), 60 Neb. 655, 83 N. W. 916; *Walcott vs Wells* (1890), 21 Nev. 47, 24 P. 367, 37 Am. St. R. 478, 9 L.R.A. 59; *Jewell vs Gilbert* (1885), 64 N. H. 13, 5 A. 80, 10 Am. St. R. 357; *Oliver vs Jersey City* (1899), 63 N. J. L. 634, 44 A. 709, 76 Am. St. R. 228, 48 L.R.A. 412, reversing 63 N. J. L. 96, 42 A. 782; *Wilcox vs Smith* (1830), 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; *People vs Cook* (1853), 8 N. Y. 67, 59 Am. Dec. 451, affirming (1852), 14 Barb. 259; *Burke vs Elliott* (1844), 4 Ired. L. (N. C.) 355, 42 Am. Dec. 142; *Ex p. Strang* (1871), 21 Ohio St. 610; *Hamlin vs Kassafer* (1887), 15 Or. 456, 15 P. 778, 3 Am. St. R. 176; *Riddle vs Bedford County* (1821), 7 S. & R. (Pa.) 386; *Ex p. Norris* (1877), 8 S. C. (8 Rich.) 408; *Fylpaa vs Brown County* (1895), 6 S. Dak. 634, 62 N. W. 962; *State vs Hart* (1901), 103 Tenn. 269, 61 S. W. 780; *Aulanier vs Governor* (1846), 1 Tex.

who have submitted to them.⁹ "However much color of authority," says the Supreme Court of Missouri, "may clothe the person who assumes to perform the functions of an office and discharge its duties, yet, if the public or third persons are not deceived thereby, if they know the true state of the case, the reason which gives origin or existence to the rule which validates the act of an officer *de facto*, ceases; and with it cease also all of its ordinary validating incidents and consequences."¹⁰

A fortiori, if the pretended officer be a mere intruder, acting without color of right, and without recognition by the public, no one should believe him to be an officer and deal with him as such, for no one can reasonably believe a fact to exist for which he has no reasonable grounds.¹¹ In other words, when the defects in the title of an officer are notorious, those relying on his acts are chargeable with such knowledge.¹² Thus, in *R. vs Corporation of Bedford Level*,¹³ the registration of deeds by a deputy registrar after the death of his principal, was held invalid, because the fact of the death was a matter of common knowledge. "When that fact," says Lord Ellenborough, "was notorious to the owners of land in this Level, no one could have registered his deeds with him under a belief that he was acting as the assistant of one, who by the course of nature had ceased to fill the office, in the exe-

653; *Vanderberg vs Connolly* (1898), 18 Utah, 112, 54 P. 1097; *State vs Bates* (1863), 36 Vt. 387; *Old Dominion Building etc. Ass'n vs Sohn* (1903), 54 W. Va. 101; *McCraw vs Williams* (1880), 33 Gratt. (Va.) 510; *State vs Fountain* (1896), 14 Wash. 236, 44 P. 270; *Yorty vs Paine* (1885), 62 Wis. 154, 22 N. W. 137.

⁹*LeBoutillier vs Harper* (1875), 1 Que. L. R. 4.

¹⁰*State vs Perkins* (1897), 139 Mo. 106, 40 S. W. 650.

¹¹*Dabney vs Hudson* (1890), 68 Miss. 292, 8 So. 545, 24 Am. St. R. 276.

¹²*Nixon, J., in Oliver vs Jersey City* (1899), 63 N. J. L. 634, 44 A. 709, 76 Am. St. R. 228, 48 L.R.A. 412, reversing 63 N. J. L. 96, 42 A. 782.

¹³(1805), 6 East, 356, 2 Smith, K. B. 535.

cution of which he was to be assisted by the deputy." And further on, referring to Moor 112, he adds: "It is said in that book, that the acts of such steward (i. e. a steward de facto) are good, because the suitors cannot examine his title; but when his authority has notoriously ceased, no such reason obtains."

So where a pretended municipal councillor whose election was a patent illegality and nullity, took his seat and concurred in the nomination of other councillors, it was held that his official action could not be sustained as that of an officer de facto, because the illegality of his nomination was a matter of public notoriety in the municipality, and therefore he could not have had the reputation of being a good officer.¹⁴ So where a person was seated as a town supervisor by the board of supervisors, after his opponent had been declared elected and had received a certificate of election, pursuant to an order of the court directing the board of canvassers to recount the votes and to issue a certificate to the candidate having the greater number of ballots, and he himself had been directed to deliver the books and papers of the office to his opponent,—it was held that he could not be deemed an officer de facto, and that his concurrence in passing a resolution rendered the same void, when his vote was essential to constitute the required majority.¹⁵ It was there pointed out that the de facto doctrine does not apply where the official action of an officer has been challenged at the outset, and before any person has been or can be misled by it, and where no rights have as yet accrued upon its faith, either of a public or private character.¹⁶

¹⁴Lacasse vs Labonté (1896), 10 Que. R. (S. C.) 97, 104; Rouleau vs Corp. of St. Lambert (1896), 10 Que. R. (S. C.) 69, 85.

147 N. Y. 426, 42 N. E. 184, affirming (1893), 71 Hun (N. Y.) 309.

¹⁵Williams vs Boynton (1895),

¹⁶See also Van Amringe vs Taylor (1891), 108 N. C. 196, 12 S. E.

§ 303. Acts not valid as to persons aware of the officer's want of title.—Moreover, according to the authorities, though a person's title to an office may not be so notoriously bad as to render all his acts invalid, yet his official character will be no protection to those who happen to know that he is an illegal officer. In other words, he may be a usurper as to certain persons, and a good officer as to others. This was laid down by Andrews, J., in *Lacasse vs Labonté*,¹⁷ where the learned Judge, after quoting the definition of Lord Ellenborough, observes: "From this definition it is apparent that a man in one place, at one time, and among certain persons, might 'have the reputation of being the officer he assumes to be,' and the same man in a different place, or at a different time, or among different persons, might not have such reputation. Therefore it is plain that whether the man is a de facto officer or not cannot be decided absolutely, once for all, and as to all, but on the contrary depends on the knowledge possessed by those with whom he deals as to his true status. As Chief Justice Lee said in the case of *R. vs Lisle* (1738), Andr. 163, 'In these cases the proper question is whether a person be an officer de facto as to the particular purpose under consideration.' Conformably to this we find that in the case of *R. vs Bedford Level* (1805), 6 East, 356, the Court held the acts of the officer in question therein invalid as to certain parties who were aware of the fact which rendered him incompetent, viz., the death of the officer whose deputy he had been, but intimated that they would be valid

1005, 23 Am. St. R. 51, 12 L.R.A. 202; *Baker vs Hobgood* (1900), 126 N. C. 149, 35 S. E. 253; *Cronin vs Stoddard* (1884), 97 N. Y. 271; *Montgomery vs O'Dell* (1893), 67 Hun (N. Y.) 169, 35 N. E. 205, 22 N. Y. S. 412, affirmed in (1894), 142 N. Y. 665, 37 N. E. 570; *Thomp-*

son vs Ewing (1862), 1 Brews. (Pa.) 67; *State vs Shuford* (1901), 128 N. C. 588, 38 S. E. 808; *Conway vs St. Louis* (1881), 9 Mo. App. 488; *State vs Pinkerman* (1893), 63 Conn. 176, 28 A. 110, 44 Am. & Eng. Corp. Cas. 233.

¹⁷(1896) 10 Que. R. (S. C.) 104.

in favor of those unaware of that fact. This is perfectly reasonable and is in accord with the general principles of law applicable to such matters.”

§ 304. *Same subject.*—This principle is clearly exemplified by the case of *St. Luke's Church vs Matthews*.²⁰ There a clergyman entered into a contract with a vestry, who were not legally elected, but who were yet the vestry de facto, for a year's service in the church. He was ignorant of the illegality of the election, and there was no collusion. He performed the duties, and it was held that he was entitled to the benefit of his contract. But in the ensuing year he entered into another contract with the same vestry, when apprised of the illegality of their election. The Court ruled that this furnished sufficient proof of collusion, and a perpetual injunction was decreed against any suit for the services rendered the second year.

The same principle was also applied in *Murphy vs Moies*.²¹ The question in that case was whether the plaintiff's claim had been duly presented to the town council, pursuant to a statutory requirement. The council to which the claim was presented had been declared elected, and had qualified and organized, but the day after the members were sworn in, quo warranto proceedings were commenced to oust them from office, on the ground that their election was invalid. The plaintiff was the attorney of the council in the quo warranto proceedings, and he presented his claim to them after the commencement of such proceedings. It was held that in so doing he assumed the chances of the legality or illegality of the council, and hence the judgment of ouster against them was fatal to his claim. “He knew,” said the Court, “that their

²⁰ (1815), 4 Des. Eq. (S. C.)
578.

²¹ (1892), 18 R. I. 100, 25 A. 977.

title was not only in question, but in litigation at the time, and that their right to act, in any capacity, depended upon the fact of plainly fraudulent votes, which he, himself, as town solicitor, had advised should be counted. . . . If, in this state of affairs the plaintiff chose to submit his claim to that body he took the chance of its ultimate legality. Certainly he is not within the class of persons and the reason for which the rule in regard to de facto officers was established."

So where two school boards were assuming to act in the same district, each claiming to be the lawful board, and a school teacher was hired by one of them, but before she entered upon her duties, she was notified by the other board, who was lawfully in office, not to teach under the authority of the persons who had engaged her, it was held that the hiring contract, though partly performed, was not binding on the school district.²² So in another case, which was also on a teacher's contract, it was held that the plaintiff could not recover if the circumstances known to her were such as to preclude her, as a reasonable person, from believing that the person with whom she had entered into the contract, was subdirector by right.²³

So where a township drainage engineer had been appointed by a municipal council without their having complied with the formalities prescribed by the Act under which the appointment was made, it was held that as to such council who knew or should have known that his appointment was invalid, he could not be regarded as an officer de facto, and an award made by him was set aside. "How can those," said Meredith, J., "who so recently attempted to appoint him say that he had the reputation of being the engineer?"²⁴

²²Genesee Tp. vs McDonald (1881), 98 Pa. St. 444.

²³Bennett vs Colfax (1880), 53 Iowa, 687, 6 N. W. 36.

²⁴Turtle vs Township of Euphemia (1900), 31 O. R. 404. See also Mahony vs East Holyford Mining Co. (1875), L. R. 7 H. L.

§ 305. Knowledge of defective title of appointees not generally imputable to appointors—Liability of appointors for acts of appointees discussed.—It would be a mistake, however, to infer from the language used by the Court in *Turtle vs Township of Euphemia*,²⁵ from which is quoted the above sentence, that an illegal officer can never be a de facto officer in regard to those who appointed him, on the ground that they are presumed to know of the invalidity of his title. In that case the circumstances were suspicious, and suggestive of wrong intention and unfair dealing, if not of actual fraud. The old engineer, whom the council intended to replace, had apparently not been satisfactory to them in his decisions upon matters in which they were concerned, and they wished to appoint one that would be more favorable to their interests. In this they seemed to have succeeded, judging from the results. This led the Court to take the ground, that “where persons have the power of appointment of the judges of their own cases, every prerequisite

869, 33 L. T. 383, Ir. R. 9 C. L. 306; *Herkimer vs Keeler* (1899), 109 Iowa, 680, 81 N. W. 178; *State vs Carroll* (1871), 38 Conn. 449, 9 Am. R. 409; *Herring vs Lee* (1883), 22 W. Va. 661; *Rouleau vs Corp. of St. Lambert* (1896), 10 Que. R. (S. C.) 85; *Le Boutilier vs Harper* (1875), 1 Que. L. R. 4.

²⁵(1900), 31 O. R. 404. This was an action to enjoin the enforcement of a ditch award made by a township engineer on the requisition of one of the plaintiffs, and for damages. The engineer had been appointed by by-law, but the appointment of his predecessor had not been revoked by by-law nor had the latter been notified, as re-

quired by the statute. It was held that the award was a nullity, and that the defendants were liable in damages. The reason assigned by the court, was that the engineer was not an officer de jure, nor could he be regarded as an officer de facto as to those who had recently appointed him. Whether or not he had acted in an official capacity before making the award in question, does not appear by the report. It seems not, because the court said he had not the reputation of being the engineer. The nature of the damages claimed, is also left uncertain by the report. They may not have been occasioned by any work done under the award.

to such an appointment may, by their opponents, be fairly considered a matter of something more than mere form." The Court also relied on the fact of recent appointment, and lack of official reputation in the appointee. From this it is inferable, that the judgment might have been different had it been proven that the new engineer had openly acted for a sufficient length of time to acquire the reputation of being a public officer.

Possibly, also, under the circumstances disclosed, the decision might have been supported on the ground that the former engineer had never been dispossessed, not only legally but even in fact; and, therefore, the principle that there cannot be an officer *de jure* and an officer *de facto*, both in possession of the office at the same time, might have been applied. Be this as it may, however, it is evident that the words of the learned judge must be interpreted with reference to the facts before him. This is especially so in regard to his statement, that the corporation was presumed to know the law. While it is true, as a general proposition, that *ignorantia juris non excusat*, this maxim sometimes requires qualification.²⁶ To invoke it in cases of this class, in order to render official persons or bodies responsible for the acts of their appointees, on account of mere informalities in exercising their power, would be straining a principle of law almost to the breaking point. If presumptive knowledge could be relied on, as against the persons making an appointment, the same could often be urged as effectively against the public. Suppose, for instance, that an irregular appointment is publicly made, and those present know of the manner in which it is made, why should they not be chargeable with presumptive knowledge of the irregularity as well as the appointors, if everyone is presumed to know the

²⁶R. vs Mayor of Tewkesbury B. 629, 37 L. J. Q. B. 288, 18 L. (1868), 9 B. & S. 683, L. R. 3 Q. T. 851, 16 W. R. 1200.

law? This would be manifestly absurd, and against the principle laid down in the English cases quoted before.^{28a} As we have seen, the theory that a person, aware of an officer's defective title, cannot claim that his acts are valid, is based upon the principle that one cannot set up his belief in the legality of something, which he positively knows not to be legal. In other words, he cannot be heard to say that he was deceived, when in fact he was not. But this clearly implies actual, and not merely constructive or presumptive, knowledge—that is, an actual knowledge, not merely of an informality, but of something so manifestly fatal to the title of the pretended officer, that no one possessing such knowledge could reasonably regard him as a good officer.

Therefore, the logical and inevitable conclusion, to our mind, is that, unless the appointors wilfully disregard the law, and knowingly commit an illegality of such a character that they could not, as reasonable men, expect that their proceedings would confer any title on their appointee,²⁷ the latter must be regarded as an officer *de facto*, in regard to them as well as to anybody else; and their responsibility should not be greater than that of any other third party procuring his services.²⁸

In fact, according to English authority at least, only fraud on the part of the appointors can make them liable for the official acts of their appointees; so that, in trespass against them, the question should not be whether the appointment was made strictly in conformity to law, but whether in making it they acted *bona fide* or *mala fide*. If they acted fraudulently, they should be liable; if innocently, they should be re-

²⁷Rouleau vs Corp. of St. Lambert (1896), 10 Que. R. (S. C.) 69 & 85; Lower Terrebonne R. & Mnfg. Co. vs Police Jury (1906), 115 La. 1019, 40 So. 443.

²⁸See Berry vs Hart (1871), 1 Col. 246.

^{28a}See ante, note 26.

lieved from all responsibility. Any other doctrine would lead to the most disastrous consequences. A mere informal non-compliance with a statute might render a municipal corporation liable in trespass, for the official acts of its assessors, collectors, or any other like officers.^{28b} This would not be consonant with reason and justice.

§ 306. **Same subject—English authority.**—A case in point is *Penney vs Slade*.²⁹ That was an action of trespass for seizing the goods of the plaintiff, under color of a warrant signed by the defendants, who were magistrates of the borough of Poole (one of them being the Mayor), for the purpose of enforcing the payment of a poor-rate, which was alleged by the plaintiff to be void, on the ground that the overseers, Sydenham and Custard, by whom it was made, had not been duly appointed. At the trial before Lord Denman, C. J., the following facts were proven on the part of the plaintiff: Seven borough magistrates, including the Mayor, assembled to appoint overseers. The Mayor drew from his pocket two blank forms, with three seals already attached, filled them up with the names of two persons of his own political party, handed them to the two magistrates sitting next to himself, and, on their being signed, immediately despatched them by a constable to be served. As soon as the constable had left the room, the four other magistrates, who had not observed the Mayor's proceedings, requested him to nominate two other overseers, and, upon his refusing to put the question, appointed them without his concurrence. The appointees of the Mayor, however, proceeded to act; and afterwards, the bor-

^{28b}As to right of municipal bodies to rely on the official acts of de facto collectors, assessors and other officers, see post, sec. 338.

²⁹(1839), 5 Bing. (N. C.) 319, 7 Scott, 484.

ough magistrates, being applied to to issue warrants against the plaintiff and others for non-payment of a poor-rate made by such officers, a majority of the magistrates dismissed the application; but the Mayor and another magistrate signed warrants notwithstanding, and the plaintiff's goods having been seized and sold, they were sued in trespass.

Lord Denman directed the jury that if they were of opinion the defendants had acted fraudulently in making the appointment of overseers the appointment was void, and a verdict must be found for the plaintiff; while if they had acted *bona fide*, the verdict should be given for the defendants. The jury having found that it was not fraudulently made, the Court refused a new trial, which was moved for on the ground, that whether the appointment were fraudulent or not, it was void, as being a judicial act done by the minority of the justices assembled, without opportunity of deliberation afforded to the entire body. Tindal, C. J., said: "The appointment may be directly questioned by an appeal to the sessions, or, if there is any impropriety in the mode of the appointment, it may be set aside by a direct application for that purpose to the Court of Queen's Bench.³⁰ It is obviously a much more convenient course that the validity of the appointment should be brought into controversy in a direct way immediately upon the appointment, than that a party should lie by until a rate has been made and levied, and should then be allowed to revert back to some miscarriage in the appointment. No objection arising in such a way ought to prevail, unless it rests on the most solid ground, which, in our judgment, the present objection does not."

It will be noted that, in some respects, this is a much stronger case than where a municipal corporation is sued, by reason of illegal appointments made by its members. Here it was

³⁰R. vs The Overseers of Bridge water (1774), Cowp. 139.

sought to charge the individuals themselves alleged to be guilty of illegal acts, and not the innocent public, represented by the corporation.

§ 307. Same subject—American authorities. — In *Hamlin vs Dingman*³¹ the complaint was for conversion of the plaintiff's property. The defendant was sole trustee of the school district in which the property was taken, and it was taken and sold for a tax levied against the plaintiff and others for school purposes, by a collector, pursuant to a warrant issued to him by the defendant. The collector had only been verbally appointed by the defendant, and, on that ground, it was claimed that the appointment was illegal and void, and that the defendant was personally liable to the plaintiff for the damages he had sustained. But it was held that the collector was an officer de facto, and that the defendant was not liable for his acts in enforcing the warrant. The Court said: "Why should the persons making the appointment be deprived of the protection which a colorable appointment gives to all other third persons? Is it because they make the appointment? To enable those who make an appointment that will make the appointee an officer de facto, they must have the legal capacity to make it, but by reason of some defect in the time or manner of the appointment have failed to make a valid one. This may be the result of an innocent mistake on their part, or of some disqualification on the part of the person appointed wholly unknown to them. They should not suffer for doing what they supposed the law required them to do. It would not be contended that persons, who applied for the appointment of the officer, should be deprived of the protection which the acts of the officer de facto affords to the public. They stood upon precisely the

³¹(1871), 5 Lans. (N. Y.) 61, reversing 41 How. Pr. 132.

same footing as the persons making the appointment. The persons making the appointment may be presumed to know of its irregularity, and if knowledge of the irregularity is sufficient to charge those who appoint, it should extend to all who are cognizant of the defect. To deprive those who make the appointment of the protection afforded by the acts of the person appointed, would be to punish them in damages for their irregular action. When the officer is in under color of an election by the people, are all those voting for him to suffer if it turns out that the election was illegal?"

In *Clark vs Inhabitants of Easton*³² the defendants were sued in tort for a trespass upon the plaintiff's land. The trespasses consisted in entering upon the land and depositing thereon stone, earth, and rubbish, thereby obstructing a water-course. The acts of trespass were committed by three persons acting as road commissioners in repairing a town way. On the part of the plaintiff, it was urged that the election of the commissioners by the town had been irregular, because it had never voted to accept certain statutory provisions relating to road commissioners. But the Court, overruling the objection, said: "We think for the purposes of this case the persons elected by the town must be treated as road commissioners *de facto*, and that the plaintiff cannot in this suit collaterally inquire into the validity and regularity of their election. They were elected by the town as road commissioners, and accepted, were qualified, and publicly acted as such. They were thus in the position of persons who were holding and publicly exercising the functions of an office known to our laws, by virtue of an election by the town which was *prima facie* valid."³³

³²(1888), 146 Mass. 43, 14 N. E. 795.

³³See also *Olson vs Hawkins* (1908), 135 Wis. 394, 116 N. W.

18, where the point under consideration was apparently not thought of sufficient importance to be raised.

There is, however, a conflicting case in Vermont.³⁴ There the selectmen of a town had issued a warrant to collect a highway tax assessed upon the plaintiff, and the same was executed by a surveyor irregularly appointed by the selectmen. The plaintiff's cow was sold, and he brought an action for illegal seizure and sale against the surveyor and selectmen. It was claimed on the part of the defence, that the surveyor was an officer de facto and his acts were valid, but the court held that such defence was not available when the officer himself, or those under whose authority he was appointed and put in motion, were called to justify his proceedings. But this case is adversely criticised in *Hamlin vs Dingman*, above referred to, where Mullin, J., says: "It would be difficult to assign a reason why the person making the appointment should be held liable as a trespasser because he made a mistake as to the mode of appointment. I have been unable to find any case in which such a proposition has ever been advanced, except the case of *Cummings vs Clark*. . . . The court after deciding that the appointment by the selectmen was unauthorized, and hence that he was not an officer de jure, seem to hold that he was an officer de facto as to all third persons, except the persons making the illegal appointment. They were no more protected than was the appointee himself. No authority is referred to in support of the proposition. I have examined with some care, to find a case in support of the ruling of the court, but I have not been successful."

There are also two other cases, where some of the judicial language might be interpreted as meaning that an illegal officer cannot be an officer de facto in regard to those who appointed him. But in one of them,³⁵ the appointment was

³⁴*Cummings vs Clark* (1843), 15 Vt. 653. *Co. vs Police Jury* (1906), 115 La. Ann. 1019, 40 So. 443.

³⁵*Lower Terrebone R. & Mnfg.*

a manifest absurdity, and in the other,³⁶ was involved the validity of a tax assessed by a *de facto* assessor, in a jurisdiction where the acts of *de facto* officers are not recognized as valid in respect to such matters.

§ 308. Where ignorance of defective title is due to gross negligence, *de facto* rule cannot be invoked.—The *de facto* doctrine, however, will not assist those guilty of negligence, and therefore where third persons, invoking or submitting to the acts of an officer *de facto*, might have known, by reasonable care and diligence, that he was not a good officer, as to them his acts will not be maintained. Thus, where a person acted as judge and made an order as such after the appointment of his successor, and after the fact of the new appointment was generally known, and should have been known to the party applying for the order, it was held that the same could not be upheld, if, as apparently was the case, it had been made after the assumption of the office by the new Judge, since that fact could have been easily ascertained. The Court, after assigning various grounds for its decision, added: "There is also another reason why this order should not be sustained. It was made when it was well known by all, including the Judge who made it, that another Judge had been appointed, whose qualification and assumption of the duties of the office it was reasonable to anticipate might occur any day. By a little care and inquiry it could easily have been learned just when this would happen, and thus avoid unnecessary conflict, and especially might this have been done, as there was no such emergency as demanded hasty action. Judicial officers, of all others, should observe the greatest care in the exercise of the important power delegated to them. In view of all the circumstances, I think the order was im-

³⁶*Springfield vs Butterfield*

(1903), 98 Me. 155, 56 A. 581.

providently made. To hold it valid would be a precedent justifying a practice which courts should discourage rather than sustain. Courts have sustained the acts of *de facto* officers only as a matter of necessity, to avoid serious damage to those not at fault; but the encouragement of a careless practice on this subject would result in far greater injury than benefit. Rather is it better that it be understood that the acts and orders of those without the legal right to exercise official trust must pass the ordeal of the closest scrutiny, and be ratified only so far as justified by public policy and necessity.”³⁷

§ 309. Conflicting ruling in New York in regard to effect of knowledge of defective title.—There is a decision of the Supreme Court of New York in conflict with the foregoing principles, touching the effect of knowledge of defective title upon those who deal with an officer *de facto*.³⁸ There an action, brought to recover damages for a breach of a contract, by which the plaintiff was employed to teach a district school by one Will, the defendant's predecessor in office, was defended upon the ground that Will, although elected to and exercising the duties of the office, was disqualified from holding the same by reason of his alienage, he being of Canadian origin and a British subject, and that the plaintiff had knowledge of this fact at the time of making the contract. It was held that the defence was properly overruled by the lower court; and that the validity of Will's title and of the contract, could only be assailed by the people acting in their sovereign capacity as a State. Said the Court: “The defendant here seeks to make an exception (to the rule validating acts of officers *de facto*) viz: That where the party dealing with the

³⁷United States vs Alexander (1891), 46 Fed. 728.

³⁸Morrison vs Sayre (1886), 40 Hun (N. Y.) 465.

officer knows of the invalidity of his title to the office, and where the official act is one to which the party had not a previous right, then the general rule does not apply. That is, for instance, that one who makes a contract with an officer *de facto*, knowing the invalidity of the officer's title, cannot enforce the contract. But this exception cannot be recognized, and for this reason: In an official contract it is not the officer and the other contracting party who alone are interested. The people have an interest; they have a right to insist that such a contract shall be valid; they have a right to say that, so long as they permit their officer *de facto* to continue in office, the government shall not be hampered or obstructed by the assertions of parties who deal with him, that he was not an officer *de jure*, and that they knew it. For the contract must be binding on both sides or on neither. . . . The case of *State vs Carroll* (38 Conn. 449) is, of course, no authority here. And we think that, on the point in question, the views there stated are erroneous."

Without expressing any opinion upon the above decision, it is possible that the rule which limits the validity of a *de facto* officer's acts to those ignorant of the illegality of his title, has often been too broadly stated. Its strict application to persons who knowingly deal with mere usurpers, or with supposed officers who lose all color of title or authority as soon as certain facts are known,³⁹ is agreeable to reason and justice. But to declare that in all cases, no matter what the circumstances may be, the character of an officer, exercising an office under color of title, or with an appearance of right generally acquiesced in, may be changed, by mere knowledge of some defects in his title, from that of a good officer to that of a mere usurper, as to those possessing such knowledge,

³⁹As was the case in *R. vs* (1805), 6 East, 356, 2 Smith K. Corporation of Bedford Level B. 535.

is a doctrine probably requiring qualification. In the preceding sections, we have given expression to the views of the authorities as we found them, rather than to our own.^{39a}

§ 310. **De facto rule does not apply where same would work injury.**—The de facto doctrine, having been invented to protect the public, will not be applied where its application would result in damage and injury to third persons. Thus, in *Green vs Burke*,⁴⁰ an execution was placed in the hands of one Stevenson, a town constable, who went to the residence of the defendant and levied on personal property of amply sufficient value to satisfy the judgment. A few days afterwards he returned the execution to the justice, and within a week or two thereafter informed the defendant of his having so returned it, that he was under twenty-one years of age, and had abandoned the levy. A new execution was issued and delivered to another constable, who by virtue thereof sold nine acres of wheat growing upon the defendant's farm to the plaintiff in this cause. When the wheat was ripe, the defendant undertook to harvest it for his own use. Plaintiff thereupon took the wheat by virtue of a writ of replevin. Defendant pleaded *non cepit* and property in himself. It was contended on his behalf, that the plaintiff had acquired no title by virtue of the sale under the second execution, because the judgment was satisfied by the levy under the first execution. But it was held, that Stevenson had a right to abandon the levy to relieve himself from the consequence of his unlawful act in taking upon himself the duties of the office whilst under age, and that the levy made by him was not a satisfaction of the judgment and another execution might be issued and another levy made. "I know," said Cowen,

^{39a}See, however, our remarks ⁴⁰(1840), 23 Wend. (N. Y.) 490.
under sec. 305.

J., delivering the opinion of the court, "the cases have gone a great way. But they have stopped with preventing mischief to such as confide in officers who are acting without right." So voluntary acts injurious to the successor, performed by a bishop *de facto*, were held invalid in England.⁴¹

§ 311. Acts of *de facto* Governors and Legislators in relation to the passing of laws.— Having now explained the limitations, to which the general rule validating the official acts of *de facto* officers is subject, we shall next proceed to illustrate the same.

In *State vs Williams*⁴² the motion was for an alternative writ of mandamus, commanding the respondent to hold his office of clerk at Shullsburg instead of Avon. Respondent insisted that the county seat had been changed from Shullsburg to Avon, by a vote of the people under an Act of the legislature passed for the purpose. Relator claimed that the law was not valid, because it had not received the approval of the proper Governor of the State. It had been approved by Barstow, whose term had expired and was holding over and acting as Governor, on the assumption of a re-election and under the certificate of the State canvassers, although his successor had been duly elected and had taken the oath of office. The court overruled the objection, on the ground that inasmuch as the Governor was in office and acting Governor, he was a *de facto* officer and his acts were valid until ousted by proper proceeding. The writ, however, was granted on another ground.

In *State vs Smith*⁴³ the objection to the validity of an Act

⁴¹*O'Brian vs Knivan* (1620), Cro. Jac. 552, 79 Eng. R. 473. See also *Old Dominion Bldg. & Loan Asso'n vs Sohn* (1903), 54 W. Va. 101, 46 S. E. 222.

⁴²(1856), 5 Wis. 308, 68 Am. Dec. 65.

⁴³(1886), 44 Ohio St. 348, 7 N. E. 447.

creating a municipal board, was that it had not been passed by a constitutional quorum of the senate. The quorum was nineteen, but seventeen of the members, during the absence of the others, declared the seats of four of the absentees vacant, upon the determination of a contested election, and seated four new members in their stead. The Act was then passed, but it was contended that since the four new members were seated by a minority of the senate, their votes could not be counted to make up the constitutional quorum. Held, that the members so seated were at least de facto members of the House, and the validity of their title could not be inquired into for the purpose of impeaching the validity of laws, enacted by the legislature in which they held seats.⁴⁴

§ 312. **Ordinances or other measures passed by de facto municipal bodies.**—Municipal ordinances, by-laws, regulations, or other measures cannot be assailed on the ground that they were made or passed by merely de facto municipal bodies, or that the making or passing thereof was concurred in by corporate members having only a de facto title to their office.⁴⁵ Thus, in *Scovill vs Cleveland*,⁴⁶ the

⁴⁴See also *Auditor-General vs Sup'rs of Menominee County* (1891), 89 Mich. 552, 51 N. W. 483; *In re Sherill* (1907), 188 N. Y. 185, 81 N. E. 124, 117 Am. St. R. 841. As to validity of pardon granted by de facto governor, see *Ex p. Norris* (1877), 8 S. C. (8 Rich.) 408; *Powers vs Comm.* (1901), 110 Ky. 386, 61 S. W. 735, 22 Ky. Law R. 1807, 63 S. W. 976, 53 L.R.A. 245.

⁴⁵*Magneau vs Fremont* (1890), 30 Neb. 843, 47 N. W. 280, 27 Am. St. R. 436; *State vs Gray* (1888), 23 Neb. 365, 36 N. W. 577; *Susanville vs Long* (1904), 144 Cal. 362,

77 P. 987; *Satterlee vs San Francisco* (1863), 23 Cal. 315; *Roche vs Jones* (1891), 87 Va. 484, 12 S. E. 965; *Keeling vs Pittsburg etc. R. Co.* (1903), 205 Pa. St. 31, 54 A. 485; *Perkins vs Fielding* (1893), 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100; *Hilgert vs Barber Asphalt Pav. Co.* (1904), 107 Mo. App. 385, 81 S. W. 496; *Simpson vs McGonegal* (1892), 52 Mo. App. 540; *Oliver vs Jersey City* (1899), 63 N. J. L. 634, 44 A. 709, 76 Am. St. R. 228, 48 L.R.A. 412, reversing 63 N. J. L. 96, 42 A. 782.

⁴⁶(1853), 1 Ohio St. 126.

trustees of a town passed an ordinance imposing a fee of \$50 a quarter for a license to sell liquor. Defendant carried on business for a time without a license and when sued for the license fee, claimed that the ordinance was void, since the trustees who passed it were not de jure officers. Held, that the trustees were at least de facto officers, and the ordinance could not be impugned by showing defects in their title.⁴⁷

In *Bedford vs Rice* ⁴⁸ it was sought to recover a penalty for violating the regulations of the plaintiff's health officer, forbidding the maintenance of a nuisance. At the annual meeting of the town, no health officers were chosen; and in July of the same year, the selectmen, on the ground that the office was vacant, appointed a board of three health officers who made and published regulations for the health of the public. They ordered the defendant to remove the nuisance complained of, and, on refusal, directed this suit to be brought. The defendant claimed that there was no legal board of health officers, and that their action was without authority. The court denied a motion for a nonsuit, and the defendant excepted. Held, that the regulations were valid since it was sufficient that the persons appointed were health officers de facto.

Pence vs Frankfort ⁴⁹ was a suit brought by taxpayers, residing within a territory added to the city by an ordinance of the council extending the city limits, to enjoin the city from collecting taxes from them, on the ground that the ordinance was not passed by a legally constituted council. Some of the members of the council were holding over after the expiration of their term, and without their votes, the ordinance could not have passed for want of a quorum. Held, that the councilmen so holding over were de facto officers and

⁴⁷See also *Butler vs Walker* (1893), 98 Ala. 358, 13 So. 261, 39 Am. St. R. 61.

⁴⁸(1878), 58 N. H. 446.

⁴⁹(1897), 101 Ky. 534, 41 S. W. 1011.

their concurrence in passing the ordinance did not invalidate it.

§ 313. Bonds signed or issued by de facto municipal officers.—Bonds, debentures, or warrants authorized, signed or issued by de facto municipal officers, are valid and binding on the corporation on behalf of which they are issued.⁵⁰ Thus, in *Waite vs Santa Cruz*,⁵¹ the action was on bonds alleged to have been issued by the defendant city. Among other defences raised, it was urged that the bonds had been signed by the Mayor, and negotiated by him and the other members of the common council after their term of office had expired, and their successors been elected and qualified. In point of fact, the old council continued to act until May 7th, without protest from any person, although the new council was elected on April 9th. It was during that interval that the bonds were signed and sealed. The new Mayor qualified on April 16th, and some of the bonds were signed by the outgoing Mayor in the afternoon of that day, after the qualification of his successor. Whether the bonds sold were signed

⁵⁰*Knight vs Corporation of Wells* (1895), *Lutw.* 508, *Nelson's Lutw.* 156; *Lampasas vs Talcott* (1899), 94 *Fed.* 457, 36 *C. C. A.* 318; *Woodward vs Fruitvale Sanitary Dist.* (1893), 99 *Cal.* 554. 34 *P.* 239; *Fulton vs Town of Andrea* (1897), 70 *Minn.* 445, 73 *N. W.* 256; *Leach vs People* (1887), 122 *Ill.* 420, 12 *N. E.* 726; *Riley vs Garfield Tp.* (1897), 58 *Kan.* 299, 49 *P.* 85; *Nat. Life Ins. Co. vs Bd. of Education* (1894), 62 *Fed.* 778, 10 *C. C. A.* 637; *Carlisle vs Saginaw City* (1890), 84 *Mich.* 134, 47 *N. W.* 444; *Chandler vs Attica* (1883), 13 *Abb. N. C. (N.*

Y.) 153; *Greene vs Rienzi* (1906), 87 *Miss.* 463, 40 *So.* 17; *Knight vs Town of West Union* (1898), 45 *W. Va.* 194, 32 *S. E.* 163; *Lockhart vs Troy* (1872), 48 *Ala.* 579; *Franklin Ave. G. S. Inst. vs Bd. of Education* (1882), 75 *Mo.* 408; *Merchants' Nat. Bank vs McKinney* (1891), 2 *S. Dak.* 106, 48 *N. W.* 841; *Kyle vs Abernethy* (Col. 1909), 102 *P.* 746. (Aliter, where the municipal organization itself has no lawful existence. *Norton vs Shelby County* (1886), 118 *U. S.* 425, 6 *Sup. Ct.* 1121, 30 *L. ed.* 178).

⁵¹(*Cal.* 1898), 89 *Fed.* 619.

before or after the qualification did not appear at the trial. Defendant insisted that, as it was not shown that the bonds were signed by the Mayor before his successor had qualified, the plaintiff had failed to prove that the same were signed by an authorized officer, and they must be void. Held, that the Mayor and the members of the old council were officers de facto after the expiration of their legal term of office, and the bonds were valid.

In *County of Pontiac vs Pontiac Pac. Junction Ry. Co.*,⁵² the validity of debentures was in issue. The corporation of the county of Pontiac had passed a by-law granting aid to the defendant railway in the shape of a bonus of \$100,000. When the by-law was passed, William J. Poupore was warden of the county, and after the same was approved by the Lieutenant-Governor-in-Council and had come into force, he refused to sign the debentures, which were to be given for the bonus. Censured by the Council for his conduct, he declared that he would rather resign his office than accede to their request, and he afterward pressed his resignation upon the council. It was then agreed that another meeting should be held to accept his resignation, name his successor, and instruct the latter to sign the debentures. At that special session, at which Poupore did not attend though notified, a resolution was first passed to record his resignation, and then another resolution was adopted, accepting his resignation as warden and appointing one McNally as his successor. After being installed, McNally was authorized to sign the debentures and he did so, and delivered them to the provincial Treasurer to be held by him as trustee. The minutes of these proceedings were subsequently approved and ratified at the general quarterly session of the council, notwithstanding the objection

⁵² (1888), 11 Leg. News (Que.) of Pontiac vs Ross (1889), 17 Can. 370, affirmed sub. nom. County Sup. Ct. 406.

of Poupore, who was present and challenged the legality of the appointment of McNally as warden. The action was brought to have the debentures declared irregular, illegal and void, on the ground that McNally had no authority to sign them, since his election was void and Poupore was then the warden of the county. The court, after observing that the position assumed by the plaintiff corporation was not one entitled to be viewed with much favor, held that supposing the nomination of McNally to have been irregular, because of the resignation of his predecessor not having been made in writing or on account of other informalities, yet he was a warden de facto when he signed the debentures, and hence the same were valid and binding.

In *Vicksburg vs Lombard* ⁵³ it was sought by mandamus to enforce the payment of interest upon municipal bonds issued by the City of Vicksburg. The validity of the bonds was disputed on the ground, among others, that the Mayor and aldermen, under whose administration they were issued, were not rightfully in office and were usurpers or intruders. An Act had been passed extending the limits of the city and creating a board of Mayor and aldermen, to succeed to the Mayor and council under the previous organization. The Act vested in the board the right to issue (inter alia) the bonds involved in this suit, and provided for the filling of the new offices by an election to be held at a future day named. But during the interval between the passage of the Act (being the time mentioned for its coming into force), and the date of the first election, the Governor, acting under a general law which authorized him to fill vacancies, appointed the members of the board. They entered upon their offices and issued the bonds in question. It was insisted that such appointments were absolutely void, because no vacancies existed that

⁵³ (1875), 51 Miss. 111.

could be filled by the Governor. The court was of the opinion that the objection was ill-founded, but held that even if the appointments were irregular, yet as they were made under an Act of the legislature, the appointees had color of right and were officers de facto, and their invalid title could not invalidate the bonds.

§ 313a. Contracts made by de facto officers binding on corporation.—A contract entered into by de facto officers within the scope of their authority is valid, and binds the public corporation on behalf of which they assume to act. Thus, *DeGrave vs Corporation of Monmouth*⁵⁴ was an action brought to recover the value of a quantity of weights and measures of the imperial standard, supplied to the defendant corporation in the year 1826, on the order of Mr. Jenkins, who was then the Mayor of that borough. One of the witnesses, however, stated in his cross examination, that Mr. Jenkins was afterwards displaced from his office of Mayor by a judgment of ouster. On behalf of the defendant, it was objected that Mr. Jenkins was not Mayor, but Lord Tenterden, C. J., observed that “he was Mayor de facto, which was sufficient to authorize him to order the weights and measures.”

*Neale vs Overseers*⁵⁵ was a suit by Dr. Neale against the Overseers of the Poor, to recover compensation for medical services rendered to a pauper, at the special instance and request of the Overseers; and, to maintain the issue on his part, the plaintiff offered in evidence the written request of Daniel Naugle, one of the Overseers of the township, to the plaintiff to attend the patient, who was a pauper. The defendants objected to the evidence, on the ground that Naugle, although elected as Overseer, had never been sworn before entering upon the duties of the office. The Court of Com-

⁵⁴(1830), 4 C. & P. 111.

⁵⁵(1836), 5 Watts (Pa.) 538.

mon Pleas of Armstrong County sustained the objection. Held, reversing this ruling, that in order to charge the township, it was only necessary for the plaintiff to show that the Overseer was an officer de facto.⁵⁶

In *School Directors vs National School Furnishing Co.*⁵⁷ plaintiffs in error filed a bill to enjoin the collection of a judgment, rendered by a justice of the peace against their school district, on an order issued to the defendants in error for school furniture. When the furniture was bought there were two boards, each claiming to be the legal board of directors and assuming to act. The first board was elected in May, (1885), but there was some dissatisfaction over the election, and afterward another was held upon the theory that the first one was void. The first elected directors bought the furniture, and gave an order for the payment of the same. Soon after, quo warranto proceedings were instituted against both boards and they all resigned. The claim of the plaintiffs in error was that the persons who purchased the furniture and issued the order, were not at the time School Directors of the district. Held, that if their election was invalid by reason of some informality in calling it, the persons then declared elected became directors de facto, and their acts as such must be regarded as valid, because there were no other directors de jure at the same time.

In *Milford vs Zeigler*⁵⁸ a board of trustees who had been in office six years with the acquiescence and approval of the town, but whose successors were elected though they had not begun to act, hired a teacher for the ensuing year. When the

⁵⁶See also *Belfast vs Morrill* (1876), 65 Me. 580; *Harvey vs Philbrick* (1887), 49 N. J. L. 374, 8 A. 122; *People vs Lister* (1901), 106 App. Div. (N. Y.) 61, 93 N. Y. S. 330; *Schwartz vs Flatboats* (1859), 14 La. Ann. 243; *Wiley vs Windham* (1901), 95 Me. 482, 50 A. 281.
⁵⁷(1893) 53 Ill. App. 254.
⁵⁸(1890), 1 Ind. App. 138, 27 N. E. 303.

new board was organized, they repudiated the contract and hired another teacher who took the school. The action was brought by the first teacher to recover damages for breach of contract. The court decided in her favor, on the ground that the trustees who hired her were de facto officers and their acts binding on the school corporation.⁵⁹

§ 314. Acts of de facto municipal officers in relation to various matters.—In *Cole vs Black River Falls*⁶⁰ the action was for an injury alleged to have been sustained by reason of a defective sidewalk in the village of Black River Falls. The defendant demurred to the complaint generally, alleging that there was no such municipal corporation in the State as “The President and Trustees of the Village of Black River Falls.” The ground of the contention was that the village offices had been illegally filled, pursuant to an unconstitutional Act passed to amend the incorporating Act. Held that, assuming that the officers of the village at the time the action was commenced had been elected in the illegal manner provided by the amending Act, they were nevertheless officers de facto, and the demurrer could not be sustained.

In *People vs McDowell*⁶¹ the defendant was indicted for

⁵⁹See also *School Dis. No. 77 vs Cowgill* (1906), 76 Neb. 317, 107 N. W. 584; *Atty-Gen. vs Megin* (1885), 63 N. H. 378, 9 Am. & Eng. Corp. Cas. 68; *School Dist. No. 54 vs Garrison* (Ark. 1909), 119 S. W. 275; *De Wolf vs Watterson* (1885), 35 Hun (N. Y.) 111; *O’Neil vs Battie* (1891), 61 Hun (N. Y.) 622, 15 N. Y. S. 818; *Barrett vs Sayer* (1890), 34 N. Y. St. R. 325, affirmed in 58 Hun (N. Y.) 608, 12 N. Y. S. 170; *Case vs Wresler* (1855), 4 Ohio St. 561; *State*

vs Hart (1901), 106 Tenn. 269 61 S. W. 780; *School Directors No. 7 vs Tingley* (1897), 73 Ill. App. 471. But see *Bennett vs Colfax* (1880), 53 Iowa, 687, 6 N. W. 36; *White vs Archibald* (Pa. 1887), 8 A. 443; *Genesee Tp. vs McDonald* (1881), 98 Pa. St. 444. See also secs. 304, 309.

⁶⁰(1883), 57 Wis. 110, 14 N. W. 906.

⁶¹(1893), 70 Hun (N. Y.) 1, 23 N. Y. S. 950, 10 N. Y. Crim. R. 462.

selling liquor without a license. The defendant admitted the selling, but claimed that it was done under a license duly issued to him by the commissioners of the town. One of the board was a de facto commissioner. Held, that a license signed by him as one of the board was a good defence.⁶²

In *Trinity College vs Hartford*⁶³ a board of commissioners of compensation appointed by the city council, appraised the damages accruing to Trinity College, and also the benefits the college would receive from the construction of a new street. The college committee were not satisfied with the appraisement, and applied for an injunction against the opening and construction of the street, on the ground, among others, that the board of commissioners were not authorized to act as such, as they did not possess the requisite qualifications nor were ever sworn. Held, that the appraisement was valid, since the commissioners of compensation had at least color of title and were officers de facto.⁶⁴

In *People vs Collins*⁶⁵ the application was for mandamus against the town clerk to compel him to record the survey of a road. The commissioners of highways before entering upon the duties of their office, were required to take an oath, which was to be filed with the clerk, and the law provided that a neglect to do so should be deemed a refusal to serve, and that the town might proceed to choose others. The commissioners, without having taken and filed the oath, as required, laid out a road, but the town clerk refused to record the survey, insisting that their office was vacant. The Court, however, decided that they were officers de facto, and compelled the clerk to record the survey.⁶⁶

⁶²As to license issued by clerk de facto, see *Ward vs State* (1866), 2 Coldw. (Tenn.) 605, 91 Am. Dec. 270.

⁶³(1865), 32 Conn. 452.

⁶⁴Also *People vs Covert* (1841), 1 Hill (N. Y.) 674.

⁶⁵(1841), 7 John. (N. Y.) 549.

⁶⁶See also *State vs Meyers* (1862), 29 N. J. L. 392; but see

In *Carland vs Custer*⁶⁷ plaintiff had been removed from the office of county treasurer by the board of commissioners because he had not filed a sufficient bond within the time required by law, and also because his books showed negligence in the care and keeping of public moneys. Plaintiff contended that the board of commissioners were not a legal board, and that their action in removing him was void. Held, that as they were acting under the apparent authority of an Act of the legislature they were de facto officers, and their official action could not be questioned by a collateral attack on their title.⁶⁸

§ 315. Payments by or to officer de facto, valid and binding on all parties.— Payment to an officer de facto is good without showing that he was appointed and qualified agreeably to law.⁶⁹ Thus, in *Smith vs Redford*^{69a} which was a suit to set aside a sale for taxes, the plaintiff alleged that the taxes for a given year were duly paid by him to the collector before the return of the roll to the county treasurer. Payment was proved by producing the receipt of one Sparrow, the collector, who was then dead, and also producing the roll returned by him to the treasurer, on which the payment was duly entered in Sparrow's hand-writing. It was contended that a by-law appointing Sparrow should be produced. But it was held, that if he acted and was recognized as collector, the payment

Hoagland vs Culvert (1845), 20 N. J. L. 387. As to drain located by de facto commissioners, see *Zabel vs Harshman* (1888), 68 Mich. 273, 42 N. W. 44. As to prosecution for obstructing a road opened by de facto overseers, see *Thompson vs State* (1852), 21 Ala. 48.

⁶⁷ (1885), 5 Mont. 579, 6 P. 24.

⁶⁸For acts of fence viewers de facto, see *Day vs Dolan* (1899), 174 Mass. 524, 55 N. E. 384.

⁶⁹*Kingsbury vs Ledyard* (1841), 2 W. & S. (Pa.) 37; *Williamson vs Lake County* (1903), 17 S. D. 353, 96 N. W. 702.

^{69a} (1866), 12 Gr. (U. C.) 316.

to him was good, even if there was an irregularity in the mode of his appointment.⁷⁰ So all payments made by a de facto municipal treasurer will acquit the corporation, and all payments to him will be binding on the corporation, and acquit the parties paying.⁷¹ Likewise payment to a sheriff de facto will discharge the debt named in the writ of execution.⁷²

§ 315a. Validity of marriages performed by de facto officers.—A marriage cannot be attacked or annulled on the ground that the same was solemnized before a minister, magistrate, or other officer, who had not or is not proven to have had a de jure title to his office, provided he had in the community where he lived the reputation of being the officer he assumed to be. Thus, in *State vs Winkley*,⁷³ the Court, after remarking that it had been held in Connecticut that a clergyman, in the administration of marriage, is a public officer, and his acts as such, in the celebration of marriage, are admitted as *prima facie* proof of his qualifications, without higher evidence, added: "There seems indeed to be no reason why the acts of a minister, coming in question incidentally, and not declared to be void by statute, should not be considered valid as well as the official acts of an inspector of the revenue, a deputy sheriff, or an attorney."⁷⁴

§ 316. Validity of instruments acknowledged before or registered by de facto officers.—The validity of an instrument cannot be questioned on the ground that it was

⁷⁰Also *Oldtown vs Blake* (1883), 74 Me. 280; *Whitby Tp. vs Harrison* (1859), 18 U. C. Q. B. 603.

⁷¹*R. vs Smith* (1848), 4 U. C. Q. B. 322. Also *Keyser vs McKissan* (1828), 2 Rawle (Pa.) 138.

⁷²*Kent vs Mercer* (1862), 12 U. C. C. P. 30. Also *Kelley vs Storey*

(1871), 6 Heisk. (Tenn.) 202; *Douglas vs Neil* (1872), 7 Heisk. (Tenn.) 437.

⁷³(1843), 14 N. H. 480.

⁷⁴See also *Londonderry vs Chester* (1820), 2 N. H. 268, 9 Am. Dec. 61.

acknowledged before or recorded by an officer having only a de facto title to his office. Thus, in *Stokes vs Acklen*,⁷⁵ the bill was to collect notes given by the defendant for a tract of land, by the foreclosure of the vendor's lien retained to secure their payment. The complainants as husband and wife, were the joint owners in fee of the land and sold it to the defendant partly for cash and partly on credit, receiving the notes in suit to secure the balance of the purchase price. They executed to the defendant a deed regular in form, and the acknowledgments and privy examination thereto of the wife and husband were taken by a woman, who had been elected a notary public by the county, and commissioned and qualified to act in that capacity. In his answer, defendant claimed that the complainants had not given him a valid and legal deed, and the defect relied on was that the privy examination of Mrs. Stokes was taken by a woman notary public, who, because she was a woman, could not act in that capacity, nor hold the position of notary public; and having been given no legal title to the property, he insisted that he was entitled to recover the cash paid by him, as also the notes for the purpose of cancellation. The Chancellor upheld the defendant's contention and decreed accordingly, holding that the acknowledgment of the deed before the woman notary public was null and void, and was not binding on Mrs. Stokes. Held, reversing the Chancellor's decree, that the woman notary public, though ineligible to that office, was a de facto officer and the privy acknowledgment taken by her was valid.⁷⁶

⁷⁵ (Tenn. Chy. App., 1898), 46 S. W. 316.

⁷⁶As to further acknowledgments or attestations before de facto notaries, see *Old Dominion Bldg. & Loan Assoc'n vs Sohn* (1903), 54 W. Va. 101, 46 S. E. 222; *Davidson vs State* (1893), 135 Ind. 254,

34 N. E. 972; *Wilson vs Kimmel* (1891), 109 Mo. 260, 19 S. W. 24; *Hamilton vs Pitcher* (1873), 53 Mo. 334; *Bullene vs Garrison* (1878), 1 Wash. Ter. 587; *Smith vs Meador* (1885), 74 Ga. 416, 58 Am. Rep. 438; but see *Bernier vs Becker* (1881), 37 Ohio St. 72;

*Thompson vs Johnson*⁷⁷ was an action in trespass to try title to land. The land had been conveyed by the plaintiff jointly with her husband since deceased, to one Purinton. The contention was that the deed was invalid because the acknowledgment had been taken before an unauthorized officer. The facts showed that a district clerk, authorized to take acknowledgments of deeds, and required to make his appointment of deputies in writing, by writing appointed one Hopson "special deputy" to take the acknowledgment of the plaintiff and her husband to their deed to one Miller. The deputy thus appointed took the oath of office and took the acknowledgment. Subsequently, however, he was again appointed by the clerk but by word only, to take the acknowledgment of the same parties to the deed to said Purinton, the clerk agreeing on his return to fix up the necessary papers authorizing him to take the acknowledgment, which was never done. Held that, if he was not at the time of taking the second acknowledgment a de jure deputy by reason of his first appointment, the clerk having no power to limit the authority of a deputy to a single act, he was acting under color of authority, and was therefore a de facto deputy, and the acknowledgment taken by him was valid.⁷⁸

Hughes vs Long (1896), 119 N. C. 52, 25 S. E. 743; *Sandlin vs Dowdall* (1905), 143 Ala. 518, 39 So. 279, as to cases where under the circumstances the acknowledgments were held invalid. As to testament executed before a de facto notary public, see *Davenport vs Davenport* (1906), 116 La. 1009, 41 So. 240.

⁷⁷(1892), 84 Tex. 548, 19 S. W. 784.

⁷⁸As to further acknowledgments before de facto clerks or deputy clerks, see *Woodruff vs*

McHarry (1870), 56 Ill. 218; *Sharp vs Thompson* (1881), 100 Ill. 447, 39 Am. Rep. 61; *Farmers' Bank vs Chester* (1846), 6 Hump. (Tenn.) 458, 44 Am. Dec. 318; *Macey vs Stark* (1893), 116 Mo. 481, 21 S. W. 1088; but see *Simpson vs Loving* (1867), 3 Bush. (Ky.) 458, 96 Am. Dec. 252; *Smith vs Cansler* (1885), 83 Ky. 367; *Suddereth vs Smyth* (1852), 13 Ired. L. (N. C.) 452, as to cases where under the circumstances the acknowledgments were not upheld.

In *Brown vs Lunt*⁷⁹ the acknowledgment of the deed in controversy had been taken by one Fessenden, who, being called as a witness, testified that a year or two before he took the acknowledgment, his last commission as a justice of the peace had expired, as he had since ascertained; that he did not know the fact at the time, and acted inadvertently; that he had acted as such justice since 1809, under commissions from Massachusetts and Maine; that he had without interruption frequently acted as such justice, after his last commission had expired, until after he had taken the acknowledgment, believing that he was a justice of the peace; that the parties to the deed well knew that he so acted. Held, that he was an officer de facto, and the duly recorded deed, bearing his certificate that it was acknowledged, was a valid conveyance.⁸⁰

In *Cocke vs Halsey*⁸¹ the validity of the recording of a trust deed was attacked, on the ground that it had not been recorded by a proper officer. It had been recorded by a clerk *pro tem.* of the probate court, appointed by the Judge thereof during the absence from the State of the clerk. The clerk so appointed acted during the session of the court, and continued to perform the duties of the office after the term was over. It was during the adjournment that the trust deed was recorded. It was claimed that the Act of the legislature of Mississippi, authorizing the judge to appoint a clerk *pro tem.*, only empowered him to make an appointment for the session of the court and until the end of the term; that after the adjournment the appointee had no authority to act and his

⁷⁹ (1854), 37 Me. 423.

⁸⁰As to further acknowledgments before de facto justices of the peace, see *Nelson vs Kessinger* (1884), 16 Ill. App. 185; *Crutchfield vs Hewett* (1894), 2 App. Cas. (D. C.) 373; *Prescott vs Hayes* (1860), 42 N. H. 56; *Adam vs*

Mengel (Pa. 1887), 8 A. 606. As to relinquishment of inheritance executed before de facto magistrate, see *Kottman vs Ayer* (1848), 3 Strob. (S. C.) 92.

⁸¹(1842), 16 Pet. (U. S.) 71, 10 L. ed. 891.

acts were null and void. The Circuit Court upheld these views, and adjudged that the trust deed was not duly and legally recorded. Held, reversing the judgment of the Circuit Court, that the clerk was legally authorized to record the deed of trust, under the circumstances, but were it otherwise, his recording would still be valid, since it would be the official act of an officer de facto.⁸²

§ 317. **Acts of de facto clerks and deputy clerks of courts.**—A writ of summons issued by a de facto clerk or deputy clerk is a valid writ, and want of title in the officer is no cause for quashing it.⁸³ Thus, in *Harbaugh vs Winsor*,⁸⁴ the record showed that one Vaughan was appointed clerk of the circuit in May, 1862, and continued to hold and discharge the duties of the office up to July 10, 1865. By an ordinance, passed by the Constitutional Convention, on March 17, 1865, the office of the circuit clerks were declared vacant on May 1, 1865, and the Governor was authorized to fill the vacancies by appointment, and pursuant thereto S. F. Currie was commissioned to be circuit clerk. Vaughan disputed the validity of the ordinance, and refused to vacate the office. Pending the controversy, the court, at its May session, appointed Vaughan clerk *pro tem.*, and he continued in office until July 10, ensuing, when he delivered up the office to Currie. Held, reversing the judgment of Circuit Court, that Vaughan was

⁸²Also *State Bank vs Frey* (1902), 3 Neb. (Unoff.) 83, 91 N. W. 239; *Gilliam vs Reddick* (1844), 4 Ired. L. (N. C.) 368; *Henning vs Fisher* (1873), 6 W. Va. 238; *Farmers' etc. Bank vs Chester* (1846), 6 Hump. (Tenn.) 458, 44 Am. Dec. 318; *Maley vs Tipton* (1859), 2 Head. (Tenn.) 403; *Jeffords vs Hine* (1886), 2 Ariz. 162,

11 P. 351; *Cooke vs Hall* (1844), 6 Ill. 575.

⁸³*Haskell vs Dutton* (1902), 65 Neb. 274, 91 N. W. 395; *Threadgill vs Carolina Central Ry. Co.* (1875), 73 N. C. 178; *Com. vs Arnold* (1823), 3 Litt. (Ky.) 309; *Eaton vs Harris* (1868), 42 Ala. 491.

⁸⁴(1866), 38 Mo. 327.

an officer de facto while so holding over, and that a writ issued by him was valid.

So, a writ signed by a woman as deputy clerk of a court, if voidable, is not absolutely void, and a party to the suit cannot be prejudiced by her signature, since she must be regarded as a de facto officer.⁸⁵ So, an attachment issued by a clerk de facto,⁸⁶ or a deputy clerk de facto,⁸⁷ is valid. Likewise is a scire facias, issued by a clerk after his resignation, but before the qualification of his successor, notifying the sureties in a bail-bond that their principal has failed to appear, etc.⁸⁸ So, a notice of appeal accepted for the clerk by a de facto deputy will be maintained.⁸⁹ So, a license issued by a clerk de facto is a good defence to a prosecution for selling liquor without a license.⁹⁰

So, where mortgage notes held by a bank were about to become prescribed, and in order to avert this loss and to recover the claim, the attorney for the bank presented the petition to the person in possession of the office of clerk of the court and acting as such, and caused due process to issue, it was held that this was sufficient to interrupt the prescription, though the clerk was only an officer de facto.⁹¹ So, where a defendant was convicted of a misdemeanor for selling liquor contrary to the statute, it was held on appeal that he could not successfully claim that the court below was without jurisdiction to try him, because the person who had acted as clerk

⁸⁵State vs Police Jury (1907), 120 La. 163, 45 So. 47.

⁸⁶Galbraith vs McFarland (1866), 43 Tenn. (3 Coldw.) 267, 91 Am. Dec. 281.

⁸⁷Joseph vs Cawthron (1883), 74 Ala. 411.

⁸⁸Cook vs State (1891), 91 Ala. 53, 8 So. 686.

⁸⁹Wheeler Wilson Mfg. Co. vs Sterrett (1895), 94 Iowa, 158, 62 N. W. 675.

⁹⁰Ward vs State (1866), 2 Coldw. (Tenn.) 605, 91 Am. Dec. 270.

⁹¹New Orleans etc. Co. vs Tanner (1874), 26 La. Ann. 273.

had accepted the incompatible office of intendant of the town.⁹²

§ 318. Acts of de facto sheriffs and constables, and de facto deputies.—The validity of the service of writs, warrants, citations, or of any other legal process or notice, cannot be disputed on the ground that the same was effected by an officer de facto.⁹³ Thus, in *State vs Brennan's Liquors*,⁹⁴ the complaint made before a justice of the peace charged that Martin Brennan owned and kept liquors upon his premises, for the purpose of being sold in violation of "an Act for the suppression of intemperance." Upon this complaint the magistrate issued his warrant for the seizure

⁹²*State vs Coleman* (1899), 54 S. C. 282, 32 S. E. 406. See also *In re Boyle* (1859), 9 Wis. 264; *Kelley vs Storey* (1871), 6 Heisk. (Tenn.) 202; *Douglas vs Neil* (1872), 7 Heisk. (Tenn.) 437. As to arraignment of prisoner by de facto deputy clerk, see *State vs Hopkins* (1880), 15 S. C. 153; *Ledbetter vs State* (1907), 2 Ga. App. 631, 58 S. E. 1106; *Lopez vs State* (1875), 42 Tex. 298; *Collins vs Brown*, 12 Ky. Law R. 469; *In re Mason* (1898), 85 Fed. 145.

⁹³*Hussey vs Smith* (1878), 99 U. S. 20, 25 L. ed. 314; *O'Neil vs Atty-Gen. of Canada* (1896), 26 Can. Sup. Ct. 122, 1 Can. Crim. Cas. 303; *Hyman vs Chales* (1882), 12 Fed. 855, 4 McCrary 246; *Barlow vs Stanford* (1876), 82 Ill. 298; *Fowler vs Bebee* (1812), 9 Mass. 231, 6 Am. Dec. 62; *Elliott vs Willis* (1861), 1 Allen (Mass.) 461; *Petersilia vs Stone* (1876), 119 Mass. 465, 20 Am. Rep. 335; *Bliss vs Day* (1878), 68 Me. 201;

Clark vs Ennis (1883), 45 N. J. L. 69; *Moore vs Graves* (1826), 3 N. H. 408; *Morse vs Calley* (1830), 5 N. H. 222; *Merrill vs Palmer* (1842), 13 N. H. 184; *Jewell vs Gilbert* (1885), 64 N. H. 13, 5 A. 80, 10 Am. St. R. 357; *Snyder vs Schram* (1880), 59 How. Pr. (N. Y.) 404; *Stokes vs Kirkpatrick* (1858), 1 Metc. (Ky.) 138; *Mabry vs Turrentine* (1847), 8 Ired. L. (N. C.) 201; *Garner vs Clay* (1827), 1 Stewart (Ala.) 182; *Flournoy vs Clements* (1845), 7 Ala. 535; *Gradnigo vs Moore* (1855), 10 La. Ann. 670; *Stickney vs Stickney* (1889), 77 Iowa, 699, 42 N. W. 518; *Irving vs Edrington* (1889), 41 La. Ann. 671, 6 So. 177; *Abington vs Steinberg* (1900), 86 Mo. App. 639; *Railway Co. vs Bolding* (1891), 69 Miss. 255, 13 So. 844, 30 Am. St. R. 541; *Williamson vs Lake County* (1903), 17 S. Dak. 353, 96 N. W. 702.

⁹⁴(1856), 25 Conn. 278.

of the liquors and the vessels containing them, which was executed by one Nichols, who was acting as town constable. Brennan having been duly notified, appeared, and the magistrate upon a hearing of the parties, adjudged the liquors and the vessels to be forfeited, and that Brennan pay the costs of the prosecution. From this judgment the latter appealed to the Superior Court, and there pleaded that the attorney for the State ought to be barred from maintaining the complaint, because Nichols, when the warrant was served, although chosen a town constable, had never qualified according to law. To this plea, there was a demurrer, and the Superior Court reserved the questions of law arising upon the record, for the advice of the Supreme Court. Held by the latter court, that the constable when serving the process was an officer de facto, and the validity of his qualifications could not be called in question by the defendant.⁹⁵

So it is no valid objection to a levy, or seizure, or a sale, that the same was made or conducted by an officer de facto.⁹⁶ "It would," said the Court in *Doty vs Gorham*,⁹⁷ "be productive of great inconvenience to require purchasers

⁹⁵As to warrant served by de facto chief of police, see *State vs Clark* (1872), 44 Vt. 636.

⁹⁶*Buis vs Cooper* (1895), 63 Mo. App. 196; *Powers vs Braley* (1890), 41 Mo. App. 556; *Adams vs Tator* (1886), 42 Hun (N. Y.) 384; *Gunn vs Tackett* (1881), 67 Ga. 725; *Swindell vs Warden* (1860), 7 Jones L. (N. C.) 575; *Burke vs Elliott* (1844), 4 Ired. L. (N. C.) 355, 42 Am. Dec. 142; *Bucknam vs Ruggles* (1818), 15 Mass. 180, 8 Am. Dec. 98; *Brooks vs Rooney* (1852), 11 Ga. 423, 56 Am. Dec. 430; *Bansemmer vs Mace* (1862), 18 Ind. 27, 81 Am. Dec. 344; *Shores vs Scott River Water Co.* (1861),

17 Cal. 626; *Youngblood vs Cunningham* (1882), 38 Ark. 571; *Dorsey vs Vaughan* (1850), 5 La. Ann. 155; *Bates vs Dyer* (1848), 9 Hump. (Tenn.) 162; *Nason vs Dillingham* (1818), 15 Mass. 170 (Coroner de facto); and see also *Doe dem. James vs Brawn* (1821), 5 B. & Ald. 243, 24 R. R. 347. But see *Jester vs Spurgeon* (1887), 27 Mo. App. 477, and *McMillan vs Rowe* (1884), 15 Neb. 520, 19 N. W. 504, where the persons making the levies were not deemed officers de facto.

⁹⁷(1827), 5 Pick. (Mass.) 487, 16 Am. Dec. 417.

at officers' sales to inquire into the regularity of the appointments and qualifications of those assuming to act as such. Titles acquired under the proceedings of sheriffs and constables cannot be made to depend upon the purchasers' ability to prove that they were officers de jure as well as de facto."

Again, the surrender of his principal by a surety on a bail-bond to a de facto deputy of the sheriff, is a good defence to an action on the bond. Thus, in *Carter vs State*,⁹⁸ the appellant was surety in a bail-bond of one Spain, charged with a misdemeanor. Spain failed to appear in accordance with its terms. The bond was declared forfeited and the State proceeded against the surety. Carter, the appellant, pleaded a delivery of the prisoner to the sheriff with copy of the bail-bond. The case was submitted to the court, and it was shown on trial that appellant had delivered the prisoner according to law to a deputy, or supposed deputy, of the sheriff. The receipt for the prisoner was endorsed on the copy of the bond in the name of the sheriff by the deputy. The sheriff had been elected and qualified in 1880, and re-elected in 1882. After his qualification on October 30, 1882, he had not renewed the appointment of the deputy before the next day when the prisoner was received. It did not appear that either the surety or the deputy knew that the sheriff had qualified under his new term on the day before. The Circuit Court ruled that the powers of the deputy had ceased upon the 30th, and that a delivery to him was invalid. Held, on appeal, that it was a proper case for the application of the de facto doctrine, and that the surety should be discharged.

§ 319. Acts of de facto prosecuting attorneys.—An indictment or a conviction will not be quashed on the ground

⁹⁸ (1884), 43 Ark. 132.

that it was procured or obtained, upon the complaint or through the prosecution of a de facto prosecuting attorney. Thus, in *Lask vs United States*⁹⁹ it was alleged that the district attorney who had aided, assisted and advised the grand jury during their investigation, and finding of the indictment, was ineligible at the time he received his appointment, and upon that ground the court was asked to quash the indictment. Held that, as long as he held the commission of district attorney from proper authority, the validity of his acts could not be questioned.¹

In *Re Gilson*² the petition was for a writ of habeas corpus to obtain the discharge of the petitioner. He had been tried and convicted on an information charging him with an unlawful sale of intoxicating liquors, and sentenced to pay a fine, and to be imprisoned. The complaint was prepared and filed in the district court by one Poplin, appointed assistant attorney-general under the authority of a statute. It was claimed (*inter alia*), that the attorney general had made the appointment of the assistant without good reasons therefor, and in violation of the provisions of the statute. Held, that the assistant was at least an officer de facto, and his acts were valid.³

§ 320. **Validity of acts of de facto officers in relation to the selection and swearing of jurymen.**—It is no valid objection to a jury-list or panel that the same was prepared or selected by de facto officers, and no challenge to the array will be allowed on that ground.⁴ “A jury,” says Earl, J.,

⁹⁹(1839), 1 Pin. (Wis.) 77.

¹Also *United States vs Mitchell* (1905), 136 Fed. 896.

²(1886), 34 Kan. 641.

³See also *State vs Nield* (1896), 4 Kan. App. 626, 45 P. 623; *Dane De Facto*—29.

vs State (1896), 36 Tex. Crim. R. 84, 35 S. W. 661.

⁴*Cox vs State* (1879), 64 Ga. 374, 37 Am. Rep. 76; *Carpenter vs People* (1876), 64 N. Y. 483; *Thompson vs People* (1875), 6

delivering the opinion of the New York Court of Appeals, "drawn by a de facto commissioner would be as regular as one drawn by a de jure commissioner."⁵ Thus, in *Leech's Case*,⁶ the defendant sought to quash the indictment on the ground that the jurors who had presented the same, had been returned and impanelled by one Dudley North and one Peter Rich, as sheriffs of the city of London, who, it was claimed, were not sheriffs at the time the panel and return thereof were made. The objection, however, was overruled, Mr. Justice Levinz observing, that these worthy persons "were owned as sheriffs by the Lord Mayor, Mr. Recorder, and several aldermen there present, and that he made no difference between sheriffs de facto and de jure," under the circumstances.⁷

In *People vs Roberts*⁸ the appellant was indicted and convicted of murder. He assigned as error that the indictment was not found by a lawfully constituted grand jury. To support this plea he alleged that the sheriff, who participated in the drawing of the jury, was unlawfully appointed by the judge of the County Court. But the Court held that, "admitting this, and that such appointment was void, yet his acts as a de facto officer were good."

Likewise in *Com. vs Clemmer*⁹ it was held that the array of petit jurors in a murder case will not be quashed on account of the ineligibility of a jury commissioner, if it appears that such commissioner holds his office under color

Hun (N. Y.) 135; *State vs Fenderson* (1876), 28 La. Ann. 82; *Com. vs Valsalka* (1897), 181 Pa. St. 17, 37 A. 405; *Mapes vs People* (1873), 69 Ill. 523; *Palmer vs Charlotte, etc. R. Co.* (1872), 3 S. C. 580, 16 Am. Rep. 750; *State vs McJunkin* (1875), 7 S. C. 21.

⁵*Dolan vs People* (1876), 64 N.

Y. 485, affirming 6 Hun (N. Y.) 493.

⁶(1682), 9 Cobbett's State Trials, 351, 355.

⁷See also *Thrower vs State* (1875), 52 Ala. 22.

⁸(1856), 6 Cal. 214.

⁹(1899), 190 Pa. St. 202, 42 A.

675.

of an election by the people, and has actually entered upon it and is performing its duties.

Again, in *State vs Lee*,¹⁰ it was held that a jury list prepared by a commissioner, whose term of office had expired and his successor appointed, was valid. But the contrary was held in *State vs Bryce*,¹¹ where the successor had not only been elected but had also qualified. The conviction for receiving stolen goods in that case was quashed, and a new trial granted.

In *Mobley vs State*¹² it was also held that the fact that jurors in a criminal case, were sworn by one acting at that term of the court as a deputy clerk, but not appointed regularly nor sworn, is not ground for a new trial.¹³

§ 321. Validity of bonds or recognizances taken or approved by officers de facto.—The parties to a bond or recognizance cannot resist payment thereof on the ground that it was taken or approved by an officer de facto.¹⁴ Thus, a replevin bond taken by a deputy sheriff, after he has been appointed to the incompatible office of justice of the peace and taken the oaths of office, is not void, and cannot on that account, be set aside on a motion of the obligors therein.¹⁵ Neither is a bond approved by a probate justice de facto in the usual course of granting letters of administration, in-

¹⁰ (1891), 35 S. C. 192, 14 S. E. 395.

¹¹ (1878), 11 S. C. 342.

¹² (1872), 46 Miss. 501.

¹³ As to grand jury organized by a de facto judge, see *Walker vs State* (1905), 142 Ala. 32, 38 So. 241. As to complaints preferred by de facto grand jurors, see *Douglas vs Wickwire* (1849), 19 Conn.

488; *Smith vs State* (1848), 19 Conn. 493.

¹⁴ *State vs Gilbert* (1855), 10 La. Ann. 524; *Estis vs Prince* (1872), 47 Ala. 269; *Rheinhardt vs State* (1875), 14 Kan. 318; *Blackman vs State* (1859), 12 Ind. 556.

¹⁵ *Wilson vs King* (1823), 3 Litt. (Ky.) 457.

valid.¹⁶ So, upon a scire facias upon a forfeited recognizance of bail, the title to office of the judge, who took the recognizance, will not be inquired into. It is sufficient that he was an officer de facto.¹⁷

¹⁶Pritchett vs People (1844),
6 Ill. 525.

¹⁷Sturgeon vs Com. (Pa., 1888),
14 A. 41.

CHAPTER 26.

ACTS OF DE FACTO OFFICERS IN RELATION TO THE LEVY AND COLLECTION OF TAXES—TAX TITLES.

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| § 322. General rule. | § 335. Rulings in Illinois. |
| 323. Tax titles. | 336. Rulings in New Jersey. |
| 324. Order in which the authorities are reviewed. | 337. Rulings in Pennsylvania, Nevada, South Carolina, Texas and Ohio. |
| 325. English rulings. | 338. Rulings in Massachusetts, Kansas, and Maryland. |
| 326. Canadian rulings. | 339. Rulings in Iowa, Nebraska, Georgia, and Washington. |
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| 328. Rulings in Vermont. | |
| 329. Rulings in New Hampshire. | |
| 330. Rulings in Arkansas. | |
| 331. Rulings in Mississippi. | |
| 332. Rulings in California. | |
| 333. Rulings in New York. | |
| 334. Rulings in Michigan. | |

§ 322. **General rule.**— The prevailing rule is that the validity of a tax cannot be impeached on the ground that it was assessed, levied, or collected by de facto officers. “Every consideration of public policy, upon which the rule of law is grounded that the character of officers de facto shall not be questioned in collateral proceedings, applies with equal, if not with greater force, to the officers engaged in the collection of the revenue. It is essential to the well-being of the whole community that collections should be made promptly to meet the exigencies of the government. Endless embarrassment in the administration of the laws, and in maintaining the public credit, might occur, if each and every taxpayer on the eve of the collections might impede them by questioning the official character of some one concerned in the chain

of legal formalities, through which taxes are exacted. There is no ground for the distinction.”¹

Some authorities, however, lay down a different doctrine. Thus, in *Dresden vs Goud*,² the Court quoted with approval the following language taken from a New Hampshire case:³ “The general principle undoubtedly is, that the acts of an officer de facto are valid, so far as the public or the rights of third persons are concerned; and that the title of such an officer cannot be inquired into in any proceeding to which he is not a party. But proceedings founded upon the assessment and collection of taxes have been supposed to form an exception to this rule; or rather, a different rule has been supposed to be applicable to such proceedings.”

§ 323. **Tax titles.**—Inasmuch as the title to land derived from a sale for delinquent taxes is dependent upon a proper assessment and the institution of lawful proceedings to collect and enforce payment of the same, it follows that a title of this nature, when based upon the official acts of de facto officers, will be held valid or invalid, according to the views of the authorities as to the applicability of the de facto doctrine in such cases.^{3a} A few courts, unwilling to recognize the acts of de facto officers in this connection, rely on the ground that one should not be deprived of his property by an *ex parte* proceeding, unless every step prescribed by law to effectuate such result be taken, and be so taken by officers duly qualified to act. The first part of this proposition is undoubtedly conceded by all the authorities, and is sanctioned by the Unit-

¹Per Eakin, J. in *Moore vs Turner* (1884), 43 Ark. 243.

²(1883), 75 Me. 298.

³*Tucker vs Aiken* (1834), 7 N. H. 113.

^{3a}Some courts, however, seem to

require greater strictness regarding the title and qualification of officers in the case of the sale of lands, than when the taxes can be collected without deprivation of real property.

ed States Supreme Court in several cases. In one of them, the Court says: "The power to impose a tax on real estate, and to sell it where there is failure to pay the tax, is a high prerogative, and should never be exercised where the right is doubtful." ⁴ And in another, it is said: "The court recognizes the correctness of the principle contended for by the counsel for the plaintiff in error; that in an *ex parte* proceeding of this kind, under a special authority, great strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be shown to have been complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes, to cover any radical defect in his proceeding; and the proof of regularity in the procedure devolves upon the person who claims under the collector's sale." ⁵

The above principle, though perhaps rather strictly administered in the United States,⁶ is to a large extent admitted and acted upon, we venture to say, in every country ruled by the English law; so much so, that a tax deed is ever regarded with suspicion. But when the proceedings are regular, what sound reason can be alleged for their avoidance, merely because they were carried on by officers *de facto*? In principle we fail to see any. Such officers are only the agents of the public, and are invested with naked powers, wherein they have not the remotest interest. They act under the dictates of the law, which clearly sets forth the various duties they are bound to perform. The validation of their acts, therefore, does not deprive the owners of land of the protection of law, since the same must strictly be complied with,

⁴Beaty vs Knowler (1830), 4 Pet. (U. S.) 152.

⁵Ronkendorff vs Taylor's Lessee (1830), 4 Pet. (U. S.) 349.

⁶Cotter vs Sutherland (1858), 18 U. C. C. P. 357.

whatever may be the title of the acting officer. Hence, it seems that the refusal to apply the de facto doctrine, under such circumstances, is not supported by sound reasoning; but is the result of misapprehension, caused by confounding the acts or proceedings themselves with the agency whereby they are performed or carried on. Real property ought not to be held more sacred than human life; yet it is now firmly established that if an individual is convicted and sentenced to death by a de facto judge, such conviction and sentence cannot be quashed or set aside, on account of any defect in the Judge's title or qualification.

§ 324. Order in which the authorities are reviewed.—

Having intimated the conflicting views of the authorities upon the subject of taxes, brief reference will now be made to the rulings found in various jurisdictions. The English and Canadian decisions will be first dealt with. The American cases will next be referred to, by State, in the following order, viz.: (1.) States where the authorities deny the application of the de facto doctrine; (2.) States where the authorities are conflicting; and (3.) States where the acts of de facto tax officers are placed on a level with those of other de facto officers.

§ 325. English rulings.—In Viner's Abridgment⁷ it is said, that "if he that is a churchwarden de facto makes a rate for repairing the church, this will bind the parishioners."

In *Scadding vs Lorant*⁸ the action was replevin against the defendants, two tax collectors of the parish of St. Pancras, in England, for a distress made by them to levy a poor rate. There were numerous objections raised to their proceed-

⁷Tit. Church-wardens (A. 2). L. & Eq. 16, 15 Jur. 955, affirming
⁸(1851), 3 H. L. Cas. 418, 5 Eng. 13 Q. B. 706.

ings, one being that the rate had not been made by de jure vestrymen. This objection, however, was overruled on appeal, and Alderson, J., delivering the judgment of the Exchequer Court, which was subsequently affirmed by the House of Lords, said: "One objection was, that the forty-six vestrymen appointed in May 1839 were not duly elected, as was the fact; and that no notice of the meeting was given to some of the vestrymen, who, if their election was to be held void, still continued to act like legal vestrymen. The answer to that objection is that, as the forty-six vestrymen were de facto vestrymen, the rate made by them or all of them, having had due notice, was valid as the rate of the churchwardens and overseers de facto."

Likewise, in *R. vs St. Clements*,⁹ it was held that a vestry summoned by churchwardens de facto may make a valid rate. So in *Waterloo Bridge Co. vs Cull*¹⁰ it was held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that an assessment and levy was not invalidated by reason of the want of qualification, in respect of residence, of collectors and assessors appointed and acting in fact. So it has been held that a rate or assessment is valid, though made or levied by overseers irregularly appointed,¹¹ or by tithe valuers ineligible to the office, by reason of interest.¹²

§ 326. Canadian rulings.—In *Municipality of Whitby vs Flint*¹³ the right of a tax collector to act was incidentally called into question on the ground that he had not taken

⁹ (1840), 12 Ad. & El. 177, 3 P. & D. 481, 4 Jur. 1059.

¹⁰ (1858), 1 El. & El. 213, 28 L. J. Q. B. 70, 5 Jur. (N. S.) 464.

¹¹ *Penney vs Slade* (1839), 5 Bing. (N. C.) 319, 7 Scott. 484.

¹² *Lancaster & Carlisle Ry. Co. vs Heaton* (1858), 8 El. & Bl. 952, 27 L. J. Q. B. 195, 4 Jur. (N. S.) 707. See also, sec. 153.

¹³ (1859), 9 U. C. C. P. 449.

the official oath. But the Court overruled the objection, saying: "So soon as Hodgson became collector it became his duty to take it; the statute which subjects him to a penalty 'upon default' emphatically recognizes the duty. But the omission to take it does not vacate the appointment, nor render him incompetent to discharge the other duties appertaining to it."¹⁴ The same was held where a collector had not made and subscribed the solemn declaration prescribed by statute.¹⁵

Again, where a collector had failed to give a bond before entering upon his duties as required by statute, it was held that collecting the rates without such compliance was not an illegal act.¹⁶ So, in *Gill vs Jackson*,¹⁷ it was held that a school rate imposed by trustees de facto was legal. So, in New Brunswick, it was held that a district assessment will not be quashed because the secretary to school trustees has not given the bond required by law.¹⁸ Likewise where the county treasurer had not given a bond.¹⁹

But in *R. vs Com. of Sewers for Hopewell*,²⁰ under an Act providing that commissioners of sewers shall be sworn into office within one week after their election, or shall be deemed to have refused, it was held that the statute was imperative, and that a commissioner elected on the 2nd of August could not be legally sworn in on the 8th of September—the office at that time being vacant; and that his joining with the other commissioners in making an assessment rendered it void.

¹⁴Also *Township of Whitby vs Harrison* (1859), 18 U. C. Q. B. 603.

¹⁵*Lewis vs Brady* (1889), 17 O. R. 377.

¹⁶*Judd vs Read* (1857), 6 U. C. C. P. 362.

¹⁷(1856), 14 U. C. Q. B. 119.

¹⁸Ex p. *Johnston* (1894), 32 N. B. 556.

¹⁹Ex p. *Raymond* (1872), *Stev. Dig.* (N. B.) 127.

²⁰(1872), 14 N. B. 161.

§ 327. **Rulings in Maine.**— In this State it was laid down as late as 1907, that it is indispensable to the validity of a sale of real estate made by a tax collector for non-payment of taxes, that the collector be shown to have been legally elected and qualified to act in that capacity.²² Among the older decisions the leading case appears to be *Payson vs Hall*.²³ There a tax sale was set aside because the collector had not taken the official oath. The language of the Court is interesting. It is in part as follows: “With reference to the first answer it may be observed, that when constables or sheriffs perform acts by virtue of judicial precepts, it is usually sufficient to show, that they were officers de facto, without producing proof, that they were legally qualified to do so. A person injured by such acts has a remedy by action against the officer, and his rights are secured by a final resort to the official bond. But one injured by the misconduct of a collector of taxes cannot be protected by a resort to his official bond for redress, that having been made for the security of the town alone. He must be permitted to avoid the acts of one assuming without lawful authority to be a collector, or be in many cases without remedy. If a person without election and legal qualification could act as a collector of taxes and as such make sale of an estate, and the production of a deed made by him in that capacity were to be considered as effectual without proof of his election and qualification, there would be no effectual security for the faithful discharge of his duties. Such was not the intention of the Legislature. The party is required to produce the collector’s deed, not the deed of a person assuming without right to act in that capacity. The tax

²²*Baker vs Webber* (1907), 102 Me. 414, 67 A. 144.

²³(1849), 30 Me. 319.

payer is entitled to have his interests protected in the sale of his property by the obligations imposed by the official oath."

Subsequent cases have approved and followed this doctrine. Thus, *Springfield vs Butterfield* ²⁴ was an action of debt for taxes assessed in the year 1900. The only defence set up was that one of the assessors of the plaintiff town for that year was ineligible to the office, and hence that, although regularly elected and sworn, he was only an officer de facto, and not de jure. The court upheld the defendant's contention and gave judgment in his favor, on the ground that "the rule is too firmly established in this state to be now overruled, or questioned, that taxes assessed by a de facto board of assessors, or by a board one of whose members is a de facto assessor are void and uncollectable, and that the question may be raised in a suit for the taxes by the town." ²⁵

But in Maine the acts of officers de facto in relation to taxes are not always absolutely void. Thus, where a tax was received by the collector who was not sworn but was acting under color of his office, it was held that he was a collector de facto, and had the right, as between the town and tax payer, to receive and receipt for the taxes committed to him as such officer.²⁶

§ 328. **Rulings in Vermont.**—*Coit vs Wells* ²⁷ was an action of ejectment, in which the defendant set up as a de-

²⁴ (1903), 98 Me. 155, 56 A. 581.

²⁵ Also *Dresden vs Goud* (1883), 75 Me. 298; *Green vs Lunt* (1870), 58 Me. 518; *Oldtown vs Blake* (1883), 74 Me. 280; *Williamsburg vs Lord* (1863), 51 Me. 599; *Bowler vs Brown* (1892), 84 Me. 376, 24 A. 879; *Lord vs Parker* (1891), 83 Me. 530, 22 A. 392; *Orneville vs Palmer* (1887), 79 Me. 472, 10 A.

451; *Jordan vs Hopkins* (1892), 85 Me. 159, 27 A. 91; but see the old case of *Hale vs Cushing* (1823), 2 Me. 218.

²⁶ *Whiting vs Ellsworth* (1893), 85 Me. 301, 27 A. 177. See also *Greene vs Walker* (1873), 63 Me. 311.

²⁷ (1829), 2 Vt. 318.

fence a title acquired through a collector's sale for a special road tax. On behalf of the plaintiff, the objection was raised that the collector had not given bond as required by law, and this was held fatal to the tax sale. The Court said: "The bond is to be the security, that the money received by the collector shall be paid to the committee, and go to subserve the objects of the tax; that the land owners may not pay their money and yet fail of the roads, which are intended to operate to their benefit by adding value to their lands. Now the collector, as soon as he receives his rate bill and warrant, proceeds to receive the money for the taxes, and advertises his sale. These are official acts, and he must give bond before he commences these acts, or his acts are void."

This principle is apparently sanctioned in *Spear vs Ditty*,²⁸ where a collector's bond was objected to because, it was claimed, the penalty was insufficient in amount. Referring to tax titles, the Court remarked: "Great nicety has prevailed in relation to these titles; and, in cases of doubt, the inverted maxim seems to have obtained, *ut res majis pereat quam valeat*." But continuing, the court adduces reasons in support of the validity of the bond, which might be urged with equal force to validate the acts of the collector, so far as innocent third persons are concerned, even if he had given no bond at all.

However, in the subsequent case of *Isaacs vs Wiley*,²⁹ the court lays down in unmistakable terms the doctrine that a bond is essential, and this merely because the law requires one to be given. "We hold the giving of a bond," said the Court, "and such a bond as the statute requires, to be indispensable to pass the title, not because we consider that the public, or the land-holders, have any indirect interest even, in the security which it affords, but because a strict compli-

²⁸ (1836), 8 Vt. 419.

²⁹ (1839), 12 Vt. 674.

ance with all the prerequisites of the statute is considered necessary, in this class of cases, in order to pass the title. In accordance with this rule, it has been twice decided that it is necessary for the collector to give such a bond as is required by statute."³⁰

The taking of the official oaths required by law, is also strictly insisted upon in Vermont. Thus, in *Ayers vs Moulton*,³¹ it was held that a statute which provided that listers, before entering upon the duties of their office, shall be sworn to their faithful performance, is mandatory, and must be substantially complied with, to give validity to the lists.³² And more recently, it was held, that if the listers in taking the oath prescribed by an Act of 1882, add immediately before the words "So help me God," the words "to the best of our judgment," that addition is sufficient to render the oath null, and the subsequent grand list invalid.³³

§ 329. Rulings in New Hampshire.—In *Cardigan vs Page*³⁴ it was held that where a title to real estate is derived from a collector's sale of taxes, it must appear by record that he took the oath of office prescribed by law; otherwise the sale is void. However, this case was adversely criticized in *Tucker vs Aiken*,³⁵ where the Court remarked that "there seems to be no sound distinction between the acts of a collector de facto, in making a distress, or sale of land in order to satisfy a tax, and those of a sheriff in the seizure and sale of property under attachment, or in the way of an execution." But notwithstanding this decision, it was again held

³⁰*Coit vs Wells* (1829), 2 Vt. 318.

³¹(1878), 51 Vt. 115.

³²See also *Walker vs Burling-ton* (1883), 56 Vt. 131.

³³*Lynde vs Dummerston* (1888),

61 Vt. 48. See also *Newell vs Whitingham* (1885), 58 Vt. 341; *Woodstock vs Bolster* (1863), 35 Vt. 632.

³⁴(1833), 6 N. H. 182.

³⁵(1834), 7 N. H. 113.

in *Pike vs Hanson*,³⁶ that a tax is not valid which is founded upon an appraisement made by selectmen not sworn according to law. There, however, the action was for assault and false imprisonment against the officer, and did not merely constitute a collateral attack upon his official acts. But the Court apparently did not rest its opinion on any such distinction, but upon the broad principle, that the provision of the statute requiring the collector to take an oath could not be deemed merely directory, it being designed, they claimed, "for the protection and security of the citizen, whose rights are in some degree in the discretionary power of the assessors."

However, in *Hayes vs Hanson*,³⁷ it was held that the provision of the statute, requiring that the oath of the assessors shall be filed and recorded in the office of the town clerk, was only directory, and the assessment of a tax was not invalid, in case the statutory provision was not complied with.

And in *Smith vs Messer*³⁸ the doctrine expounded in *Tucker vs Aiken* was strongly approved, the Court holding that where a title is derived from a sale for taxes, it is sufficient evidence of official capacity of the collector, if he is shown to have been such de facto. "It sufficiently appears," said Gilchrist, J., "that Hutchinson was de facto collector, exercising the functions of that office under color of an election; and it was held in *Tucker vs Aiken*³⁹ that the acts of an officer de facto are in general valid, so far as the rights of third parties are concerned, and that the regularity of his appointment is not to be collaterally inquired into in proceedings to which he is not a party. The case of *Cardigan vs Page*⁴⁰ is there adverted to, and the doctrine which it seems

³⁶ (1838), 9 N. H. 491.

³⁷ N. H. 113.

³⁷ (1841), 12 N. H. 284.

⁴⁰ N. H. 182.

³⁸ (1845), 17 N. H. 420.

to establish declared to be untenable.”⁴¹ But in a later case, under a statute requiring the appointment of the collector to be in writing and recorded, the same judge held that a non-compliance with such requirements rendered the collector’s sale void.⁴²

On the whole, however, whatever diversity of opinion there may have been among the New Hampshire judges, in the earlier cases, it is clear now that the courts, unless controlled by mandatory statutes, are willing to apply the principles of the de facto doctrine to the acts of tax officers. Recent cases do not seem to even doubt that proposition. Thus, in *French vs Spalding*,⁴³ where the validity of a tax deed was assailed, it was held that it was sufficient to show that the selectmen who had assessed the taxes, and the collector who had collected them, were officers de facto.⁴⁴

§ 330. Rulings in Arkansas.—In Arkansas, under a statute providing that the sheriff shall qualify himself to perform the duties of assessor, by filing an affidavit on or before a certain date, under penalty of forfeiture of office, it was held by the Supreme Court of the United States, that the failure of the sheriff to comply with the Act, invalidated the assessment.⁴⁵ But in *Scott vs Watkins*⁴⁶ the Supreme Court of Arkansas held, that if the proof was not satisfactory that the sheriff had made and filed the affidavit required of him by law, as assessor of taxes, yet, having acted as such, and there being no proceeding to avoid the office, they would

⁴¹See also *Bean vs Thompson* (1848), 19 N. H. 290, 49 Am. Dec. 154.

⁴²*Ainsworth vs Dean* (1850), 21 N. H. 400. See also *Pierce vs Richardson* (1858), 37 N. H. 306.

⁴³(1881), 61 N. H. 395.

⁴⁴See also *Odiorne vs Rand* (1880), 59 N. H. 504.

⁴⁵*Parker vs Overman* (1855), 18 How. (U. S.) 137.

⁴⁶(1861), 22 Ark. 556.

be loath to hold in a controversy to which he is not a party, that his acts as an assessor de facto were null and void; but no decided opinion was given on the point.

In a later case, however, *Twombly vs Kimbrough*,⁴⁷ the same court criticized the decision of the United States Supreme Court, in a rather harsh language. Omitting that portion, it reads as follows: "We need not undertake to decide whether a sale of lands for taxes, made by a collector de facto, would be valid, like other acts done by judicial and other officers de facto. This Court, in *Scott vs Watkins*, 22 Ark. 556, indicated its disinclination to agree to the doctrine of the Supreme Court of the United States, in *Parker vs Overman*. . . . We should not bow with unhesitating submission to its decision on a question arising under our own statutes. We see no reason why the general principle as to the acts of officers de facto should not apply to those of assessors and collectors."

Finally, in *Moore vs Turner*,⁴⁹ it was directly held on certiorari, that the failure of the tax collector to take the oath of office required by law is no ground for quashing the assessment, as his official character cannot be questioned in such collateral proceeding. The Court attempted to distinguish and explain *Parker vs Overman*.

But a few years afterwards came the decision of *Martin vs Barbour*.⁵⁰ There the Circuit Court, after reviewing the legislation from time to time in force in Arkansas on the subject of assessment of property, and after considering the Act of 1883, which required the assessor to take, in addition to the ordinary official oath, a special oath within a prescribed time and this under penalty of forfeiture of office, concluded that the last mentioned oath was one of the means

⁴⁷ (1866), 24 Ark. 459.

⁴⁹ (1884), 43 Ark. 243.

⁵⁰ (Ark. 1888), 34 Fed. 701, affirmed in 140 U. S. 634.

provided by the legislature to give effect to the constitutional requirement that property shall be taxed according to its value; that the failure of the assessor to take the oath vacates ipso facto his office; and that where there is such a failure on his part, and the clerk, in violation of law delivers to him the assessment book, no assessment on that book can be made the foundation of a valid tax title.

But, again, the Supreme Court of Arkansas refused to follow the decision of the Circuit Court, although affirmed by the United States Supreme Court, and held, that an assessor regularly elected and qualified by taking the oath prescribed by the constitution, though neglecting to take the special statutory oath, is a de facto assessor, and a tax deed based on a sale made for the non-payment of taxes for the year during which such officers held office, is valid.⁵¹

The result of the foregoing conflicting decisions seems to be this: that a party, under given circumstances, may win or lose his suit according to whether it is a Federal or a State tribunal that adjudicates upon it. This is the only conclusion we can arrive at.

§ 331. Rulings in Mississippi.—In Mississippi it is held that where a board of supervisors appoints an assessor,⁵² or a board of police, or a commissioner to classify lands,⁵³ the appointees are de facto officers and their acts valid, though under the circumstances such boards have no authority to make the appointments. But in *Vasser vs George*⁵⁴ it was

⁵¹*Barton vs Latourette* (1891), 55 Ark. 81, 17 S. W. 588. See also *Murphy vs Shepherd* (1889), 52 Ark. 356, 12 S. W. 707; *Equalization Board vs Land Owners* (1889), 51 Ark. 516, s. c. sub. nom. *Stell vs Watson*, 11 S. W. 822; *School District of Ft. Smith vs Board of Im-*

provement (1898), 65 Ark. 343, 46 S. W. 418; *Sawyer vs Wilson* (1907), 81 Ark. 319, 99 S. W. 389.

⁵²*Wolfe vs Murphy* (1882), 60 Miss. 1.

⁵³*Ray vs Murdock* (1859), 36 Miss. 692.

⁵⁴(1873), 47 Miss. 713.

held, under the statutes then in force, that the failure to give bond on the part of the sheriff precluded him from receiving money from the taxpayers, and "if he was not competent to receive, clearly he could not take coercive measures for a sale."

§ 332. **Rulings in California.**—In California the courts have held, under constitutional requirements, that a tax, to be valid, must rest upon an assessment made by an assessor elected by the qualified voters of the district, county or town in which the property is taxed for State, county or town purposes. Accordingly, an assessment made by an assessor elected by the qualified electors of the City and County of Sacramento combined, could not be a sufficient basis for the levy of a tax for city purposes.⁵⁵ So, where a law authorized sheriffs to act as tax collectors, the same, it was held, did not empower the sheriff to appoint an under tax collector, and a tax deed executed by a sheriff as tax collector by his under-sheriff, was held not to be admissible in evidence, as it vested no title in the grantee.⁵⁶

But in *Hamilton vs County of San Diego*⁵⁷ it was held that since the school district there in question had a de facto existence, the plaintiff could not recover back the taxes paid by him, nor could he have enjoined the collection of such taxes, nor have resisted an action for the same, on the ground of illegality of its organization; and from the observations of Britt, C., it is to be inferred, that the acts of de facto tax officers are to be considered as valid and binding as those of any other de facto officer, barring, of course, cases where

⁵⁵*People vs Hastings* (1866),
29 Cal. 449; *Reily vs Lancaster*
(1870), 39 Cal. 354.

⁵⁶*Lathrop vs Brittain* (1866),
30 Cal. 680.

⁵⁷(1895), 108 Cal. 273, 41 P.
305.

some constitutional or statutory provisions demand strict compliance with the law.

§ 333. **Rulings in New York.**—In New York it is declared that it would be a monstrous proposition to hold that the action of town assessors or of trustees of villages, who, under the general village Act perform the duties of assessors, was void, because they had neglected to take any official oath.⁵⁸ Therefore, an assessment roll cannot be questioned on the ground that it was made by officers who had not qualified.⁵⁹ So, where the trustee of a school district makes an appointment of a collector verbally, and issues to him a warrant to collect the tax assessed for school purposes, such collector is an officer de facto, and the trustee is not liable for his acts in enforcing the warrant.⁶⁰ But of course where the pretended tax officers have not sufficient color of right to constitute them officers de facto, any assessment or tax proceeding made or taken by them is absolutely void.⁶¹

§ 334. **Rulings in Michigan.**—In this State a tax will not be held illegal in a proceeding for the sale of land therefor, on the ground that the deputy township treasurer, who made the return, was not a resident of the township, if the township treasurer was a resident, and the deputy was in fact appointed, and was an officer de facto.⁶² So the lawful

⁵⁸Matter of Kendall (1881), 85 N. Y. 302. Also New York vs Vanderveer (1904), 91 N. Y. App. Div. 303, 86 N. Y. S. 659; but see Merritt vs Port Chester (1877), 71 N. Y. 309, 27 Am. R. 47.

⁵⁹Dows vs Irvington (1883), 66 How. Pr. (N. Y.) 93, 13 Abb. N. C. 162.

⁶⁰Hamlin vs Dingman (1871), 5

Lans. (N. Y.) 61, reversing 41 How. Pr. 132.

⁶¹People vs Parker (1889), 117 N. Y. 86, 22 N. E. 752, affirming 45 Hun 432; Canaseraga vs Green (1903), 88 N. Y. S. 539.

⁶²Auditor-Gen. vs Longyear (1896), 110 Mich. 223, 68 N. W. 130.

acts of a de facto collector as such are valid whether he was strictly entitled to the tax roll or not; and they cannot be collaterally attacked by contesting in an ejectment suit a tax title based upon them.⁶³ So, in a suit to restrain the collection of a special assessment for paving, the Court will not determine whether certain persons who were appointed by the council, and discharged the duties of such officers, were officers de jure.⁶⁴

But a tax officer cannot constitute another a de facto officer by delegating his power to him. Accordingly, where a supervisor authorized a neighbor to copy the roll of the previous year, so far as the real estate was concerned, making only such changes as were necessary by change of owners, and to attach and sign the statutory certificate, the assessment was held invalid, since it was not in accord with the law, which requires the exercise of the best judgment of the supervisor in assessing property at its cash value.⁶⁵

§ 335. Rulings in Illinois.—In Illinois the fact that an assessor is not sworn by a proper officer, will afford no ground for refusing judgment for the collection of delinquent taxes.⁶⁶ So, an assessment will not be invalid, even if made by persons ineligible or irregularly appointed to the office of assessor,⁶⁷ or by other de facto officials to whose office is incident the power of levying taxes.⁶⁸ Hence, upon a bill to foreclose a lien claimed for drainage assessments against lands, the defendant cannot assail the validity of the assessments on

⁶³Stockle vs Silsbee (1879), 41 Mich. 615.

⁶⁴Boehme vs Monroc (1895), 106 Mich. 401, 64 N. W. 204.

⁶⁵Paldi vs Paldi (1890), 84 Mich. 346, 47 N. W. 510.

⁶⁶Sullivan vs State (1872), 66 Ill. 75.

⁶⁷Du Page County vs Jenks (1872), 65 Ill. 275; People vs Lieb (1877), 85 Ill. 484.

⁶⁸Trumbo vs People (1874), 75 Ill. 561; People vs Knopf (1900), 183 Ill. 410, 56 N. E. 155.

the ground that they were made by drainage commissioners, who were merely such de facto.⁶⁹ So the official acts of a collector who has not taken the oath prescribed by the statute, cannot be questioned collaterally.⁷⁰ Again, a court of equity will not enjoin a tax for mere errors, where it is attempted to be levied by an officer de facto, under authority pertaining to his office;⁷¹ but may do so, if the levy is by one without pretence of authority, or color of office to which such a right is an incident.⁷²

§ 336. **Rulings in New Jersey.**—In *Rosell vs Bd. of Education*⁷³ the prosecutors on a certiorari questioned the validity of a tax levied against them by the assessor of the borough of Avon-by-the-Sea, in the year 1901, for interest on school bonds issued by the school district of Neptune City. The first and second reasons assigned for reversal of the tax, turned upon the allegation that the Board of Education, who authorized a special meeting of the voters of the district at which the issue of the bonds was ordered, had failed to take the prescribed oath of office. Held, that if there was fault in this particular, nevertheless these persons were officers de facto, and their proceedings were valid.

So it was held that on a certiorari to review a tax, the Court will not look into the validity of the title to office of those holding membership in the taxing body, under a colorable appointment. Their acts are conclusive, so far as the public or third persons are concerned.⁷⁴ Nor, in a like pro-

⁶⁹*Samuels vs Drainage Com'rs.* (1888), 125 Ill. 536, 17 N. E. 829.

⁷⁰*Guyer vs Andrews* (1850), 11 Ill. 494.

⁷¹*Munson vs Minor* (1859), 22 Ill. 594; *Schofield vs Watkins* (1859), 22 Ill. 66; *Merritt vs Faris* (1859), 22 Ill. 303; *Metz vs*

Anderson (1860), 23 Ill. 463, 76 Am. Dec. 704.

⁷²*Idem.*

⁷³(1902), 68 N. J. L. 498, 53 A. 398, affirmed in 70 N. J. L. 336, 57 A. 1132.

⁷⁴*State vs Collector* (1876), 39 N. J. L. 75. See also *Dugan vs*

ceeding, will the Court inquire into the right of a *de facto* assessor to make the assessment.⁷⁵ So, a tax assessed by officers sworn before a person not authorized to administer the oaths, is unassailable.⁷⁶

§ 337. **Rulings in Pennsylvania, Nevada, South Carolina, Texas, and Ohio.**—In Pennsylvania a failure of county commissioners to be sworn as a board of revision does not invalidate a tax assessment made by them when acting as such board.⁷⁷ So an assessment made by an acting assessor is good, though he has not taken the oath of office.⁷⁸ But in an old case,⁷⁹ it was held, that to support a title under a sale for taxes, by virtue of the Acts of the 3d of April, 1804, the election returns of the assessors must be produced, or their existence proved and their absence accounted for, and that parol evidence was not admissible to show who acted as assessor. Said the Court: “The evidence showed only that the persons who made the assessment were recognized as officers by the commissioners, and that they acted as such; but will it be pretended, that such an assessment would be valid, or that a sale under it would confer any right? An assessment by persons neither elected nor sworn, would be an assessment, not by officers *de facto*, but by intruders who came in without even color of authority.”

Farrier (1885), 47 N. J. L. 383, 1 A. 751, affirmed 48 N. J. L. 613, 7 A. 881; *State vs Van Winkle* (1855), 25 N. J. L. 73; *State vs Donahay* (1863), 30 N. J. L. 404.

⁷⁵*Bailey vs Manasquan* (1890), 53 N. J. L. 162, 20 A. 772; see also *Bloomfield vs Pierson* (1885), 47 N. J. L. 247.

⁷⁶*State vs Perkins* (1854), 24 N. J. L. 409.

⁷⁷*Manor etc. Co. vs Cooner* (1904), 209 Pa. St. 531, 58 A. 918.

⁷⁸*Parker vs Luffborough* (1823), 10 S. & R. (Pa.) 249. See also *Kingsbury vs Ledyard* (1841), 2 W. & S. (Pa.) 37.

⁷⁹*Birch vs Fisher* (1825), 13 S. & R. (Pa.) 208.

In Nevada the right of a de facto member of a board of assessors and equalization to exercise the duties of his office, cannot be collaterally questioned.⁸⁰

In South Carolina a sale of lands under a tax execution directed to a sheriff is not unlawful because made by a person who acts as a deputy, with the approval of the sheriff, although his appointment as deputy has not been confirmed by the judge of the circuit court, as required by statute, his acts being valid as those of an officer de facto.⁸¹

In Texas the acts of de facto deputy assessors in raising the valuation of property listed for taxes, are not rendered invalid because they may have been legally disqualified from acting as deputies by reason of their holding other offices.⁸² So the acts of a de facto collector of taxes are valid.⁸³

In Ohio the omission of the sheriff to give a bond as collector, in 1805, did not operate to defeat a sale made by him for delinquent taxes.⁸⁴

In Alabama, it was held that the official acts of a tax collector, who, failing to give an additional bond as required by law, obtained an injunction restraining the Governor's appointee from claiming the office or exercising any of the duties thereof, and thereafter, continued to discharge the functions of the office, must so far as necessary for the protection of third persons and the public, be treated as the acts of an officer de facto.⁸⁵ But the collection of taxes by a col-

⁸⁰*Sawyer vs Dooley* (1893), 21 Nev. 390, 32 P. 437.

⁸¹*Commercial Bk. vs Sandford* (1900), 103 Fed. 98.

⁸²*Texas & P. Ry. Co. vs Harrison County* (1880), 54 Tex. 119.

⁸³*Aulanier vs Governor* (1846), 1 Tex. 653. See also *Nalle vs Austin* (1900), 23 Tex. Civ. App. 595, 56 S. W. 954; *State vs Cocks* (1881) 54 Tex. 482.

⁸⁴*Sheldon vs Coates* (1840), 10 Ohio, 278. See also *State vs Findley* (1840), 10 Ohio, 51. As to assessments, see *Scovill vs Cleveland* (1853), 1 Ohio St. 126; *Smith vs Lynch* (1876), 29 Ohio St. 261.

⁸⁵*Beebe vs Robinson* (1875), 52 Ala. 66, overruling (1874), 50 Ala. 522.

lector, after the office has been judicially declared vacant, is void.⁸⁶

§ 338. **Rulings in Massachusetts, Kansas, and Maryland.**—In Massachusetts, in defence to an action by a town for a tax assessed by persons chosen, sworn and acting as the plaintiff's assessors, it is not open to the defendant to impeach the validity of their election on the ground that the same was irregularly made, inasmuch as they must be deemed assessors de facto, and their acts are valid.⁸⁷ So, in an action against a school district to recover back a tax paid to a collector de facto, the plaintiff is precluded from showing that the officer has not been duly elected or sworn.⁸⁸

In Kansas, *Watkins vs Inge*⁸⁹ was an action in the nature of ejectment to recover the possession of certain lands. The defendant's right to possession was based upon the title acquired by and through a tax deed, the validity of which was attacked upon the ground, among others, that the tax sale was illegal, because the person who made it had no authority at law to act as county treasurer at the time it was executed. Held, that he was a treasurer de facto, and the sale was legal.⁹⁰

In Maryland it is said that as taxes are levied for the support of the government, the reasons of public policy on which the principle of the de facto doctrine, is founded, apply with even greater force in regard to the acts of officers whose duty is to levy and collect such taxes.⁹¹ But in an early case⁹² it

⁸⁶*Peck vs Holcombe* (1836), 3 Port. (Ala.) 329.

⁸⁷*Sudbury vs Heard* (1870), 103 Mass. 543.

⁸⁸*Williams vs School District* (1838), 21 Pick. (Mass.) 75. See also *Allen vs Metcalf* (1835), 17 Pick. (Mass.) 208.

⁸⁹(1880), 24 Kan. 612.

⁹⁰See also *Hale vs Bischoff* (1894), 53 Kan. 301, 36 P. 752.

⁹¹*Koontz vs Hancock* (1885). 64 Md. 134. As to acknowledgments before de facto clerks or deputy clerks, see sec. 316.

⁹²*Burgess vs Pue* (1844), 2 Gill. (Md.) 11.

was held that a collector of taxes not selected by competent authority, although he gives bond for the discharge of his duties, has no legal warrant to act, and all his proceedings are tortious and invalid.

§ 339. Rulings in Iowa, Nebraska, Georgia, and Washington.—In Iowa the fact that an assessor was not duly qualified when, acting as an officer de facto, he assessed certain property, did not invalidate the assessment, or affect the validity of a sale for taxes.⁹³

In Nebraska it was held that where a precinct for purposes of taxation and revenue, as formed, embraced four wards of a city, each of which was by statute made a precinct for taxing purposes, an officer elected for and exercising his office in all four of them without objection, and with the acquiescence of the people, was a de facto assessor in each ward; and city taxes paid to him under protest were not recoverable on the ground that the assessment was invalid.⁹⁴

In Georgia a tax levied by de facto county commissioners is a valid and binding tax.⁹⁵ But where the intendant and commissioners of a town are invested both with the power of appointing and the power of reviewing assessments on appeal, they cannot appoint any of themselves to act as assessors; and an assessment made, under color of such void appointment, will be invalid.⁹⁶

⁹³Allen vs Armstrong (1864), 16 Iowa, 508. See also Washington County vs Miller (1863), 14 Iowa, 584; Pierce vs Weare (1875), 41 Iowa, 378; Burke vs Cutler (1889), 78 Iowa, 299, 43 N. W. 204.

⁹⁴South Omaha vs O'Rourke (1903) 70 Neb. 479, 97 N. W. 608. See also Magneau vs Fremont

(1890), 30 Neb. 843, 47 N. W. 280, 27 Am. St. R. 436.

⁹⁵Brown vs Flake (1897), 102 Ga. 528, 29 S. E. 267; Argo vs Flake (1897), 102 Ga. 531, 29 S. E. 268; Waller vs Perkins (1874), 52 Ga. 233.

⁹⁶Hawkins vs Jonesboro (1879), 63 Ga. 527.

In Washington it was held that the failure of ditch commissioners to qualify by filing a bond in the required amount, did not invalidate an assessment made by them as de facto officers.⁹⁷ It was also held that the right of a de facto assessor to his office could not be collaterally attacked in an action to enjoin the collection of taxes levied upon property assessed by him.⁹⁸

§ 340. Rulings in Kentucky, Wisconsin, Tennessee, and other states.—In Kentucky the authorities seem to entertain no doubt as to the applicability of the de facto doctrine to the acts of de facto tax officers.⁹⁹

The same doctrine prevails in Wisconsin. Thus, in an action brought to set aside taxes attempted to be imposed on certain lands, the Court said: "Since there were the requisite county offices in the county de jure to be filled, can we hold that because such offices were filled by appointment instead of an election, that therefore the official acts of such officers in levying and collecting the taxes in question were mere nullities?" The answer was in the negative, and the taxes were upheld.¹⁰⁰ In *Yorty vs Paine* ¹⁰¹ a tax deed was sustained, although based upon proceedings carried on by de facto tax officers.¹⁰²

⁹⁷*State vs Skagit County Superior Court* (1906), 42 Wash. 491, 85 P. 264.

⁹⁸*North Western Lumber Co. vs Chehalis County* (1901), 25 Wash. 95, 64 P. 909, 87 Am. St. R. 747, 54 L.R.A. 212.

⁹⁹*United States etc. Co. vs Bd. of Education* (1905), 118 Ky. 355, 86 S. W. 1120; *Shawhan vs Harrison County* (1903), 116 Ky. 490, 76 S. W. 407.

¹⁰⁰*Chicago etc. Ry. Co. vs Langlade County* (1883), 56 Wis. 614, 14 N. W. 844.

¹⁰¹(1885), 62 Wis. 154, 22 N. W. 137.

¹⁰²See also *Dean vs Gleason* (1862), 16 Wis. 1; *Strange vs Oconto Land Co.* (1908), 136 Wis. 516, 117 N. W. 1023.

In Tennessee it was held that tax assessors appointed by County commissioners, acting under an unconstitutional Act, were officers de facto, and their assessments valid.¹⁰³

In Florida, however, it was held that one employed by a city to assist its assessor of taxes in the performance of his duties, who does not claim to be, and is not recognized as, an officer of the city, but merely an employee to assist the assessor, is not an officer de facto of said city whose acts, as such, in making an assessment of taxes, in which the rightful assessor does not participate, will be binding.¹⁰⁴ So in North Dakota, it was held that an assessment made by a pretended deputy assessor was null and void, where there was no such office in existence.¹⁰⁵

¹⁰³*McLean vs State* (1873), 8 Heisk. (Tenn.) 22. As to rulings in other states, see *Black vs Early* (1907), 208 Mo. 281, 106 S. W. 1014; *Akers vs Kolkmeier* (1903), 97 Mo. App. 520, 71 S. W. 536; *Adams vs Lindell* (1878), 5 Mo. App. 197, affirmed in 72 Mo. 198;

McCormick vs Fitch (1869), 14 Minn. 252; *Roche vs Jones* (1891), 87 Va. 484, 12 S. E. 965.

¹⁰⁴*Tampa vs Kaunitz* (1898), 39 Fla. 683, 23 So. 416.

¹⁰⁵*Farrington vs New England Invest. Co.* (1890), 1 N. D. 102, 45 N. W. 191.

CHAPTER 27.

APPOINTMENT OR ELECTION TO OFFICE BY DE FACTO OFFICERS.

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| § 341. English doctrine. | § 346. General rule in America |
| 342. Where de facto officer merely perfected official title, same rule did not apply. | sustains validity of appointments made by de facto officers. |
| 343. Canadian rulings. | 347. Same subject. |
| 344. Doctrine in New York. | 348. Same subject. |
| 345. Judgment of ouster against one appointee, not evidence against another. | |

§ 341. **English doctrine.**—At common law the title of the appointee or electee is dependent upon, and subject to any infirmity in, the title of the appointor or elector. Accordingly, a judgment of ouster against an officer de facto concludes his appointees as privies to himself, unless the judgment can be impeached upon the ground of fraud, collusion, or the like. In *R. vs York*,¹ Lord Kenyon, C. J., says: "If you derive title to a corporate office through A., and the prosecutor show a judgment of ouster against A., it is conclusive against you, unless you can impeach the judgment as obtained per fraudem."

Thus, in quo warranto against a bailiff of a corporation, he pleaded a nomination by A. & B., two bailiffs thereof, and upon issue taken on their being bailiffs, it was held that a judgment of ouster was good evidence against the defendant, but that it was not conclusive, because the latter might have

¹(1792), 5 Term (D. & E.) 66.

proved that the judgment was obtained by collusion, or that the first defendants were restored.² Likewise, in *R. vs Grimes*,^{2a} one of the questions being, whether a special verdict found on an information against one John Leigh for usurping the office of Mayor, and the judgment given thereupon against him, were evidence against Grimes for usurping the office of capital burgess, and to what degree it ought to be allowed, the court directed that such judgment was admissible, but not conclusive.³ But nothing short of a judgment of ouster can be given in evidence against the appointee, for the courts will not permit the title of the de facto corporators to be tried collaterally in quo warranto against him.⁴

The common law doctrine, however, has long ago been altered by statute, and it is now declared that acts done by persons de facto in office are valid in all respects, although they may labor under a defect of qualification.⁵ Moreover, the strict rule applicable to appointees of de facto corporators, does not seem to have prevailed in case of appointments by other de facto officers. Thus, in *R. vs Justices of Herefordshire*,⁶ it was sought to impeach the title of a county treasurer on the ground that one of the justices, who had voted at the election had not previously taken the qualification oath prescribed by 18 Geo. II, c. 20, and consequently that his vote was void, so as to annul the election. But it was held that the same could not be invalidated for that reason. Abbott, C. J., observed: "This office is full de facto,

²*R. vs Hebden* (1738), Andr. 388, 2 Str. 1109.

^{2a}(1770), 5 Burr. 2598.

³See also *R. vs Lisle* (1738), Andr. 163, 2 Str. 1090; *R. vs Hughes* (1825), 4 B. & C. 368.

⁴*Symmers vs Regem* (1776), 2 Cowp. 489; *R vs Hughes* (1825), 4 B. & C. 368.

⁵See 45 & 46 Vic. c. 50, ss. 42 & 102; and other statutes, 1 Vic. c. 78, s. 1; 3 & 4 Vic. c. 108, s. 89; 32 Geo. III, c. 58, s. 3; also *R. vs McCarthy* (1859), 10 Ir. C. L. R. 312.

⁶(1819), 1 Chitty, 700.

and we cannot say that the act of the justice, who had not taken the qualification oath, is void." Likewise, Bayley, J., said: "In this case the acts of the justice are valid, though he may be liable to penalties for not having taken the oath prescribed by the statute."

§ 342. Where de facto officer merely perfected official title, same rule did not apply.—Again, the English rule did not operate to invalidate the title of an officer whose appointment or election was lawful, but whose admittance to office was made by a de facto officer. Upon this principle, it was held that where a person had an inchoate right to be a free burgess of a borough, his title could not be impeached, because he was sworn in before officers who were so de facto, but not de jure. Abbott, C. J., said: "The application was made upon this ground only, that the party was admitted to his office of free burgess at a corporate meeting holden before bailiffs, who were not good presiding officers. That is *prima facie* a valid objection; but the answer made to it is, that the defendant had an inchoate right to be admitted. I take it to be clear, that where a title has been conferred, that is defeated by showing that the party conferring it had no right to do so. But the title in question was not conferred by the presiding officers; their duty was merely to inquire into the fact of the existence of the alleged inchoate right. If any doubt as to the propriety of the admittance had been suggested, the case would be different, for then there would be a question of right to be determined. But where we find a person, having a clear inchoate right, and going to a corporate meeting to claim his admittance as a free burgess, can we say that his admittance was bad on account of a defect in the title of the officers presiding at that meeting? If the objection were good, I should expect to

find that it has been heretofore raised, but there is no case to support it.”⁷

§ 343. **Canadian rulings.**—The Canadian courts seem to have favored the doctrine that appointments made by de facto officers are valid. In *Lacasse vs Roy*⁸ the application was for quo warranto against the defendant, Roy, for usurping the office of municipal councillor for the parish of St. Lambert. He had been nominated by four councillors, but one of them was merely a de facto councillor, and without him there would not have been a regular quorum. It was contended, that the defendant's title was dependent upon that of the illegal councillor who had concurred in his appointment, and therefore was invalid. But the Court, relying on the principles of the de facto doctrine as found expounded in American works, held that the position was untenable.

In *In re McPherson & Beeman*⁹ the council by resolution appointed one Bartell assessor, who was sworn into office, and made an assessment. This appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a subsequent vote the resolution was rescinded, and a by-law passed appointing another assessor. Both made assessments, and much confusion arose. Under those circumstances the Court granted a quo warranto to determine the validity of the last appointment. While the result of the proceedings is not known, yet it is to be noted that Burns, J., one of the court, expressed himself strongly to the effect, that the appointment made by the council, while one of their number was a councillor de facto, could not be disturbed.

⁷*R. vs Slythe* (1827), 6 B. & C. 240, 30 R. R. 312.

⁸(1895), 8 Que. R. (S. C.) 293.

⁹(1859), 17 U. C. Q. B. 99.

§ 344. **Doctrine in New York.**—The New York decisions apparently follow the English cases, and hold that a de facto officer cannot create a de jure officer. Thus, in *New York vs Flagg*,¹⁰ Sutherland, J., speaking of an officer de facto, says: "Without right himself, he cannot confer any on others. His appointment of deputies or subordinates, as to himself and them, would be as void as any other colorable official act. It might make them severally officers de facto as to third persons, but could give them no better or greater right to institute, as such, any affirmative action or proceeding than he himself had or has, as an officer de facto. The right and title of his appointee rests on his own right and title."

The same principle is laid down in *People vs Anthony*,¹¹ where the action was in the nature of a quo warranto, to determine whether the relator Steinart or the defendant Anthony was entitled to the office of clerk of one of the district courts of the city of New York. Steinart was appointed clerk by McGuire, who claimed to be, and at the time of the appointment was, acting as justice of the court. Afterward, one Stemmler claimed to have been legally elected to the office of justice, and an action upon his relation in the nature of quo warranto was commenced against McGuire, and in that action it was determined that McGuire was not entitled to the office but that Stemmler was; and after Stemmler obtained possession of the office under the judgment in that action, he appointed the defendant, Anthony, clerk, and it was held that the judgment against McGuire was competent evidence against Steinart, who claimed under him. The Court proceeded upon the principle that where a person claims an office by virtue of an appointment, he must prove that the

¹⁰ (1858), 6 Abb. Pr. (N. Y.) 296.

¹¹ (1875), 6 Hun (N. Y.) 142.

officer by whom the appointment was made was lawfully entitled to his office; the fact that it was made by one who claimed to be, and was then acting as such officer, but who has subsequently been ousted therefrom, is not sufficient. The Court said: "The counsel of the appellants contends that, at the time when McGuire appointed the relator, he was a justice de facto, and that his acts, as respects other persons than himself, were just as valid as if he had been an officer de jure; and that, as the justice of the District Court in question had the right to appoint a clerk and an assistant clerk for the term of the justice, to wit, six years, the appointment of the relator was valid; and that, therefore, there was no vacancy in the office of clerk to be filled at the time when Stemmler, who had been declared by a judgment of this court to be the justice de jure of said court, appointed the respondent. I cannot accede to this position of the appellants' counsel, and I do not think that it is sustained by the numerous cases which he has cited upon his brief. While it is perfectly well settled that the acts of an officer de facto are valid as to third persons, it is equally well settled that where one claims, by action, an office, or its incidents, he can only recover upon proof of title."¹²

§ 345. **Judgment of ouster against one appointee, not evidence against another.**—But while the New York decisions hold that a judgment of ouster against an officer de facto, is evidence against his appointee, yet this rule will not be extended so as to render admissible in evidence against one appointee, a judgment of ouster obtained against another. This was decided by the New York Court of Appeals in

¹²See also *People vs Murray* Daly 347. But see *People vs Stevens* (1878), 73 N. Y. 535, reversing 8 *ens* (1843), 5 Hill (N. Y.) 616.

People ex rel. Gilchrist vs Murray,¹³ where the facts were as follows: In March, 1873, defendant was duly appointed assistant clerk of one of the district courts of New York city for the full term of six years; he was removed by the justice of that court, and in January, 1875, the relator, Gilchrist, was appointed by the justice. In January, 1876, the relator was removed and one Mangin appointed. Thereupon an action in the nature of quo warranto was brought on the relation of Gilchrist against Mangin. A judgment was rendered therein, deciding that the relator was entitled to the office, and that Mangin be ousted. A few days prior to the entry of judgment, defendant, with the consent of Mangin, resumed possession under his original appointment. It was held, that the justice had no power to remove defendant, who was entitled to the office for the full term; and that the judgment against Mangin was neither conclusive nor any evidence against him. Earl, J., delivering the opinion of the court, said: "It is a general rule that judgments are conclusive only against the parties thereto or their privies. (*Campbell vs Hall*, 16 N. Y. 575). This defendant was in no sense a party to that action, and he did not take his office from, or in any way hold it under, Mangin, and under such circumstances there never was a time in the jurisprudence of this country or of England when an adjudication upon writ of quo warranto against Mangin would bind him. Such an adjudication would bind all who came in under Mangin, and whose title to the office depended upon his; and to this effect are the cases to which the learned counsel for the plaintiffs has called our attention."

§ 346. General rule in America sustains validity of appointments made by de facto officers.—The English

¹³(1878), 73 N. Y. 535, reversing 8 Daly, 347.

rule, however, is not approved by the weight of authority in the United States, and it is generally held that the appointees of de facto officers have a good title to their office, even if their appointors are subsequently ousted. The reason for thus holding is fully explained by the Supreme Court of North Carolina in *Norfleet vs Staton*.¹⁴ There a person had been appointed clerk of the Superior Court for the county of Edgecombe, by the de facto judge presiding in that judicial district; and in an action brought against such clerk to oust him from the office, by the appointee of one who had been declared judge de jure, it was held that the appointment by the judge de facto was valid, and the appointee of the judge de jure was not entitled to the office. Reade, J., delivering the judgment of the court, said: "Probably the whole inquiry can be covered by the question: Is the appointee of a de facto officer a rightful officer? Or is he only an officer de facto like his appointor? The burden of the very full argument for the relator, was to show that while the defendant was an officer, and his acts valid as to the public and third persons, yet, in a direct proceeding against him, as this is, he cannot set up his wrongful appointment in support of his claim to the office. This is unquestionably true, supported by all the authorities, if we admit that the defendant is a de facto officer. But that is the very question in dispute. Why is the defendant a de facto and not a de jure officer? When the defendant is asked 'by what authority do you hold the office?' he answers, by the appointment of the Judge of the Superior Court. And when it is replied, but that Judge was only a Judge de facto; the defendant rejoins, that may be so; but all his necessary official acts were valid as to the public and third persons; my appointment was a necessary official act, and therefore, valid; and I became not a wrong-

¹⁴ (1875), 73 N. C. 546.

ful usurper, not merely a de facto, but a rightful officer; just as rightful as any judgment which he rendered or any act which he did." ¹⁵

§ 347. **Same subject.**—The same doctrine has been upheld in a number of other cases. Thus, in *Brinkerhoff vs Jersey City*,¹⁶ it was declared, that the principles upon which the acts of de facto officers are held valid require the recognition of appointments to office made by them, when such appointments would be valid, if made by officers de jure. Accordingly, the court held that the appointment of a person as corporation counsel by the votes of four of the five members of a city board of finance, made him a corporation counsel de jure, although one of the members so voting for his appointment was only a member de facto, whose title was attacked by quo warranto.¹⁷ So, in *Brady vs Howe*,¹⁸ the validity of the appointment of a clerk by a de facto chancellor was in dispute, and it was held that, inasmuch as it pertains to a chancellor to appoint a clerk, under certain circumstances, when these circumstances exist a de facto chancellor exercises the power with the same right that he may render a decree or punish for contempt.¹⁹ So it has been held, that a collector of taxes, deriving his authority from the appointment of selectmen de facto, is an officer de jure.²⁰ So the appointment of a treasurer by a de facto Mayor, is no more subject to collateral attack than anything he does.²¹ So county

¹⁵Also *Ellis vs Deaf & Dumb Asylum* (1873), 68 N. C. 423; *Jones vs Jones* (1879), 80 N. C. 127.

¹⁶(1900), 64 N. J. L. 225, 46 A. 170; *disapproving Jersey City vs Erwin* (1896), 59 N. J. L. 282, 35 A. 948.

¹⁷See also *Bownes vs Meehan* (1883), 45 N. J. L. 189; *Dugan vs*

Farrier (1885), 47 N. J. L. 383, 1 A. 751.

¹⁸(1874), 50 Miss. 607.

¹⁹To same effect, see *State vs Alling* (1843), 12 Ohio, 16.

²⁰*Roberts vs Holmes* (1874), 54 N. H. 560.

²¹*State vs Badger* (1901), 90 Mo. App. 183.

commissioners de facto can fill a vacancy in the office of county treasurer.²² So the acts of school directors, who have not properly qualified, being valid as the acts of de facto officers, the election of a treasurer and a secretary by them will constitute the appointees officers de jure.²³

§ 348. **Same subject.**—But where there are two rival boards of education, both de facto, and both exercising as far as possible the duties of the office, and each makes an appointment the same day to the same place, in such case the appointee of the de facto Board, which is subsequently adjudged to be the de jure board, clearly has the title. ²⁴ So an appointment made by de facto officers cannot be sustained where the same would be invalid, if made by de jure officers. Thus, where the de facto intendant and commissioners of a town, invested both with the power of appointment and the power of reviewing assessments on appeal, appointed three members of their own body a committee to assess property, such appointment was held so clearly illegal that it could not constitute the appointees even de facto officers.²⁵

²²State vs Jacobs (1848), 17 Ohio, 143. Also Jones vs Jones (1879), 80 N. C. 127.

²³State vs Powell (1897), 101 Iowa, 382, 70 N. W. 592.

²⁴Baker vs Hobgood (1900), 126 N. C. 149, 35 S. E. 253.

²⁵Hawkins vs Jonesboro (1879), 63 Ga. 527.

CHAPTER 28.

ACTS OF DE FACTO OFFICERS IN RELATION TO THE HOLDING AND CONDUCT OF ELECTIONS.

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| § 349. English Parliamentary doctrine. | § 359. Former doctrine of the American House of Representatives. |
| 350. Same subject. | 360. Same subject. |
| 351. Same subject—Statutory ineligibility of returning officer. | 361. Later doctrine. |
| 352. Same subject—Ineligibility of returning officer by reason of minority. | 362. Same subject. |
| 353. Same subject—Failure of election officers to take oath. | 363. Same subject—Election officers must be appointed by authorized persons. |
| 354. Returning officers joined by unauthorized persons. | 364. American judicial doctrine. |
| 355. Unauthorized persons acting as returning officers. | 365. Same subject—Irregular appointment of election officers. |
| 356. English doctrine adopted in Canada. | 366. Same subject—Officers ineligible or disqualified. |
| 357. English judicial doctrine. | 367. Same subject—Omission to take oath. |
| 358. English judicial doctrine followed in a Canadian case. | 368. Same subject—Election officers acting in insufficient number or joined by improper persons. |

§ 349. **English Parliamentary doctrine.**—The English Parliament has long ago recognized the validity of elections held or conducted by de facto officers. The settled rule has been, that “wherever it appears that an election of a member of Parliament has been fairly made, there will be every inclination in the House of Commons to support such election; and upon this principle, the proceedings of the person in possession of the office of returning officer, will be adopted,

even though his title to the office, to which that duty is attached, be questionable.”¹ “The Law of Parliament,” says Serjt. Heywood, “has departed from the general law of the land, and elections made under usurping presiding officers, where there has been the form of an election, have been uniformly supported.”² Likewise Lord Mansfield observes: “How many instances do we recollect of Mayors acting as returning officers after there has been a judgment of ouster against the Mayor, under whom they derive their title.”³ Thus, in the *Winchelsea case*,⁴ the Mayor was reported by the committee of privileges to be an intruder; but nevertheless the election was holden good by the committee and by the House. He was an intruder, that is to say, in a municipal sense, with respect to the office of Mayor, because his title to that office was defective; but capable, notwithstanding, of acting as returning officer for parliamentary purposes, being in actual possession of the office to which that of returning officer was annexed.⁵

§ 350. *Same subject.*—Similarly in the *Bodmin case*,⁶ the petitioners claimed that one Hext, to whom the precept for the election had been delivered, was not the lawful Mayor, nor the legal or proper returning officer for the borough, but that he had usurped the said office, and therefore the election held before him was void. The defect in the election of the Mayor was the non-observance of some requisites of the charter with respect to such election. When, however, called upon to argue the case before the committee, counsel for the petitioners declined to do so, stating on behalf of his clients

¹Roe on Elections, 443.

²Heywood, Boroughs, pp. 62. 63.

³R. vs Davie (1781), 2 Doug. K. B. 588.

⁴28th May, 1624, 1 Jour. 798.

⁵Wakefield (1842), Bar. & Aus.

El. Cas. p. 298.

⁶(1791), 2 Fras. 236.

that as the alleged Mayor "filled the office of mayor de facto, though not de jure, he now understood it to be the law of Parliament, though he had formerly given an opinion the other way, that Hext might act as returning officer." The petition was accordingly declared by the committee to be frivolous and vexatious.

Again, in the *Wakefield* case,⁷ it appeared that one Holdsworth had been appointed and had acted as returning officer for the borough of Wakefield, in every year from 1832 down to 1841, when the election took place. In the last mentioned year, however, he declined to act and caused a notice to be sent to the sheriff advising him of his refusal to accept the office. The sheriff then appointed one Barff to act in his stead, and delivered the precept to him. Holdsworth became a candidate and was elected. It was contended that he was ineligible, as he was the de jure returning officer of the borough at the time of the election. The committee resolved accordingly, and declared that he was the proper officer to whom the precept ought to have been directed, and was therefore incapable of being elected to serve in Parliament for that borough. The next question was whether Barff, the acting returning officer, could be regarded as an officer de facto and his acts held valid, so as to sustain the election in other respects. It was urged that the resolution of the committee was conclusive upon that point, and since it had been decided that Holdsworth was the lawful returning officer, the sheriff was not empowered to deliver the precept to anyone else, and consequently the election held by Barff was a mere nullity. The committee, however, agreed with the law laid down by the counsel for the sitting member, and declined to declare the election and return void on the ground of any deficiency in the title of the returning officer.

⁷ (1842), Bar. & Aus. El. Cas. 270.

§ 351. **Same subject—Statutory ineligibility of returning officer.**—The same principle was upheld where the returning officer was ineligible to the office, to which was annexed that of returning officer. Thus, in the *Winchelsea* case,⁸ the Mayor had not taken the sacrament of the Lord's Supper, according to the rites of the Church of England, within a year next before the election; and the committee, upon perusal of the clause in the Act of Parliament for regulating corporations, were of opinion, that the return made by the Mayor of the election of Mr. Austin, the sitting member, was not good; and that the election was void. But, when the matter came to be debated in the House, the House disagreed with the committee, and it was resolved that Mr. Austin was duly elected. So in the *Portsmouth* case,⁹ as in the last, it appeared that the Mayor had not taken the sacrament within a year before his election; notwithstanding which, the proceedings before him were recognized, inasmuch as the House did not avoid the election, but seated the petitioners, Sir James Wishart and Sir William Gifford, who had the legal majority of votes, instead of Sir Charles Wager and Sir John Jennings, who had been returned; and in this case, that of *Winchelsea*, 1666, above mentioned, was cited.

§ 352. **Same subject—Ineligibility of returning officer by reason of minority.**—Again, in the *Clitheroe* case,¹⁰ the sitting member was declared duly elected although the returning officer was ineligible by reason of minority. But in the *Belfast* case,¹¹ where four of the seven deputy returning officers were minors, the election was set aside. There

⁸9th and 10th January, 1666, 8 Jour. 673, 674; Roe, 443.

⁹3rd February, 1710, 16 Jour. 480; Roe, 444.

¹⁰(1693), 11 Journ. 77. Clerk on Elect. 359.

¹¹(1842), Bar. & Aus. El. Cas. 553.

were, however, other great irregularities, so that the invalidity of the election did not depend upon this point alone. In fact, in a note, the reporters say: "We have reason to know that the resolution of the Committee was solely grounded on the allegation respecting the insufficiency of the booths." And Clerk remarks: "If the election had been properly conducted in other respects, it may well be doubted whether a committee would hold an election void on account of the minority of any of the officials engaged in it."¹²

§ 353. Same subject—Failure of election officers to take oath.—The failure of election officers to take the oath prescribed by law, has been held not to affect the election. This was decided in the *Colchester* case,¹³ under 25 Geo. III, c. 84, s. 7, which required that "every person whom the returning officer or officers shall retain to act as a clerk in taking the poll shall, before beginning to take such poll, be sworn by such returning officer or officers." The Mayor refused to swear the poll clerks, and the committee resolved that the failure to take the oath did not invalidate the election.

§ 354. Returning officers joined by unauthorized persons.—The circumstance of persons not being returning officers joining with the proper officers in holding the election, or making the return, has been considered not to prejudice the election. Thus, in the *Taunton* case,¹⁴ the bailiffs of the borough were the legal returning officers, but they were joined by the constables, who assumed to act with them in that capacity, and made the return jointly with them. The committee held the sitting members duly elected, although

¹²Clerk on Elect. 363.

¹³(1789), 1 Peck. 503.

¹⁴(1805), 1 Peck 406, 58 Jour. 382; Roe, 448.

they at the same time reported, "that the bailiffs of the borough of Taunton, appointed at a court-leet held annually in and for the said borough, are the legal returning officers of the said borough."

§ 355. **Unauthorized persons acting as returning officers.**—Again, there have been cases in which, the returning officer declining to fulfil his duty in taking the poll, or being interrupted, the electors have voted before a constable, or even before a private person, and their votes, as well as the election, have been held good. Such were the cases of *Cricklade*,¹⁵ and of *Liverpool*.¹⁶ But in the case of *Wells*,¹⁷ where the poll was taken by one Keate, who was not the proper returning officer, evidence was offered to show the refusal of the Mayor to go into the borough to receive the precept, whereupon Keate proclaimed the election and took the poll; but the House refused to admit the poll so taken by Keate to be produced. So in the *Cricklade* case,¹⁸ where the returning officer, upon an appearance of riot (as to the extent of which there was contradictory evidence), closed the poll, and positively refused to renew it, and votes were thereupon taken before a constable, the committee resolved that the constable's poll should not be given in evidence, and that parol evidence should not be admitted to prove what persons polled before him. It is to be observed, however, that no other person than the returning officer had any authority under the statute to administer the bribery oath, which, by the stat. 2 Geo. II, c. 24 might be required to be taken by every voter; and this was much relied upon in the argu-

¹⁵1st April, 1689, 10 Jour. 72, 73.

¹⁶5th, 19th, 21st, and 24th
March, 1729-30, 21 Jour. 476, 506,
508, 514.

¹⁷15th and 20th January, and

19th February, 1766, 30 Jour. 456,
466, 595; Roe, 449.

¹⁸(1775), 1 Doug. 293, 299; Roe,
449.

ment against the validity of the constable's poll, in the *Cricklade* case. Had it not been for that statute, it is possible that the conclusion of the House would have been different.

§ 356. English doctrine adopted in Canada.—The foregoing English doctrine has been followed and applied in Canada, in the case of *Le Boutillier vs Harper*.¹⁹ There Harper, the respondent, on the 13th January, 1874, received a commission from the Clerk of the Crown in Chancery, appointing him returning officer for the then coming election in the county of Gaspé. He at the same time received the writ of election, and signed as returning officer the receipt endorsed upon the writ. On the 14th of January, the respondent signed the usual proclamations as returning officer, and afterwards caused them to be posted up throughout the county. On the 31st January, he appointed L. Z. Joncas to be his election clerk, and on the same day telegraphed to the Clerk of the Crown in Chancery informing him that he was offering himself as a candidate, and therefore could not act as a returning officer, and stating that he had transferred all papers to his election clerk. On the 2nd February he notified the latter of the above facts. There was some exchange of correspondence and messages between the respondent and the Clerk of the Crown in Chancery, but the resignation of the former was never formally accepted. The election was held by the election clerk and Harper was elected. As in the *Wakefield* case,²⁰ already referred to, two objections were urged against the validity of the election, viz.: First, that the respondent was ineligible; and secondly, that the election clerk was not a good returning officer. The first objection was sustained, but as to the second, the Court

¹⁹ (1875), 1 Que. Law R. 4.

²⁰ (1842), Bar. & Aus. El. Cas. 270.

held that the election clerk having acted as returning officer after the attempted resignation of the respondent, the election held by him was not invalid. In arriving at this conclusion, the Court followed the English parliamentary decisions, which are copiously quoted in their opinions. One of the Judges (Tessier, J.) remarked that though Harper remained returning officer *de jure*, the election clerk became officer *de facto*, he having acted as such, and the election was not invalidated on that account.

§ 357. **English judicial doctrine.**— Until the law was altered by statute, the English Courts declined to apply the parliamentary rule to municipal elections, held or presided over by *de facto* officers. The reason was, that “considered as a corporate officer, the Mayor or other presiding officer, is an integral part of the corporation, and the validity of elections to corporate offices depends upon the legality of the title of the presiding officer: he must not only be in possession of the office *de facto*, but must also be entitled to hold it *de jure*. This, observes Mr. Serjt. Heywood, ‘has in many instances been productive of great inconvenience, and if the same rule prevailed with respect to the election of members to serve in Parliament, it would have been the source of endless confusion.’ ”²¹

Upon this principle, it was held that if a presiding officer at an elective assembly of a borough, depart from it after the meeting has been regularly formed, and the election entered upon, but before it is completed, an election made after his departure is void.²² So it was held that where the Mayor, who presides at the election of the new Mayor, is only Mayor

²¹Wakefield Case (1842), Bar. 389; R. vs Williams (1813), 2 M. & Aus. El. Cas. 270, 301. & S. 141.

²²R. vs Buller (1807), 8 East,

de facto and not de jure, and is subsequently removed by judgment of ouster, the election of the new Mayor is void.²³ Likewise where one was elected burgess at a meeting presided over by an illegal Mayor, against whom were pending quo warranto proceedings, and a judgment of ouster was afterwards rendered against him, the election of such burgess was held void.²⁴

But now it is declared by statute, that an election of a person to a corporate office shall not be liable to be questioned by reason of a defect in the title, or want of title, of the person before whom the election was had, if that person was then in actual possession of, or acting in, the office giving the right to preside at the election.²⁵

§ 358. English judicial doctrine followed in a Canadian case.—In *Perrault vs Brochu*²⁶ the principle laid down by the English courts was adopted and followed. The warden of the County of Arthabaska had appointed one Louis Foisy to preside at the general meeting of electors of the parish of St. Chistophe d'Arthabaska, which was to be held on the first Monday of January, in pursuance of the Municipal Act of 1855, for the purpose of electing seven councillors for the municipality of the said parish. Foisy, having entered upon his duties as such president, proceeded to propose the names of several candidates, but a division taking place among the electors, as to who should be the seventh councillor, some of the parties present demanded a poll; Foisy refused to proceed any further and left the

²³R. vs Bridgewater (1784), 3 Doug. K. B. 379; R. vs Smith (1816), 5 M. & S. 271.

²⁴R. vs Lisle (1738), Andr. 163, 2 Str. 1090. See also R. vs Malden (1767), 4 Burr. 2135.

²⁵45 & 46 Vict. c. 50, s. 42; 1 Vic. c. 78, s. 1.

²⁶(1860), 10 Low. Can. R. 111.

meeting. Thereupon, James Goodhue, Esq., the oldest magistrate present, was called to preside over the meeting, and immediately after taking the chair, opened a poll. An hour after the closing of the poll, Goodhue proclaimed as duly elected the above named defendant Brochu; Brochu having subsequently taken his seat as councillor for the said Municipality, the validity of his election was tried upon an information in the nature of a quo warranto brought by Perrault, the petitioner, one of the qualified electors of the Municipality. The Court, relying on some of the English cases quoted in the preceeding section, gave a judgment of ouster against the defendant, declaring all the proceedings had under the presidency of Goodhue null and void, and setting aside the election of the defendant Brochu. In the course of his observations, the presiding Judge remarked that the person named by the warden having been presented at the opening of the meeting, had become and was in fact an integral part of that assembly, and that the election could not be proceeded with during his absence, although he had improperly absented himself.

§ 359. Former doctrine of the American House of Representatives.—In the United States the rules regarding the recognition of elections held or conducted by illegal officers, were precisely the reverse of what they were in England. Instead of the courts being opposed to the application of de facto principles, we find the House of Representatives showing a disinclination to adopt the same, and this lasted until recently. That the House, however, did not always thoroughly grasp the extent of the de facto doctrine, is evident from the following language of its committee: “We venture to assert that in no case has it ever been held that persons were officers de facto who did not possess the quali-

fications requisite for officers de jure. One may be an officer de facto, who has been irregularly, or improperly, appointed, or selected, and his acts may be binding on third persons; but in a case of personal disqualification of the officer, for reasons which could not be cured by a change in the manner of his selection, the rule is universal that he can have no jurisdiction, and his acts are void from the beginning for want of authority.”²⁷ Had the committee consulted the numerous authorities on the subject, they would have assuredly discovered their error, as it has often been held that persons ineligible to an office, such as minors or females, may nevertheless become good officers de facto.

§ 360. **Same subject.**—The above is the doctrine which was applied in *McKee vs Young*,²⁸ where the election officers were disqualified because of their having participated in the rebellion. The committee said: “It has long been held that, if the officers of elections are not capable of holding the office, the election has no more validity than would have an election where no officers were appointed. It is otherwise where persons capable of holding the office are appointed, although they may not have complied with the forms of the law.” A similar case is *Delano vs Morgan*,²⁹ where the vote of a whole precinct was rejected, because one of the three Judges in the precinct was disqualified from holding office, on account of his having forfeited his citizenship by desertion from the army. Another is *Dodge vs Brooks*,³⁰ where one of the grounds for the rejection of the precinct was that the board of registers who had made the registry were incompetent to act, they not being residents

²⁷Reid vs Julian (1870), 2 Bart.
El. Cas. 822.

²⁸2 Bart. El. Cas. 168.

³⁰2 Bart. El. Cas. 78.

²⁸2 Bart. El. Cas. 422.

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of the district. But in another case, where it appeared that one of the clerks was not a qualified elector, the committee refused to throw out the precinct on that ground.³¹

Again, in *Jackson vs Wayne*,³² where a return was made by three persons, only one of whom was a magistrate, whereas the law required that three magistrates should preside at the election, the return was held defective.³³ So it was held where an election was presided over by two inspectors, and the law required three.³⁴ Likewise where the election officers had failed to take the required oath.³⁵

§ 361. **Later doctrine.**—The later congressional cases, however, with the exception of *Reid vs Julian*,³⁶ from which we quoted an excerpt above, hold an opposite view, and lay down the principle that, in the absence of fraud, the de facto doctrine should be applied to sustain the official acts of illegal election officers, whether their defective title be due to irregular election or appointment, or to failure to qualify as required by law.³⁷ The leading case is *Barnes vs Adams*,³⁸ which was followed in *Eggleston vs Strader*,³⁹ and in *Gooding vs Wilson*.⁴⁰ In fact, it seems that the only conflicting case of late is that of *Reid vs Julian*, where curiously enough the principles of the old cases were re-affirmed. Why

³¹Finley vs Walls, Smith El. Cas. 367.

³²Cl. & H. El. Cas. 47.

³³See also, Letcher vs Moore, Cl. & H. El. Cas. 756; Donnelly vs Washburne, 5 Cong. El. Cas. 466.

³⁴Howard vs Cooper, 1 Bart. El. Cas. 275.

³⁵McFarland vs Culpepper, Cl. & H. El. Cas. 221; Easton vs Scott, Cl. & H. El. Cas. 273; Draper vs Johnson, Cl. & H. El. Cas. 702.

³⁶2 Bart. El. Cas. 822.

³⁷Blair vs Barrett, 1 Bart. El. Cas. 313; Barnes vs Adams, 2 Bart. El. Cas. 760; Finley vs Walls, Smith El. Cas. 367; Sheafe vs Tillman, 2 Bart. El. Cas. 907; Millikin vs Fuller, 1 Bart. El. Cas. 176; Clark vs Hall, 1 Bart. El. Cas. 215; Flanders vs Hahn, 1 Bart. El. Cas. 438.

³⁸2 Bart. El. Cas. 760.

³⁹2 Bart. El. Cas. 897.

⁴⁰42nd Congress.

this should have been done in view of *Barnes vs Adams*, is unexplainable. Fortunately, the case was not decided upon the principle of law it laid down, but upon questions of fact, so that it is no direct authority in favor or against any legal doctrine.

§ 362. Same subject.—The following is a portion of the report of the committee in *Barnes vs Adams* (decided in the Forty-first Congress), which was unanimously adopted, and which, we think, may be considered as settling the law of the House: “The question, therefore, regarded in the light of precedent or authority alone, would stand about as follows: The judicial decisions are all to the effect that the acts of officers de facto, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of an officer de jure. The decisions of this House are to some extent conflicting; the point has seldom been presented upon its own merits, separated from questions of fraud; and in the few cases where this seems to have been the case the rulings are not harmonious. In one of the most recent and important cases, *Blair vs Barrett*,⁴¹ in which there was an exceedingly able report, the doctrine of the courts, as above stated, is recognized and indorsed. The question is therefore a settled question in the courts of the country, and is, so far as this House is concerned, to say the least, an open one. Your committee feel constrained to adhere to the law as it exists and is administered in all the courts of the country, not only because of the very great authority by which it is supported, but for the further reason, as stated in the outset, that we believe the rule to be most wise and salutary. The officers of election are chosen of necessity from among all classes of the people; they are numbered in every State by

⁴¹1 Bart. El. Cas. 313.

thousands; they are often men unaccustomed to the formalities of legal proceedings. Omissions and mistakes in the discharge of their ministerial duties are almost inevitable. If this House shall establish the doctrine that an election is void because an officer thereof is not in all respects duly qualified, or because the same is not conducted strictly according to law, notwithstanding it may have been a fair and free election, the result will be very many contests, and, what is worse, injustice will be done in many cases. It will enable those who are so disposed, to seize upon mere technicality in order to defeat the will of the majority."

§ 363. Same subject—Election officers must be appointed by authorized persons.—The above doctrine, however, seems to be subject to this limitation, that those appointing election officers must be clothed with the legal power to make such appointments. This was decided in two cases. The first one is *Bennett vs Chapman*,⁴² where the electors in one precinct chose their own returning officer and tendered their votes to him, the probate Judge whose duty it was to make the appointment having failed to do so under a misapprehension. The return was rejected. The other case is *Sheafe vs Tillman*,⁴³ where a precinct officer was appointed by the probate Judge contrary to law, which provided that the Governor should appoint commissioners of registration, who in their turn should make the appointment of the precinct officers, and hold the election in the county. It was held that the officer so appointed was not an officer de facto, but a mere usurper, and the election illegal.

§ 364. American judicial doctrine.—The practically uniform trend of judicial decisions in the United States,

⁴²¹ Bart. El. Cas. 204.

⁴³² Bart. El. Cas. 907.

as already intimated, has always sanctioned the doctrine, that elections held or conducted by de facto officers, are valid. Accordingly, statutory provisions regulating and controlling election proceedings, and the appointment and qualification of election officers, are construed as merely directory, unless it clearly appears by the language used that they were intended to be mandatory, or that a disregard of them would affect the votes, or the result of the election. "Elections," says one of the Courts, "are the ultimate expression of the sovereign will. When fairly expressed, that is, free from taint of fraud or charge of improper conduct, it becomes the duty of courts to sustain them where it can be done by a liberal construction of the laws relating to elections, rather than defeat them by requiring a rigid conformity to law."⁴⁴ It is also pointed out, that it would be impracticable to require each citizen to investigate and judge at his peril who are and who are not in strictness of law officers, or whether they have complied with the directions of the statute regulating their conduct; especially on the day of election, when the time afforded is not a tithe of what is necessary for investigation and redress.⁴⁵ Therefore, whenever practical to ascertain how many legal votes have been cast, at the proper time and place, there is no rightful power to reject them, although they may have been received by an officer de facto, and not de jure.⁴⁶

§ 365. Same subject—Irregular appointment of election officers.—In accordance with the foregoing principles, election returns should not be rejected or an election avoided

⁴⁴Ex p. White (1894), 33 Tex. Cr. R. 594, 28 S. W. 542. Also Peard vs State (1892), 34 Neb. 372, 51 N. W. 828.

⁴⁵People vs Cook (1852), 14

Barb. (N. Y.) 259; affirmed in 8 N. Y. 67, 59 Am. Dec. 451.

⁴⁶Marks vs Park (Pa. 1875), 7 Leg. Gaz. 70.

for any irregularity in the appointment of the officers of election, where it does not appear that any injurious results accrued therefrom, either by the reception of illegal votes or the rejection of legal votes, or that either of the candidates lost or gained votes thereby.⁴⁷ Thus, where election inspectors are appointed by a coroner, without the concurrence of three justices of the peace, as required by law, such irregularity will not avoid the election.⁴⁸ So, where an Act provides that election inspectors shall be appointed at or during a certain time, their appointment before or after the specified time will not render the election illegal.⁴⁹

So the fact that election commissioners, within five days before the election, appointed two Democrats to act as officers of the election in lieu of two other Democrats who declined to act, without giving notice to the Republican member of the election board, was held not sufficient to invalidate the election.⁵⁰ So where one of three qualified electors, appointed pursuant to law to conduct an election, was sick and could not attend and the vacancy was filled by the appointment of another qualified elector in his stead by the remaining two appointees, it was held that such appointment, if irregular, did not affect the validity of the election, provided the result was not thereby changed.⁵¹ So an election held

⁴⁷Keller vs Chapman (1868), 34 Cal. 635; Hankey vs Bowman (1901), 82 Minn. 328, 84 N. W. 1002; People vs Cook (1853), 8 N. Y. 67, 59 Am. Dec. 451, affirming 14 Barb. 259; Pickett vs Russell (1900), 42 Fla. 116, 28 So. 764; Varney vs Justice (1888), 86 Ky. 596, 6 S. W. 457; Conway vs Bd. of Aldermen (1869), 2. Brewst. (Pa.) 134.

⁴⁸McCraw vs Harralson (1867), 4 Coldw. (Tenn.) 34; quoted and

approved in Cook vs State (1891), 90 Tenn. 407, 16 S. W. 471.

⁴⁹People vs Board of Police (1887), 46 Hun (N. Y.) 296; People vs Police Com'rs of New York (1879), 57 How. Pr. (N. Y.) 445; Marion vs Territory (1893), 1 Okla. 210, 32 P. 116.

⁵⁰Notley vs Wilson (1904), 26 Ky. Law R. 1011, 82 S. W. 1023.

⁵¹People vs Lodi High School Dis. (1899), 124 Cal. 694, 57 P. 660.

by commissioners appointed by the legislature, is valid, though the appointment is unconstitutional.⁵² So where the law requires election officers to be chosen by the voters, the election will not be annulled because of their appointment by an unauthorized body.⁵³

So it has been held that where the regularly appointed election officers fail to appear at a precinct, and other persons present take their place without having been properly selected, such persons will be considered officers de facto in regard to the receiving and counting of votes.⁵⁴ But an election will not be upheld, where the officers holding it have no color of authority whatever, either by appointment, acquiescence, or otherwise, and are mere usurpers to the knowledge of those tendering their votes.⁵⁵

The only case we have discovered in conflict with the foregoing authorities, is *Phillips vs Corbin*,⁵⁶ where the Court apparently shared the views entertained in the Congressional cases of *Bennett vs Chapman*,⁵⁷ and of *Sheafe vs Tillman*,⁵⁸ already adverted to,⁵⁹ and refused to recognize the validity of an election held by officers appointed by an unauthorized body. A special election had taken place to determine whether the town of Colfax should be dissolved and the territory

⁵²*Pratt vs Breckinridge* (1901), 112 Ky. 1, 65 S. W. 136, 23 Ky. Law R. 1356; *Id.*, 112 Ky. 1, 66 S. W. 405, 23 Ky. Law R. 1858.

⁵³*Sprague vs Norway* (1866), 31 Cal. 173; *Trustees Common School Dis. No. 88 vs Garvey* (1882), 80 Ky. 159.

⁵⁴*Choisser vs York* (1904), 211 Ill. 56, 71 N. E. 940; *Thompson vs Ewing* (1862), 1 Brewst. (Pa.) 67, 5 Phila. 102, 19 Leg. Int. 348; *Tullos vs Lane* (1893), 45 La. Ann. 333, 12 So. 508.

⁵⁵*VanAmringe vs Taylor* (1891), 108 N. C. 196, 12 S. E. 1005, 23 Am. St. R. 51, 12 L.R.A. 202; *Lower Terrebonne R. & M. Co. vs Police Jury* (1906), 115 La. 1019, 40 So. 443.

⁵⁶(1896), 8 Col. App. 346, 46 P. 224.

⁵⁷1 Bart. 204.

⁵⁸2 Bart. 907.

⁵⁹See sec. 363.

annexed to the City of Denver. In the ordinance providing for the election, the trustees of the town had appointed the officers to preside and conduct the same, whereas the general statute provided that the judges of election should be appointed by the county commissioners. The Court held that the statutory provision was not merely directory, but imperative, and therefore the election was illegal and void.⁶⁰

§ 366. **Same subject—Officers ineligible or disqualified.**—Moreover, it is no ground for the rejection of votes or the avoidance of an election, that some of the election officers were ineligible or disqualified by law.⁶¹ Thus, a minor may be a good clerk *de facto* at a poll, and the votes cast before him will not be thrown out.⁶² Neither will the votes of a precinct be rejected, because some of the managers were not freeholders, as required by law.⁶³ Nor will an election be avoided because two of the election officers were ineligible, one being a non-resident of the State, and the other a postmaster.⁶⁴

Again, an election will not generally be invalidated by reason of some of the candidates acting as election officers,⁶⁵

⁶⁰See *contra*, *Fidelity T. & S. Va. Co. vs Morganfield* (1895), 96 Ky. 563, 29 S. W. 442, and other cases above quoted.

⁶¹*Quinn vs Markoe* (1887), 37 Minn. 439, 35 N. W. 263. See *Lee vs State* (1873), 49 Ala. 43, where an election inspector acted after he had lost his right to act by reason of his absence at the opening of the poll and the appointment of another one.

⁶²*Bell vs Faulkner* (1892), 84 Tex. 187, 19 S. W. 480.

⁶³*Collins vs Huff* (1879), 63 Ga.

207; *Slate vs Blue Ridge* (1901), 113 Ga. 646, 38 S. E. 977.

⁶⁴*Swepton vs Barton* (1882), 39 Ark. 549. See also *McCarthy vs Wilson* (1905), 146 Cal. 323, 82 P. 243; *In re Dauphin County Election* (Pa., 1874), 11 Phila. 645, 32 Leg. Inst. 59.

⁶⁵*People vs Avery* (1894), 102 Mich. 572, 61 N. W. 4; *Taylor vs Taylor* (1865), 10 Minn. 107; *State vs Bernier* (Minn. 1888), 38 N. W. 368; *Collins vs Masden* (1903), 25 Ky. L. R. 81, 74 S. W. 720; *State vs Cosgrove* (1892), 34 Neb. 386, 51 N. W. 974.

though, according to some authorities, this seems to be so only in cases where the rightful officers constitute a lawful quorum, independently of the candidate.⁶⁶ Others also hold that the election is void as to the candidate himself, though valid as to others.⁶⁷

Contrary, however, to the prevailing rulings, it was held under a law providing that "no election shall be defeated for noncompliance with the requirements of the law if held at the proper time and place by persons *qualified to hold it*," that an election held by officers, all of whom were not qualified to act, was invalid.⁶⁸

§ 367. Same subject—Omission to take oath.—Where no fraud is proven, and the election appears to have been properly and honestly conducted, the failure on the part of election officers to take the official oath will not vitiate the election.⁶⁹ "The inspectors," says the Supreme Court of

⁶⁶*People vs McManus* (1861), 34 Barb. (N. Y.) 620; *Farrier vs Dugan* (1886), 48 N. J. L. 613, 7 A. 881; *Wilcox vs Magruder* (1850), 1 Ohio Dec. 350, 7 West. Law J. 505.

⁶⁷*Swepton vs Barton* (1832), 39 Ark. 549; *In re Boileau* (1845), 2 Pars. Eq. Cas. (Pa.) 503.

⁶⁸*Walker vs Sandford* (1887), 78 Ga. 165, 1 S. E. 424.

⁶⁹*People vs Cook* (1853), 8 N. Y. 67, 59 Am. Dec. 541, affirming 14 Barb. 259; *People vs Schermerhorn* (1855), 19 Barb. (N. Y.) 540; *Taylor vs Taylor* (1865), 10 Minn. 107; *Quinn vs Markoe* (1887), 37 Minn. 439, 35 N. W. 263; *Lehlbach vs Haynes* (1891), 54 N. J. L. 77, 23 A. 422; *Smith vs Howell* (1897), 60 N. J. L. 384, 38 A. 180; *Whipley vs McKune*

(1859), 12 Cal. 352; *People vs Prewett* (1899), 124 Cal. 7, 56 P. 619; *Jossey vs Speer* (1899), 107 Ga. 828, 33 S. E. 718; *Heyfron vs Mahoney* (1890), 9 Mont. 497, 24 P. 93, 18 Am. St. R. 757; *Wells vs Taylor* (1884), 5 Mont. 202, 3 P. 255; *Wheelock's Case* (1876), 82 Pa. St. 297; *In re Boileau* (1845), 2 Pars. Eq. Cas. (Pa.) 503; *Barnes vs Supervisors* (1875), 51 Miss. 305; *Stinson vs Sweeney* (1883), 17 Nev. 309, 30 P. 997; *Rounds vs Smart* (1880), 71 Me. 380; *People vs Hilliard* (1862), 29 Ill. 413; *Dishon vs Smith* (1859), 10 Iowa, 212; *State vs Baker County* (1886), 22 Fla. 29; *In re Krickbaum's Contested Election* (Pa. 1908), 70 A. 852; *Hunnicutts vs State* (1889), 75 Tex. 233, 12 S. W. 103; *Tanner vs Deen* (1899), 108 Ga. 95, 33 S.

Florida, "are public agents authorized to conduct the election and to certify the result. Like other official persons, having acted in a public official capacity, they occupy the position of officers *de facto* even though they failed to return the oath duly taken."⁷⁰ So irregularities in the manner of taking, administering, or evidencing the oath will not affect the election. Thus, the title of an inspector or clerk cannot be collaterally challenged in election proceedings, on the ground that he was sworn upon a book other than the Holy Evangelists as on Watts' Psalms and Hymns.⁷¹ So the fact that the officer who administered the oaths to the judges and clerks of election neglected to put his title to the several jurats will not be allowed to operate to disfranchise the voters in the precinct in which such judges and clerks acted.⁷² Likewise with other irregularities in regard to the jurat, where such irregularities are the result of innocent mistake, and do not produce any effect on the election.⁷³

The omission to take an oath, however, as pointed out in some Congressional cases, is always regarded with suspicion, unless it is shown to be clearly due to ignorance or inadvertence. There is no doubt, therefore, that where election officers have failed in that respect, the courts will jealously scrutinize their conduct and proceedings, and if it should appear that the result of the election has been in the least affected or prejudiced by such failure the election will be annulled.

E. 832; *Sanders vs Lacks* (1897), 142 Mo. 255, 43 S. W. 653; *Montgomery vs Chelf* (1904), 118 Ky. 766, 82 S. W. 388.

⁷⁰*State vs Bd. of County Canvassers* (1878), 17 Fla. 9.

⁷¹*Rounds vs Smart* (1880), 71 Mc. 380.

⁷²*People vs Hilliard* (1862), 29 Ill. 413.

⁷³*Behrensmeyer vs Krietz* (1891), 135 Ill. 591, 26 N. E. 704; *Ackerman vs Haenck* (1893), 147 Ill. 514, 35 N. E. 381; *State vs Bd. of County Canvassers* (1878), 17 Fla. 9.

§ 368. Same subject—Election officers acting in insufficient number or joined by improper persons.—

Where the proper number of election officers do not act at an election, or where they are joined and aided in the performance of their duties by unauthorized persons, such irregularities are not deemed by the courts of any consequence, unless it can be shown that the result of the election has been affected. Thus, where the statute required three inspectors, and only two acted, the election was not thereby avoided, the statutory provision being construed as directory merely.⁷⁴ So it was held where there were only four judges of election, and the law required six.⁷⁵ Likewise, where the statute required the presiding officer of a precinct to select three judges and four clerks, and he selected only three judges and two clerks.⁷⁶ So where the commissioners of election appointed two additional ballot clerks contrary to law, through an innocent mistake, the election was not avoided.⁷⁷ So an election was held valid although four inspectors acted during part of the time, three only being required,⁷⁸ the fourth being unauthorized to act. So the fact that a person acts as a member of the election board without being legally appointed and sworn,⁷⁹ or that an unauthorized person is allowed to assist in counting the votes, will not vitiate the election.⁸⁰ Nor will an election be affected by the fact that a person

⁷⁴State vs Stumpf (1867), 21 Wis. 579. Also Gilleland vs Schuyler (1872), 9 Kan. 569; State vs Townsend (1837), 1 McMul. (S. C.) 495.

⁷⁵Sanders vs Lacks (1897), 142 Mo. 255, 43 S. W. 653.

⁷⁶Chapman vs State (1897), 37 Tex. Crim. R. 167, 39 S. W. 113. Also Fragley vs Phelan (1899), 126 Cal. 383, 58 P. 923.

⁷⁷Dial vs Hollandsworth (1894), 39 W. Va. 1, 19 S. E. 557.

⁷⁸People vs Cook (1852), 14 Barb. (N. Y.) 259.

⁷⁹Lehlbach vs Haynes (1891), 54 N. J. L. 77, 23 A. 422.

⁸⁰Sprague vs Norway (1866), 31 Cal. 173; Roberts vs Calvert (1887), 98 N. C. 580, 4 S. E. 127.

acts at the poll, during the temporary absence of the lawful clerk, without being sworn.⁸¹

In those cases, however, slight proof of fraud, or proof of even opportunity to change the ballots, will suffice to give rise to the presumption that the election has been illegally conducted. "While ordinarily," says the Court in *Dial vs Hollandsworth*,⁸² "such misconduct unexplained raises grave suspicions, and would require but a small amount of additional evidence to destroy the presumption of fairness and sustain the charge of corruption, yet in this case the officers of the election have given a reasonable, although not a legal, excuse for their conduct, and the contestant has failed to produce any evidence of unfairness tending to sustain the fraudulent practices alleged in the notice of contest. So far as anything in the evidence is contained, it tends to show that there was a free ballot and a fair count as to every vote cast at this precinct."

⁸¹In re Boileau (1845), 2 Pars. Eq. Cas. (Pa.) 503; Brightly Elec. Cas. 268.

⁸²(1894), 39 W. Va. 1, 19 S. E. 557.

CHAPTER 29.

VALIDITY OF OATHS TAKEN BEFORE DE FACTO OFFICERS— PERJURY.

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| <p>§ 369. Affidavits and depositions taken before de facto officers, valid.</p> <p>370. Perjury cannot be committed at common law before a de facto tribunal.</p> <p>371. English doctrine still as at common law.</p> <p>372. Exception to the English rule.</p> <p>373. Evidence of official reputation sufficient, unless rebutted.</p> <p>374. Doctrine in Canada.</p> <p>375. Observations on case of <i>Drew vs The King</i>.</p> <p>376. Same subject—Language of the commissioners.</p> <p>377. Same subject—Language of the Code.</p> | <p>§ 378. Same subject—Status of the Recorder.</p> <p>379. Doctrine in New York.</p> <p>380. Same subject.</p> <p>381. Doctrine in Alabama.</p> <p>382. Doctrine in Kentucky.</p> <p>383. Doctrine in Ohio.</p> <p>384. Doctrine in Indiana.</p> <p>385. Doctrine in South Carolina.</p> <p>386. Doctrine in Iowa.</p> <p>387. Doctrine in New Hampshire.</p> <p>388. Doctrine in Texas.</p> <p>389. Doctrine in Illinois.</p> <p>390. Doctrine in Florida.</p> <p>391. Doctrine in Maryland.</p> <p>392. Doctrine in Michigan.</p> <p>393. Doctrine in Oklahoma.</p> <p>394. Doctrine in Kansas.</p> |
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§ 369. Affidavits and depositions taken before de facto officers, valid.— The validity of affidavits and depositions cannot be assailed on the ground of their having been sworn or taken before persons who were merely de facto officers. Thus, where it was claimed that a chattel mortgage had not been properly renewed, and was therefore void as against execution creditors, because the renewal affidavit had been taken before a deputy city clerk, whose appointment was apparently irregular, the Court held that such objection could not prevail, inasmuch as the record showed that at the time

the affidavit was made, the deputy clerk was, and for a long time before had been, openly and without objection performing the duties of his office; he was therefore an officer de facto, and his title could not be questioned collaterally.¹ So, an affidavit taken before a commissioner of deeds de facto for a city, who is exercising such office under color of an appointment, may be used in a suit between other persons; and the Court will not inquire collaterally into the legality of the officer's appointment.² Again, in an action upon a promissory note, an affidavit made before a commissioner de facto, as to the amount due thereon, cannot be objected to.³ Likewise, depositions cannot be suppressed or invalidated on the ground that they were not taken before a competent officer, where it appears that they were taken before a notary public whose appointment was regular and valid, but who had failed to file a bond as required by law.⁴ So in England, although before 7 & 8 Will. III, c. 27, s. 21, and 1 Ann, c. 8, s. 5, a commission issuing out of a court of equity for the examination of witnesses, was determined ipso facto by the demise of the King, yet the depositions taken under it without notice of such demise, were valid.⁵

§ 370. Perjury cannot be committed at common law before a de facto tribunal.—A singular anomaly exists at common law with reference to proceedings before de facto tribunals. While on the one hand, the convictions, judgments, decrees, and other judicial acts of de facto courts are recognized as valid and binding, yet persons may corruptly

¹Tower vs Welker (1892), 93 Mich. 332, 53 N. W. 527.

²Parker vs Baker (1840), 8 Paige (N. Y.) 428.

³Kaufman vs Stone (1869), 25 Ark. 336.

⁴Keeney vs Leas (1863), 14 Iowa, 464. See also Pack vs United States (1906), 41 Ct. Cl. 414.

⁵Crew vs Vernon (1628), Cro. Car. 97, 79 Eng. R. 686.

and intentionally deceive and mislead such courts by giving false testimony before them, without thereby becoming liable to punishment for perjury. In a prosecution of this kind, the defendant is allowed to challenge the authority of the judge before whom the oath was taken, and if he can show that such judge was merely an officer *de facto* by reason of irregular appointment, or defective qualification, he is entitled to be discharged. In the language of the law, the false swearing must have been before a "competent tribunal," by which is meant a tribunal not only having jurisdiction of the person and of the subject-matter, but also presided over by an officer legally appointed and duly qualified to act.

Such doctrine obviously has its foundation neither in reason nor in justice. Nay, it is manifestly against public policy, the efficient administration of justice, and the most sacred rights of individuals. Why should legal protection against deceit be denied to tribunals whose judgments are recognized as valid and binding in all cases, even where the life or liberty of the citizen is at stake? Such rule evidently owes its origin to a misapprehension of the true principles underlying the *de facto* doctrine. There is no reason why the term "competent tribunal" should not mean any tribunal recognized by law, whether the same be *de jure* or *de facto* only. Nevertheless, though this state of the law has been the subject of much adverse criticism, the same is still permitted to continue in full force in several jurisdictions.

§ 371. English doctrine still as at common law.—
This is the case in England where the principles of the common law are still adhered to. Bacon lays down this doctrine, as follows: "The oath ought to be taken before persons lawfully authorized to administer it; for if it be taken before persons acting merely in a private capacity, or before persons

pretending to a legal authority of administering such oath, but having in truth no such authority, it is not punishable as perjury.”^{5a}

Likewise, Hawkins says: “It seemeth clear, that no oath whatsoever taken before those who take upon them to administer justice of an authority seemingly colorable, but in truth unwarranted and merely void, can ever amount to perjury in the eye of the law. . . . And from the same ground it seemeth also clearly to follow, that no false oath in an affidavit made before persons falsely pretending to be authorized by a court of justice to take affidavits in relation to matters depending before such courts, can properly be called perjury, because no affidavit is any way regarded, unless it be made before persons legally intrusted with a power to take it.”⁶

The leading case upon this subject is apparently *R. vs Verelst.*⁷ There an indictment was found for perjury committed before one acting as surrogate in the ecclesiastical court, in making oath to an answer in a cause there pending for a divorce. The surrogate having acted in that capacity, it was held that it was *prima facie* evidence of his appointment, and that he had authority to administer the oath. It appeared, however, from the registrar’s book, containing the appointment, that it was irregularly made, for the reason that instead of being authenticated in the usual manner, no notary public, nor his deputy, nor the registrar, had been present at the time for the purpose of authenticating the act, according to the rule of the ancient common law; and it was claimed that the appointment was a nullity. The counsel for the prosecution contended that the officer appointed having acted as surrogate for twenty years without his authority

^{5a}Bac. Abr. Perjury (A).

⁶1 Hawk. P. C., c. 27, s. 4; see, also, Archb. Cr. Pl. (23rd Ed.) p. 1045; 4 Black. Comm. 137; Rus-

sell on Crimes (6th Ed.) p. 297;

Ros. Crim. Ev. (12th Ed.) 717.

⁷(1813), 3 Camp. 432, 14 R. R. 775.

being questioned in the ecclesiastical court, a judge and jury at Nisi Prius ought not to inquire into the manner of his appointment; that if they did, they might still presume a notary was present, although a blank was left for the name in the entry; that the entry was not the appointment, but only the evidence of it; that the appointment might be regular although the entry was deficient; and that even if no notary was present, it did not follow that the appointment was a nullity, although the judge might be liable to suspension. But Lord Ellenborough held, that he could not shut out evidence that Dr. Parsons, who acted as surrogate, was not duly appointed, however long he might have acted in that capacity, and that the presumption arising from his acting could only stand till the contrary was proven; and, after reviewing the facts, he decided that the allegation that Dr. Parsons had authority to administer the oath was negatived; and the defendant was acquitted. This case has been quoted with approval and followed in numerous other cases, both in the English and American courts.

In 1878, an Imperial Commission was appointed in England, to examine the criminal law and report upon changes that should seem to them necessary and desirable. Among other things, the commissioners recommended that a change be made in the law in regard to perjury, so as to render amenable to justice persons falsely swearing before a *de facto* Judge or tribunal, but, so far as we are aware, their suggestion has not yet received the formal recognition of Parliament.

§ 372. Exception to the English rule.—The English courts, however, before there was any statutory law on the subject, recognized an exception to the general rule that perjury could not be founded upon an oath administered by a

de facto officer. This was in the case of false oaths taken before persons authorized by commission to take the same, and who acted by virtue of such commission after the demise of the Crown, but before the same was known to them. "It hath been adjudged," says Hawkins, "that a false oath taken before persons, who, having been commissioned to examine witnesses, happen to proceed after the demise of the King who gave them their commission, and before notice thereof, may be punished as perjury; for it would be of the most ill consequence to make such proceedings void; and therefore, though all such commissions be in strictness legally determined by the demise of the King who gave them, without any notice; yet for the necessity of the case, whatever is done under them before such notice, must be held to stand good; for otherwise the most innocent and most deserving subjects would be unavoidably exposed to numberless prosecutions for doing their duties, without any color of a fault."⁸

Whether the same principles would be deemed to apply, under like circumstances, to all officers empowered to administer oaths, has apparently never been decided, but there appears to be no reason to be urged against such application.

It is to be noted, however, that since the passing of certain statutes,⁹ commissions under the Crown in regard to various offices, are not determined by its demise, but are continued for six months thereafter. And as to judges, since 1 Geo. III, c. 23, their official tenure is not affected by the death of the sovereign.¹⁰

§ 373. Evidence of official reputation sufficient, unless rebutted.—Again, though at common law a defendant

⁸1 Hawk. P. C., c. 27, s. 4.

¹⁰See also Rev. Stat. Can.

⁹7 & 8 Wm. III, c. 27, s. 21; 1 (1906), c. 101.
Ann. c. 8; 6 Ann. c. 7, s. 8; 1
Geo. II, c. 5.

is allowed to impeach the title of the officer before whom he swore falsely, yet it is evident from the case of *R. vs Verelst*,¹¹ that it is not incumbent on the part of the prosecution to adduce more than evidence of official reputation, where no attempt is made to rebut that evidence. "I think," says Lord Ellenborough, in that case, "the fact of Dr. Parsons having acted as surrogate, is sufficient *prima facie* evidence that he was duly appointed and had competent authority to administer the oath. I cannot for this purpose make any distinction between the ecclesiastical courts and other jurisdictions. It is a general presumption of law that a person acting in a public capacity is duly authorized so to do." The defendant therefore, in that case, would have been convicted on such presumption, had it not been rebutted. Following this rule, the Court of Criminal Appeal, in a prosecution for perjury, held that the fact that one acted as deputy judge of a County Court, was sufficient *prima facie* evidence of his appointment as such.¹² The same principle was upheld where the evidence showed that the commissioner before whom the affidavit was sworn had never seen his commission, but had acted as such commissioner during the last ten years.¹³

§ 374. **Doctrine in Canada.**—The English doctrine prevailed in Canada until the passing of the Criminal Code, 1892.¹⁴ By art. 145 of that Code, it is now provided, among other things, that every proceeding is judicial "within the meaning of this section" which is held "before any legal tribunal by which any legal right or liability can be established,

¹¹ (1813), 3 Camp. 432, 14 R. R. 775.

¹² *R. vs Roberts* (1878), 14 Cox. C. C. 101, 38 L. T. 690.

¹³ *R. vs Newton* (1844), 1 Car.

& K. 469. Also *R. vs Ward* (1848), 3 Cox. C. C. 279; *R. vs.*

Howard (1832), 1 M. & Rob. 187. 1455 & 56 Vict., c. 29.

or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, *whether duly constituted or not*, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid."

A rather singular interpretation, considering its far-reaching effect, was given to the above clause in a case which arose in the Province of Quebec, in 1902.¹⁵ There the appellant, Drew, charged one Rowe with having committed a trespass by forcible entry on his land situate in the County of Huntingdon, in the District of Beauharnois. The charge was laid under Art. 5551 of the Revised Statutes of Quebec, which restricts the hearing of such cases to a magistrate residing in the county where the offence was committed. The case was tried before the Recorder of Valleyfield, who was *ex officio* a justice of the peace in and for the whole district of Beauharnois, but did not reside in the County of Huntingdon, where the offence was charged to have been committed, and was, therefore, without jurisdiction of the subject-matter of the complaint in consequence of the provisions of the Quebec Statutes above referred to. Drew, however, gave false testimony before the magistrate, and being convicted therefor in the proper Criminal Court, of perjury, the question was reserved whether the objection to the competency of the Recorder to sit in the case of trespass prevented the commission of the legal offence of perjury.

The reserved case was first heard by the Court of King's Bench, Appeal Side, at Montreal, and by three of the five judges, the conviction was upheld. Then an appeal was

¹⁵Drew vs The King (1902), 11 Sup. Ct. R. 228, 6 Can. Crim. Cas. Que. R. (K. B.) 477, 6 Can. Crim. 424.
Cas. 241; affirmed (1903), 33 Can.

taken to the Supreme Court of Canada, where the decision of the Court of King's Bench was affirmed, but again, only by a majority, this time there being four judges against two.

§ 375. Observations on case of Drew vs The King.—

Although the above case settles the law in Canada, so long at least as the Supreme Court rests satisfied with its own judgment, nevertheless we submit, with much deference, that the soundness of the conclusions arrived at by the majority of the judges in the two Courts admits of legitimate doubt. Art. 145 of the Canadian Criminal Code, part of which is quoted in the preceding section, was copied practically verbatim from the English draft code prepared by the Royal Commissioners appointed in England, in 1878, to report upon the criminal law. "In framing the above section," say the commissioners, "we have proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal de facto exercising judicial functions."

The majority, both in the King's Bench and in the Supreme Court, were seemingly misled by the words "tribunal de facto exercising judicial functions," to which they referred to in construing that section of the code. They ascribed to the words "de facto" a literal and untechnical meaning, obviously disregarding its legal signification which is far less comprehensive. Thus, Hall, J., who delivered the judgment of the court of King's Bench, said: "It seems to a majority of this Court that the intention of that commission as expressed in their report and the natural interpretation of the definition they recommended and our Parliament adopted are these: that any false statement made under oath by a witness in the presence of justice is perjury; it is a violation of the solemnity surrounding a legal tribunal; it is an attempt

to mislead justice . . .” Likewise, Armour, J., delivering the opinion of the Supreme Court, after quoting from the report of the commissioners, concludes that “the Recorder was, in hearing the said charge, a tribunal de facto exercising judicial functions.”

Our reasons for doubting the soundness of these conclusions of the majority, are based upon (1) the language of the commissioners, (2) the language of the Code, and (3) a consideration of the status of the Recorder, under the circumstances.

§ 376. **Same subject — Language of the commissioners.**—Admitting that the term “de facto,” as used by the commissioners, might be misleading to persons unskilled in the law, it is difficult to conceive that such could be its effect upon Judges and jurists, acquainted with the de facto doctrine. “A tribunal de facto exercising judicial functions,” is undoubtedly intended to designate a de facto court lawfully entitled to that appellation, and not any pretended court, whether self-constituted or not, and whether invested with jurisdiction or not. Independently of general principles, this, to our mind, is quite obvious from the explanatory remarks of the commissioners. “It seems to us,” said they, “not desirable that the person who has done this, should escape from punishment if he can show some defect in the constitution of the tribunal which he sought to mislead, or some error in the proceedings themselves.” But what could be shown at common law against the constitution of the tribunal? Anything that would tend to destroy its apparent legality, and establish that it had merely a de facto character, such as the irregular appointment or defective qualification of the presiding officer, or the like. The judgments of such a tribunal, as we have seen, were valid and binding, but a witness

testifying before it could not be convicted of perjury. Evidently the intention of the commissioners was to remove such anomaly, but not to revolutionize the law by introducing and adopting a diametrically opposite policy, the enforcement of which would practically have the effect of punishing moral perjury.

Again, the commissioners observe that the guilt and danger of perjury consists in attempting to mislead a tribunal in the exercise of judicial functions, but there cannot be any such attempt, where there is no tribunal recognized by law, either *de jure* or *de facto*, capable of being misled. They also point out that "perjury may be made the means of committing what amounts to murder or robbery of the worst kind," but no such evil results can be apprehended where the pretended judicial proceedings are mere nullities.

§ 377. Same subject—Language of the code.—But regardless of the remarks of the commissioners, it seems to us that the interpretation of their draft amendment, which constitutes art. 145 of the Canadian Criminal Code, in the light of the most elementary rules of construction,¹⁶ must lead to the same conclusion as above expressed. What was the law before the Code was passed? What were the defects in the law intended to be cured or remedied? To constitute the offence of perjury at common law, it was essential to establish, besides the falsity of the oath, at least three things: 1. That the oath was material; 2. That it was administered by a *de jure* tribunal or officer; 3. That it was taken in a judicial proceeding; and as to this last requisite, it was a much debated question whether any irregularity in the proceedings was not fatal to a prosecution of this kind. Now turning to the Code, we find the following words: 1. "whether

¹⁶*Heydon's Case* (1584), 2

Coke's Rep. 18.

such evidence is material or not;" 2. "before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not;" 3. "whether the proceeding was duly instituted or not." What could be more obvious? Three defects in the common law, three remedial amendments in the statutes. It would be hard to imagine an instance, where the legislative intent was more clearly expressed.

Again, why should the words "having power to hold such judicial proceeding," have been entirely disregarded in a case where it was shown that the person who acted as a court had no authority whatever in regard to the proceeding before him? This was pointed out by Blanchet, J., dissentiente, in the Court below: "It seems . . . that the words 'duly constituted or not' referring, as they do, to 'any person acting as a court, justice or tribunal' cannot be construed as meaning 'whether the person so acting had jurisdiction or not' because the words immediately preceding expressly require that such person must have 'power to hold such judicial proceeding,' which is tantamount to declaring that jurisdiction must exist. It is therefore evident, to my mind, that the only logical interpretation of the words 'duly constituted or not' is that they are intended to cover mere irregularities and technicalities, or, as stated by the English commissioners, some defect in the constitution of the tribunal. I have no doubt that if it had been the will of Parliament to depart, in this particular respect, from the old principle of the English law which is maintained throughout the code, its intention would have been expressed in clear and unmistakable terms."

§ 378. Same subject—Status of the recorder.—Having given our reasons for concluding that neither the English commissioners nor the Canadian Parliament intended to make

it a criminal offence to swear falsely before a tribunal which had not at least a de facto character in the technical sense of the term, we must next examine what was the status of the Recorder of Valleyfield. Could he be regarded as a de facto judge or tribunal? Had he such a character that his acts could be held valid, independently of defects in his title or qualification? Both courts seemingly confounded the case of a de facto officer performing duties annexed to his office, with that of a legal officer, de facto assuming or usurping powers belonging to another. While there may be a de facto judge or tribunal, whose judgments and convictions are valid and binding, there is no such thing known to the law as a de facto jurisdiction.¹⁷ Were it otherwise, a justice of the peace could convict of murder; or a magistrate of Montreal could punish for intoxication occurring in the City of Toronto. This would be absurd. The Recorder of Valleyfield did not have the reputation of being the officer in whose capacity he assumed to act, nor did he pretend to have such reputation. In fact, he did not assume to be anything else but what he really and lawfully was, that is, Recorder of Valleyfield. Hence, it was manifestly an instance of a de jure officer usurping the authority of another officer. How then could he be styled a de facto judge or tribunal?

An analogous case in principle, though involving entirely a different question, came before the Supreme Court of Iowa, in 1874.¹⁸ As the law then stood in that State, in ad-

¹⁷It is hardly necessary to cite authority for the proposition that perjury cannot be predicated upon an oath administered by a tribunal without jurisdiction *ratione materiae aut personae*, but were it so, the following cases are in point: *State vs Jenkins* (1887), 26 S. C. 121, 1 S. E. 437; *Com. vs*

White (1829), 25 Mass. (8 Pick.) 453; *Flower vs Swift* (1830), 8 Mart. N. S. (La.) 450; *United States vs Jackson* (1895), 20 D. C. 424; *State vs Gates* (1892), 107 N. C. 832, 12 S. E. 319.

¹⁸*Bailey vs Fisher* (1874), 38 Iowa, 229.

dition to township assessors, there was chosen by each incorporated town at its municipal election, an assessor who listed all property within its limits. The township assessors were elected at the general election for State and county offices. The incorporated town of Anamosa was in Fairview township. At a general election in 1866, one Arnold was elected assessor of Fairview township, and one Dott, at the same election, and not a municipal election, was chosen assessor for Anamosa. It appeared that both of these assessors were voted for by all the electors of the township, including those living in the town. Dott, following a custom, assessed land outside of the town, and it was held that such assessment was a nullity, and a sale for taxes under it, void. Beck, J., delivering the opinion of the Court, said: "While the election of Dott was irregular, he may be regarded as the assessor de facto of the town of Anamosa, and all his acts as such within the limits of his official powers are valid, so far as they involve the interests of third persons and the public. Dott, as the assessor of Anamosa, listed lands of the township, including the tract in controversy. He did not assess them as the township assessor, and it is not claimed that he acted as such. We then have the simple case of one officer performing an act which the law requires of another, without claiming or assuming his functions. The question does not arise whether Dott was de facto assessor of Fairview township. He did not act as such, nor assume the duties of that office. He simply performed acts in his official capacity as assessor of Anamosa, which the law required another officer to do. The discussion upon the point made by the defendant's counsel, that Dott was the assessor de facto, and his acts are therefore valid, does not apply to the facts of the case. Had Dott made the assessment as the assessor of Fairview township, the argument of counsel

on this point would be applicable to the case. But the distinction between such a case and the one before us is obvious. It is not claimed that where an officer *de jure* or *de facto* assumes duties not imposed upon him by law, and which pertain, under the law, to another officer, that, in such a case, his acts are valid on the ground that he is an officer *de facto*. We have seen no authority supporting such a rule. Yet this is the precise case before us. In order to support the acts of one on the ground that he is a *de facto* officer, they must be done under color of the office, the duties of which must have been assumed and discharged by the person claiming to fill the office. This we think is essential to give one the character of an officer *de facto*, and render his acts valid. These views, we think, are not contested by appellant's counsel, and are certainly in accord with all the authorities to which we have been referred." So in a California case, it was held that the exercise by a justice of the peace of jurisdiction outside of that conferred by the constitution is not the exercise of an office, and the result thereof is to render acts done outside of such jurisdiction void.¹⁹

The Chief Justice of the Supreme Court,²⁰ whose opinion is entitled to great weight, both as a distinguished judge and as the author of a valuable work on criminal law, substantially laid down the same principles, in his dissenting judgment. "The proceedings before him (the recorder)," said the learned Chief Justice, "were not judicial proceedings, because he was not a judge or magistrate *de jure* (*pro hac vice*). Neither could he have been at Valleyfield, not being a resident of the county of Huntingdon, a magistrate *de facto*, any more than if he had been sitting at Toronto or Vancouver. A *de facto* officer's jurisdiction cannot be terri-

¹⁹Buckner vs Veuve (1883), as reported in 3 P. 862. By the word jurisdiction used in this case, is meant territorial jurisdiction.

²⁰Sir Elzear Taschereau.

torially more extensive than the de jure one whose functions he assumes. Where the statute expressly enacts that only the magistrates residing in the county of Huntingdon have jurisdiction over the case, there cannot have been, outside of that county, whether in the same district or a thousand miles from it, a de facto magistrate having any reasonable pretence to jurisdiction. . . . A magistrate de facto cannot have more powers than a magistrate de jure. The proceedings before the Recorder of Valleyfield were not only voidable, but were void of a nullity of non esse. As is said in the civil law, defectus potestatis, nullitas nullitatum."

Lastly, we may note that there is a marked difference, as pointed out in *R. vs Bolton*,²¹ between cases, where there is a total want of jurisdiction, as in the one under discussion, and where there is a potential jurisdiction depending upon certain facts upon which the tribunal may found his authority, even through an erroneous conclusion. In the latter case, even at common law, perjury might be committed, but not in the other.

We have criticized the above decision at some length owing to its very important bearing upon the criminal law of Canada in relation to perjury, in fact entirely revolutionizing it; and, also, because the criticism may be of interest in other jurisdictions where similar legislation may be enacted.

§ 379. *Doctrine in New York.*—The law of New York, upon the subject we are considering, seems to be in an unsatisfactory State. In *Howard vs Sexton*²² the action was for slander. The defendant charged the plaintiff with false swearing at a trial before arbitrators, and for these

²¹(1841), 1 Q. B. 66, 4 P. & D. 679, 5 Jur. 1154. reversed on other grounds (1850), 4 N. Y. 157.

²²(1845), 1 Den. (N. Y.) 440,

words, imputing perjury, as was alleged, the action was brought. The oath had been administered by a justice of the peace, but as it appeared that the arbitrators had not been sworn, it was contended that the justice had no authority to administer an oath to the witnesses; and consequently that there could be no perjury before such arbitrators. The Court (Per Bronson, C. J.) held that the defendant's contention was unfounded, and declared that in its opinion if parties should go to a trial before a judge or a justice of the peace who had not taken the oath of office, a witness who should swear falsely on such trial could not escape the pains of perjury. This case was cited with approval by the Court of Appeals in *People vs Cook*,²³ where in an action in the nature of quo warranto, it was declared that "the person of the voter is as securely guarded under the authority of inspectors de facto, as of inspectors de jure. A challenged voter swearing falsely before a de facto board of inspectors is as much liable to punishment under the statute as if the oath had been administered by inspectors de jure." But in *People vs Albertson*,²⁴ which was a prosecution for perjury, it was held that the defendant might show that the officer before whom the oath was taken was not acting under color of title, and that no such color of title could exist where the magistrate who had administered the oath had been appointed by three justices, having no authority to fill the office at all.

§ 380. Same subject.—Finally, the question came up directly before the Court of Appeals and was thoroughly discussed in *Lambert vs People*,²⁵ where perjury was predi-

²³ (1853), 8 N. Y. 67, 59 Am. Dec. 451, affirming (1852), 14 Barb. 259.

²⁴ (1853), 8 How. Pr. (N. Y.) (Green County Court) 363.
²⁵ (1879), 76 N. Y. 220, 32 Am.

cated upon an affidavit purporting to have been sworn to before a notary public. The prosecution proved that the alleged notary had acted as such for some years, and produced a book from the County Clerk's Office containing a list of notaries, the time of their appointment, etc., among which appeared his name. The defendant offered to prove that the notary, at the time of his alleged appointment, and at the date of his administering the oath, was a resident of the State of New Jersey, and was therefore ineligible,—the statutes of New York providing that no person is capable of holding a civil office, who, at the time of his appointment, is not a citizen of the State. This evidence was rejected by the Supreme Court, but this ruling was reversed by the Court of Appeals, all the Judges concurring in the judgment, but assigning conflicting reasons in support of it.

Miller, J., reviewed *Howard vs Sexton*, and *People vs Cook*,²⁶ and after remarking that "there is a wide and marked distinction between the right to act at all and the failure to comply with some statutory requirement, in assuming power conferred by an appointment to discharge the duties of an official position," continued by saying that "conceding the correctness of the rule upheld in the cases cited, and that such rule is most generally applicable, I am of the opinion that it cannot be invoked where an indictment is found for perjury and the foundation of the charge rests entirely upon the competency or the jurisdiction of the officer or tribunal before which the oath is taken. This is one of the issues presented by the indictment, in this case; and upon principle, it would seem to be quite obvious that the accused party had a right to show that there was no such officer or tribunal

Rep. 293; reversing *Lambert vs* ²⁶*Supra*.
People (1878), 14 Hun (N. Y.)
512.

in existence as is alleged in the indictment. Such a rule only operates in cases where a charge of perjury is preferred, while the acts of an officer de facto, acting under color of authority, even if he had been illegally appointed, under ordinary circumstances would not be affected or impaired. No pernicious consequences or serious inconvenience would result to the public at large by the enforcement of such a principle, as all acknowledgments made, or other acts of a notary public or of any other officer de facto done, while in the performance of his duties, except in cases where false swearing was directly charged, would be valid and lawful. The argument of *ab inconvenienti* therefore has no application, and should not influence the decision of the question considered, even if it could properly be urged, to affect the disposition of a grave criminal charge, under any circumstances." The learned Judge referred with approval to *R. vs Verelst*.²⁷

Earl, J., grounded his opinion on the fact, that the prosecution had not shown that the notary was either an officer de jure or de facto. Proof that he had acted as a notary for some years was only *prima facie* evidence that he was such officer de jure, and the defendant had a right to meet this *prima facie* case by any evidence tending to show that he was not de jure a notary. Then, if the defendant succeeded in establishing this, the burden of proof shifted again upon the people, and it became their duty to prove that the alleged notary was at least an officer de facto, which the learned Judge claimed they had not done.

Hand, J., said: "I am not prepared to assent to the doctrine of the opinion that perjury can only be committed before an officer de jure, and that, on the trial of an indictment for that crime, the title of such officer can always be

²⁷(1813), 3 Camp. 432, 14 R. R. 775.

attacked. Nor, indeed, am I prepared now to say that if, in the present case, the commission of the notary from the proper appointing power had been shown, that the prisoner could have raised such a question as non-residence. I am inclined to think that, in such a contingency, the question of residence being often a very nice one, the validity of appointment could not thus be attacked." The other four judges did not deliver any written opinions, but upon the point in question, one concurred with Miller, J., one with Earl, J., one with Hand, J., and the other expressed no opinion.

The result of this decision seems to be this: That perjury may sometimes be predicated upon an oath taken before an officer de facto, but in such case stricter proof of his color of authority will be required than in other cases, where the oath itself is not the subject or foundation of a prosecution. The Court, at least the majority, apparently inclined to the opinion that if the notary's commission, even if irregularly issued, had been produced, its validity could not have been impeached. And even Miller, J., seemed to think that the failure to take the official oath or to qualify according to law on the part of an officer, could not be pleaded by the defence in a case of this nature. It cannot be said, however, that this decision lucidly and satisfactorily settles the law upon the subject involved, as the opinions are at variance with one another, and many of the reasons assigned by the learned Judges in support of their conclusions, are at least questionable.

§ 381. **Doctrine in Alabama.**—The strict English rule has been followed in Alabama. In *Merlette vs State* ²⁸ the Court incidentally adverted to the point, but left it open, as they did not deem it advisable to undertake the reconcilia-

tion of the conflicting authorities. But in *Walker vs State*,²⁹ it was held that one acting as deputy clerk of a civil court under claim and color of authority, having been appointed to that position by the clerk, but never having qualified as such deputy by taking the oath required by law, was a de facto, but not a de jure, officer, and perjury could not be predicated upon an oath administered by him as such de facto officer. He was not "duly authorized" to perform an official act. The conviction, however, was upheld on another ground, namely, that the oath having been administered by the deputy in the presence of the clerk, the act of the former was, in legal contemplation, the official act of the latter.

§ 382. *Doctrine in Kentucky.*—In Kentucky, it is laid down that "the rule founded upon public policy which requires the acts of de facto officers to be treated for many purposes as valid and binding does not apply when an oath administered by such an officer is made the foundation of a prosecution for perjury."³⁰ In that case the charge against the defendant was for falsely swearing before a judge of election that he was of age, in order to procure the right to vote. On the part of the accused, it was proven that the Judge had not taken the oath prescribed by law for judges of election, and that he was acting, at the time defendant was sworn, as a judge of the election without having taken such oath. Upon this evidence, it was held that the Judge was at most an officer de facto, and that perjury could not be assigned upon an oath administered by him.³¹

§ 383. *Doctrine in Ohio.*—The Supreme Court of Ohio endorsed the principle of the English common law, in *Staight*

²⁹ (1895), 107 Ala. 5, 18 So. 393.

³⁰ *Biggerstaff vs Commonwealth* (1874), 11 Bush. (74 Ky.) 169.

De Facto—34.

³¹ See also *Com. vs Hillenbrand* (1895), 96 Ky. 407, 29 S. W. 287.

vs State.³² Staight, the appellant, was indicted in the Court of Common Pleas of Logan county for perjury. It was proved that he made application for a marriage license, in Logan county on December 2, 1882, and testified as to the ages of the parties to the contemplated marriage, and residence of the female, and the alleged perjury was in the testimony so given. The oath was administered by L. E. Pettit, to whom the application was made. In 1878, R. E. Pettit was elected and duly qualified as probate judge of Logan county. He was re-elected in 1881, and on February 6, 1882, entered on his second term, after being duly qualified, and he continued to be such judge. Evidence was given on the trial tending to show, that on December 8, 1879, R. E. Pettit appointed as deputy clerk of the probate court, L. E. Pettit, who, being duly qualified, entered on the duties of the appointment, and acted as such deputy continuously ever since that time, under the original appointment, and that he was not re-appointed when R. E. Pettit entered upon his second term of office, nor since. Staight asked the Court to charge the jury, that if they should find the facts to be as above stated, he could not be convicted, but the Court refused to so charge, and he was found guilty. In error, however, the Supreme Court, following *R. vs Verelst*,³³ held that the accused had the right to show that L. E. Pettit was not an officer de jure, and so defeat the prosecution.

However, after the extensive recognition of the de facto principles in the subsequent case of *State vs Gardner*,³⁴ which was a prosecution for offering a bribe, it is doubtful whether the rule of the English common law would now be strictly adhered to. In that case, *Staight vs State* was dis-

³² (1883), 39 Ohio St. 496.

³⁴ (1896), 54 Ohio St. 24, 42 N.

³³ (1813), 3 Camp. 432, 14 R. E. 999, 31 L.R.A. 660.
R. 775.

tinguished by one of the judges, Spear, J., who observed that "the position of deputy clerk is not, in the constitutional sense, an office. At common law the officer and his deputy filled but a single office. By statute the probate Judge is ex officio clerk of his own court; the deputy is appointed by him, and can be neither appointed nor removed by any one else, and the acts of the deputy are the acts of the principal.³⁵ Pettit, the one acting as deputy when the oath was administered to Staight, had received no appointment under the Judge's second term, and had taken no oath. Even had there been an office to fill, he lacked color of office, and in no respect could be regarded an officer de facto."

Likewise, the Supreme Court of Kansas, commenting upon *Staight vs State*, remarked that "as the officer (the deputy clerk) who had administered the oath did not have color of title to the office claimed, and was not an officer de facto, the Ohio case cannot be regarded as an authority for the English view." ³⁶

§ 384. **Doctrine in Indiana.**—A case similar to *Staight vs State*, supra, occurred in Indiana. The oath upon which was assigned the perjury had been administered by a deputy clerk, who had not received a written appointment nor been sworn as such, as required by statute. The Court held that the deputy clerk not having been appointed according to the requirements of the law, the authorities were clear, that the defendant to the indictment might show, as a ground for defeating the prosecution, that the officer who administered the oath charged to be false, acted under an invalid appoint-

³⁵*Warwick vs State*, 25 Ohio St. 21. Kan. 739, 60 P. 1050, 60 Kan. 837, 58 P. 476.

³⁶*State vs Williams* (1900), 61

ment; and that if he did establish that fact, he must be acquitted.³⁷

§ 385. **Doctrine in South Carolina.**—In South Carolina an objection to the competency of the magistrate who had administered the oath, upon which was assigned perjury, based upon the fact that he had taken the oaths of qualification before one of the associate Judges, who had no power to administer them, was held good ground for a new trial. The Court observed that, although the objection was not raised at the trial, nor in the notice of motion, yet as it was their practice “to allow any objections growing out of the merits of the case,” they thought the defendant should have the benefit of it.³⁸

§ 386. **Doctrine in Iowa.**—In *State vs Phippen* ³⁹ it was held that a person cannot be convicted of perjury for taking a false oath before one not empowered by law to administer oaths; and as a township assessor is not authorized to enter upon his duties before the third Monday of January after his election, one who, before such assessor, falsely swears to an assessment of his property, prior to that time, does not thereby commit legal perjury. The conviction of the defendant by the District Court was accordingly set aside. The Court remarked: “The want of authority of the assessor to administer the oath at the time alleged in the indictment, takes from the false swearing the quality which renders it punishable by the law. It may, notwithstanding, be a moral perjury, but with that we have nothing to do.”

³⁷*Muir vs State* (1846), 8 Blackf. (Ind.) 154.

³⁹(1883), 62 Iowa, 54.

³⁸*State vs Hayward* (1819), 1 Nott. & McC. (S. C.) 546.

§ 387. **Doctrine in New Hampshire.**—The point never arose directly in this State, whether an oath administered by a de facto officer could be the subject of perjury, but it was decided that it is sufficient, *prima facie*, on an indictment for perjury, to show that the person by whom the oath was administered was an acting magistrate, and that the evidence of the individual himself might be received for the purpose.⁴⁰

§ 388. **Doctrine in Texas.**—The identical principle was upheld by the Texas Court of Appeals in *Woodson vs State*.⁴¹ One of the objections against a conviction for perjury was that the lower court had erred in permitting a State's witness to testify that he was a justice of the peace, and as such had administered to the defendant the oath upon which the false swearing was predicated. The Court, overruling the objection, said: "While the general rule is that the best evidence by which a fact can be proved must be produced, or its absence accounted for, before secondary or inferior evidence is admissible, a well established exception to this general rule is that the official character of an alleged public officer need not be proved by the commission or other written evidence of the right of such officer to act as such, except in an issue directly between the officer and the public. Such proof may be made originally by parol evidence, and is sufficient if it shows the person to be a de facto officer." Although this case was decided merely upon a point of evidence, yet the Court seemed to be of the opinion that the acts of de facto officers are collaterally unassailable, even in a criminal case for perjury.

⁴⁰*State vs Ilascall* (1833), 6 N. H. 352.

⁴¹(1887), 24 Tex. App. 153, 6 S. W. 184.

§ 389. **Doctrine in Illinois.**—The Supreme Court of Illinois seems to favor the doctrine that perjury can be committed before an officer de facto. Thus, in *Greene vs People*,⁴² the plaintiff in error was found guilty of the crime of perjury in the criminal Court of Cook county, and after overruling the motion for a new trial and in arrest of judgment, the Court sentenced him to the penitentiary. To reverse that judgment a writ of error was sued out. Numerous assignments of error were made upon the record, but the point which interests us here was disposed of by the Court, as follows: "It is next objected that the master in chancery who administered the oath to the defendant at the time it is alleged he gave the false testimony had no authority to do so. This contention is based upon the fact that he was appointed to succeed himself as such master by all the superior judges of the county sitting together, whereas the appointment should have been made by one, only, and that his bond was approved by a single judge; and it is said that either the appointment or the approval of the bond was fatally defective. We do not think the point is well taken; but if it be conceded, still it is clear that he was acting in the capacity of master in chancery at the time, and therefore his authority to administer the oath cannot be questioned in this proceeding."⁴³

§ 390. **Doctrine in Florida.**—The doctrine laid down by the Supreme Court of Illinois in *Greene vs People*,⁴⁴ supra, was approved by the Supreme Court of Florida in *Markey vs State*,⁴⁵ where it was held that mere irregularities in the

⁴² (1899), 182 Ill. 278, 55 N. E. 341.

⁴³ See also *Morrell vs People* (1863), 32 Ill. 499; *Hereford vs People* (1902), 197 Ill. 222, 64 N. E. 310.

⁴⁴ (1899), 182 Ill. 278, 55 N. E. 341.

⁴⁵ (1904), 47 Fla. 38, 37 So. 53.

appointment of a master in chancery, an examiner, or other person appointed by the Court to take testimony, whether such person be designated in said order by any official title or not, cannot be questioned on the trial for perjury of one who, it is alleged, testified falsely before him.

§ 391. **Doctrine in Maryland.**—In *Izer vs State* ⁴⁶ the appellant was indicted by the grand jury of Alleghany county for perjury. Having been convicted and sentenced to penitentiary, he appealed to the Court of Appeals. He objected to the authority of the deputy clerk, who had administered the oath to him, on the ground that it appeared in evidence that the deputy had continued to act after the reelection of his principal, without being re-appointed or re-sworn. The Court, overruling the objection, said: “Of course, if Izer was never legally sworn to give testimony before the grand jury, no false statement made by him before that body could constitute indictable perjury; and if Williamson had no authority to administer to Izer the oath he did administer, Izer was not legally sworn. But Williamson was then in the undisputed possession of the office of deputy clerk, and since 1886 had openly and notoriously discharged the duties pertaining thereto. He was at least a de facto officer, filling a de jure office, and whatever defects or irregularities there may have been in the manner of his appointment or qualification, his acts, done under color of title, are, upon grounds of public policy and necessity, valid and binding.”

§ 392. **Doctrine in Michigan.**—In Michigan, also, the validity of an oath administered by a de facto officer seems to be fully recognized, even where perjury is assigned there-

⁴⁶ (1893), 77 Md. 110, 26 A. 282.

on. Thus it was held, on a trial for perjury, that evidence that the oath was administered in open court by one who was acting as deputy clerk was sufficient proof of his official character, and that in a collateral proceeding it was enough that he was shown to be an officer de facto.⁴⁷

§ 393. **Doctrine in Oklahoma.**—The Supreme Court of Oklahoma enunciated the same doctrine in *Morford vs Territory*,⁴⁸ where in error to the District Court for Payne County to review a judgment convicting defendant of perjury, counsel for appellant insisted that the case should be reversed for the reason, inter alia, that the trial in the libel suit, in which perjury was alleged to have been committed, was presided over by a Probate Judge who was not a lawyer, nor even licensed to practise law, and therefore did not possess the qualifications prescribed by statute. The Court, after citing several authorities and discussing the principles of the de facto doctrine, held the objection untenable, and concluded thus: "Conceding that the Probate Judge who tried Martin for criminal libel and administered the oath to the appellant, when the alleged false testimony was given, and upon which the perjury is assigned, was only a de facto officer, his acts while exercising the duties and functions of a Probate Court were valid, and his acts could only be attacked in a direct proceeding, and not in a collateral manner, as attempted in this case."

§ 394. **Doctrine in Kansas.**—It was likewise laid down in Kansas, that a witness who swears falsely about a relevant matter before a de facto judge, whose judgment is binding upon the parties to the proceeding, is guilty of perjury,

⁴⁷*Keator vs People* (1875), 32 Mich. 484.

⁴⁸(1901), 10 Okla. 741, 63 P. 958, 54 L.R.A. 513.

and liable to the same punishment as though the oath had been administered by a de jure judge. Where this was said, it was held that it being shown that a police judge, who administered the oath upon which perjury was predicated, was appointed by officers having authority to appoint, and that he had qualified and entered upon the duties of his office, testimony that he had changed his residence to a place outside of the city was properly excluded, his title or right to the office not being subject to collateral attack.⁴⁹

⁴⁹*State vs Williams* (1900), 61 Kan. 739, 60 Pac. 1050, 60 Kan. 837, 58 P. 476.

CHAPTER 30.

VALIDITY OF ACTS OF DE FACTO JUDICIAL OFFICERS—DE FACTO COURTS.

- § 395. Scope of this chapter.
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- § 414. Causing objection to judge to be spread on the record, of no avail.
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422. Acts of de facto judicial officers, valid.
423. Acts of de jure judges acting outside their jurisdiction, under an unconstitutional Act.
424. Same subject — American cases.
425. Same subject — Canadian cases.
426. Same subject—Same subject.
427. Same subject—Same subject.

§ 395. **Scope of this chapter.**—Some departure from the general plan adopted and followed in this work, will be made in this chapter. For instance, we have already treated of de facto offices, and incidentally of de facto courts, but we shall again advert to this subject in order to introduce new matter, or to supplement and further illustrate what has already been said. Likewise, though the question of collateral attack on the title of de facto officers will be discussed later on, yet this subject will be extensively dealt with in this chapter, as this has been thought to be the best course to pursue in expounding the doctrine in relation to the validity of acts performed by de facto judicial officers.

§ 396. **De facto courts.**—Some writers lay down the principle, that judgments and decrees rendered by a de facto court are as valid and effectual as though pronounced by a de jure tribunal. If the word "court" be used, as it often is, to designate the officer who presides over the same, the above language is unobjectionable; but if thereby is meant the tribunal itself, that is, the judicial office, we submit it is inaccurate, save in a very few cases. A learned author says: "But on principles of public policy and for the security of rights, it is held that the regular judgments of a de facto court, whose existence has afterwards been pronounced unconstitutional and void, are nevertheless valid and conclusive."¹ That the author alludes to the Court itself is inferable from the fact that in a subsequent paragraph he treats of de facto judges. In support of his statement, he quotes several authorities,² all of which, except one, were decided upon objec-

¹Black on Judgments, sec. 173.

²State vs Carroll (1878), 38 Conn. 449, 9 Am. Rep. 409; Burt vs Winona (1884), 31 Minn. 472, 18 N. W. 285, 4 Am. & Eng. Corp.

Cas. 426; State vs Anone (1819), 2 Nott. & McC. (S. C.) 27; Gilliam vs Reddick (1844), 4 Ired. L. (N. C.) 368; State vs Porter (1840), 1 Ala. 688; Mayo vs Stoneum

tions made to judges not properly qualified, or unlawfully elected or appointed to legally constituted tribunals, and therefore are no authority for the proposition that there can exist a de facto court. The exception is *Burt vs Winona etc. R. Co.*, which decides, that where a Court is established by a legislative Act apparently valid, and the court has gone into operation under the Act, it is a de facto court, the legality of which cannot be collaterally attacked. The opinion, however, was not delivered by a unanimous court, and one of the dissenting judges observed, that "a de facto court is a political solecism." Though this authority has recently received the approval of the tribunal in *State vs Bailey*,³ yet in a previous case it was rather adversely commented upon,⁴ and the principle it lays down has generally been regarded as unsound.

On the other hand, there is a powerful array of authorities upholding the proposition that where a court has no lawful existence, the acts performed by the judge thereof cannot be sustained as the acts of a de facto officer.⁵ But as this subject has already been treated in connection with de facto offices, the reader is referred to that part of the work, where

(1841), 2 Ala. 390; *Masterson vs Matthews* (1877), 60 Ala. 260; and *State vs Alling* (1843), 12 Ohio 16.

³(Minn. 1908), 118 N. W. 676.

⁴*State vs District Court of Ramsey County* (1898), 72 Minn. 226, 75 N. W. 224, 71 Am. St. R. 480.

⁵Ex p. *Snyder* (1876), 64 Mo. 58; *State vs O'Brian* (1878), 68 Mo. 153; *People vs Terry* (1886), 42 Hun (N. Y.) 273, reversed on other grounds in 108 N. Y. 1, 14 N. E. 815; *In re Norton* (1902), 64 Kan. 842, 68 P. 639, 91 Am. St. R. 255; *State vs Shuford* (1901), 128 N. C. 588, 38 S. E. 808; *Matter of Quinn* (1897), 152 N. Y. 89,

46 N. E. 175; *Daniel vs Hutcheson* (1893), 4 Tex. Civ. App. 239, 22 S. W. 278; *Ayers vs Lattimer* (1894), 57 Mo. App. 78; *In re Hinkle* (1884), 31 Kan. 712, 3 P. 531; *State vs Lake* (1873), 8 Nev. 276; *Hildreth vs McIntyre* (1829), 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61; *Treble vs Frame* (1829), 1 J. J. Marsh. (Ky.) 205; *Mallory vs Hiles* (1862), 4 Metc. (Ky.) 53; *State vs Boone County Court* (1872), 50 Mo. 317; *People vs Toal* (1890), 85 Cal. 333, 23 P. 203; *Caldwell vs Barrett* (1903), 71 Ark. 310, 74 S. W. 748.

all the authorities will be found quoted.^{5a} However, it may not be amiss to give here a few rulings, bearing directly upon the question of de facto courts.

§ 397. **Same subject—Rulings.**—In *In re Norton*,⁶ which was a proceeding in habeas corpus, the petitioner was convicted in the Court of Common Pleas of Cherokee and Crawford counties of murder in the second degree, and sentenced to imprisonment for a term of twenty years. The petition alleged, that the court had no existence at the time of the conviction and sentence, and therefore that the imprisonment of the petitioner was illegal, and that he ought of right be discharged. An Act of the legislature had been passed creating such court, but its establishment was subject to the following proviso: "Provided, however, that the majority of the qualified electors of said counties shall vote in favor thereof as hereinafter provided." An election was held and afterwards the respective boards of county commissioners of the two counties met, canvassed the returns, and caused the result to be certified to the Governor, who thereupon appointed a judge of the court. The person thus appointed qualified and acted as such judge of the court until his successor took possession of the office. The successor thereafter held court in the several counties, tried cases, and transacted all other business coming within the jurisdiction of the court, and in June, 1900, tried, convicted and sentenced the petitioner. But, afterwards, it was discovered that the proposition to establish the court had not received the majority of the votes. To sustain the validity of the conviction, it was argued that the court was recognized by the chief executive, by the sheriffs of both counties and by the people, and therefore it

^{5a}See sec. 23 et seq.

⁶(1902), 64 Kan. 842, 68 P. 639,
91 Am. St. R. 255.

was entitled to be regarded as a de facto tribunal. However, the Supreme Court was unanimous in its refusal to accede to such proposition, and declared the petitioner illegally imprisoned. "There must be," said the court, "a reality in the existence of the court that undertakes to deprive one of his liberty. In all cases where the acts of de facto officers have been upheld, there existed a de jure office."

In *State vs Shuford*⁷ the defendant was charged with larceny, and after verdict of guilty he moved in arrest of judgment, and excepted to the refusal of his motion. From the judgment, he appealed. The following were the facts: The General Assembly passed an Act increasing the number of judicial districts to sixteen, and stipulated that it should take effect and be in force from June 30th, 1901, except as to the fifteenth district whose creation was to be effective from and after the 25th day of March, 1901. The Act further provided, that the courts in the last mentioned district should be presided over by the judge of the sixteenth district, who was to be appointed by the Governor on or prior to the 25th April, 1901. The effect of the Act therefore was, that the judge of the sixteenth district was to be appointed and act before the district was legally in existence. Nevertheless, the Governor appointed and commissioned a judge thereof. On appeal, the argument was pressed that the presiding officer was at least a de facto judge, as he held a commission issued by the Executive under the authority of an Act of the Legislature. But the judgment was arrested, the Court holding that "the indispensable basis of being a de facto officer is that there is such an office."⁸

⁷ (1901), 128 N. C. 588, 38 S. E. 29, but see *State vs Bailey* (Minn. 1908), 118 N. W. 676.

⁸See also cases cited under sec.

An analogous English case may also be quoted.⁹ There, upon a trial of an issue in prohibition, it was attempted to give in evidence a document from the Remembrancer's office of the court of Exchequer, but as it appeared that the court had not been duly constituted, the evidence was overruled, Lord Tenterden, C. J., saying: "It was evidently, therefore, a proceeding before persons not forming any court known to the laws of this country."

§ 398. **De facto courts may exist under a de facto government.**—There is, however, an exception to the above rule, which has received the sanction of judicial authority, both in England and the United States. It occurs where the lawful government is overpowered and ousted for the time being by a usurping power, which takes charge of it and maintains itself by force and arms. The de facto judiciary administering justice, under such circumstances, must be recognized to avoid intolerable mischief to the citizens of the State. "If the government itself," says a learned court, "is a usurpation, as long as such government lasts the courts established by it are de facto courts, because the only existing government is de facto; and when the rightful government is restored, the acts of such courts, as a matter of necessity, must be held to be valid."¹⁰

Thus, in *Bank of North America vs McCall*,¹¹ it was contended that certain judicial proceedings from St. Domingo were void, because they were carried on by a court which was said not to derive its authority from the French government. Presumably, although the report is silent on the

⁹Rogers vs Wood (1831), 2 B. & Ad. 245.

dreth vs McIntyre (1829), 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61.

¹⁰State vs Boone County Court (1872), 50 Mo. 317. Also Hil-

¹¹(1812), 4 Binn. (Pa.) 371.

point, the court in question had acted at a time when the Island was in the throes of a revolution, and its lawful government had been overthrown by the revolutionists. As a matter of history, it is known that St. Domingo was in a state of political commotion for over thirty years under the French regime, and that, during most of that time, a *de facto* government was successfully maintained by force against the mother country. This state of affairs continued until 1825, when its independence was recognized by France. Under those circumstances, the Supreme Court of Pennsylvania overruled the above contention, and declared that a court, acting under the authority of those in whom the power of the country is for the time being vested, must be deemed to have the jurisdiction of a legitimate court. "There was a court *de facto*, and that is sufficient," remarked one of the judges.

The history of England also affords a memorable instance of the application of the above doctrine. On the death of Charles I, Charles II immediately became King of England *de jure*; and the years of the reign of Charles II are to this day counted from the death of Charles I; yet there was an interval of eleven years between the death of Charles I and the restoration of Charles II, during the greater part of which, under the Protector, a government, maintaining order and able to enforce its authority, existed. Sir Matthew Hale, though he never formally recognized the government of Cromwell, sat as judge of the Common Bench, as the Court of King's Bench was called in Cromwell's time, in the adjudication of cases involving title to property as well as those affecting civil liberty. In a word, administering the plenary jurisdiction of the court. At the Restoration he sat in the same court as Lord Chief Justice of the King's Bench. His explanation has often been quoted, to the effect that the pub-

lic business must go on, and justice be administered, alike under de facto and de jure governments.

§ 399. De facto courts under other circumstances.—

Upon principles of public policy and necessity, running on parallel lines with those which sustain the acts of de facto courts under de facto governments, it has sometimes been held that certain tribunals, exercising jurisdiction under various exceptional circumstances, should be recognized as de facto courts. Thus, the Supreme Court of the United States supported, as legal and binding, the judgment of a Spanish Court, rendered in Louisiana, after the cession of that country to the American Union, but before the same was formally surrendered. The court held, that the territory was de facto in the possession of Spain, and subject to Spanish laws, and that the judgments of its courts, so far as they affected the private rights of the parties thereto, must be deemed valid.¹²

§ 400. Courts of the Confederate States of America.—

It may be of interest from an historical standpoint, if from no other, to deal briefly with the courts which administered justice in the Confederate States of America, during the War of Secession. There was for a long time much fluctuation of opinion as to what character should be attributed to them. In the United States courts their status underwent three different and distinct stages, during each of which were entertained opinions at variance with, and sometimes directly opposite to, those previously or subsequently held. A passing reference to each period will be made.

¹²Keene vs McDonough (1834), 8 Pet. (U. S.) 308. See also Ryder vs Cohn (1869), 37 Cal. 69; Tre-
vino vs Fernandez (1855), 13 Tex. 630; Cullins vs Overton (1898), 7 Okla. 470, 54 P. 702.
De Facto—35.

§ 401. **Same subject—First period.**—One has only to peruse the judgments pronounced during the first period, to realize that the judges delivering them were not, in many instances, free from the prejudices and feelings which were the inevitable results of the war. Some of those decisions sound more like political orations than the deliberate, impartial and considered deliverances of judicial officers, unbiased in their conduct, and uninfluenced by public opinion. The consequence was that, during a certain time after the conclusion of the war, the American courts generally refused all recognition to the judgments of the courts of the Confederate States, on the ground that the alleged government from which they derived their authority, being illegal and rebellious to the sovereignty of the United States, they were tainted with the same illegality as the body from which they proceeded. The fact that the United States government accorded belligerent rights to the States in rebellion was not considered of any consequence, as the judges claimed that these were granted as a matter of indulgence and not of right. They held that as the legislatures of the several States in rebellion could not be considered as *de facto* governments, neither could the courts, which were constituent parts thereof, be looked upon as *de facto* tribunals, and hence their judgments were mere nullities. “We cannot conceive,” it was said in one case, “of any condition of affairs that would authorize us to tolerate the acts of persons, as legal, who, claimed to exercise judicial functions, who, in the exercise of these functions, were sworn to disregard the Constitution of the United States, or who had solemnly sworn they would not recognize it as the supreme law of the land. . . . Writers, on the law of nations and international law, speak of *de facto* governments; but the sense in which the word is used by them has not, and cannot have any application to

the State governments known to the Constitution of the United States. The different States of the Union, or rather the people of the different States of the Union, constitute one nation; they are an entirety; therefore we say that there can be no such thing as a *de facto* government of the United States and a *de jure* government of the United States existing at one and the same time, and such would be the result of any admission that characterizes the organization, known as the 'Confederate States,' as a government *de facto*." ¹³

§ 402. **Same subject—Second period.**—But when the strife and excitement of fratricidal conflict had passed away, and the courts were able to take a dispassionate view of the state of things that existed during the rebellion, they were impressed with the idea, that the citizens of the Confederate States recognized and obeyed some form of government which, though perhaps not entitled to be called *de facto* in the strict sense of the term, nevertheless had a real existence. Acting upon that idea, they came to the conclusion that the judgments of the Confederate courts should be regarded as foreign or quasi-foreign judgments. "We thus see," says Peck, C. J., "the rebel government in this State held and declared the government of the United States, and the governments of the loyal States, to be foreign governments, and the people thereof to be alien enemies; consequently, applying the rule thus laid down for its own government, no just complaint can be made by treating it, and all the other rebel governments in confederacy with it, as foreign governments, and the judgments of their courts as foreign judgments, though we do not

¹³Penn vs Tollison (1871), 26 Ark. 545. See also Ray vs Thompson (1869), 43 Ala. 434, 94 Am. Dec. 696; Thompson vs Mankin (1871), 26 Ark. 586, 7 Am. Rep. 628; Timms vs Grace (1871), 26 Ark. 598.

hold them in any proper sense to be foreign governments, or their judgments foreign judgments; accurately speaking, they were not foreign governments, nor were the judgments of their courts foreign judgments.”¹⁴

Upon principle, this second point of view was worse than the first, for the first was at least a logical consequence flowing from the assumed premises, whereas the latter was simply an anomaly. In order that judgments may be recognized and sued upon as foreign judgments, the State whence they come must be acknowledged as such by the government where they are attempted to be enforced. Hence, the objection to regard them as foreign judgments was such a formidable one, that the courts soon relinquished this anomalous idea.

§ 403. Same subject—Third period.—Finally, the courts took a directly opposite view to that adopted at first, and were not content with adjudging the governments and courts existing in the Confederate States, during the rebellion, de facto governments and de facto courts, but went still further and recognized in them a de jure character. They held that the acts and ordinances of secession were mere nullities, and although the State governments transferred their allegiance from the United States to the supposed government of the Confederate States, they never ceased to be the rightful governments of those States, and the courts under them were de jure courts. Thus, in *White vs Canon*,¹⁵ the Supreme Court of the United States observed: “The objection that the judgment of the Supreme Court of Louisiana is to be treated as void, because rendered some days after the passage of the

¹⁴*Martin vs Hewitt* (1870), 44 Ala. 418. Also *Mosely vs Tuthill* (1871), 45 Ala. 621, 6 Am. Rep. 710; *Shaw vs Lindsay* (1871), 46 Ala. 290; *Bush vs Glover* (1872),

47 Ala. 167; *Barclay vs Plant* (1869), 50 Ala. 509; *Bibb vs Avery* (1871), 45 Ala. 691; *Pepin vs Lachenmeyer* (1871), 45 N. Y. 27. ¹⁵(1867), 6 Wall. (U. S.) 443.

ordinance of secession of that State, is not tenable. That ordinance was an absolute nullity, and of itself alone, neither affected the jurisdiction of that court, or its relation to the appellate power of this court."

And in a subsequent case, the same doctrine is thus emphasized by the same court: "We admit that the acts of the several States in their individual capacities and of their different departments of governments, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the National government, and did not impair the rights of citizens under the Constitution." ¹⁶

¹⁶Horn vs Lockhart (1873), 17 Wall. (U. S.) 570. Also United States vs Insurance Companies (1874), 22 Wall. (U. S.) 99, 103; Ketchum vs Buckley (1878), 99 U. S. 188, 190; Johnson vs West India Transit Co. (1894), 156 U. S. 618, 645, 15 Sup. Ct. R. 520, 530; Cook

vs Oliver (1870), 1 Woods (U. S.) 437; French vs Tumlin (1871), 9 Fed. Cas. (No. 5,104) 798; Hendry vs Cline (1874), 29 Ark. 414; McQueen vs McQueen (1876), 55 Ala. 433; Hill vs Armistead (1876), 56 Ala. 118.

§ 404. **Limitations to the above doctrine.**—The jurisdiction of the Courts of the Confederate States, however, could be lawfully exercised only over citizens residing within the rebel lines, and could not affect other citizens of the United States. Thus, it was held in *Pennywit vs Foote*,¹⁷ that, as between parties residing in the State of Arkansas and within the rebel lines, and a citizen of Ohio, resident within the Union lines, between whom the war made intercourse impossible, there could be no jurisdiction in such court, by which the rights of non-residents could be injuriously affected; neither could such jurisdiction be acquired by the consent or waiver of an attorney practising in said court, who was employed and appeared for the non-resident defendants before the war commenced. His general authority as an attorney, before the war, though not revoked by the clients, did not authorize him to waive any of their rights, nor could such consent or waiver confer on the court jurisdiction over the case, or over the person of defendants.¹⁸

A further limitation to the recognition of the courts of the rebellious States, is that the courts created by the Confederate Congress, for supposed national purposes, can never be considered as ever having had any judicial authority, and their judgments and decrees are null and void. These courts were evidently on a different footing from the others, and the same reasoning could not be applied to them. Accordingly, the Supreme Court of the United States, in an action for malicious imprisonment, in which the defendants attempted to justify as officers of a court known as the "District Court

¹⁷(1875), 27 Ohio St. 600, 22 Am. Rep. 340.

¹⁸Also *Botts vs Crenshaw* (1868), 3 Fed. Cas. (No. 1690) 976; *Livingston vs Jordan* (1869), 15 Fed. Cas. (No. 8415) 675;

Cuyler vs Ferrill (1867), 6 Fed. Cas. (No. 3523) 1088, 1 Abb. (U. S.) 169; *Cook vs Oliver* (1870), 1 Woods (U. S.) 437; *Brooke vs Filer* (1871), 35 Ind. 402.

of the Confederate States of America for the Northern District of Alabama" held, that "the Act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted."¹⁹

§ 405. Who are de facto judicial officers.—The law recognizes no difference between a judge, a justice of the peace, or other judicial officer, and any other public officer in regard to the application of the de facto doctrine; and, therefore, wherever the circumstances are such, that the person acting in a judicial capacity is not a mere usurper, but has color of right or authority in his favor, he will be regarded as a de facto judicial officer, and his acts will be valid. However, the subject of de facto officers having been amply treated of in other parts of this work, it will be sufficient to cite here, without comment, the numerous authorities recognizing de facto judges and other judicial officers.²⁰

¹⁹Hickman vs Jones (1869), 9 Wall. (U. S.) 197.

²⁰Manning vs Weeks (1891), 139 U. S. 504, 11 Sup. Ct. R. 624, 35 L. ed. 264; affirming In re Manning (1890), 76 Wis. 365, 45 N. W. 26; In re Ah Lee (1880), 6 Sawy. 410, 5 Fed. 899; Walker vs State (1905), 142 Ala. 7, 39 So. 242; Stephens vs Davis (Ala., 1905), 39 So. 831; Williamson vs Woolf (1861), 37 Ala. 298; Butler vs Phillips (1907), 38 Col. 378, 88 P. 480; Hinton vs Lindsay (1856), 20 Ga. 746; Pool vs Perdue (1871), 44 Ga. 454; People vs Bangs

(1860), 24 Ill. (14 Peck.) 184; Becker vs People (1895), 156 Ill. 301, 40 N. E. 944; Lewiston vs Proctor (1860), 23 Ill. (13 Peck.) 533; Lexington & H. Turnpike Board Co. vs McMurtry (1845), 45 Ky. (6 B. Mon.) 214; Rodman vs Harcourt (1843), 43 Ky. (4 B. Mon.) 224; Reinhart vs State (1875), 14 Kan. 318; Woodside vs Wagg (1880), 71 Me. 207; Brown vs Lunt (1854), 37 Me. 423; Johnson vs McGinly (1884), 76 Me. 432; Commonwealth vs Kirby (1849), 56 Mass. (2 Cush.) 577; Thompson vs Couch (1906),

§ 406. **Title of de facto judicial officers not collaterally assailable.**—This proposition is universally admitted. “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. Such questions must be raised by some action or proceeding to which the judge himself is a party and where the issue as to the validity of his election or appointment is directly involved. It would be an unseemly proceeding derogatory to the dignity of the court and subversive of all respect for the orderly administration of justice to permit private litigants to enter upon an inquiry as to the title of the judge, before whom the action is pending, to his office. Of course, if such an inquiry is permissible, the very judge whose official existence is in question, must, in the first instance at least, determine it

144 Mich. 671, 108 N. W. 363; *People vs Payment* (1896), 109 Mich. 553, 67 N. W. 689; *Fleming vs Mulhall* (1880), 9 Mo. App. 71; *Coyle vs Sherwood* (1874), 1 Hun (N. Y.) 272, 4 Thomp. & C. 34; *Weeks vs Ellis* (1848), 2 Barb. (N. Y.) 320; *Greenleaf vs Low* (1847), 4 Denio (N. Y.) 168; *People vs Terry* (1887), 108 N. Y. 1, 14 N. E. 815; *State vs Lewis* (1890), 107 N. C. 967, 12 S. E. 457; *Walcott vs Wells* (1890), 21 Nev. 47, 24 P. 367, 37 Am. St. R. 478, 9 L.R.A. 59; *Gitsky vs Newton* (1898), 17 Ohio Cir. Ct. 484; *Hamlin vs Kassafer* (1887), 15 Or.

456, 15 P. 778, 3 Am. St. R. 176; *Campbell vs Commonwealth* (1880), 96 Pa. 344; *Adam vs Mengel* (Pa. 1887), 8 A. 603; *Turney vs Dibrell* (1873), 3 Bax. (Tenn.) 235; *McCraw vs Williams* (1880), 33 Gratt. (Va.) 510; *Maddox vs Ewell* (1817), 2 Va. Cas. 59; *McGregor vs Balch* (1842), 14 Vt. 428, 39 Am. Dec. 231; *In re Boyle* (1859), 9 Wis. 264; *Laver vs McGlachlin* (1871), 28 Wis. 364; *State, Ex p.* (1905), 142 Ala. 87, s. c. sub nom. *State vs Judge*, 38 So. 835; *Usher vs Telegraph Co.* (1906), 122 Mo. App. 98, 98 S. W. 84.

and thus he is compelled to violate a fundamental principle in all proceedings of a judicial nature, which precludes a person from acting as a judge in his own case or in respect to a question in the result of which he has a personal interest.”²¹

§ 407. Same subject — Illustrations. — Accordingly, whatever may be the defects in a judge's title, and whatever may be the character of his judgments or convictions, an appellate court will not entertain any objection to his jurisdiction grounded on such defects, whenever it appears that he had sufficient color of right or authority to constitute him an officer de facto. Thus, in *State vs Brown*,²² the defendant was indicted for murder in the first degree, and tried and found guilty of murder in the second degree. He removed the case to the Supreme Court by writ of error. One of his objections was that the judge had no authority or jurisdiction to sit in the case, because his term of office had expired. Held, that such objection could not be entertained, because the judge was at least an officer de facto, and until his right to the office was settled by a direct proceeding for the purpose, it could not be legally questioned in a collateral proceeding.

So in *People vs Sassovich*,²³ the appellant was convicted of murder and sentenced to be hanged. On appeal, it was contended that the Governor had no authority under the constitution to appoint the judge who presided at the trial, and therefore the trial and conviction of appellant were *coram non judice*. Held, that, as the person who filled the office of judge at the time the case was tried was appointed and commissioned by the Governor under and in pursuance of an Act of the legislature, he entered the office under color of right

²¹*Curtin vs Barton* (1893), 139 N. Y. 505, 34 N. E. 1093.

²²(1867), 12 Minn. 538.

²³(1866), 29 Cal. 480.

and became an officer de facto, and his title to the office could not be questioned in that collateral mode.

So in *Ex p. Call* ²⁴ a person, being convicted by a justice of the peace as a delinquent road-hand, appealed to the county court, and by it was again convicted, and detained in custody till payment of the fine and costs; and thereupon he sued out habeas corpus to the Court of Appeals, setting out the proceedings of the county court, and alleging them to be void for want of jurisdiction, and on account of ineligibility of the county judge, because he was a deputy United States marshal at the time of his appointment. Held, that the County Court having acquired jurisdiction by the appeal, the objection to the judge's title could not be collaterally inquired into.²⁵

§ 408. **Same subject—Same subject.**—In *Campbell vs Commonwealth* ²⁶ two associate judges not learned in the law sat with the president judge in Fayette County and participated in the trial and sentence of certain defendants for arson. It was not denied that these associate judges acted under and by virtue of an election by the people of the county, and that a commission was regularly issued to them by the Governor, but the validity of their title to the office was questioned on the ground that under the Constitution of 1874, and subsequent legislation, the people had no power to elect associate judges in Fayette County. Held, that they were judges de facto, and as against all parties but the Commonwealth they were judges de jure, and having at least a colorable title to these offices, their title thereto could not be questioned in any other form than by quo warranto at the suit of the Commonwealth.

²⁴(1877), 2 Tex. App. (Crim. Cas.) 497.

²⁵See also Habeas Corpus, sec. 435.

²⁶(1880), 96 Pa. 344.

So in *Culbertson vs Galena*,²⁷ the City of Galena sued the appellant before one R. F. Barry, who acted as a justice of the peace of Jo Daviess county, to recover a penalty for an alleged violation of an ordinance of the city. The cause was removed by appeal to the Circuit Court. The appellant appeared in the Circuit Court and moved to dismiss the suit, and reversed the judgment of the justice, upon the ground that he had not filed a bond with security previous to his entering upon the duties of his office. The Court overruled the motion. Upon appeal, it was held that the Court below was right in doing so, inasmuch as in a proceeding of this nature, it is sufficient to show that the justice acted as such, and his right to exercise the duties of the office cannot be collaterally examined.²⁸

So in *In re Radl*²⁹ it appeared that one Shaughnessey was appointed a justice of the peace by the common council of Portage, to fill a vacancy made by the resignation of another. Thereupon an action was commenced before such justice, and a summons issued by him in favor of one Charles Chislow and against the petitioner, Charles Radl. Upon the return of the summons served upon him, Radl applied to the Supreme Court for a writ of prohibition to perpetually restrain such justice from taking any steps or exercising any jurisdiction in the cause, on the ground that the common council had no lawful authority, to fill such vacancy by appointment. Held that, assuming such to be the facts, still, as there was such an office de jure in the city as justice of the peace to be filled, and as the person who acted was ostensibly appointed to fill that office and qualified, he must

²⁷(1845), 7 Ill. (2 Gill.) 129.

²⁹(1894), 86 Wis. 645, 57 N. W.

²⁸See also *State vs Miller* 1105.

(1892), 111 Mo. 542, 20 S. W. 243.

be regarded as such officer, at least de facto, and hence his jurisdiction could not be questioned upon prohibition.³⁰

§ 409. **Same subject—Same subject.**—So it has been held that the right of a justice of the peace, acting under color of appointment, to fill a vacancy, can not be questioned by a suit to enjoin the collection of a judgment rendered by him.³¹ So on a certiorari issued to review the conviction of the relator for assault and battery in a court whose judges were claimed to have been appointed under an unconstitutional enactment, it was held that the judges, if not such de jure, were such de facto, with color of title, and their acts must be respected until judgment of ouster was pronounced against them.³² So where a person, acting as justice of the peace, holds a commission for that office from the Governor, under the seal of the State, the Court will not go behind that commission to inquire whether he has been duly appointed to that office by the General Assembly of the State, or not.³³ So if a judge of a district court holds, at the same time, the office of Mayor of a city within the district, the question whether he is disqualified to act as judge by reason of incompatibility in the two offices, cannot be determined upon an appeal taken by a person whom he has tried and

³⁰For further cases on prohibition, see *State vs McMartin* (1889), 42 Minn. 30, 43 N. W. 572; *Thompson vs Couch* (1906), 144 Mich. 671, 108 N. W. 363. See also *Prohibition*, sec. 440.

³¹*Baker vs Wambaugh* (1884), 99 Ind. 312; *Cooper vs Moore* (1870), 44 Miss. 386. Also *Littleton vs Smith* (1889), 119 Ind. 230, 21 N. E. 886.

³²*Coyle vs Sherwood* (1874), 1 Hun (N. Y.) 272, 4 Thomp. & C.

34; *People vs Sherwood* (1874), 4 Thomp. & C. 34. See also *Curtin vs Barton* (1893), 139 N. Y. 505, 34 N. E. 1093; *Morris vs People* (1846), 3 Denio (N. Y.) 381; *State vs McMartin* (1889), 42 Minn. 30, 43 N. W. 572; *State vs Recorder* (1896), 48 La. Ann. 1375, 20 So. 908; *Byer vs Harris* (N. J. 1909), 72 A. 136. See also *Certiorari*, secs. 437, 438.

³³*Norwich vs Yarrington* (1848), 20 Vt. 473.

found guilty upon a complaint originally made returnable before him.³⁴ Again, a de facto judicial officer's authority cannot be collaterally questioned on the ground that he was a minor,³⁵ or an alien,³⁶ or had not residential qualification,³⁷ at the time of his appointment or election.

§ 410. Same subject—Same subject.—Finally, a rather interesting and peculiarly circumstanced case will be referred to. It is *Coolidge vs Brigham*,³⁸ determined in the Supreme Court of Massachusetts. The action in that case was commenced by a writ signed and issued by one William Barnes of Marlborough in the county of Middlesex, as justice of the peace for said county, and made returnable before him. The parties appeared on the return day, and, after a trial, judgment was rendered for the plaintiff, and the defendant appealed to the Superior Court. In the latter court the defendant moved that the action be dismissed for the reason that Barnes was not a lawful justice of the peace. It appeared at the hearing upon the motion, that another person by the name of William Barnes, residing in Marlborough, had been for several years a justice of the peace, and so continued up to the time of his death, in 1856; that, in conformity to custom, and in ignorance of the fact of his death, a new commission in his name was made out and signed, in anticipation of the expiration of his former commission, and was sent by mail addressed to "William Barnes, Esq., Marlborough, Mass.;" that the Governor and council did not know of the existence of such a person as the William Barnes

³⁴*Commonwealth vs Taber* (1877), 123 Mass. 253; *Dredla vs Baache* (1900), 60 Neb. 655, 83 N. W. 916.

³⁵*Hooper vs Goodwin* (1861), 48 Me. 79.

³⁶*Fancher vs Stearns* (1889), 61 Vt. 616, 18 A. 455.

³⁷*State vs Fountain* (1896), 14 Wash. 236, 44 P. 270.

³⁸(1861), 1 Allen (Mass.) 333.

who signed the writ in the action, and intended simply to renew the commission of the former magistrate; and that the last named William Barnes received the commission, so addressed, from the postoffice in Marlborough, and went with it before the Governor of the Commonwealth, who was not acquainted with him, and took the oaths of office. It also appeared that, since taking the official oaths, he had performed the ordinary duties of a justice of the peace for that county. Upon these facts, it was held that the Court had no authority to entertain the motion to dismiss the action, as the justice, acting under color of a commission issued under the Great Seal of the State, was an officer *de facto*, and his right to office could not be questioned collaterally.³⁹

³⁹For further cases on collateral attacks on judicial officers, see *Manning vs Weeks* (1891), 139 U. S. 504, 11 Sup. Ct. 624, 35 L. ed. 264, affirming *In re Manning* (1890), 76 Wis. 365, 45 N. W. 26; *Ball vs United States* (1890), 140 U. S. 118, 11 Sup. Ct. 761, 35 L. ed. 377; *In re Boyle* (1859), 9 Wis. 264; *Baker vs State* (1887), 69 Wis. 32, 33 N. W. 52; *Read vs Buffalo* (1867), 4 Abb. Dec. (N. Y.) 22, 3 Keyes, 447; *People vs Dillon* (1894), 26 N. Y. S. 778; *People vs White* (1840), 24 Wend. (N. Y.) 520; *Nelson vs People* (1860), 5 Parker Cr. R. 39, affirmed (1861), 23 N. Y. 293; *Rogers vs Beauchamp* (1885), 102 Ind. 33, 1 N. E. 185; *Kuhle vs People* (1895), 65 Ill. App. 378; *Orme vs Commonwealth* (1900), 21 Ky. Law R. 1412, 55 S. W. 195; *State vs Gleason* (1869), 12 Fla. 190; *People vs Gobles* (1887), 67 Mich. 475, 35 N. W. 91; *In re Corrigan*

(1877), 37 Mich. 66; *Facey vs Fuller* (1865), 13 Mich. 527; *Norwich vs Yarrington* (1848), 20 Vt. 473; *Sheehan's Case* (1877), 122 Mass. 445, 23 Am. Rep. 374; *State vs Brown* (1867), 12 Minn. 538; *In re Johnson* (1884), 15 Neb. 512, 19 N. W. 594; *Anderson vs Morton* (1903), 21 App. Cas. (D. C.) 444; *State vs Pertsdorf* (1881), 33 La. Ann. 1411; *State vs Lewis* (1870), 22 La. Ann. 33; *State vs Williams* (1883), 35 La. Ann. 742; *Clark vs Commonwealth* (1858), 29 Pa. St. (5 Casey) 129; *State vs Whitney* (1879), 7 Or. 386; *Frichnicht vs Hulsaidt* (1882), 6 N. J. L. J. 57; *Hamilton vs State* (1899), 40 Tex. Cr. R. 464, 51 S. W. 217; *Caldwell vs High* (Dist. Ct., 1881), 6 Wkly. Law Bul. 201; *State vs Bailey* (Minn., 1908), 118 N. W. 676; *State vs Bednar* (N. D. 1909), 121 N. W. 614. See also *Habeas Corpus*, sec. 435; *Certiorari*, ss. 437, 438; *Prohibition*, sec. 440.

§ 411. Same subject — English illustrations. — In *Hippisly vs Tucke* ⁴⁰ the head-note reads thus: "Judge of an inferior court has not taken the oath and sacrament according to Stat. 25 Car. 2; yet his judgment is not void, and cannot be assigned for error." The report verbatim is as follows: "Error of a Judgment in Newberry Court; and it was assigned, that the Mayor who was judge there had not taken the oath or sacrament according to Stat. 25 Car. 2 for which his office was void before the judgment given, and so the matter *coram non judice*. To which it was answered, that this is not matter assignable, being contrary to the Record, whereby he is taken and admitted to be judge, 2 Cro. 359, 3 Cro. 320. Also though the statute make the office void, yet that is only *quoad* himself, to subject him to a fine for meddling in the office; not *quoad* strangers, *who may not know* whether he had taken the oaths or not, to make his judgments void to their prejudice. Further it was said, that he is *de facto* a judge, which is sufficient; as if a steward *de facto* admits a copyholder, the admission is good, though he was not a *de jure* steward. But to this it was replied, that the statute in making the office void makes it void to all purposes touching the jurisdiction, and then this matter is assignable, though contrary to the Record. 2 Roll. 761. Of which opinion was the court now, and reversed the judgment. But afterward Hill 30 & 31, Car. 2, inter Denning vs Jennings, which is entered Pasch. 30 Car. 2 B. R. Rot. 391, it was adjudged *contra*."

This last mentioned decision was followed by the court in the subsequent case of *Denning vs Norris*,⁴¹ where a portion of the report reads: "Error of a judgment in Norwich court, assigned, that the sheriff by whom the judgment was given

⁴⁰ (1677), 2 Lev. 184, 83 Eng. Rep. 510.

⁴¹ (1679), 2 Lev. 243.

had not taken the oaths, and subscribed the Declaration, according to 13 Car. 2, Cap. 1. The defendant pleaded, that the oaths and declaration were not tendered to the sheriff. The plaintiff demurred. And resolved, that this is not assignable contrary to the Record and admittance of the parties; for this is in effect to say that he was not sheriff, because the statute says upon default etc., shall be void."

In the further case of *Andrews vs Linton*,⁴² it was held that, "Tis not assignable for error that the party who sat as judge in the court below was not a legal judge." And Chief Justice Holt, commenting there on *Denning vs Norris*, supra, said "he was counsel in the said case, and that the court held there, that since the defendant had admitted the judge to be a judge, by a plea to the action, he was estopped to say that he was not a judge afterwards. And he denied the case of *Hippisley vs Tucke* to be law."

§ 412. Same subject—Same subject.—So it has been repeatedly held, that judicial acts done in a court baron by a steward not duly appointed, or by an under-steward who kept court as steward without authority of the lord or of the high steward, were valid, as done by color of authority, the lawfulness of which the suitors could not inquire into.⁴³ And in *Knowles vs Luce*,^{43a} it is even stated by Manwood, J., that where the clerk of the lord of a manor held a manorial court, without general or special authority from the lord to do so, he was a good officer de facto until disturbed by the lord; for the tenants were not obliged to examine into his

⁴²(1703), 2 Ray. (Ld.) 884.

⁴³*Harris vs Jays* (1599), Cro. Eliz. 699, 78 Eng. R. 934; *Blagrave vs Woods* (1591), 1 Leon. 227; *Parker vs Kett* (1701), 12 Mod. 466, 88 Eng. R. 1454; *Leach vs*

Whitaker (1833), 5 B. & Ad. 409, 417; *Vin. Abr. Steward of Courts* (G); *Com. Dig. Copyhold, C. 5.* ^{43a}(1580), *Moore*, 109, 72 Eng. R. 473.

authority, nor was he compellable to give an account of it to them. So in *O'Brian vs Kinnun*,⁴⁴ it is laid down that all judicial acts, as admissions, institutions, certificates, etc., done by a bishop de facto only, are valid, though other acts of his may be invalid.

Again, in *Margate Pier Co. vs Hannam*,⁴⁵ where the objection made to the justice was grounded upon the fact that he had not taken the oaths at the general sessions, nor delivered in the certificate, as required by law, Abbott, C. J., said: "Many persons, acting as justices of the peace in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons, are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known."⁴⁶

So in *R. vs Justices of Herefordshire*,⁴⁷ it was claimed that a certain official act of a justice of the peace was invalid, because he had not taken the qualification oath prescribed by 18 Geo. II, c. 20. The objection was overruled by the court, Bayley, J., saying: "The acts of the Justice are valid, although he may be liable to certain penalties. Can it be contended that if a magistrate who has taken the qualification oath, that he is worth £100 per annum, and from circumstances is afterwards reduced to £80 and he commits a man after his income is so reduced, an action will lie against a gaoler for taking the man into his custody? If that cannot be contended, the argument here fails. The construction to be put upon the 18 Geo. II, c. 20, is, that the magistrate

⁴⁴ (1620), Cro. Jac. 552, 79 Eng. R. 473.

⁴⁵ (1819), 3 B. & Ald. 266, 22 R. R. 378.

⁴⁶ See comments on this case in *R. vs Boyle* (1868), 4 Ont. Pr. R. 256.

⁴⁷ (1819), 1 Chitty, 700.

shall be only so far disqualified from acting that he shall be subject to certain penalties if he does act. In this case the acts of the justice are valid, though he may be liable to penalties for not having taken the oath prescribed by the statute."

But the whole doctrine applicable to judicial officers, is apparently summed up by Buller, J., in *Milward vs Thatcher*,⁴⁸ where the learned judge says: "The cases cited from Cro. Car., Cro. Eliz., and Sir W. Jones, are cases of writs of error brought in civil actions, and the objection was taken to the competency of the judges below; but in such cases the question whether they be properly judges or not, can never be determined; it is sufficient if they be judges de facto. Suppose a person were even criminally convicted in a court of record, and the recorder of such court were not duly elected, the conviction would still be good in law, he being the judge de facto."

§ 413. Same subject—Canadian authorities.—In but a few Canadian cases has the de facto doctrine been applied to judicial officers. In *Speers vs Speers*⁴⁹ it was held that a judgment rendered by a junior county court judge in a surrogate court matter, after his authority to act had ceased by reason of the appointment of a senior judge who was ex officio surrogate judge, could not be set aside on appeal, the ground being that the junior judge was an officer de facto at the time he delivered his judgment.⁵⁰ In *Crookshank vs McFarlane*⁵¹ letters of administration were objected to because the surrogate, it was claimed, had not taken the oath of office, but the court held, that it will be presumed that a person acting as surrogate has taken the official oath, but if

⁴⁸ (1787), 2 Term (D. & E.) 81,
1 R. R. 431.

⁴⁹ (1896), 28 O. R. 188.

⁵⁰For full particulars of this
case, see sec. 117.

⁵¹ (1853), 7 N. B. 544.

he has not, his acts will not be invalid, if he has been appointed to office.

In *Hogle vs Rockwell*⁵² prohibition was applied for to have a conviction for selling liquor, without a license, quashed. The warrant of arrest had been signed on July 18, 1898, by Rockwell, one of the defendants, and one Moynan; and the conviction was made on the 27th of the same month, by Rockwell, and one Poirier, the other defendant. But it appeared that the commission of the peace as to these justices, had been revoked on July 16, and the new commission dated the same day did not include Moynan. The contention was that, as the latter was not a justice of the peace at the time he signed the warrant, the same was void. And as to the other two, their authority was challenged on the ground that they had not taken the oath of office when they made the conviction. The judgment of the Court was as follows: "Considering that the want of quality in the justices should have been urged before the magistrates to avail now; considering that respondents, Rockwell and Poirier, were de facto justices of the peace; that their acts were not invalid; and that the want of jurisdiction does not clearly appear; doth dismiss the petition with costs."⁵³

§ 414. Causing objection to judge to be spread on the record, of no avail.—As is evident from the foregoing authorities, at least the American ones, the prohibition against collateral attack on the authority of regular judges, though only such de facto, is absolute. It is not dependent upon the conduct of the parties to a suit, upon their consent express

⁵²(1898), 20 Que. R. (S. C.) 309.

⁵³Also *R. vs Boyle* (1868), 4 Ont. Pr. R. 256; *Ex p. Curry* (1898), 1 Can. Crim. Cas. 532;

Ex. p. Mainville (1898), 1 Can. Crim. Cas. 528. These two last cases are dealt with hereafter. See also *R. vs Hodgins* (1836), 12 O. R. 367.

or implied, but upon the broad principle, as already intimated, that the administration of justice might be fettered and impeded at every step were persons coming before a judge de facto permitted to question his title. Hence, it is of no avail to a litigant to challenge a judge's jurisdiction at the outset and have his objection spread on the record, since an appellate court will refuse to take notice of it.

Thus, in *McGregor vs Balch*,⁵⁴ where objection to a justice of the peace on account of ineligibility, had been made at the trial before him and overruled, the Supreme Court of Vermont, on appeal, remarked: "It is said that these defendants have presented the question as soon as their rights were invaded by the acts of this justice. This is true if they have the right which they contend for. But if Morrill was a justice, duly appointed, and acted as such, the plaintiff might well bring this suit before him, not knowing of his holding an office incompatible with the office of justice, which he exercised, and there would be no more propriety in saying the suit should fail on that account, because the defendant in this suit brought his appointment in question, than in saying the reverse. There was nothing particularly affecting the interest of this defendant in being sued before this justice, nor should he be permitted to inquire whether Morrill rightfully held the office, in any suit to which the justice was not a party."⁵⁵

Again, in *Keith vs State*,^{55a} the defendant caused certain objections to the judge's jurisdiction to be spread upon the record, but it was held that, from the objections and from the legislation, of which the court would take judicial notice,

⁵⁴(1842), 14 Vt. 428, 39 Am. Dec. 231.

^{55a}(1887), 49 Ark. 439, 5 S. W. 880.

⁵⁵See also *Nelson vs People* (1860), 5 Parker Cr. R. (N. Y.) 39, affirmed (1861), 23 N. Y. 293.

it was shown that the judge was judge de facto, if not de jure, and his acts were binding on the public, and his right could only be questioned in a direct proceeding to which he was a party. The Court, referring to a previous decision,⁵⁶ observed: "It was intimated in that case that the ruling might have been different if the party had not voluntarily submitted to the jurisdiction; but, as consent cannot confer jurisdiction . . . and the facts were all apparent to the court, we fail to appreciate the force of the suggestion."

§ 415. When foregoing principles are inapplicable.—

However, the general doctrine heretofore expounded in regard to collateral attack, must be restricted in its application to persons who are actively engaged in the discharge of judicial duties and have the reputation of being judges, whatever their rank may be. In other words, the rule cannot reasonably be invoked unless the officer holds his office under some degree of notoriety, and is in the exercise of continuous, or at least frequent, official acts of the kind that are attempted to be called in question.⁵⁷ "There is," says one Court, "a material distinction between an officer de facto, with general duties to perform through a stated term of office, and a special court organized for a single specified trial."⁵⁸

The same distinction is to be made where the court itself is not a special one, but the officer presiding it, is. Therefore, while it would be greatly detrimental to the administration of justice and against public policy, to allow litigants to assail the authority of a regular judge, it would be ridiculous to apply like principles to a person, who may act in a

⁵⁶Rives vs Pettit (1842), 4 Ark. 582.

⁵⁸Rice vs Commonwealth (1867), 3 Bush. (Ky.) 14.

⁵⁷Vacarri vs Maxwell (1855), 3 Blatch. (U. S.) 368.

judicial capacity possibly once or twice in a lifetime, and whose occupation in the community has nothing in common with the exercise of such functions. If a litigant willingly submits to the jurisdiction of such a person, while he is acting under color of right, this precludes him from afterwards complaining; but it is submitted that objection can be raised to his authority by the parties appearing before him, when they are aware that he is not in all respects qualified to assume judicial duties.

§ 416. **Same subject—Special judges.**—Within the class of judicial officers just referred to, must be included special judges, generally called judges *pro tem.*, who are appointed to perform judicial duties during the absence, sickness or other disability of the regular judge. Their right to act being merely temporary and conditional upon the existence of certain facts or events, it is quite reasonable to allow litigants to refuse to submit to their jurisdiction, unless all the conditions to afford them judicial authority for the time being be shown to exist, and all the prerequisites as to appointment and qualification appear to have been duly fulfilled. “The practice,” says one judge, “was long ago established in this court that the limited power of a special judge commissioned by the Governor to try causes when the regular judge was disqualified, might be inquired into by a litigant and considered on appeal by causing his authority to be spread upon the record.”⁵⁹

But an objection to a special judge must be made promptly

⁵⁹Per Cockrill, C. J.—Keith vs State (1887), 49 Ark. 439, 5 S. W. 880. Also Crusin vs Whitley (1857), 19 Ark. 99; White vs Reagan (1869), 25 Ark. 622; Lacy vs Barrett (1882), 75 Mo. 469; State vs Miller (1892), 111 Mo.

542, 20 S. W. 243; Kennedy vs State (1876), 53 Ind. 542; Greenwood vs State (1889), 116 Ind. 485, 19 N. E. 333; Cargar vs Fee (1889), 119 Ind. 536, 21 N. E. 1080; Vanderver vs Vanderver (1860), 3 Met. (Ky.) 137; Highby

and should the same be overruled, it should be spread upon the record by a proper method, so as to entitle it to be considered on appeal. Otherwise, it will be presumed in the appellate court, that the judge who tried the case was regularly appointed and duly qualified, and that the parties willingly submitted to his jurisdiction. In which case, his judicial acts will be held as valid and binding as those of an ordinary *de facto* judge, and will be protected accordingly from collateral attack.⁶⁰ Thus, failure on the part of a special judge to take the oath of office is no ground for reversing a judgment rendered by him, where his qualification has not been challenged at the trial.⁶¹ So parties raising no objection to the jurisdiction of a deputy or special judge appointed to act during the absence, illness, or other disability of the regular judge, cannot afterwards dispute the same, though he acted while the regular judge was present, and was competent to hear and determine their case.⁶²

vs Ayers (1875), 14 Kan. 331; *Schultze vs McLeary* (1889), 73 Tex. 92. 11 S. W. 924.

⁶⁰*Bartley vs Phillips* (1888), 114 Ind. 189, 16 N. E. 508; *Littleton vs Smith* (1889), 119 Ind. 230, 21 N. E. 886; *Crawford vs Lawrence* (1900), 154 Ind. 288, 56 N. E. 673; *Feaster vs Woodfill* (1864), 23 Ind. 493; *State vs Miller* (1892), 111 Mo. 542, 20 S. W. 243; *Grant vs Holmes* (1881), 75 Mo. 109; *People vs Mellon* (1871), 40 Cal. 648; *In re Hathaway* (1877), 71 N. Y. 238, affirming 9 Hun 79; *Hall vs Jankofsky* (1895), 9 Tex. Civ. App. 504, 29 S. W. 515; *Roberts vs State* (1900), 126 Ala. 74, 28 So. 741; *Caldwell vs Bell* (1845), 6 Ark. 227; *Kimball vs Penney* (1897), 117 Ala. 245, 22 So. 899; *State vs*

Anone (1819), 2 Nott. & McC. (S. C.) 27; *Landon vs Comet* (1836), 62 Mich. 690, 28 N. W. 788; *Briggs vs Voss* (1906), 73 Kan. 418, 85 P. 571; *Louisville & N. R. vs Herndon's Admr.* (1907), 31 Ky. Law R. 1059, 104 S. W. 732; *State vs Low* (1883), 21 W. Va. 783, 45 Am. R. 570; *State vs Holmes* (1895), 12 Wash. 169, 40 P. 735, 41 P. 887.

⁶¹*In re Hewes* (1900), 62 Kan. 288, 62 P. 673; *Salter vs Salter* (1869), 6 Bush. (Ky.) 624; *Carter vs Prior* (1883), 78 Mo. 222; *Ford vs Cameron First Nat. Bk.* (1896), 34 S. W. 684; *Tower vs Whip* (1903), 53 W. Va. 158, 44 S. E. 179.

⁶²*Highby vs Ayers* (1875), 14 Kan. 331; *Smith vs Sullivan* (1903), 33 Wash. 30, 73 P. 793; *Dredla vs Baache* (1900), 60 Neb.

§ 416a. Same subject—Same subject.—But, inasmuch as consent cannot confer jurisdiction,⁶³ where the circumstances are such that the court considers them insufficient to bestow color of authority on a supposed judge *pro tem.*, the consent of the parties will be of no avail, and, notwithstanding the same, his authority may always be collaterally assailed.⁶⁴ Thus, where a county court judge, without any authority whatever, appointed a judge *pro hac vice* to hear and determine a case for him, on account of disqualification on his part, it was held that the appointee was not an officer *de facto*, and his acts were null and void.⁶⁵ The court observed that the facts, circumstances, and conditions which would reasonably lead persons having business with an officer to presume the incumbent to be the lawful officer and to recognize him as such, cannot arise in the case of an individual confessedly selected to try only one case. So, where a special judge was chosen to fill a vacancy and acted after the newly appointed judge had assumed the duties of the bench, it was held that a judgment rendered by him while so holding over was void.⁶⁶

But in a Mississippi case, it was held that if a special judge of the Supreme Court be regularly appointed, enter upon the discharge of his duty, hear argument in a cause and duly consult thereon with his associates, before the expiration of the term of the regular judge in whose place he was ap-

655, 83 N. W. 916; Schultze vs McLeary (1889), 73 Tex. 92, 11 S. W. 924. See also R. vs Fee (1883), 3 O. R. 107.

⁶³Rodding vs Kane (1887), 14 Daly (N. Y.) 535, 2 N. Y. S. 55.

⁶⁴Van Slykes vs Trempealeau County Farmers' Fire Ins. Co. (1876), 39 Wis. 390, 20 Am. Rep. 50; State vs Fritz (1875), 27 La.

Ann. 689; Herbster vs State (1881), 80 Ind. 484; Cargar vs Fee (1889), 119 Ind. 536, 21 N. E. 1080.

⁶⁵Bedingfield vs First Nat. Bank (Ga. 1908), 61 S. E. 30. See also Oates vs State (Tex. Crim. App. 1909), 121 S. W. 370.

⁶⁶Hyllis vs State (1885), 45 Ark. 478.

pointed, a judgment rendered by him, without objection from the litigants, is valid, although the term of office of the regular judge had expired before its rendition, and his successor had assumed the exercise of the office.⁶⁷

Again, the general rule is that a special judge sitting at the same time as the regular judge, cannot perform valid judicial acts, even by consent, for "whatever provision exists for judges *pro tem.*, is not for the purpose of duplicating or increasing the judicial force, but to preserve a continuous though single force."⁶⁸ But it has been held in Kentucky, that it is no objection to the judgment of a special judge, that the same was rendered while the regular judge was engaged in holding the regular term of the court.⁶⁹ Likewise in a Kansas case, it was held that the parties, not having seasonably objected, were estopped from denying the jurisdiction of the judge *pro tem.*, though he acted at the same time as the regular judge.⁷⁰

§ 417. Same subject—Canadian authorities.—There are two cases apparently in point in Canada. One is *Ex p. Mainville*,⁷¹ which was a petition for discharge upon habeas corpus, on the ground that the person who acted as Deputy Recorder of the City of Montreal and convicted the petitioner, had not taken the oath required by law. The conviction was quashed by Wurtele, J., who said: "But it was suggested that he had assumed the office and was exercising its functions openly and with the acquiescence of the public, and

⁶⁷Adams vs Mississippi State Bank (1897), 75 Miss. 701, 23 So. 395.

⁶⁸Brewer, J.—In re Millington (1880), 24 Kan. 214. Also Cox vs State (1879), 64 Ga. 374, 37 Am. Rep. 76; Williams vs Struss (1896), 4 Okla. 160, 44 P. 273; Baisley vs

Baisley (1887), 15 Or. 183, 13 P. 888.

⁶⁹Paducah Land etc. Co. vs Cochran (1896), 18 Ky. L. R. 465, 37 S. W. 67.

⁷⁰List vs Jockheck (1898), 59 Kan. 143, 52 P. 420.

⁷¹(1898), 1 Can. Crim. Cas. 528.

consequently that he was a judge de facto and that his judgments were valid and binding. It was, however, admitted, at the argument, that the point that the Deputy Recorder had not taken the oaths was raised at the trial of the petitioner, and that his qualification and his right to sit and act in the case had been challenged, that the petitioner had not acquiesced in his assuming the office, and had not admitted any right or power on his part to act, but had in fact contested his qualification and his jurisdiction and power. In so far therefore as she is concerned he was a mere intruder in the office, and he cannot claim to have occupied the position of a judge de facto."

The other case is *Ex p. Curry*,⁷² which was also an application for a writ of habeas corpus, before the same judge and based upon the same grounds as in the previous case. The conviction, however, was sustained, and the learned judge thus distinguished the two cases: "In the previous case, it appeared that the Deputy Recorder's qualification, and right and power to act were challenged at the hearing by the defendant, and that the point was raised that he was not qualified to act, in consequence of having failed to take the oath of allegiance and the oath of office or judicial oath, after his appointment. Such being the case, he ceased to occupy the position of a judge de facto as regarded the defendant, and became a mere intruder in the office. His judgment therefore, was not valid and binding as that of a judge de facto, and having been rendered by a mere intruder in the office, was illegal and null. Under these circumstances, after it having been ascertained that the oaths had really not been taken, I maintained the writ of habeas corpus, and ordered the discharge of the petitioner. But in the present case, the Deputy Recorder's qualification was not denied, and his

⁷² (1898), 1 Can. Crim. Cas. 532.

power to act was not challenged by the defendant. While sitting in the case, he was really a judge de facto, and the sentence or judgment which he rendered is therefore valid and binding. This being the case, I cannot grant a writ of habeas corpus, and I therefore reject the petitioner's application."

§ 418. **Same subject—Public officers only occasionally discharging judicial duties.**—Certain municipal and public officers whose ordinary duties are ministerial, but who are sometimes authorized by virtue of their office, to occasionally perform acts judicial in their character, should also be placed in the category of special judicial officers. As a condition precedent to their assuming this extraordinary power, these officers are generally enjoined by law to qualify by taking an oath or making a declaration. They are not recognized in the community as judicial officers, and very seldom act as such. It is submitted, therefore, that their status could rightly be assimilated to that of special judges, so that if they fail to qualify according to law, and prompt objection is made to their jurisdiction, the same could be entertained by an appellate court. Thus, in a Canadian case, where an alderman was required to take an oath before acting as an ex officio justice of the peace, and he, without thus qualifying, signed a warrant jointly with another justice of the peace, it was held upon habeas corpus that the warrant was invalid, and the person arrested thereon was discharged.⁷³ In that case there was prompt action on the part of the prisoner, as he availed himself of the first opportunity afforded him to object to the jurisdiction of the alderman.⁷⁴

⁷³R. vs Boyle(1868), 4 Ont. Pr. R. 256.

⁷⁴But now statute 3 Edw. VII,

c. 19, s. 475, provides that no warden, mayor, reeve or alderman, after taking the oaths, or making

So in another analagous Canadian case, where a special superintendent was appointed by a municipality to lay out a road, and he took the required oath before an unauthorized person, it was held that his award was invalid.⁷⁵ Though this officer did not act as a judge, his duties were evidently of a judicial character; and as he was not an ordinary municipal officer, he might perhaps be better compared to a special judge than to a municipal officer occasionally performing judicial functions.

In an American case, it was even held that where municipal officers attempt to constitute themselves into an extraordinary tribunal under statutory authority, for a given purpose, that their acts will be void, if they fail to qualify, notwithstanding that no objection may have been raised to their jurisdiction at the time they acted. This was the decision given where a board of aldermen, who could only become a court to try charges preferred against a city officer upon taking a prescribed oath, administered by an officer duly authorized, were sworn by an officer not authorized to administer the oath; their judgment was declared a mere nullity.⁷⁶

§ 419. Same subject—Justices of the peace only occasionally acting.— Again, it is submitted that certain justices of the peace might possibly be looked upon as special judges in regard to the question under consideration, at least in Canada. Some of them, though named in the commission of the peace for a specified county, are not qualified

the declarations as such, shall be required to take any further oath to enable him to act as a justice of the peace.

⁷⁵*Pinsonnault vs Corp. de Larprarie* (1901), 20 Que. R. (S. C.) 525.

⁷⁶*Tompert vs Lithgow* (1866), 1 Bush. (Ky.) 176. See also *Rice vs Commonwealth* (1867), 3 Bush. (Ky.) 14.

and never even attempted to qualify as required by law, and are not generally known to be justices of the peace. Their ordinary avocation may be that of merchant or farmer, and they are merely known as such, and not otherwise. Upon principle, therefore, we think that upon their failure to qualify before acting, they could be objected to as if they were only temporary judicial officers. It seems that this course would not be opposed to public policy, nor to the reasons underlying the doctrine we have expounded. Evidently it would be otherwise, if any such justice was continually or frequently in the habit of acting as such, and was generally reputed to be a judicial officer. However, it is difficult to lay down any hard and fast rule upon this subject, as the *de facto* doctrine is so very elastic that its application depends upon the peculiar facts and circumstances of each case.⁷⁷

But some Canadian cases ⁷⁸ seem to take it for granted, that the qualification of a magistrate or justice of the peace can always be inquired into by a Superior Court when reviewing his judgment, at any rate where objection to him has been promptly raised.^{78a} In such cases, it is most important not to confound the principles applicable to the jurisdiction of inferior tribunals in regard to subject-matter and person, with those applicable to the official title of the officers presiding over them. While there cannot be a *de facto* jurisdiction, there may be a *de facto* judicial officer exercising a lawful jurisdiction.⁷⁹ Moreover, disqualification due to defective title or failure to qualify must not be placed on a level with dis-

⁷⁷See *Vaccarri vs Maxwell* (1855), 3 Blatch. (U. S.) 368.

⁷⁸*R. vs Hodgins* (1886), 12 O. R. 367; *R. vs White* (1871), 21 U. C. C. P. 354; *R. vs Boyle* (1868), 4 Ont. Pr. R. 256.

^{78a}*Hogle vs Rockwell* (1898), 20 Que. R. (S. C.) 1, 309.

⁷⁹See *Smith vs Sullivan* (1903), 33 Wash. 30, 73 P. 793.

ability arising by reason of interest, which was the case in some English authorities often quoted.⁸⁰

§ 420. **Observations on the English and Canadian cases.**—Having concluded the exposition of the general doctrine relating to collateral attack on judges' title, it may not be amiss to make a few observations on the English and Canadian cases which have been quoted. Influenced by a desire of preserving their identity in the midst of a mass of American decisions, it has been thought proper to group them as much as possible together, even if, logically, a better place might have been assigned to some of them. The facts disclosed in certain cases have also sometimes been relied on, in preference to the reasons given for the decisions. Thus, we have inserted two cases,⁸¹ under the head of special judges, not on account of any distinction made therein between a regular and a special judge, but merely because, in our opinion, that was the only way the judgments could be sustained upon principle. In fact, the learned judge who decided those cases, far from making such a distinction, advanced, in support of his conclusions, reasons which are certainly not maintainable in view of the authorities. He seemed to have been of the opinion that a disqualified regular judge, of whatever rank, was practically at the mercy of the criminals and suitors that appeared before him, so far as his judicial authority was concerned. Referring to the judges of the King's Bench and the Superior Courts, he observed: "No one would seriously pretend that they can lawfully act before having taken the oath of allegiance and the oath of office; and the same rule

⁸⁰R. vs Justices of Richmond (1860), 8 Cox. C. C. 314, s. c. sub nom. R. vs Huntingtower, 8 W. R. 562; R. vs Justices of Kent (1880), 44 J. P. 298.

⁸¹Ex p. Mainville (1898), 1 Can. Crim. Cas. 528. and Ex p. Curry (1898), 1 Can. Crim. Cas. 532.

must necessarily apply to the Deputy Recorder who is a judge of an inferior rank."

If by such language he meant that the first mentioned judges could not perform valid judicial acts before taking the oath of allegiance, whenever their authority was objected to, he laid down a proposition which is untenable. In *Ipsley vs Turk*,⁸² Wylde, J., says: "Upon a writ of error in Parliament it cannot be assigned for error, that the Chief Justice of the Kings' Bench had not taken this oath (25 Car., II, c. 2); the same might be also of a writ of error in the exchequer chamber."

Indeed, that it be in the power of litigants to change the status of a disqualified regular judge at their pleasure, by submitting to him and constituting him a good officer, or by objecting to him and making him an intruder, is against public policy and the most vital interests of the community. Certainly no suitor could effectively challenge the authority of the superior court judges he named. For, if it should happen that any such judge was so remiss in his duty, as to act without taking the proper oaths of office and allegiance, this would be a matter for the interference of the State authorities, not of private individuals. For instance, in *Stoddard vs Prentice*,⁸³ an objection was raised to the appointment of Mr. Justice Martin of British Columbia, because, it was alleged, he had not been of ten years' standing at the bar previous to his appointment, as required by the provincial statute; but the Supreme Court refused to entertain the objection, saying that it had no power to decide the validity of the appointment of one of its own members. This was quite sound, because a Canadian Superior Court Judge can only be removed by the Governor-General on address of the Senate and

⁸²(1677), 2 Mod. 193.

⁸³(1898), 6 B. C. 308.

House of Commons, or under the provisions of the statute 22 Geo III, c. 75.^{83a}

But reverting to the Deputy Recorder, if he, to use the words of the learned judge, "had assumed the office and was exercising its functions openly and with the acquiescence of the public," he was manifestly an officer *de facto*, and, unless he could be classed among special judges, no one could have collaterally assailed his authority.

§ 421. **Same subject.**—On the whole, however, it is obvious that the English and Canadian courts are willing to uphold the validity of acts performed by a judge *de facto*, at any rate where his authority has not been challenged at the trial; for, as we have seen, the principle that the acts of *de facto* judicial officers are valid, has been recognized in England for centuries. The only doubtful point is, as to what extent and under what circumstances a litigant will be permitted to raise an objection to an acting judge. According to some English cases, one might be led into the belief that this can never be done by the suitor. On the other hand, some Canadian judges practically lay down the principle that a judge, who has failed to qualify according to law, may be objected to by any litigant who desires to do so. Neither of such opposite views, if such they are, commends itself to reason. The practical solution of the question, we submit, is that afforded by the American authorities, which,

^{83a}The Canadian County and District Court Judges, like the Superior Court judges, hold their offices during good behavior, but are removable for cause by the Governor in Council. R. S. C. (1906), c. 138, s. 28. They may also be removed under the statute 22 Geo. III, c. 75. In England the superior

Court Judges are only removable by the Crown on address of both Houses; but the County Court Judges are appointed and may be dismissed by the Lord Chancellor. They are also subject to proceedings by *quo warranto*. R. vs Parham (1849), 13 Q. B. 858, 18 L. J. Q. B. 281, 13 Jur. 981.

as already explained, is: That where a person acts as a regular judge, of whatever rank, under color of right, and with the acquiescence of the public and the State authorities, his title can never be impeached collaterally, whatever defects there may be in his appointment or qualification; but where he merely acts as a temporary or special judge, or in any such like capacity, his authority may be challenged by parties appearing before him, and if their objection is overruled, the same may be entertained and finally decided by an appellate court.

§ 422. **Acts of de facto judicial officers, valid.**—The inevitable conclusion resulting from what has been said and the numerous cases quoted in this chapter, is that, as to the public and third persons, the official acts of de facto judicial officers, within the scope of their jurisdiction, are as valid and binding as if they were the acts of de jure officers. This rule applies to the judgments, decrees, and other official acts of all judicial officers, whatever may be their rank, high or low, and whatever may be the nature of the matters coming before them for adjudication, civil or criminal. To repeat the words of Buller, J., "Suppose a person were even criminally convicted in a court of record, and the Recorder of such court were not duly elected, the conviction would still be good in law, he being the judge de facto."⁸⁴

If the rule was otherwise, as pointed out in a New York case, no man would be safe in taking a title until he had examined the commission of the judge, who had done any act upon which the validity of the title depended, and had then gone from the commission up to the source from which the officer derived his authority.⁸⁵ In fact, the United States

⁸⁴Milward vs Thatcher (1787), Wend. (N. Y.) 520; reversing 22 Term (D. & E.) 81, 1 R. R. 431. Wend. 167.

⁸⁵People vs White (1840), 24 De Facto—37.

Supreme Court positively declared that, under the Federal Constitution, there was no difference between a judge de facto and a judge de jure, so far as the acts of either affected third persons. This was the decision pronounced upon appeal thereto in a case of manslaughter. It held that a person is not denied the equal protection of the laws, nor deprived of liberty, without due process of law, in violation of the Fourteenth Amendment of the American Constitution, by being tried and sentenced to imprisonment by a judge who, although appointed by the Governor without authority, is a judge de facto of a court de jure by the law of the State as declared by its highest court.⁸⁶

But of course, as repeatedly said with reference to other officers, the above doctrine will not validate the acts of a de facto judge when they are performed for his own benefit, since he will not be permitted to take advantage of his own wrong;⁸⁷ nor will it validate the acts of a pretended judge who was a mere usurper at the time he acted.⁸⁸

The present subject has been treated and illustrated in the foregoing pages, in a somewhat indirect way, by laying down the principles governing collateral attacks on the title of de facto judicial officers. This manner of proceeding has been adopted in this chapter, because, as we already intimated, it was thought the balance of convenience favored such a course. The result, however, is the same; for, whenever the authorities hold that the title of a judge cannot be collaterally drawn into question, it follows that his acts are

⁸⁶*Manning vs Weeks* (1891), 139 U. S. 504, 11 Sup. Ct. 624, 35 L. ed. 264, affirming *In re Manning* (1890), 76 Wis. 365, 45 N. W. 26.

⁸⁷*Venable vs Curd* (1859), 2 Head. (Tenn.) 582.

⁸⁸*United States vs Alexander* (1891), 46 Fed. 728; *Cromer vs Boinest* (1887), 27 S. C. 436, 3 S. E. 849; *State vs Perkins* (1897), 139 Mo. 106, 40 S. W. 650; *Dabney vs Hudson* (1890), 68 Miss. 292, 8 So. 545, 24 Am. St. R. 276.

valid, and vice versa. It would, therefore, be useless to further dwell upon a doctrine which has already received sufficient consideration. For purpose of reference, however, a number of authorities are quoted.⁸⁹

§ 423. Acts of de jure judges acting outside their jurisdiction, under an unconstitutional Act.—This subject calls for special treatment. The question involved is,

⁸⁹Knowles vs Luce (1880), Moore, 109; Hipsly vs Tucke (1877), 2 Lev. 184, 83 Eng. R. 510, also Denning vs Norris (1879), 2 Lev. 243; Andrews vs Linton (1703), 2 Ray. (Ld.) 884, also briefly reported in Salk. 265, and in Holt's R. 273; Harris vs Jays (1599), Cro. Eliz. 699, 78 Eng. R. 934; Parker vs Kett (1701), 12 Mod. 466, 88 Eng. R. 1454; s. c. 1 Ray. (Ld.) 658, 91 Eng. R. 1338; Margate Pier Co. vs Hannam (1819), 3 B. & Ald. 266, 22 R. R. 378; Ex p. Curry (1898), 1 Can. Crim. Cas. 532; Speers vs Speers (1896), 28 O. R. 188; R. vs Boyle (1868), 4 Ont. Pr. R. 256; Crookshank vs McFarlane (1853), 7 N. B. 544; Sellers vs Smith (1905), 143 Ala. 566, 39 So. 356; Alabama Nat. Bank vs Williams (1905), 144 Ala. 406, 38 So. 240; Stephens vs Davis (Ala. 1905), 39 So. 831; Butler vs Phillips (1907), 38 Col. 378, 88 P. 480; Rude vs Sisack (Col. 1908), 96 P. 976; People vs Rosborough (1859), 14 Cal. 180; Griffin's Case (1869), 11 Fed. Cas. (No. 5,815) 7; State vs Carroll (1871), 38 Conn. 449, 9 Am. Rep. 409; State vs Sadler (1899), 51 La. Ann. 1397, 26 So. 390; In re Sheehan's Case (1877), 122 Mass. 445, 23 Am. Rep.

374; Woodside vs Wagg (1880), 71 Me. 207; Bell vs State (Miss. 1905), 38 So. 795; Adams vs Mississippi State Bank (1897), 75 Miss. 701, 23 So. 395; State vs Brown (1867), 12 Minn. 538; Ostlander vs People (1883), 29 Hun (N. Y.) 513; Walcott vs Wells (1890), 21 Nev. 47, 24 P. 367, 37 Am. St. R. 478, 9 L.R.A. 59; State vs Lewis (1890), 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L.R.A. 100; Beard vs Cameron (1819), 3 Murp. (N. C.) 181; Angell vs Steere (1888), 16 R. I. 200, 14 A. 81; Blackburn vs State (1859), 3 Head (Tenn.) 690; Gold vs Fite (1872), 2 Bax. (Tenn.) 237; Turney vs Dibrell (1873), 3 Bax. (Tenn.) 235; Nashville vs Thompson (1883), 12 Lea (Tenn.) 344; Moore vs State (1858), 5 Sneed (Tenn.) 510; McCraw vs Williams (1880), 33 Gratt. (Va.) 510; Quinn vs Commonwealth (1870), 20 Gratt. (Va.) 138; State vs Carter (1901), 49 W. Va. 709, 39 S. E. 611; In re Burke (1890), 76 Wis. 357, 45 N. W. 24; Baker vs State (1891), 80 Wis. 416, 50 N. W. 518; State vs Bloom (1863), 17 Wis. 521; State vs Hill (1843), 2 Speers L. (S. C.) 150.

whether a judge *de jure* acting without his territorial jurisdiction, under the supposed authority of an unconstitutional statute, can be regarded, while so acting, as an officer *de facto*, and thus be capable of performing valid judicial acts. The case we wish to deal with is where the legislature passing the void law, is not authorized to fill the judicial office. In Canada, for instance, the provinces are intrusted, under the British North America Act, with the "constitution, maintenance, and organization of Provincial Courts," but the power of appointment thereto, so far as the Superior, District and County Courts are concerned, is vested in the Federal Government. In the several States of America an analogous situation is found. The judicial office is either created by the constitution or the legislature, but the people are in general constitutionally entitled to fill the same by popular election. While theoretically such powers, creative, appointive, or elective, should not clash with one another, as they are usually well defined, it is a matter of experience that they sometimes do, as a result of their illegitimate exercise. For example, a judge may be appointed or elected to a court territorially limited in jurisdiction, and, after his appointment or election, an Act may be passed by the legislature extending his authority, by providing that he may perform judicial functions in districts other than his. Then arises immediately the contention, that the legislative body has indirectly assumed the power of appointing judges.

§ 424. **Same subject—American cases.**—In the United States this question has never created serious difficulty, since the authorities, without a single dissenting voice, have always held that an unconstitutional Act affords sufficient color of title to an officer to constitute him an officer *de facto* and to render his acts valid, until the statute is declared void in a

proper proceeding. This was the decision in the great leading case of *State vs Carroll*⁹⁰ and in many others.^{90a} Thus, in *Rives vs Petit*,⁹¹ the question involved the jurisdiction of a circuit judge who had presided over a court under an Act of the legislature permitting an exchange of circuits between judges, which turned out to be unconstitutional. Upon an appeal from a judgment rendered by the court thus organized, it was held that the proceedings were binding upon the parties and could not be set aside.

So in *Clark vs Commonwealth*⁹² the case presented a similar point. The legislature had enacted that the county of Montana should be transferred from one judicial district to another, during the term of office of Judge Jordan; and it was contended that as to that county, the judge of the district to which it was transferred could have no jurisdiction, as the Act of the legislature was equivalent to an appointment of a judge for the county without an election, and was, therefore, void under the constitution of Pennsylvania. But in reply to such argument, the Court said: "A very important question upon the constitutional power of the legislature so to alter judicial districts as to transfer a judge to the courts of certain counties who was never voted for in those counties, was intended to be raised by this plea; but, unfortunately for the prisoner, it cannot be raised in this form. His plea admits that Judge Jordan is a judge de facto; and if it did not admit this, we would take judicial notice of the legislation which placed him in the courts of Montour County, so

⁹⁰ (1871), 38 Conn. 449, 9 Am. Rep. 409, 21 Am. Law R. 165.

^{90a} *Taylor vs Skrine* (1815), 2 Tread. Const. (S. C.) 696; *Masterson vs Matthews* (1877), 60 Ala. 260; *Ex p. Strang* (1871), 21 Ohio St. 610; *In re Parks* (1880), 3 Mont. 426; *People vs Bangs*

(1860), 24 Ill. 184; *Butler vs Phillips* (1907), 38 Col. 378, 88 P. 480. See also officers de facto holding under unconstitutional law, sec. 192, et seq.

⁹¹ (1842), 4 Ark. 582.

⁹² (1858), 29 Pa. St. 129.

far as to hold him to be a judge de facto. That legislation is at least a colorable title to his office. Can the rights and powers of a judge de facto, with color of title, be questioned in any other form than by quo warranto, at the suit of the Commonwealth? Assuredly not." Therefore, the conviction appealed against, which was for murder, was upheld.⁹³

§ 425. Same subject — Canadian cases. — In Canada there are some cases in point, or at least presenting similar questions, but they were decided without even a reference to the de facto doctrine. Thus, in *Gibson vs McDonald*,⁹⁴ it was held that the county judge of the County of Lanark had no power to preside at the general sessions of the peace in the County of Renfrew, the provincial statute authorizing him to do so being declared unconstitutional.⁹⁵ The right of the judge so to preside was collaterally inquired into upon an application for a writ of prohibition. A person having been convicted before two magistrates, entered an appeal against the conviction, which was tried by the general sessions of the peace of the County of Renfrew, presided over by the judge in question. Prohibition was granted, and the main ground upon which the writ was allowed to issue, was that an appeal did not lie to that court. But two out of the three judges (the other expressing no positive opinion on the point) held also that the presiding judge was not authorized to hear the appeal, because the Act under which he acted was ultra vires. One of them ⁹⁶ observed: "It may

⁹³See also *Keith vs State* (1887), 49 Ark. 439, 5 S. W. 880; *State vs Douglass* (1872), 50 Mo. 593.

⁹⁴(1885), 7 O. R. 401. See also *R. vs Bennett* (1882), 1 O. R. 445; *In re Wilson vs McGuire* (1883), 2 O. R. 118.

⁹⁵This decision has since been indirectly overruled by the Supreme Court of Canada: *In re County Courts of British Columbia* (1892), 21 Can. Sup. Ct. 446.

⁹⁶O'Connor, J.

easily be imagined, therefore, that important interests of both a public and private nature must be disturbed and affected, in most cases injuriously, if the statute be found destitute of authority and consequently void. It is impossible to calculate the evil results which may be expected to result from the confusion created by so disturbing a cause. But, on the other hand, allowing matters to continue and proceed under such a statute can lead only to a greater accumulation of evil results and more disastrous consequences; for sooner or later the statute is sure to be brought to the crucial test, be the consequences what they may."

§ 426. **Same subject—Same subject.**—This language strongly suggests that the learned judge was of the opinion that all the acts of the county court judges who had presided over courts, under the authority of the alleged unconstitutional Act, would be null and void if the statute was declared *ultra vires*. In view of the English and American authorities, it is difficult to conceive that a judge could entertain such an opinion. In the case under his consideration, could it have been reasonably contended that an Act solemnly passed by the legislature and not vetoed by the federal power, was ineffectual to impart to the county court judge, sufficient color of title to constitute him an officer de facto? Surely no court in Ontario would think for a moment of questioning the validity of the past acts of such an officer. As we have already pointed out, questions affecting the title of a judicial officer, must not be confounded with questions affecting his jurisdiction. Prohibition, according to Bacon, issues out of the Superior Courts of Common Law, to restrain the inferior courts on a suggestion that the jurisdiction of the matter belongs not to such courts.⁹⁷ But it is not

⁹⁷Bac. Abr. Title, Prohibition.

a writ intended to try the title of the judge, where the matter is lawfully within the jurisdiction of the court presided over by him.

§ 427. **Same subject—Same subject.**—It goes without saying, that private individuals in Canada should have no more right than elsewhere to intermeddle, either by prohibition or otherwise, with questions concerning the appointment of judges. If they find a *de jure* court held by a judge, acting under color of right, their duty should be to submit to it. What material difference can it make to them whether the officer was appointed by the Federal Government or a Provincial Legislature? This is a matter for the consideration and interference of the State authorities, not of litigants. As we have already seen, the stability and dignity of the Bench as well as the interest of the community at large, forbid that the acts of a judicial officer be dependent upon the validity of his appointment. His right to act should be settled once for all by a sort of judgment *in rem*, in a case where no private interests are involved. Judicial appointments, in Canada, being vested in the federal power, that power alone has a right to complaint, if its authority is encroached upon. If it expresses no dissatisfaction with the invasion of its rights, it is absurd to allow private individuals to come to the rescue, and defend it against provincial usurpation. "It would, indeed," says the Supreme Court of North Dakota, "be a strange rule of law that would permit every party to a lawsuit to volunteer to become a champion of the public rights by challenging the official right of the judge to act."^{97a}

Whenever the Federal Government is of opinion that a provincial Act indirectly attempts to appoint judges and is there-

^{97a}Fisk, J., delivering opinion of court in *State vs Bednar* (N. D. 1909), 121 N. W. 614.

fore unconstitutional, it can easily disallow it, or have the same tested by submitting a case to the Supreme Court of Canada, as it did with reference to the British Columbia statute.⁹⁸ If the statute is found *ultra vires*, all authority to act thereunder *ipso facto* ceases, and a judicial officer that would attempt to continue thereafter to act in pursuance thereof, would be considered a mere intruder. But until this is done, and so long as the judge is allowed to perform judicial functions under the authority of the legislative enactment, without objection from the federal power, there is no sound reason why he should not be regarded as a good officer, as to all persons who resort to him for the dispensation of justice. Especially is this evident, when it is borne in mind that a litigant's right to impeach the validity of a statute is confined to cases where his private interests are affected by the Act.

⁹⁸In re County Courts of British Columbia (1892) 21 Can. Sup. Ct. 446.

BOOK VI.

OF THE REMOVAL OF DE FACTO OFFICERS.

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OF THE REMOVAL OF DE FACTO OFFICERS.

CHAPTER 31.

INTRODUCTORY.

§ 428. Scope of this book.

§ 428. **Scope of this book.**—This book will be devoted to an exposition of the principles governing the removal of de facto officers. In pursuing this investigation, it has been thought advisable to divide the subject into two parts, which will form so many chapters. In the first part, which will deal with the negative aspect of the subject, will be enumerated the proceedings in or by which official title cannot generally be tried, because such question is not directly at issue but only collaterally involved therein. The second part will deal with its affirmative aspect, that is, with quo warranto or the statutory substitutes therefor, the same being, generally speaking, the only appropriate remedies to determine questions of title to office. The two chapters will be entitled as follows:—

1. Of collateral attacks on the title of de facto officers—Habeas Corpus—Certiorari—Prohibition—Mandamus—Injunction—Etc.
2. Of quo warranto.

CHAPTER 32.

OF COLLATERAL ATTACKS ON THE TITLE OF DE FACTO OFFICERS — HABEAS CORPUS — CERTIORARI — PROHIBITION — MANDAMUS—INJUNCTION—ETC.

- § 429. De facto officer's title cannot be collaterally assailed.
430. Limitations to the above rule.
431. Title to office cannot be tried in proceedings to recover official records.
432. In United States title cannot be tried in action for recovery of salary.
433. Different rule in England.
434. De facto officer's title cannot be inquired into by ministerial officers.
435. Title to office cannot be determined on habeas corpus.
436. Title to office not generally determinable on certiorari—English and Canadian authorities.
437. Same subject—Same subject.
438. Same subject — American authorities.
439. Same subject—Same subject.
- 439a. Same subject—Same subject.
440. Title to office not triable by prohibition.
- § 441. Title to office cannot be tried by mandamus—English authorities.
442. Same subject — American authorities.
443. Mandamus lies to compel admission of person having prima facie title to office, though there be another in possession.
444. Mandamus proper remedy to restore officer unlawfully removed.
445. Mandamus proper remedy to determine de facto title of officer.
446. Title to office cannot be tried by injunction—American authorities.
447. Same subject—English authorities.
- 447a. Injunction under the English Judicature Act.
448. Interference of equity on account of breaches of trust —English and American authorities.
449. Title to office not triable by writ of assize.

§ 429. **De facto officer's title cannot be collaterally assailed.**—It is a very ancient and salutary principle of the common law, that where a person claims to hold an office, his title shall not come in question in an action or proceeding to which he is not a party; but while he holds the office *de facto*, his acts and doings therein will be deemed good.¹ This principle is supported alike on grounds of public policy and of justice. On grounds of public policy, because it would be against the interest of the community to allow the acts of *de facto* officers to be collaterally impeached, by drawing into question the official title of such officers. On grounds of justice, because to judge a man unheard, and without an opportunity to defend himself, would be contrary to natural equity. For these reasons, the above proposition has received the universal support of a great mass of authorities, only a few of which can conveniently be quoted in this place.²

¹Simrall, J., *Cooper vs Moore* (1870), 44 Miss. 386, quoting 7 Bac. Abr. 283.

²*Penney vs Slade* (1839), 5 Bing. (N. C.) 319, 7 Scott, 484; *R. vs St. Clement's* (1840), 12 Ad. & El. 177, 181, 3 P. & D. 481, 4 Jur. 1059; *Symmers vs Regem* (1776), 2 Cowp. 489, 507; *R. vs Justices of Cheshire* (1840), 4 Jur. 484; *R. vs Gell* (1867), 6 S. C. R. (N. S. W.) 239; *Frost vs Mayor of Chester* (1855), 5 El. & Bl. 531, s. c. sub nom. *R. vs Mayor of Chester* (1855), 25 L. J. Q. B. 61, 2 Jur. (N. S.) 114, 4 W. R. 14; *R. vs Godwin* (1780), 1 Doug. 397; for further English cases, see secs. 6, 411, 412;—*Paris vs Couture* (1883), 10 Que. Law R. 1; *Speers vs Speers* (1896), 28 O. R. 188; *R. vs Gibson* (1896), 29 Nov. Scot.

4; for further Canadian cases, see sec. 11;—*Gibb vs Washington* (1858), 1 McAll. (U. S.) 430; *Ex p. Strobach* (1873), 49 Ala. 443; *Kaufman vs Stone* (1869), 25 Ark. 336; *Jeffords vs Hine* (1886), 2 Ariz. 162, 11 P. 351; *Susanville vs Long* (1904), 144 Cal. 362, 77 P. 987; *Pueblo County vs Gould* (1895), 6 Col. App. 44, 39 P. 895; *Kissimmee City vs Cannon* (1890), 26 Fla. 3, 7 So. 523; *Hinton vs Lindsay* (1856), 20 Ga. 746; *Gumberts vs Adams Exp. Co.* (1867), 28 Ind. 181; *Law vs People* (1877), 87 Ill. 385; *Cochran vs McCleary* (1867), 22 Iowa, 75; *Gorman vs Boise County Comm'rs* (1877), 1 Idaho, 655; *Osborne vs State* (1890), 128 Ind. 129, 27 N. E. 345; *In re Corum* (1900), 62 Kan. 271, 62 P. 661, 84 Am. St.

Again, the title of a de facto officer cannot be determined in any action or proceeding to which he is a party merely in an official capacity, for the benefit of the public or third persons.³ Nor is his title triable by means of any process or remedy which, though directly addressed to him, yet involves his right to office only in a collateral way, that is, merely because it is necessary to show want of title, in order to lay a foundation for the relief sought. Of such processes or remedies are prohibition, mandamus, injunction, and the like, which are further on dealt with.

§ 430. Limitations to the above rule.—The foregoing rule, however, will not be enforced to the extent of shielding from collateral attack the pretended official title of a mere

R. 382; *Chambers vs Adair* (1901), 110 Ky. 942, 62 S. W. 1128, 23 Ky. Law R. 373; *State vs Brooks* (1887), 39 La. Ann. 817, 2 So. 498; *State vs O'Grady* (1879), 31 La. Ann. 378; *Fowler vs Bebee* (1812), 9 Mass. 231, 6 Am. Dec. 62; *Carleton vs People* (1862), 10 Mich. 250; *Carland vs Custer* (1885), 5 Mont. 579, 6 P. 24; *Northumberland vs Cobleigh* (1879), 59 N. H. 250; *Baker vs Shephard* (1851), 24 N. H. 208; *State vs Butman* (1861), 42 N. H. 490; *Mitchell vs Tolan* (1868), 33 N. J. L. 195; *Sawyer vs Dooley* (1893), 21 Nev. 390, 32 P. 437; *People vs Bartlett* (1831), 6 Wend. (N. Y.) 422; *Buffalo vs Mackay* (1878), 15 Hun (N. Y.) 204; *New York vs Tucker* (1863), 1 Daly (N. Y.) 107; *Culver vs Eggers* (1869), 63 N. C. 630; *Cleveland vs McCauna* (1898), 7 N. D. 455, 75 N. W. 908, 66 Am. St. R. 670, 41 L.R.A. 852; *Morford vs Terri-*

tory (1901), 10 Okla. 741, 63 P. 958, 54 L.R.A. 513; *McKim vs Somers* (1830), 1 Pen. & W. (Pa.) 297; *State vs Coleman* (1899), 54 S. C. 282, 32 S. E. 406; *State vs Hart* (1901), 106 Tenn. 269, 61 S. W. 780; *Aulanier vs The Governor* (1846), 1 Tex. 653; *Vanderberg vs Connolly* (1898), 18 Utah, 112, 54 P. 1097; *McGregor vs Balch* (1842), 14 Vt. 428, 39 Am. Dec. 231; *State vs Fountain* (1896), 14 Wash. 236, 44 P. 270; *Old Dominion Building & Loan Assoc'n vs Sohn* (1903), 54 W. Va. 101, 46 S. E. 222; *Deuster vs Zillmer* (1903), 119 Wis. 402, 97 N. W. 31. As to collateral attacks on judges' title, see ss. 406, 407, 408, 409, and 410.

³*Creighton vs Piper* (1860), 14 Ind. 182; *People vs Schiellain* (1884), 95 N. Y. 124; *Taylor vs Nichols* (1856), 29 Vt. 104; *State vs Fahey* (Md., 1908), 70 A. 218.

usurper. Therefore, in every case, incidentally involving official title, the courts will pursue their investigation far enough to discover whether the supposed officer has any color of right or not,⁴ "because every person assuming to exercise the authority of an officer, does not thereby necessarily make himself an officer de facto."⁵ Where there is a plain usurpation of office without any show of title, the acts of the intruder will undoubtedly be void, both in relation to individuals and the public, and their invalidity may be established by showing that they were performed by a person having no official character entitled to legal recognition.⁶ It is upon this principle that courts will inquire into the existence of the office, for, as we have seen, there cannot be an officer de facto without a legal office.⁷

It should also be remembered, as fully explained elsewhere,⁸ that where an officer de facto claims personal benefits and sues in his own right to secure the same, or attempts to justify as a public officer, he puts his title directly at issue and the same may be collaterally inquired into.⁹

⁴United States vs Alexander (1891), 46 Fed. R. 728.

⁵In re Boyle (1859), 9 Wis. 264.

⁶People vs White (1840), 24 Wend. (N. Y.) 520; Ex p. Strahl (1864), 16 Iowa, 369; Ex p. Lewis (1903), 45 Tex. Crim. R. 1, 73 S. W. 811, 107 Am. St. R. 970.

⁷State vs Shuford (1901), 128 N. C. 588, 38 S. E. 808; In re Norton (1902), 64 Kan. 842, 68 P. 639, 91 Am. St. R. 255; Miner vs Justices Court (1898), 121 Cal. 264, 53 P. 795. See cases cited under sec. 29.

⁸See sec. 203 et seq., and sec. 266 et seq.

De Facto—38.

⁹Phelon vs Granville (1886), 140 Mass. 386, 5 N. E. 269; People vs Weber (1877), 86 Ill. 283; Riddle vs Bedford County (1821), 7 S. & R. (Pa.) 386; Meehan vs Chosen Freeholders (1844), 46 N. J. L. 276, 50 Am. Rep. 421; Shepherd vs Staten (1871), 5 Heisk. (Tenn.) 79; Stubbs vs Lee (1874), 64 Me. 195, 18 Am. R. 251; Rodman vs Harcourt (1843), 43 Ky. (4 B. Mon.) 224. But see Reynolds vs McWilliams (1873), 49 Ala. 552.

§ 431. Title to office cannot be tried in proceedings to recover official records.— In accordance with the foregoing principles, the title to a public office cannot be tried in actions or proceedings, instituted to obtain the possession of books and papers appertaining to the office, the question of title being there only collaterally involved. Therefore, no recovery can be had where there is a reasonable doubt as to who is entitled to the office, inasmuch as such doubt must first be settled by recourse to quo warranto or other proper proceeding. Thus, the right of a claimant cannot be adjudicated upon in an action of replevin to recover from the de facto incumbent the records of the office.¹⁰ Nor can a claimant's title be determined in summary proceedings provided by statute to compel delivery of official records,¹¹ nor by mandamus brought for the same purpose.¹² But the Court can look beyond the actual possession of the office, and investigate the claimant's title to the extent of ascertaining whether he has a clear *prima facie* case, and if it finds this affirmatively, he will be entitled to succeed; as, for example, where the claimant holds the certificate of election or a commission, or otherwise produces satisfactory evidence of title.¹³

¹⁰Desmond vs McCarthy (1864), 17 Iowa, 525; Hallgren vs Campbell (1890), 82 Mich. 255, 46 N. W. 381, 21 Am. St. R. 557, 9 L.R.A. 408.

¹¹In re Baker (1855), 11 How. Pr. (N. Y.) 418; People vs Stevens (1843), 5 Hill (N. Y.) 616; In re Bradley (1894), 141 N. Y. 527, 36 N. E. 598, 57 Am. St. R. 816; Ex p. Scott (1872), 47 Ala. 609.

¹²Ashwell vs Bullock (1900), 122 Mich. 620, 81 N. W. 577; People vs Head (1861), 25 Ill. 325; Ewing vs Turner (1894), 2 Okla. 94, 35 P. 951; State vs Williams (1879),

25 Minn. 340; R. vs Dubord (1885), 3 Man. 15.

¹³In re Lacroix (1836), 4 U. C. Q. B. (O. S.) 339; In re Asphodel Tp. (1859), 17 U. C. Q. B. 593; In re Bradley (1894), 141 N. Y. 527, 36 N. E. 598, 57 St. Rep. 816; Matter of Brearton (1904), 44 Misc. (N. Y.) 247, 89 N. Y. S. 893; In re Whiting (1848), 2 Barb. (N. Y.) 513, 1 Edm. 498; Chambers vs Stringer (1878), 62 Ala. 596; People vs Scannell (1857), 7 Cal. 432; People vs Kilduff (1854), 15 Ill. 492, 60 Am. Dec. 769; State vs Johnson (1895), 35 Fla. 2, 16

Again, it has been held, that where two persons claim an office, as to which *quo warranto* does not lie, the title to it may be tried by *mandamus* to give papers relating to it.¹⁴ So it has been held that, though a person may be ineligible to an office, yet if he is appointed or elected thereto, duly qualifies, and takes charge thereof, he may, by *mandamus*, recover the official books and papers from one, who admittedly has not even color of title to such office.¹⁵

§ 432. In United States title cannot be tried in actions for recovery of salary.—The preponderance of authority in the United States maintains the principle that the title to an office cannot be determined in an action to recover the salary, fees or emoluments attached thereto. Thus, the right to an office occupied by one claiming title to it, under a certificate of election, cannot be determined in a suit instituted by an adverse claimant for the salary of the position.¹⁶ So the title of a claimant of a municipal office cannot be adjudicated in an action to recover salary for a period during which he is not in possession; that question can only be considered in a direct proceeding, in which the people and the incumbent of the office are parties.^{16a}

So. 786, 17 So. 650, 31 L.R.A. 357; *Burr vs Norton* (1856), 25 Conn. 103; *O'Donnel vs Dushman* (1877), 39 N. J. L. 677; *Kimball vs Lamprey* (1848), 19 N. H. 215; *Stone vs Small* (1882), 54 Vt. 498; *Crowell vs Lambert* (1865), 10 Minn. 369; *State vs Jaynes* (1886), 19 Neb. 161; *Mannix vs State* (1888), 115 Ind. 245, 17 N. E. 565; *Huffman vs Mills* (1888), 39 Kan. 577, 18 P. 516; *State vs Oates* (1893), 86 Wis. 634, 57 N. W. 296, 39 Am. St. R. 912.

¹⁴*R. vs Hopkins* (1841), 1 Q. B. 161, 4 P. & D. 550, 10 L. J. Q. B. 63.

¹⁵*R. vs Smith* (1848), 4 U. C. Q. B. 322; *McGee vs State* (1885), 103 Ind. 444, 3 N. E. 139. See right of officers *de facto* to records of office, sec. 208.

¹⁶*State vs Moores* (1904), 71 Neb. 522, 99 N. W. 504.

^{16a}*Lee vs Wilmington* (1895), 1 Marv. (Del.) 65, 40 A. 663. Also *Van Sant vs Atlantic City* (1902), 68 N. J. L. 449, 53 A. 701; *Selby*

There are, however, a few conflicting cases. Thus, it has been held that where the claimant of an office has been wrongfully ousted therefrom, after having been in the possession of it, he may bring an action for the recovery of fees against the actual incumbent, though this may involve determination of title.¹⁷ And other cases still go further, and hold that title can be tried in such action, even where the claimant has never been in possession.¹⁸

§ 433. **Different rule in England.**—In England, it is a well settled rule, that “any person may dispute the right to the office by refusing to pay the fees, or by bringing an action against the officer if he takes them.”¹⁹ “So long back as the time of Charles the Second,” says Heath, J., “it was held that the title to an office, under an adverse possession, might be tried in an action for the fees of the office had and received.”²⁰ Undoubtedly the learned Judge had in mind the case of *Howard vs Wood*,²¹ which appears to be the oldest reported case upon this subject. There the Queen having granted to the plaintiff a stewardship wherein were comprised several Courts-Lord and Courts-Baron, the defendant at the end of the first term, by a subsequent grant from the Crown,

vs Portland (1886), 14 Ore. 243, 12 P. 377, 58 Am. Rep. 307; Dickerson vs Butler (1887), 27 Mo. App. 9; Hunter vs Chandler (1870), 45 Mo. 452; Meredith vs Sacramento County (1875), 50 Cal. 433; Gorley vs Louisville (1900), 108 Ky. 789, 55 S. W. 886; Hagan vs Brooklyn (1891), 126 N. Y. 643, 27 N. E. 265, affirming (1889), 5 N. Y. S. 425; People vs Lane (1873), 55 N. Y. 217; Walden vs Headland (Ala. 1908), 47 So. 79.

¹⁷Allen vs McKean (1833), 1 Fed. Cas. (No. 229) 489, 1 Sumn. 276; Glascock vs Lyons (1863), 20 Ind. 1, 83 Am. Dec. 299.

¹⁸Wenner vs Smith (1886), 4 Utah, 238, 9 P. 293; Taylor vs Commonwealth (1830), 26 Ky. (3 J. J. Marsh.) 401.

¹⁹Per Lord Denman, C. J.—*R. vs Stoke Damerel* (1836), 5 A. & E. 584.

²⁰*Lightly vs Clonston* (1808), 1 Taunt. 112.

²¹(1679), 2 Lev. 245.

held court and received money, for which the plaintiff brought assumpsit to recover the fees. Objection was made to the form of the action, but the same was overruled, and the Court pronounced upon the rights of the parties to the office. The same principle has been recognized in several subsequent cases.²²

§ 434. De facto officer's title cannot be inquired into by ministerial officers.— A ministerial officer has no right or jurisdiction to determine whether a person holding an office under color of right, is or is not a legal officer. Thus, where a minor, who had been appointed commissioner of deeds, presented himself before the clerk of the common pleas of New York to take the oath of office and the clerk refused to administer the same, it was held that though a minor is incapable of holding a public office, yet it is not the province of the clerk to decide that point, and a mandamus was allowed to compel the administering to him of the official oath.²³ So where a town clerk had refused to record the survey of a road on the ground of lack of qualifications of the commissioners who had made such survey, Chancellor Kent pertinently observed, that "it certainly did not lie with the defendant, as a mere ministerial officer, to adjudge the acts of the commissioners null."²⁴

Again, it was held that the question of a person's right to the office of clerk of a circuit court, and to the compensation belonging thereto, could not be inquired into by the comp-

²²Per Lord Ellenborough, C. J., in *R. vs Bingham* (1802), 2 East, 308; *Arris vs Stukely* (1678), 2 Mod. 260; *Green vs Hewett* (1793), 1 Peake's Cas. 182; *Bowell vs Millbank* (1772), 1 Term. (D. & E.) 399, note; *Sadler vs Evans* (1766), 4 Burr. 1984; *Boyter vs*

Dodsworth (1796), 6 Term. (D. & E.) 681; *In re Hammond & McLay* (1864), 24 U. C. Q. B. 56.

²³*People vs Dean* (1830), 3 Wend. (N. Y.) 438.

²⁴*People vs Collins* (1811), 7 Johns. (N. Y.) 549.

troller of the treasury when the clerk's accounts came before him for audit.²⁵ The Court said: "It would be strange, indeed, if his right could be determined, as upon a quo warranto, on the auditing of his account in the treasury department." ²⁶

Likewise; where payment of a draft by a school trustee on the supervisor of a town, was refused by the latter by reason of a doubt as to the competency of the former to make it, but it appeared that the drawer was at least such trustee de facto, it was held that the supervisor had no authority to question the drawer's title as trustee, and was not entitled, in an action on the draft, to the certificate that he had acted in good faith required by Code Civil Proc. N. Y. sec. 3244, to relieve him from costs of the action.²⁷

§ 435. Title to office cannot be determined on habeas corpus.—The title of a de facto incumbent cannot be inquired into on habeas corpus, in order to invalidate his acts, whether judicial or otherwise. "It may sometimes," says a New York judge, "with propriety be used as a writ of error, but I am yet to learn that it can ever properly be converted into a quo warranto."²⁸ Accordingly, upon such a proceeding, it will not be investigated whether the Judge who presided in the Court below, was duly appointed or elected, or had properly qualified.²⁹ "To permit," to quote

²⁵United States vs Harsha (1893), 56 Fed. R. 953.

²⁶Also Reynolds vs McWilliams (1873), 49 Ala. 552; State vs Draper (1871), 48 Mo. 213.

²⁷Barrett vs Sayer (1890), 34 N. Y. St. R. 325, 12 N. Y. S. 170, affirmed 58 Hun 608. Also Miahle vs Fournet (1858), 13 La. Ann. 607; Delgado vs Chavez or In re Delgado (1891), 140 U. S. 586,

11 Sup. Ct. R. 874, 35 L. ed. 578. See also Pritchard vs Mayor of Bangor (1888), 13 App. Cas. 241, 57 L. J. Q. B. 313, 58 L. T. 502, 37 W. R. 103, 52 J. P. 564; R. vs Rice (1697), 5 Mod. 325.

²⁸Edmonds, J.—In re Wakker (1848), 3 Barb. (N. Y.) 162.

²⁹Ex. p. Ward (1898), 173 U. S. 452, 19 Sup. Ct. 459, 43 L. ed. 765; Griffin's Case (1869), 11 Fed.

the language of one of the Courts, "one convicted of an offence to question on habeas corpus the right of the judge before whom he was tried to hold his office would result in intolerable confusion, and, in some instances, no doubt in the defeat of justice."³⁰ Likewise, the title of the officer who issues the process upon which a prisoner is arrested, cannot be inquired into.³¹

So, upon habeas corpus proceedings resulting from the imprisonment of a person for default in delivering up the books and papers of an office, pursuant to an order made under statutory authority, the Court will not investigate the title further than to ascertain whether the prisoner was a bona fide holder of the office or a mere intruder, as against the applicant at whose instance the order was made. If it finds that the prisoner had no excuse for not complying with the order because there was no bona fide question of title at issue,

Cas. (No. 5,815) 7; Daniels vs Towers (1887), 79 Ga. 785, 7 S. E. 120; People vs White (1840), 24 Wend. (N. Y.) 520, reversing 22 Wend. 167; Patterson vs State (1887), 49 N. J. L. 326, 8 A. 305; State vs Bloom (1863), 17 Wis. 521; Ex p. Boyle (1859), 9 Wis. 264; In re Corrigan (1877), 37 Mich. 66; In re Burke (1890), 76 Wis. 357, 45 N. W. 24; Sheehan's Case (1877), 122 Mass. 445, 23 Am. Rep. 374; Ex p. Call (1877), 2 Tex. App. (Crim. Cas.) 497; Ex p. Tracey (Tex. 1905), 93 S. W. 538; Crawford vs Lawrence (1900), 154 Ind. 288, 56 N. E. 673; Ex p. Fedderwitz (1900), 130 Cal. XVIII, 62 P. 935; Smith vs Sullivan (1903), 33 Wash. 30, 73 P. 793; Com. vs Lecky (1832), 1 Watts (Pa.) 66, 26 Am. Dec.

37; Clark vs Commonwealth (1858), 29 Pa. St. (5 Casey) 129; Ex p. Johnson (1884), 15 Neb. 512, 19 N. W. 594; Ex p. Strang (1871), 21 Ohio St. 610; Ex p. Curry (1898), 1 Can. Crim. Cas. 532; State vs Bailey (Minn. 1908), 118 N. W. 676. But see Ex p. Mainville (1898), 1 Can. Crim. Cas. 528.

³⁰Smith vs Sullivan (1903), 33 Wash. 30, 73 P. 793. See further as to collateral attack on judges' title, secs. 406, et seq.

³¹Ex p. Strahl (1864), 16 Iowa, 369; State vs Pertsdorf (1881), 33 La. Ann. 1411; In re Wakker (1848), 3 Barb. (N. Y.) 162; Margate Pier Co. vs Hannam (1819), 3 B. & Ald. 266, 22 R. R. 378; but compare R. vs Boyle (1868), 4 Ont. Pr. R. 256.

it will not interfere;³² but if it concludes otherwise, the prisoner will be discharged, as in such case the order should not have been made before the determination of the title by quo warranto.³³ Again, it has been held that the validity of the appointment of the de facto members of a board of medical examiners, cannot be drawn into question upon habeas corpus, by one who is in custody charged with practising medicine without the certificate provided for by statute.³⁴

But where a pretended officer is acting by virtue of a commission absolutely void, it is not necessary to resort to quo warranto to have his title tested, but the same may be impeached collaterally on habeas corpus.³⁵

§ 436. Title to office not generally determinable on certiorari—English and Canadian authorities.—The writ of certiorari originally was intended to bring into a Superior Court the record of an inferior Court of record; but its application has been extended to matters which might not come within the strict terms of such a definition, and it has been used to superintend the proceedings of persons entrusted with the exercise of a judicial power or discretion, though not in a regularly constituted court of record.³⁶ But the writ will not issue where the acts complained of are not in some sense judicial in character.³⁷ Therefore, in every case where an attempt is made to have a question of title to office tested by removal of the proceedings of purely ministerial officers, certiorari will be refused. Thus, where it was sought to have the legality of the appointment of a clerk

³²In re Baker (1855), 11 How. Pr. (N. Y.) 418.

³³Devlin's Case (1857), 5 Abb. Pr. (N. Y.) 281.

³⁴Ex p. Gerino (1904), 143 Cal. 412, 77 P. 166.

³⁵Ex p. Lewis (1903), 45 Tex. Crim. R. 1, 73 S. W. 811, 107 Am. St. R. 970.

³⁶Ex p. Jocelyn (1853), 2 Allen (N. B.) 637.

³⁷R. vs Lloyd (1783), Cald. 309.

by justices tested by certiorari, Lord Alverstone, C. J., said: "I am of opinion that an order of justices as to the appointment of clerk to a petty sessional division is not the subject of a certiorari. It is not a judicial act. It is true, of course, that they exercise a discretion in such matters, but there is no decision which goes to the length of saying that all discretionary acts are therefore judicial acts and can be removed into this Court by writ of certiorari in order to be quashed." ³⁸

So in a Nova Scotia case, the Commissioners of Schools for Pictou County, on an application made to them for the purpose, appointed school trustees No. 16, South District, on the ground that the original trustees had failed to act. The trustees last appointed having issued a warrant for the collection of rates, the original trustees, caused a writ of certiorari to be issued, bringing the matter into the Supreme Court of Nova Scotia. Thereupon the new trustees took out a rule to set the certiorari aside and quash the assessment. The rule was made absolute, the Court saying: "It is a fatal objection that it is not addressed to parties having any judicial functions to perform. It is addressed to certain individuals by name in their private capacity, and, so far from recognizing them as a corporation, or indeed as school trustees at all, it is distinctly stated that they are not such. It would seem that the object of the proceeding was to try the question between the contending bodies of trustees as to their respective rights. This is not the mode of having that question settled. If the parties who are attempting to enforce this rate are not trustees their proceedings are wholly void, and they must fail in their attempt, or their right to act may be called in question by a writ of quo warranto." ³⁹ So in an-

³⁸R. vs Drummond (1903), 67 J. P. 300, 88 L. T. 833, 1 L. G. R. 567.

³⁹In re Assessment of Cameron (1881), 14 Nov. Scot. (2 R. & G.) 177.

other case, it was held that the acts of the Senate of the University of New Brunswick in dismissing one of the professors, not being judicial acts, the same could not be reviewed on certiorari by the Supreme Court.⁴⁰

§ 437. **Same subject—Same subject.**—Another general rule is that certiorari will not lie to settle a disputed question of title to office where there is another adequate mode of redress, such as a right of appeal, a remedy by quo warranto, or the like. Thus, in *R. vs Somersetshire, J. J.*,⁴¹ it was held that a certiorari will not be granted to remove the order for the appointment of overseers for the purpose of having it quashed, on the suggestion that the justices made the appointment from corrupt and improper motives. The Court said: "The mere impropriety of the appointment is not a ground for removing it into this Court by certiorari, in order that it may be quashed. In point of regularity the Sessions is the tribunal for setting the matter right, and quashing the appointment, if it is improperly made." Upon the same ground, the Court refused a certiorari where the objection to the appointment of an overseer was that he was ineligible, not being a house-holder.⁴² But in a New Brunswick case, where it was alleged that a person had been illegally removed from a municipal office and another one appointed in his stead, a certiorari was granted to bring up the proceedings for the purpose of quashing them, as well as a quo warranto to try the right of the appointment.⁴³

On the other hand, certiorari is generally available when there is no other remedy, or the inferior tribunal or body

⁴⁰Ex p. Jacob (1861), 10 N. B. 153. See also *In re Constables of Hipperholme* (1847), 5 D. & L. 79.
2 B. C. Rep. 98, 11 Jur. 713.

⁴¹(1822), 1 D. & R. 443.

⁴²*In re Pudding Norton, Norfolk Overseers* (1864), 33 L. J. M. C. 136, 10 L. T. 386, 12 W. R. 762.

⁴³Ex p. Gallagher (1886), 26 N. B. 73.

acted without jurisdiction *in the particular case*. Thus, in an old report we find the following language: "It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction who proceed in a summary way, in such case he is entitled to a certiorari *ex debito justitiæ*, because he has no other remedy, being bound by the judgment of the inferior judicature." ⁴⁴

Accordingly, where a certiorari was applied for to remove the appointment of two paid constables by justices at a special sessions, together with the resolution of vestry on which it had been founded, or the copy thereof transmitted to the justices, under 5 and 6 Vict., c. 109, ss. 18 and 19, on the ground that the proceedings in vestry were not regularly conducted, it was held that, though such an instrument as the resolution of vestry was not properly removable, not being the proceeding of a body acting judicially, yet the appointment itself of the justices might be brought up by certiorari, and that upon such removal it would be competent to the parties to show upon affidavit, that the irregularity in the proceedings of the vestry was of such a nature as to take away the jurisdiction of the justices.⁴⁵ Likewise, where an order of removal is apparently defective on the face of it, as not showing jurisdiction on the part of the justices making it, the parish on whom the order is made need not appeal to the Quarter Sessions, but may in the first instance apply to the Court for a certiorari.⁴⁶

⁴⁴Arthur vs Com'rs of Sewers (1724), 8 Mod. 331; above language quoted in R. vs Surrey J. J. (1870), L. R. 5 Q. B. 466, 39 L. J. M. C. 145. See also Vin. Abr. Certiorari (D. 29).

⁴⁵In re Constables of Hipper-

holme (1847), 5 D. & L. 79, 2 B. C. Rep. 98, 11 Jur. 713.

⁴⁶R. vs Gloucestershire (1846), 10 Jur. 96, 15 L. J. M. C. 48, 3 D. & L. 542. See also R. vs Standard Hill (1815), 4 M. & S. 378, 16 R. R. 490; R. vs Great Marlow (1802),

It may be noted, however, that in none of the English or Canadian cases did the question come before the Court, whether on certiorari the acts of a de facto officer could be impugned by showing his title to be defective. Nevertheless, it is submitted that this could hardly be permitted,⁴⁷ though in a Canadian case the Court seemingly would have been willing to give effect to an objection to the qualification of one, who was at least a de facto justice of the peace, with a view to quashing a conviction made by him, had the evidence been sufficient to sustain the objection.⁴⁸

§ 438. **Same subject — American authorities.** — Although the common law writ of certiorari has been greatly modified in most of the American jurisdictions, yet wherever this form of remedy has been substantially retained, the general rule is, as in England, that it will not be granted to test the legality of an appointment or a removal from office, which does not partake of a judicial character.⁴⁹

Likewise, it will generally be denied where there is another adequate remedy. It is upon this principle that it is laid down, in unmistakable terms, that the title of a de facto incumbent is not triable on certiorari, but only by quo warranto. "It is settled by repeated decisions," says one Court, "that certiorari is not the proper remedy for contesting the legality of an incumbent's title to a public office, and that, where the appointee has entered upon the office, the only

2 East 244, 6 R. R. 420; *Ex p. Thompson* (1876), 2 Que. Law R. 115.

⁴⁷See remarks of Tindal, C. J., in *Penny vs Slade* (1839), 5 Bing. N. C. 319, 7 Scott, 484.

⁴⁸*R. vs White* (1871), 21 U. C. C. P. 354.

⁴⁹*State vs Harrison* (1898), 141

Mo. 12, 41 S. W. 971, 43 S. W. 867; *Lorbeer vs Hutchinson* (1896), 111 Cal. 272, 43 P. 896; *People vs Brady* (1901), 166 N. Y. 44, 59 N. E. 701, reversing 53 N. Y. App. Div. 279, 65 N. Y. S. 844; *Atty. General vs Mayor* (1887), 143 Mass. 589, 10 N. E. 450; *Donahue vs Will County* (1881), 100 Ill. 94.

method by which to test his right to continue to occupy it is by an information against him in the nature of a quo warranto.”⁵⁰ This language was used in a case where certiorari was sued out for the purpose of reviewing the action of a common council in electing a treasurer. It is declared in another case, that the review by certiorari of the proceedings of an election or appointment to a public office, can determine nothing which would be of any efficacy as a bar, or have any other effect, in a subsequent information in the nature of a quo warranto, nor could the question arising upon such review, although judicially determined, be regarded as *res judicata* in the subsequent information.⁵¹ And it has also been held in New Jersey, that certiorari is not an appropriate remedy, even though the appointee is not de facto in office so as to be liable to quo warranto proceedings.⁵²

Again, the Courts will refuse on certiorari to entertain any question affecting the title of the Judge below, where it appears that he had sufficient color of title to constitute him at least an officer de facto.⁵³ Thus, it was held that the writ of

⁵⁰Miller vs Washington (1901), 67 N. J. L. 167, 50 A. 341.

⁵¹Roberson vs Bayonne (1896), 58 N. J. L. 326, 33 A. 734. Also Haines v. Freeholders of Camden (1885), 47 N. J. L. 454; Loper vs Millville (1891), 53 N. J. L. 362, 21 A. 568; Roberts vs Shafer (1899), 63 N. J. L. 182, 42 A. 770; Bilderback vs Freeholders of Salem (1899), 63 N. J. L. 55, 42 A. 843; Van Reyphen vs Jersey City (1886), 48 N. J. L. 428; Bumsted vs Blair (1906), 73 N. J. L. 378, 64 A. 691; Britton vs Steber (1876), 62 Mo. 370; Donough vs Dewey (1890), 82 Mich. 309, s. c.

sub nom. Donough vs Hollister, 46 N. W. 782; State vs Ansel (1907), 76 S. C. 395, 57 S. E. 185; State vs Van Brocklin (1894), 8 Wash. 557, 36 P. 495; United States vs Mills (1898), 11 App. Cas. (D. C.) 500; State vs Skagit County Superior Court (1906), 42 Wash. 491, 85 P. 264; Daniels vs Newbold (1904), 125 Iowa, 193, 100 N. W. 1119; Beaumont vs Samson (1907), 5 Cal. App. 491, 90 P. 839; Hull vs Superior Ct. (1883), 63 Cal. 174.

⁵²Simon vs Hoboken (1890), 52 N. J. L. 367, 19 A. 259.

⁵³Coyle vs Sberwood (1874), 1 Hun (N. Y.) 272, 4 Thomp. & C.

certiorari could not be used in a controversy between litigants before a de facto justice of the peace, to try the question of the validity of his appointment,—justice and fair dealing requiring that to be done, if at all, in a proceeding instituted directly for the purpose, wherein the justice might have an opportunity to defend himself and his claim of right.⁵⁴ So the contention that the Judge of the lower Court does not possess the qualification of citizenship, cannot be considered on an application for a certiorari to review the sentence or judgment of such Judge.⁵⁵

§ 439. **Same subject—Same subject.**—But it is held that collateral questions involving title to office, may be inquired into and reviewed upon a certiorari presented by a person in possession of, and presumably entitled to, an office, where the object of the proceeding is to test the validity of ordinances or resolutions affecting adversely his right to the office, and which might be used to disturb him in the possession and enjoyment thereof. Thus, where a person elected chief engineer of a fire department, presumably for three years, gave bond and entered upon the duties of his office, but one year afterwards the city council, claiming the right to then elect his successor, elected another person to the same position, it was held that certiorari was the appropriate remedy to review the council's action. The Court observed, that the object of prosecuting a quo warranto is to have one in possession declared guilty of usurpation, whereas in the case under its consideration the relator sued for no such end,

234; *People vs Sherwood* (1874), 4 *Thomp. & C.* (N. Y.) 34; *McInstry vs Tanner* (1812), 9 *John.* (N. Y.) 135; *People vs Gobles* (1887), 67 *Mich.* 475, 35 *N. W.* 91; *Byer vs Harris* (N. J. 1909) 72 *A.* 136.

⁵⁴*Anderson vs Morton* (1903), 21 *App. Cas.* (D. C.) 444.

⁵⁵*State vs Recorder* (1896), 48 *La. Ann.* 1375, 20 *So.* 908. See also collateral attack on title of de facto judges, sec. 406, et seq.

his only purpose being to remove from his way a proceeding which he apprehended might be used unlawfully to eject him.⁵⁶ A like decision, and upon the same grounds, was given where a board of aldermen unlawfully passed a resolution removing one of their members from office; their proceedings were held reviewable on certiorari.⁵⁷

But where the application to have the resolutions of a corporation or a body of persons reviewed upon certiorari is only a device to have the legality of an election or appointment to office tested by the Court, and not merely to prevent the unlawful disturbance of a person *de facto* in office, the writ will be refused. Thus, where the board of chosen freeholders of a county elected a county physician, and a writ of certiorari was sued out by a prosecutor apparently claiming no interest in the office, for the purpose of having the proceedings of the board reviewed, the writ was dismissed upon the ground, that the purpose of the proceeding was obviously to obtain a determination of the title of the incumbent, which could be done only by *quo warranto*.⁵⁸

§ 439a. **Same subject — Same subject.** — However, where a judicial or quasi-judicial body acts without, or in excess of its, jurisdiction in making an appointment, or removing a person from office, its action may generally be reviewed by certiorari, because, as already intimated, it is the office of the writ to keep inferior tribunals within the bounds of their jurisdiction. And even where there are no jurisdictional questions, in most of the States certiorari will lie

⁵⁶Haines vs Freeholders of Camden (1885), 47 N. J. L. 454.

⁵⁷Board of Aldermen vs Darrow (1889), 13 Col. 460, 22 P. 784. Also Markley vs Cape May Point (1892), 55 N. J. L. 104, 25 A. 259;

Fitzgerald vs New Brunswick (1885), 47 N. J. L. 479; Loper vs Millville (1891), 53 N. J. L. 362, 21 A. 568.

⁵⁸Stites vs Cumberland (1896), 58 N. J. L. 340, 33 A. 737.

to correct illegalities or irregularities in proceedings of the inferior tribunal, where no appeal is allowed or other method is provided by law for reviewing the same, or the remedy provided is inadequate in the circumstances; especially is this so where the tribunal is of statutory creation and authorized to proceed summarily, or in a course not according to the common law. Again, in others the statutory certiorari operates as an appeal from the judgment of the inferior tribunal, and upon such writ a new trial may be had in the Superior Court. Examples of the application of these principles are found in a number of cases, where the Courts have, by certiorari, reviewed proceedings affecting title to office, though sometimes it is difficult to grasp exactly on which of the above grounds the Court proceeded.

Following some such principles, it has been held that the proceedings of civil service commissioners removing a police patrolman from office are properly quashed on certiorari, where the record filed as a return to the writ fails to show that the patrolman was notified, or waived notice of the time and place of hearing by the police board, since without such notice or waiver the police board is without jurisdiction to act and the commission powerless to approve its action.⁵⁹ So where the removal of an officer by a board, vested with power to remove him upon written charges preferred, is in excess of jurisdiction because made without notice to him, his remedy, where no appeal or writ of error is provided, is by certiorari.⁶⁰

Again, it was held that the proceedings of a board of metropolitan police, in removing a policeman, were reviewable by

⁵⁹Powell vs Bullis (1906), 221 Ill. 379, 77 N. E. 575. Also Chicago vs Bullis (1905), 124 Ill. App.

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⁶⁰State vs Knott (1907), 207 Mo. 167, 105 S. W. 1040.

certiorari, the Court declaring that in such proceeding it had power to go beyond the inquiry, whether the inferior tribunal had jurisdiction, and examine the case upon the whole evidence, to ascertain whether any error had been committed in the proceedings before the inferior tribunal.⁶¹

So, an order of removal from office of a stenographer by the Judge of the Court, under the provisions of a statute authorizing such removal "for incompetency or any misconduct in office," may apparently be reviewed by certiorari on the ground that the Judge is empowered to proceed summarily, and not in the course of the common law, and there is no appeal provided by statute.⁶² Likewise, where judicial powers are conferred upon a city council to hear and determine contested elections of city officers, under rules to be adopted by it, and no provision is made for an appeal from its judgment, a candidate who has unsuccessfully contested an election before the council, is entitled to a trial *de novo* in a Court of competent jurisdiction upon suing out therein a writ of certiorari.⁶³

Again it has been held, that where a remedy by appeal

⁶¹People vs Board of Police (1872), 43 How. Pr. (N. Y.) 385. See also People vs Board of Police (1858), 26 Barb. (N. Y.) 481; People vs Mayor (1879), 19 Hun (N. Y.) 441; People vs Cooper (1880), 21 Hun (N. Y.) 517; People vs Hoffman (1901), 166 N. Y. 462, 60 N. E. 187, 54 L.R.A. 597; Macon vs Shaw (1854), 16 Ga. 172. And see further State vs Common Council (1893), 53 Minn. 238, 55 N. W. 118.

⁶²State vs Slover (1892), 113 Mo. 202, 20 S. W. 788. See also Browne vs Gear (1899), 21 Wash. 147, 57 P. 359.

De Facto—39.

⁶³Staples vs Brown (1905), 113 Tenn. 639, 85 S. W. 254. In Tennessee, however, the writ of certiorari is in the nature of an appeal. As to further cases upon the use of certiorari to review contested election cases, see Dodd vs Weaver (1855), 2 Sneed. (Tenn.) 670; Dryden vs Swinbourne (1882), 20 W. Va. 89; Fowler vs Thompson (1883), 22 W. Va. 106; Cushwa vs Lamar (1898), 45 W. Va. 326, 32 S. E. 10; Chase vs Miller (1862), 41 Pa. St. 403; In re Krickbaum's Contested Election (Pa., 1908), 70 A. 852.

would be of no avail to one ousted from office by a judgment of the Superior Court, by reason of the fact that his right to the office would terminate before a hearing would be had on appeal, the Supreme Court has jurisdiction by writ of review to examine and correct the action of the lower Court.⁶⁴

§ 440. Title to office not triable by prohibition.—Prohibition will not lie to prevent the usurpation of an office, or to test the title of a de facto officer to an office. “We have,” says a learned Judge, “met with no case, ancient or modern, where the Court of King’s Bench has issued the writ, pending a dispute between competitors for a public office, to prohibit those, who were de facto in possession of the office, from exercising the functions thereof.”⁶⁵ Thus, where two sets of men attempted to act as a board of education, each claiming to be the lawful board, it was held that prohibition would not lie at the instance of one set of claimants to oust the others who were de facto in office, the ground taken being that the writ of prohibition is never proper to try title to office and oust de facto officers, and replace them by others claiming to be de jure officers.⁶⁶ So where a person complained of being ousted of the office of police Judge by one who, he alleged, wrongfully assumed to discharge the duties of the office, his application for a writ of prohibition was refused.⁶⁷ So it was held that a writ of prohibition will not lie to prevent a person who claims to have been elected to an office from taking the same and assuming and exercising its power and duties, on the ground of ineligibility or invalid election.⁶⁸

⁶⁴State vs Tallman (1901), 24 Wash. 426, 64 P. 759.

⁶⁵Gaston, J., State vs Allen (1841), 2 Ired. L. (N. C.) 183.

⁶⁶Board of Education vs Holt

(1903), 54 W. Va. 167, 46 S. E. 134.

⁶⁷Buckner vs Veuve (1883), 63 Cal. 304, 3 P. 862.

⁶⁸Moore vs Holt (1904), 55 W

Likewise, prohibition will not issue to restrain the acts of de facto Judges or other judicial officers, on the ground of defects in their title. Thus, where a city charter provided for three justices of the peace, and an amendatory Act provided for only one justice, it was held that a justice elected under the latter statute, even though it were unconstitutional, was a de facto officer whose right to the office could not be collaterally attacked by a writ of prohibition.⁶⁹ So, the writ was denied where the constitutionality of a statute authorizing the appointment of additional district Judges by the Governor, and the authority of a person officiating as judge de facto by virtue of his appointment thereunder, were questioned.⁷⁰ A similar decision was given where the contention was, that a justice of the peace had been appointed in a way not authorized by the Constitution.⁷¹

But the above rule is applicable only in case the person whose title is assailed is an officer holding under color of title, and not a mere intruder. Hence, the writ may issue against a person or body of persons assuming to exercise the functions of a pretended Court, which has no lawful existence; for, under such circumstances, the same reasons might exist for arresting his or their action as in the case of a Court exceeding its jurisdiction.⁷²

Va. 507, 47 S. E. 251. See also *Baca vs Parker* (1906), 13 N. Mex. 466, 87 P. 465; *Kemp vs Ventulett* (1877), 58 Ga. 419; *Goodwin vs State* (1906), 145 Ala. 536, 40 So. 122; *Davenport vs Elrod* (1906), 20 S. Dak. 567, 107 N. W. 833; *Hull vs Superior Court* (1883), 63 Cal. 174; *Buckner vs Veuve* (1883), 63 Cal. 304, 3 P. 862; *State vs Laughlin* (1879), 7 Mo. App. 529.

⁶⁹*Thompson vs Couch* (1906), 144 Mich. 671, 108 N. W. 363. But as to Canada, see ante, ss. 425, 426.

⁷⁰*Walcott vs Wells* (1890), 21 Nev. 47, 24 P. 367, 37 Am. St. R. 478, 9 L.R.A. 59.

⁷¹*State vs McMartin* (1889), 42 Minn. 30, 43 N. W. 572. Also *In re Radl* (1894), 86 Wis. 645, 57 N. W. 1105; *Hogle vs Rockwell* (1898), 20 Que. R. (S. C.) 309.

⁷²*State vs Young* (1881), 29 Minn. 474, 523; *Ex p. Roundtree* (1874), 51 Ala. 42; *State vs McMartin* (1889), 42 Minn. 30, 43 N. W. 572; *Chambers vs Jennings* (1702), 2 Salk. 553.

§ 441. Title to office cannot be tried by mandamus—**English authorities.**—Although the English authorities lack precision in their exposition of the law on this subject, the rule seems now to be well established, that mandamus will not be granted to determine the title to office of a de facto officer, though it may lie to determine the title of a person not in possession. One of the leading cases in point appears to be *R. vs Mayor of Colchester*.⁷³ There one Ross moved for a mandamus to be directed to the defendant, commanding him to admit one Grimwood to the office of Recorder of Colchester. The mover acknowledged that the application was made for the purpose of trying the merits of an election, the complaint being that the Mayor had refused several legal votes given to Grimwood, and improperly admitted others given to his opponent, who was afterwards admitted and sworn into office. Upon these facts, the Court refused the application on the ground that there was a recorder de facto in possession, and the proper remedy to try his title was quo warranto. This authority has been followed in numerous other cases. And in a comparatively recent one,⁷⁴ Lord Campbell, C. J., observed that “where a man is bona fide in office, his title is not to be tried by mandamus, but by quo warranto.”⁷⁵

⁷³ (1788), 2 Term. (D. & E.) 259, 1 R. R. 480.

⁷⁴ *Frost vs Mayor of Chester* (1855), 5 El. & Bl. 531, s. c. sub. nom. *R. vs Mayor of Chester*, 25 L. J. Q. B. 61, 2 Jur. (N. S.) 114, 4 W. R. 14.

⁷⁵ See also *R. vs Mayor of Oxford* (1837), 6 Ad. & El. 349, 1 N. & P. 474, 6 L. J. K. B. 103; *R. vs Mayor of Winchester* (1837), 7 A. & E. 215, 2 N. & P. 274, W. W. & D.

525, 6 L. J. K. B. 213, 1 Jur 738; *R. vs Derby* (1837), 7 Ad. & El. 419; *R. v. Hertford College* (1878), L. R. 3 Q. B. D. 693. In *re Brennan* (1842), 6 U. C. Q. B. (O. S.) 330. *Election Board of Police vs Brockville* (1833), 3 U. C. Q. B. (O. S.) 173; *R. vs Bank of Upper Canada* (1849), 5 U. C. Q. B. 338; *R. vs Mayor of Cornwall* (1866), 25 U. C. Q. B. 293; *R. vs Burke* (1896), 29 N. S. 227.

This rule is based upon the principle, that mandamus will not lie where there is another adequate remedy.⁷⁶

But the Court will not refuse a mandamus as against a mere intruder or against one whose title is merely colorable and void, and not only illegal. This is clearly pointed out in *R. vs Bankes*,⁷⁷ where the application was for a mandamus to proceed to an election of Mayor, although there was at the time a Mayor in office. Lord Mansfield observed: "If the election were doubtful and fit to be tried upon an information in the nature of a quo warranto, the Court ought not to grant a mandamus, but if it were a mere colorable election, and clearly void, they ought."⁷⁸ And the distinction between "colorable" and "illegal" is aptly drawn by Coleridge, J., in *Frost vs Mayor of Chester*,⁷⁹ where the learned Judge says: "What is colorable? I always thought that where an authority existed, and there was a bona fide intention to execute it, the proceeding was not colorable though there might be a mistake in law."

It is evident, therefore, that where the Court grants a mandamus, on the ground that the person in office holds under a merely colorable election, it proceeds upon the principle that such election is altogether void and of no effect, and hence the object of the remedy is not, strictly speaking, to restore to office the party illegally ousted, but simply to permit him to exercise his office.^{79a}

Again, the writ will not be refused where there is no

⁷⁶*R. vs Bishop of Chester* (1786), 1 Term. D. & E. 396, 1 R. R. 237; *Elzevir S. Trustees vs Elzevir Corp.* (1862), 12 U. C. C. P. 548.

⁷⁷(1764), 3 Burr. 1452.

⁷⁸Also *R. vs Mayor of Cambridge* (1767), 4 Burr. 2008.

⁷⁹See note 74.

^{79a}*R. vs Mayor of Oxford* (1837), 6 Ad. & El. 349, 1 N. & P. 474, 6 L. J. K. B. 103. See also *Pelletier vs Village of de Lorimier* (1898), 17 Que. R. (S. C.) 509; *Gosselin vs Corp. of St. Jean* (1898), 16 Que. R. (S. C.) 449.

other mode of determining title to office;⁸⁰ or, it would appear, where the other remedy is not equally convenient, beneficial and effectual.⁸¹ On the other hand, the existence of another remedy, whatever may be its nature, is, as a rule, a sufficient ground to prevent the Courts trying questions of title by mandamus. Thus, it was held that mandamus did not lie to restore to office a chorister, who claimed to have been illegally removed, as the remedy for the wrongful amotion complained of was by application to the visitor, who had sufficient and exclusive jurisdiction.⁸²

However, notwithstanding the availability of another remedy, the Courts will sometimes grant mandamus to compel recognition, for the time being, of the *prima facie* title or de facto character of an officer, in order to secure the due performance of official duties and safeguard public interests.⁸³

§ 442. Same subject — American authorities. — The American rule is generally the same as the English rule upon this branch of the law, and is likewise subject to the same qualifications. As expressed by the New York Court of Appeals: “No principle is better settled in the law than that a mandamus will only lie when there is no other remedy, and that where the applicant has a clear legal right to the remedy sought. The books are full of cases which support this doctrine, and it is unnecessary to cite authorities to up-

⁸⁰R. vs Thatcher (1822), 1 D. & R. 426; R. vs Corp. of Bedford Level (1805), 6 East, 356, 2 Smith K. B. 535; same principle recognized in R. vs Stoke Damarel (1836), 5 Ad. & El. 584, 1 N. & P. 56, 6 L. J. M. C. 14.

⁸¹In re Barlow (1861), 30 L. J. Q. B. 271, 5 L. T. 289; cited with approval in R. vs Hertford College

(1878), L. R. 3 Q. B. D. 693, 47 L. J. Q. B. 649, 39 L. T. 18, 27 W. R. 347.

⁸²R. vs Chester (1850), 15 Q. B. 513, 15 Jur. 10, 19 L. J. Q. B. 485. Also R. vs Rochester (1851), 17 Q. B. 1.

⁸³R. vs Smith (1848), 4 U. C. Q. B. 322.

hold a principle so familiar and so well understood. That the relator has another remedy, if he has any right by quo warranto, is quite clear; and if another person has usurped and claims to hold an office to which he is entitled there is usually no difficulty in obtaining redress in that form.”⁸⁴

But there are cases in a few States, which apparently cannot be harmonized with the great current of authorities on this subject. Thus, in *Harwood vs Marshall*,⁸⁵ it was held that mandamus is the appropriate remedy for a party who claims title to an office, even when the office is filled by the person against whom the writ is asked, on the ground that quo warranto might prove inadequate by reason of delay, and because it could but determine the title to the office without necessarily giving possession to the claimant, who might

⁸⁴In re Gardner (1877), 68 N. Y. 467. Also Delgado vs Chavez or In re Delgado (1891), 140 U. S. 586, 11 Sup. Ct. 874, 35 L. ed. 578, affirming 5 N. Mex. 646, 25 P. 948; Ex p. Harris (1875), 52 Ala. 87, 23 Am. Rep. 559; Underwood vs White (1872), 27 Ark. 382; Meredith vs Board of Supervisors (1875), 50 Cal. 433; Duane vs McDonald (1874), 41 Conn. 517; State vs Gamble (1870), 13 Fla. 9; Bonner vs State (1849), 7 Ga. 473; Cripple Creek vs People (1904), 19 Col. App. 399, 75 P. 603; People vs Cover (1869), 50 Ill. 100; Hussey vs Hamilton (1870), 5 Kan. 462; French vs Cowan (1887), 79 Me. 426, 10 A. 335; Ashwell vs Bullock (1900), 122 Mich. 620, 81 N. W. 577; Frey vs Michie (1888), 68 Mich. 323, 36 N. W. 184; State vs Williams (1879), 25 Minn. 340; State vs Draper (1871), 48 Mo. 213; Maverick Oil Co. vs Hanson (1892), 67 N. H.

203, 29 A. 461; Denver vs Hobart (1874), 10 Nev. 28; State vs Plambeck (1893), 36 Neb. 401, 54 N. W. 667; Haines vs Freeholders of Camden (1885), 47 N. J. L. 454; People vs New York (1802), 3 Johns. Cas. (N. Y.) 79; People vs Stevens (1843), 5 Hill (N. Y.) 616; People vs Police Com'rs. (1903), 174 N. Y. 450, 67 N. E. 78, 95 Am. St. R. 596; Lyon vs Granville County (1897), 120 N. C. 237, 26 S. E. 929; Ewing vs Turner (1894), 2 Okla. 94, 35 P. 951; State vs Stewart (1875), 26 Ohio St. 216; Com. vs Philadelphia County (1851), 2 Pars. Eq. Cas. (Pa.) 220; Williams vs Clayton (1889), 6 Utah, 86, 21 P. 398; Kimball vs Olmsted (1899), 20 Wash. 629, 56 P. 377; Board of Education vs State (1898), 100 Wis. 455; s. c. sub nom. State vs Board of Education (1898), 76 N. W. 351.

⁸⁵(1856), 9 Md. 83.

still be obliged to resort to some other process to attain that end.⁸⁶ Thus, mandamus was held to lie to enforce the right of a member of a school committee to act as a member of the board to the exclusion of a person who was already in office under claim and color of title.⁸⁷

Commenting on those cases, Park, C. J., delivering the opinion of the Supreme Court of Errors of Connecticut in *Duane vs McDonald*,⁸⁸ observed: "The doctrine of these States seems mainly based upon the ground that parties may not heed the judgments of ouster in proceedings of quo warranto, and thereby may necessitate further proceedings by mandamus. This seems to us to be making provision for cases that will rarely occur. When the title of an incumbent of an office is fully heard and determined against him, there is no more reason to apprehend that he will refuse to acquiesce in the judgment of ouster, than there is that he will disregard the decisions of courts in any other class of cases, and it seems to us a departure from the ordinary course of judicial proceedings to make an exception in cases of quo warranto."

§ 443. Mandamus lies to compel admission of person having prima facie title to office, though there be another in possession.—But, though quo warranto is the proper remedy to try questions of title to office, yet a mere assertion of right on the part of a person claiming title to a

⁸⁶Also *Duer vs Dashiell* (1900), 91 Md. 660, 47 A. 1040.

⁸⁷*Conlin vs Aldrich* (1868), 98 Mass. 557, citing with approval *In re Strong* (1838), 20 Pick. (Mass.) 484. Also *Luce vs Bd. of Examiners* (1891), 153 Mass. 108, 26 N. E. 419; *Dew vs*

Judges of Sweet Springs (1808), 3 Hen. & Mun. (Va.) 1, 3 Am. Dec. 639; *Sinclair vs Young* (1902), 100 Va. 284, 40 S. E. 907; *Banton vs Wilson* (1849), 4 Tex. 400; *Lindsey vs Luckett* (1857), 20 Tex. 516.

⁸⁸(1874), 41 Conn. 517.

public office, and the apparent exercise of the functions of the office *de facto*, will not generally deter the Court from examining the uncontroverted facts before it for the purpose of determining who has *prima facie* title, and awarding the office to the person who succeeds in establishing such title.⁸⁹ Thus, where a person was removed by the board of a State hospital for the insane from the office of superintendent, and another one was apparently lawfully appointed to fill the office in his place, it was held that mandamus was the proper remedy to compel the *de facto* incumbent to surrender the office to the new appointee.⁹⁰ So where a person had a commission from the Governor, it was held that he had the highest and best evidence that he was an officer, and was entitled to exercise the functions of the office, until his title was tried by *quo warranto*.⁹¹ The Court said: "We see no foundation in reason for the claim of the defendant, that the writ does not lie against him because he is an officer *de facto*. We do not think he can take an advantage of a tenure of office which is *prima facie* wrongful, and stand upon the bare fact of such tenure when he is called upon to surrender the property of the office to the officer *de jure*."

Likewise, where a person holds the certificate of election to an office, the Court will assist him by mandamus to obtain the possession thereof.⁹² Thus, where a person holds a certificate from the authorities appointed by law to canvass the votes, declaring him duly elected to the office of clerk of the

⁸⁹*Matney vs King* (Okla. 1908), 93 P. 737; *State vs Dunn* (1821), 12 Am. Dec. 25, note; *People vs Killduff* (1854), 15 Ill. 492, 60 Am. Dec. 769; *Matter of Howard* (1853), 26 Misc. (N. Y.) 233, 56 N. Y. S. 318.

⁹⁰*State vs Archibald* (1896), 5 N. Dak. 359, 66 N. W. 234.

⁹¹*State vs Johnson* (1895), 35 Fla. 2, 16 So. 786, 31 L.R.A. 357.

⁹²*State vs Kipp* (1898), 10 S. Dak. 495, 74 N. W. 440; *Kline vs McKelvey* (1905), 57 W. Va. 29, 49 S. E. 896; *Warner vs Myers* (1870), 3 Or. 218; *Huffman vs Mills* (1888), 39 Kan. 577, 18 P. 516.

Circuit Court, and he has complied with the requirements of law in relation to the office, he is entitled to mandamus to obtain the present possession thereof, notwithstanding the prior incumbent contests his election, denying its legality.⁹³

The ground taken by some Courts is that in such case the person holding over after the expiration of his term, is not a *de facto* officer, but a mere usurper, as against the party holding the certificate of election,⁹⁴ even if he claims that he was in fact re-elected.⁹⁵ In a New York case, however, it has been intimated that, although the holder of a certificate of election may compel by mandamus a municipal body to recognize him as a member thereof, yet as the party who fills his place is not a party to the proceeding, it might be necessary to institute an action of *quo warranto* against him, in the event of his attempting to retain possession of the office by force.⁹⁶

As is evident, in all those cases where a relator seeks to obtain possession on the strength of a certificate of election, or of a commission, the Court does not attempt to finally settle the disputed questions of title, but acts on the *prima facie* appearance of right, without going behind the certificate or the commission, leaving to the party dispossessed his recourse to *quo warranto*, if he deems his claim sufficiently well founded to warrant his taking such a step.⁹⁷ Therefore, the relator's right to mandamus will not be defeated by an answer which admits his *prima facie* title, but contains averments of fact which involve his ultimate title to the office.⁹⁸

⁹³*People vs Head* (1861), 25 Ill. 325.

⁹⁴*State vs Callahan* (1895), 4 N. Dak. 481, 61 N. W. 1025; *Chandler vs Starling* (N. D. 1909), 121 N. W. 198.

⁹⁵*State vs Oates* (1893), 86 Wis. 634, 57 N. W. 296, 39 Am. St. R. 912.

⁹⁶*Howard vs Supervisors of Erie* (1899), 42 N. Y. App. Div. 510, 59 N. Y. S. 476, affirmed 160 N. Y. 687, 55 N. E. 1099.

⁹⁷*Chandler vs Starling* (N. D. 1909), 121 N. W. 198.

⁹⁸*State vs Callahan* (1895), 4 N. Dak. 481, 61 N. W. 1025.

Thus, a person may be awarded possession of the office, though it is set up that he is ineligible thereto.⁹⁹

§ 444. **Mandamus proper remedy to restore officer unlawfully removed.**—Again, it is held that where a person has been in the actual and lawful possession of an office, having a *de jure* title thereto, and is unlawfully removed or suspended, mandamus is the appropriate remedy to restore him to the office, and it is not necessary to resort to *quo warranto*, even though the office be in the possession of another, who claims to be a *de facto* officer.¹ In a number of decisions supporting this principle, the courts rely on the fact that the officer was once in lawful possession, and are apparently of the opinion that his claim is better entitled to consideration, than that of a claimant who has never been in possession. Thus, the Supreme Court of Kansas observes: “The great weight of authority is, that the courts will refuse to lend their extraordinary aid by mandamus to compel the admission of a claimant to an office in the first instance where he has never been in the actual possession of the office or discharged its duties. Where, however, one has been in the actual and lawful possession and enjoyment of an office, from which he has been wrongfully removed, a different case is presented.”²

But the force of this reasoning is not fully apparent. It

⁹⁹*Stevens vs Carter* (1895), 27 Or. 553, 40 P. 1074; *State vs Sherwood* (1870), 15 Minn. 221, 2 Am. Rep. 116.

¹*Pratt vs Bd. of Police* (1897), 15 Utah, 1, 49 P. 747; *Metsker vs Neally* (1889), 41 Kan. 122, 21 P. 206, 13 Am. St. R. 269; *Com. vs Gibbons* (1900), 196 Pa. St. 97, 46 A. 313; *Schmulbach vs Speidel*

(1901), 50 W. Va. 553, 40 S. E. 424, 55 L.R.A. 922; *Ex p. Lusk* (1886), 82 Ala. 519; *Dew vs Judges of Sweet Springs* (1808), 1 H. & M. (Va.) 1, 3 Am. Dec. 639; *Eastman vs Householder* (1894), 54 Kan. 63, 37 P. 989.

²*Eastman vs Householder* (1894), 54 Kan. 63, 37 P. 989.

is more satisfactory to declare, as several courts do, that the claimant has a right to be restored to his office because he has a clear de jure title thereto, and his successor has merely a groundless claim, which affords him no color of right. This was the doctrine laid down in *State vs Paterson*,³ where it was held that under the charter of the defendant city, an appointment of a city treasurer by less than a majority of the whole number of aldermen is unlawful and void, and the treasurer who has been ousted by such illegal act may be restored to his office by a writ of peremptory mandamus. The Court said: "Objection was raised to the use of the writ of mandamus in this case, because it was said that James Dunn is in office by color of right, and the Court will not, therefore, admit another person who claims to have been duly elected. The proper remedy is by information in the nature of a quo warranto. But this is not the case of attempting to oust from office by mandamus, a person who is in by color of right. There is no right here. The pretended appointment is a mere nullity. There was no appointing board, and those who attempted to act had no authority. The applicant here is clearly still in office by legal appointment, and the effort is to oust him without legal authority." So in *State vs Miles*⁴ it is declared that where one has been wrongfully deprived of an office by the illegal appointment of another, mandamus will issue to effect his restoration, even though such appointee be in possession de facto, for in such case the appointee is a mere intruder. Upon the same principle, it was held that where it is *res judicata* that the removal of a person from office was unlawful, the office is not full de facto, by reason of the appointment of a subsequent incumbent, and man-

³ (1871), 35 N. J. L. 190.

⁴ (1893), 210 Mo. 127, 109 S. W. 595.

damus is the proper remedy to restore the former officer thereto.⁵

Perhaps, however, the correct view of the matter is that expressed by the Supreme Court of New York, in a case where mandamus was applied for to reinstate a superintendent of sewers, who had been unlawfully removed and replaced by another.⁶ The Court said: "If his removal was illegal, *he has never been deprived of his office*, and this application is to enforce his right to continue in the office from which he was illegally removed. The person appointed in his place, if he was illegally removed, has no right to the office, and never had a right to it." At all events, whatever may be grounds upon which the Courts proceed, an officer will not be restored by mandamus when the legality of his title admits of any doubt, or is not clearly established.⁷

However, the doctrine that an unlawfully dispossessed officer has a right to be restored by mandamus, even where there is a successor de facto in possession, has apparently not met with the approval of all the courts. Thus, in *People vs Police Com'rs*,⁸ where it was attempted to have a captain in the police force reinstated by mandamus, although another one had been appointed in his stead, the New York Court of Appeals held that, assuming there was no serious questions as to the relator's title to the office, that fact did not except him from the general rule, that when some one is in actual possession of an office under color of right mandamus

⁵*Leeds vs Atlantic City* (1890), 52 N. J. L. 332, 19 A. 780.

⁶*People vs Ahearn* (1906), 111 N. Y. App. Div. 741, 98 N. Y. S. 492. Same principle recognized in England: *R. vs Mayor of Oxford* (1837), 6 A. & E. 349, 6 L. J. K. B. 103.

⁷*Pratt vs Bd. of Police* (1897), 15 Utah, 1, 49 P. 747; *St. Louis County Court vs Sparks* (1846), 10 Mo. 117, 45 Am. Dec. 355; *Ewing vs Turner* (1894), 2 Okla. 94, 35 P. 951.

⁸(1903), 174 N. Y. 450, 67 N. E. 78, 95 Am. St. R. 596.

will not lie to determine the title, but a direct action must be brought by the attorney-general for that purpose, since such an exception if once created would destroy the rule, rendering uncertain that which is now certain.⁹ So in *State vs Raleigh*¹⁰ it was ruled that a municipal body cannot deprive one of its members of his place for causes affecting his eligibility, that existed at the time of his election; but where, in such case, one is removed and his successor elected and inducted into office under a power given to fill vacancies, such successor holds under color of competent authority, and is a de facto officer; and the plaintiff, being the adverse claimant, cannot be reinstated by mandamus against the defendants, but must resort to quo warranto. So in *Kimball vs Olmstead*¹¹ it was held that mandamus is not the proper remedy where one has been illegally removed from office, and succeeded by another, when the legality of the removal is a disputed question, depending upon the construction of statutory provisions.¹²

§ 445. Mandamus proper remedy to determine de facto title of officer.—As we have already explained, in order to secure the due performance of official duties, it sometimes becomes necessary to decide without delay which of two or more persons or public bodies is entitled to legal recognition, for the time being, as a de facto officer or de facto public body. In such case mandamus may issue to determine that point, though the question of strict title may have to be

⁹Also *People vs Goetting* (1892), 133 N. Y. 569, 30 N. E. 968; *People vs Sheehan* (1908), 128 App. Div. (N. Y.) 743, 113 N. Y. S. 230. But see *People vs Ahearn* (1906), 111 N. Y. App. Div. 741, 98 N. Y. S. 492.

¹⁰(1883), 89 N. C. 125.

¹¹(1899), 20 Wash. 629. 56 P. 377.

¹²See also *Board of Education vs State* (1898), 100 Wis. 455. 76 N. W. 351; *State vs Dunlap* (1817), 5 Mart. (La.) 271.

settled later on by quo warranto. "It may be," says one Judge, "and frequently is necessary to determine whether or not a particular person is an officer de facto; trying that question is not a trial of the right to the office in any sense that makes it necessary to resort to quo warranto."¹³ Thus, where there are two persons each claiming to be the de facto Mayor of a city, and each has appointed a different person as his secretary, the situation is one of sufficient urgency to warrant the maintenance by one of such appointees of a proceeding in mandamus against the auditor for the approval of his claim for salary, in which it may be incidentally determined who is the de facto Mayor.¹⁴ So where there are two boards of supervisors acting simultaneously, each under a claim of right, the Court will compel by mandamus the recognition of the board which has the better apparent legal right, as the de facto board.¹⁵

§ 446. Title to office cannot be tried by injunction—American authorities.—It is a universal rule, that courts of equity or courts invested with equitable jurisdiction will not attempt by injunction to determine questions concerning the appointment or election of public officers, or their title to office. "It is equally well settled," says Mr. Justice Gray of the United States Supreme Court, "that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal.

¹³Upton, J. in *Warner vs Myers* (1870), 3 Or. 218.

¹⁴*McKannay vs Horton* (1907), 151 Cal. 711, 91 P. 598.

¹⁵*Morton vs Broderick* (1897), 118 Cal. 474, 50 P. 644. Also *Del-*

gado vs Chavez or *In re Delgado* (1891), 140 U. S. 586, 11 Sup. Ct. R. 874, 35 L. ed. 578, affirming 5 N. Mex. 646, 25 P. 948; *State vs Grant* (1905), 14 Wyo. 41, 81 P. 795.

The jurisdiction to determine the title to a public office belongs exclusively to the courts of law. . . . No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer.”¹⁶ “Various reasons have been assigned for the rule,—as the existence of an adequate remedy at law, the nonconcern of equity with matters of a political nature, and the impolicy of interfering with a de facto officer pending a contest as to his title.”¹⁷

Indeed, an injunction is a writ adapted to control and regulate officers in the discharge of their functions, when they are confessedly such, and not to try their right to hold

¹⁶In *re Sawyer* (1887), 124 U. S. 200, 212, 8 Sup. Ct. 482. Also *White vs Berry* (1898), 171 U. S. 366, 18 Sup. Ct. 917, 43 L. ed. 199; *Morgau vs Nunn* (1898), 84 Fed. 551; *Holmes vs Oldham* (1877), 12 Fed. Cas. (No. 6,643) 421, 1 Hughes, 76; *Little vs Bessemer* (1903), 138 Ala. 127, 35 So. 64; *Monahan vs Lynch* (1903), 2 Alaska. 132; *Willeford vs State* (1884), 43 Ark. 62; *Davis vs City Council* (1893), 90 Ga. 817, 17 S. E. 110; *Neeland vs State* (1888), 39 Kan. 154, 18 P. 165; *Poyntz vs Shackleford* (1900), 107 Ky. 546, 54 S. W. 855; *District Tp. of Grove vs Myles* (1899), 109 Iowa, 541, 80 N. W. 544; *Marshall vs State Reformatory* (1903), 201 Ill. 9, 66 N. E. 314; *Landes vs Walls* (1903), 160 Ind. 216, 66 N. E. 679; *Goldman vs Gillespie* (1891), 43 La. Ann. 83, 8 So. 880; *Ex p. Wimberly* (1879), 57 Miss. 437; *State vs Withrow* (1900), 154 Mo. 397, 55 S. W. 460; *Stahlut vs Bauer* (1897), 51 Neb. 64, 70 N. W. 496; *People vs Howe* (1904), 177 N. Y.

499, 69 N. E. 1114, 66 L.R.A. 664; *Sherman vs Clark* (1868), 4 Nev. 138; *Hardesty vs Taft* (1865), 23 Md. 512; *Burke vs Leland* (1892), 51 Minn. 355, 53 N. W. 716; *Howe vs Dunlap* (1903), 12 Okla. 467, 72 P. 365; *Hubbell vs Armijo* (1906), 13 N. Mex. 482, 85 P. 1046; *Cozart vs Fleming* (1898), 123 N. C. 547, 31 S. E. 822; *Gilroy's Appeal* (1882), 100 Pa. St. 5; *State vs Rice* (1903), 66 S. C. 1, 44 S. E. 80; *Kilpatrick vs Smith* (1883), 77 Va. 347; *McAllen vs Rhoades* (1886), 65 Tex. 348; *Mullen vs Tacoma* (1896), 16 Wash. 82, 47 P. 215; *Ward vs Sweeney* (1900), 106 Wis. 44, 82 N. W. 169. But see *Callaghan vs Tobin* (1905), 40 Tex. Civ. App. 441, 90 S. W. 328; *Callaghan vs Irvin* (1905), 40 Tex. Civ. App. 453, 90 S. W. 335.

¹⁷*Gillett, J., Landes vs Walls* (1903), 160 Ind. 216, 66 N. E. 679. See *Calloway vs Pearson* (1890), 6 Man. 364; *Fletcher vs Tuttle* (1894), 151 Ill. 41, 37 N. E. 683, 42 Am. St. R. 220, 25 L.R.A. 143.

and exercise their offices.¹⁸ Thus, equity will not interfere by injunction to restrain officers from entering upon official duties, under an alleged illegal appointment, even though they have not as yet exercised or attempted to exercise the duties of their offices.¹⁹ Nor has a court of equity jurisdiction to enjoin a person declared elected from using his certificate of election, or from qualifying and entering upon the duties of the office,—although such relief is asked by an incumbent under a former election entitled to hold until his successor is elected and qualified, and who charges that through frauds of the election officers the certificate of election was withheld from him and given to his opponent.²⁰

So an injunction will not be granted to restrain an individual from exercising an office, though he has accepted another position alleged to be incompatible therewith.²¹ Nor will equity restrain persons elected or appointed to office from assuming and exercising official functions, on the ground of alleged ineligibility or disqualification,²² or unconstitutionality of the law under which their appointment was made.²³ Again, a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another.²⁴

Neither will equity interfere by injunction to prevent a de

¹⁸Hagner vs Heyberger (1844), 7 W. & S. (Pa.) 104, 42 Am. Dec. 220.

¹⁹Updegraff vs Crans (1864), 47 Pa. St. 103.

²⁰Moulton vs Reid (1875), 54 Ala. 320, reversing Reid vs Moulton (1874), 51 Ala. 255.

²¹Hagner vs Heyberger (1844), 7 W. & S. (Pa.) 104, 42 Am. Dec. 220.

²²Neiser vs Thomas (1889), 99 Mo. 224, 12 S. W. 725.

²³People vs Draper (1857), 24 Barb. (N. Y.) 265, 4 Abb. Pr. 333, 14 How. Pr. 233.

²⁴Morgan vs Nunn (1898), 84 Fed. 551. See also Palmer vs Bd. of Education (1900), 47 N. Y. App. Div. 547, 62 N. Y. S. 485; Heffran vs Hutchins (1896), 160 Ill. 550, 43 N. E. 709.

facto officer from receiving the fees, salary or emoluments of his office, as the adjudication upon his right to such benefits necessarily involves a determination of his title to the office.²⁵ Neither can the title of a de facto judge or justice of the peace be questioned in a suit to enjoin the collection or execution of a judgment rendered by him.²⁶

Equity will likewise, as has been already shown,²⁷ refuse to restrain officers de facto from discharging the duties of their offices, as the interests of the public require the performance of such duties by those in official position, until their title is determined in a proper proceeding.²⁸ On the other hand, an officer de facto may in a proper case be protected by injunction in the possession of his office pending a dispute as to his title.²⁹

§ 447. Same subject—English authorities.—It seems that a like rule prevailed in the English Courts, before the Judicature Act, with respect to the non-interference of equity

²⁵Burgess vs Davis (1891), 138 Ill. 578, 28 N. E. 817; Lawrence vs Leidigh (1897), 58 Kan. 676, 50 P. 889; Tappan vs Gray (1842), 9 Paige (N. Y.) 507, affirmed (1843), 7 Hill. 259, reversing 1841, 3 Edw. Ch. R. 450; Colton vs Price (1874) 50 Ala. 424; McAllen vs Rhoades (1886), 65 Tex. 348; Stone vs Wetmore (1871), 42 Ga. 601. See also Keating vs Fitch (1895), 14 Misc. (N. Y.) 128, 35 N. Y. S. 641. But see sec. 228.

²⁶Cooper vs Moore (1870), 44 Miss. 386; Baker vs Wambaugh (1884), 99 Ind. 312.

²⁷See sec. 206.

²⁸State vs Durkee (1873), 12 Kan. 308; People vs Draper (1857), 24 Barb. (N. Y.) 265, 4 Abb. Pr.

333, 14 How. Pr. 233; Terry vs Stauffer (1865), 17 La. Ann. 306; State vs Alexander (1899), 107 Iowa, 177, 77 N. W. 841. For further cases, see sec. 206.

²⁹Ewing vs Thompson (1862), 43 Pa. St. 372; Brady vs Sweetland (1874), 13 Kan. 41; Huntington vs Cast (1898), 149 Ind. 255, 48 N. E. 1025; Reemilin vs Mosby (1890), 47 Ohio, 570, 26 N. E. 717; Seneca Nation of Indians vs Jameson (1909), 114 N. Y. S. 401; State vs Superior Court (1897), 17 Wash. 12, 48 P. 741, 61 Am. St. R. 893; Goldsworthy vs Boyle (1896), 175 Pa. St. 246, 34 A. 630; Mearns vs Petrolia (1880), 28 Gr. (Ont.) 98. See also sec 207.

by injunction, in cases involving title to office. There is, however, a wonderful dearth of authorities on the subject, the older cases being confined to charities, where the proper remedy to determine questions of title was generally by application to the visitorial jurisdiction created by charter. Nevertheless, the decisions rendered upon this head afford in many instances good illustrations of the principle under consideration. An apposite case is *Whiston vs The Dean & Chapter of the Cathedral Church of Rochester*.³⁰ There, a schoolmaster was removed from office by resolution of the defendants. Injunction was applied for, but it was held that whatever might be the schoolmaster's right to mandamus or prohibition at law, the Court of Chancery could not in the exercise of its ordinary jurisdiction try his right to the office. And the Court also refused to preserve things *in statu quo* until the right should be determined by the proper tribunal; holding that it would not be called upon, in every dispute arising about a right to office, as a matter of course to prevent the party from being displaced until the determination of the right, and that there were cases even of irreparable mischief, in which it would not give any ultimate relief, and would not therefore interfere between rival claimants. The Vice-Chancellor said: "The only question I have to determine is, whether the Court of Chancery, in the exercise of its ordinary jurisdiction by bill, in a case in which no trust exists, can try the plaintiff's right to the office of schoolmaster, from which the defendants have exercised the power of excluding him. I am of opinion that this question must be answered in the negative. Excluding trust, I cannot find a single authority which supports the proposition."

Again, in *Attorney-General vs Earl of Clarendon*,³¹ it is

³⁰ (1849), 7 Hare, 532, 18 L. J. Ch. 473, 13 Jur. 694.

³¹ (1810), 17 Ves. 491, 34 Eng. R. 190.

laid down that chancery has no jurisdiction with regard either to the election or amotion of corporators de facto of any description.³² And in a Canadian case, it is declared that so long as the office is full, a general injunction against acting in it cannot be granted, but quo warranto should be resorted to.³³

§ 447a. Injunction under the English Judicature Act.

—It seems, however, that the Judicature Act has modified the former English rule, and that now an injunction may be granted in matters affecting title to office. Thus, in *Aslatt vs Corp. of Southampton*,³⁴ the plaintiff, an alderman of a borough, made a composition with his creditors, but executed no composition deed; nor were any composition proceedings taken under the Debtors Act, 1869. He had, however, executed a bill of sale, duly registered, to a person not a creditor, to secure a sum of money advanced by him to meet the amount of the composition. A meeting of the corporation of the borough having been summoned by notice for the purpose of declaring the office held by him void under the Municipal Corporation Act, 1835,³⁵ s. 52, and the Debtors Act, 1869, s. 21, and electing a successor, an injunction was granted, at the instance of the plaintiff, restraining the corporation from proceeding under their notice, on the grounds, (1) that, having regard to the express words of the above sections, the plaintiff had not become disqualified from holding office; (2) that under sec. 25, sub-s. 8, of the Judicature Act, 1873, the Court had jurisdiction to grant the injunction.

³²Also *Attorney-General vs Dixie* (1805), 13 Ves. Jun. 519, 33 Eng. R. 388; *Attorney-General vs Dedham Grammar School* (1857), 23 Beav. 350, 26 L. J. Ch. 497, 3 Jur. (N. S.) 325, 5 W. R. 395.

³³*Chaplin vs Woodstock School*

Board (1889), 16 O. R. 728, 733. See also *Calloway vs Pearson* (1890), 6 Man. 364.

³⁴(1880). 16 Ch. D. 143, 43 L. T. 464, 29 W. R. 117, 45 J. P. 111.

³⁵5 & 6 Will. 4, c. 76, s. 52.

Jessel, M. R., said: "A further question is raised as to whether I ought to interfere by injunction. It is said, and I believe with perfect truth, that no such injunction was ever heard of formerly; and there was a very good reason for it, namely, that the Courts of Common Law which exercised jurisdiction over cases of this kind had no power to grant an injunction, because the Act enabling them to do so was not passed until a very recent date, and therefore you could not have an injunction so far as the Common Law was concerned; nor was it the habit of the Court of Chancery to grant an injunction in aid of a legal right where the man was in possession of an office. The mere fact that some proceeding was being taken to test his right to continue in the office was never considered a ground for interfering by injunction. There was a reason for that. The old Court of Chancery did not interfere by injunction where there was a legal right in question—but only a legal right—being tried or put in a course for trial; and this led, in some cases, to a positive denial of justice. . . . Now it has been said—and I think truly said—that, as a general rule, the Court only interferes where there is some question as to property. I do not think that the interference of the Court is absolutely confined to that now; there may be cases in which the Court would interfere even when personal status is the only thing in question; but it is not necessary for me to decide that question at the present moment."

This decision was followed in *Richardson vs Methley School Board*,³⁶ where it was held, that where a member of a school board has been improperly declared disqualified for the office, he may apply for and obtain an injunction from a

³⁶ (1893), 3 Ch. D. 510, 62 L. J. Ch. 943, 69 L. T. (N. S.) 308, 3 Eng. R. 701, 42 W. R. 27, where is found the above quoted opinion of Cotton, L. J., which is apparently not shared by Brett, L. J.

Court of Equity, restraining the board from proceeding to elect a new member in his place, notwithstanding that he has a remedy at law by quo warranto. Kekewich, J., observed: "The argument here is that there is a legal remedy open to the plaintiff by quo warranto, and that, therefore, the equitable remedy does not apply. So to hold would, in my opinion, be departing from what was said by Lord Justice Cotton."³⁷

It may be noted, also, that under the statutes of Ontario,³⁸ an injunction may be granted in aid of quo warranto proceedings, or for the purpose of enforcing the judgment which may be pronounced thereon.

§ 448. Interference of equity on account of breaches of trust—English and American authorities.—But, independently of the Judicature Act, it has been laid down that when public bodies or public officers, regarded as trustees, become guilty of breaches of trust, by abusing, misusing or transcending the powers vested in them, equity will sometimes interfere by injunction, although the exercise of such jurisdiction may involve questions of title to office. Thus, where school trustees arbitrarily removed a schoolmaster, without affording him an opportunity to defend himself, the court enjoined them not to enforce their resolution of removal.³⁹ So where the master of a free school had an estate of freehold in his office and was removed by officers acting without authority, equity interfered by injunction.⁴⁰

³⁷See *North London Ry. vs Great Northern Ry.* (1883), 11 Q. B. D. 30, 52 L. J. Q. B. 380, 48 L. T. 695, 31 W. R. 490.

³⁸R. S. O. (1897), c. 324, s. 33.

³⁹*Willis vs Childe* (1850), 13 Beav. 117, 20 L. J. Ch. 113, 15 Jur. 303, 51 Eng. R. 46.

⁴⁰*Free Grammar School of Chip-ping Sudbury, In re* (1829), 8 L. J. Ch. (O. S.) 13. See also *Dummer vs Corp. of Chippenham* (1807), 14 Ves. Jr. 245, 33 Eng. R. 515; *Atty.-General vs Dedham Grammar School* (1857), 23 Beav. 350, 26 L. J. Ch. 497, 3 Jur. (N.

The same doctrine finds support among some American authorities. Thus, in a case where an injunction was granted to prevent an illegal or corrupt appointment to a corporate office, one of the Judges said: "It is well settled that public bodies and public officers may be restrained from proceeding in violation of law to the prejudice of the public or to the injury of individual rights. A usurpation of power may be prevented, and an alienation or renunciation of a public franchise be forbidden and restrained. To the extent that public officers and public bodies are trustees either of franchises or property for the benefit of the public, they are amenable to the jurisdiction of Courts of Equity. In the exercise of this jurisdiction the Court proceeds upon substantially the same principles as those which govern its interference in cases of trust; a municipal corporation being regarded in equity as charged with and made the depositary of a public trust, and thus amenable to the jurisdiction of equity for a breach, of that trust."⁴¹

Accordingly, it was held that the president of a city council is entitled to an injunction to restrain the council from removing him, without authority, from his office, as such removal would be an irreparable injury to him.⁴² It is true that this decision was reversed on appeal, but solely on the ground that the council was not without authority in the matter. Putnam, J., said: "If such a removal is beyond the power of defendants it may be a proper case for a Court

S.) 325, 5 W. R. 395; *Daugars vs Rivaz* (1859), 28 Beav. 233, 29 L. J. Ch. 685, 6 Jur. (N. S.) 854, 8 W. R. 225; *Atty.-General vs Liverpool* (1835), 1 My. & Cr. 171, 40 Eng. R. 342, 2 M. & C. 613, 7 L. J. Ch. 57; *Atty.-General vs Compton* (1842), 1 Y. & C. 417; *Weir vs Mathieson* (1865), 11 Gr. (Ont.)

383, but reversed in 3 E. & A. 123. See also *Mearns vs Petrolia* (1880), 29 Gr. (Ont.) 98.

⁴¹*Traux, J.,—Roosevelt vs Edison* (1885), 51 N. Y. Sup. Ct. 227.

⁴²*Armitage vs Fisher* (1893), 74 Hun (N. Y.) 167, 26 N. Y. S. 364, 56 St. Rep. 384.

of Equity to grant an injunction restraining an act which it might be deemed would produce irreparable injury by depriving him of his office.”⁴³

So it has been held, that a statutory provision, declaring that the Mayor and council of a city of a designated class are authorized to provide for removing officers of such city for misconduct, does not clothe the council with power to remove the Mayor, and any attempt to exercise such power is null and void; and therefore, under such circumstances, the Mayor is not required to wait until the council has actually ejected him from his office, but may, by injunction, prevent such removal.⁴⁴

So where a board of commissioners was absolutely without power or authority to displace a veterinary surgeon—who had been elected and qualified, and was in the discharge of his duties as such,—by the election of another person, the former having not resigned, nor been impeached, it was held that the officer so attempted to be displaced was authorized to ask, and the Court justified in granting, an injunction in his favor, restraining the newly-elected surgeon, the board of commissioners and the chief of the department, from interfering with him in the performance of his duties.⁴⁵

§ 449. Title to office not triable by writ of assize.—Finally, it may not be amiss to refer to the old writ of assize. Formerly, in England,⁴⁶ the title to an office, in which the rightful officer had an estate of freehold, could be tried by a writ of assize of novel disseisin, but this mode of deter-

⁴³Armitage vs Fisher (1893), 74 Hun (N. Y.) 167, 26 N. Y. S. 364, 56 St. Rep. 384.

⁴⁴Stahlhut vs Bauer (1897), 51 Neb. 64, 70 N. W. 496.

⁴⁵Wheeler vs Fire Com'rs of

New Orleans (1894), 46 La. Ann. 731, 15 So. 179. See also Huntington vs Cast (1898), 149 Ind. 255, 48 N. E. 1025.

⁴⁶Webb's Case (1608), 4 Coke's Rep. 229.

mining title has long ago fell into disuse, and the writ itself was abolished by 3 & 4 Wm. IV, c. 27.⁴⁷

An attempt was made in Maryland to make use of that writ to have the title to a judicial office determined.⁴⁸ There, the plaintiff who had been appointed chief justice of a district during good behavior, was deprived of his office by a repealing Act of the legislature. It was held that the writ did not lie to recover the office, because the plaintiff had only an interest for a term of years in the said office, determinable on the contingency of his being convicted of misbehavior in a court of law; and such writ was not adapted to the recovery of any estate or interest in lands, or in an office less than a freehold, except in the case of a tenant by elegit as provided by 13 Edw. I, c. 18.

⁴⁷See *Green vs Hewett* (1793),
Peck's Case 182.

⁴⁸*Whittington vs Polk* (1802), 1
Har. & J. (Md.) 236.

CHAPTER 33.

OF QUO WARRANTO.

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|---|---|
| § 450. General remarks. | § 464. When private person has sufficient interest to maintain quo warranto, |
| 451. Quo warranto proper remedy to try title to office. | 465. Discretion of court in granting or refusing leave to file quo warranto. |
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§ 450. General remarks.— The term “quo warranto” is used in this chapter, as it has been throughout this work, in the sense generally ascribed to it in the United States, as designating the information in the nature of quo warranto or the statutory substitutes therefor. Some judges and legislators have even used “writ of quo warranto” in a like sense.

The scope of this work will not permit us to enter into a minute and detailed discussion of quo warranto, in its various applications. Nevertheless, it is our aim to expound the general principles regulating its use as a remedy to try title to public office, at sufficient length and with sufficient precision, to render our exposition of practical use and value.

§ 451. Quo warranto proper remedy to try title to office.—In the absence of special remedies provided by statute, quo warranto is the appropriate, and generally the exclusive, method of determining disputed questions of title to office, and of ousting an unlawful incumbent.¹ It is a

¹*Darley vs The Queen* (1845), 12 Cl. & Finn. 520; *R. vs Mayor of Colchester* (1788), 2 Term. (D. & E.) 259; *R. vs Mayor of Oxford* (1837), 6 Ad. & El. 349; *Frost vs Mayor of Chester* (1855), 5 E. & B. 531; *R. vs Mayor of Cornwall* (1866), 25 U. C. Q. B. 293; *Askew vs Manning* (1876), 38 U. C. Q. B. 345; *Chaplin vs School Board of Woodstock* (1889), 16 O. R. 728; *Roy vs Thibault* (1878), 22 Low. Can. Jur. 280; *Ex p. Cameron* (1868), 1 Han. (N. B.) 306; *In re Mack* (1906), 39 Nev. Scot. 394; *In re Delgado, or Delgado vs Chavez* (1891), 5 N. Mex. 646, 25 P. 948, affirmed in 11 Sup. Ct. R. 874, 140 U. S. 586, 35 L. ed. 578. *Ex p. Harris* (1875), 52 Ala. 87, 23 Am. R. 559; *Caldwell vs Bell* (1845), 6 Ark. 227; *Hull vs Superior Ct.* (1883), 63 Cal. 174; *Wason vs County Treasurer* (1897), 10 Col. App. 181; *Harrison vs Simonds* (1877), 44 Conn. 318; *State vs Stewart* (1881), 6 Houst. (Del.) 359; *Crovatt vs Mason* (1897), 101 Ga. 246, 28 S. E. 891;

Territory vs Armstrong (1889), 6 Dak. 226, 50 N. W. 832; *People vs Matteson* (1855), 17 Ill. 167; *Parsons vs Durand* (1898), 150 Ind. 203, 49 N. E. 1047; *Desmond vs McCarthy* (1864), 17 Iowa, 525; *Neeland vs State* (1888), 39 Kan. 154, 18 P. 165; *Tillman vs Otter* (1893), 93 Ky. 600, 20 S. W. 1036; *Peters vs Bell* (1898), 51 La. Ann. 1621, 26 So. 442; *French vs Cowan* (1887), 79 Me. 426, 10 A. 335; *Com. vs Allen* (1880), 128 Mass. 308; *Fuller vs Atty-General* (1893), 98 Mich. 96, 57 N. W. 33; *Burke vs Leland* (1892), 51 Minn. 355, 53 N. W. 716; *Newsom vs Cocke* (1879), 44 Miss. 352, 7 Am. R. 686; *Hunter vs Chandler* (1870), 45 Mo. 452; *State vs Frazier* (1890), 28 Neb. 438, 44 N. W. 471; *Osgoode vs Jones* (1881), 60 N. H. 543; *Haines vs Freeholders of Camdem* (1885), 47 N. J. L. 454; *People vs New York* (1802), 3 Johns. Cas. 79; *Matter of Hart* (1900), 161 N. Y. 507, s. c. sub. nom. *Hart vs State Bd. of Canvasers*, 55 N. E. 1058; *State vs Sad-*

proceeding brought in the name, and on behalf, of the King or the State, according to the form of government, to inquire by what warrant or authority, *quo warranto*, a person assumes to hold and exercise a public office. The King or the State is named as the prosecutor because, whatever private interests may be involved, the primary object of the remedy is always, in theory at least, unless otherwise declared by statute, to stop or hinder usurpations on the sovereign authority, the source of all offices. The title of the incumbent is therein put directly at issue, and upon him generally lies the burden of proving that he is not a usurper or an intruder, or otherwise an unlawful holder. If he fails in that respect, a judgment of ouster is pronounced against him, which immediately excludes him from the office.

But, though *quo warranto* is usually the exclusive remedy to settle questions of title, it must not be overlooked, as we have explained in the preceding chapter,² that in England and in a few American States, the right to an office may be determined in an action against the incumbent for the recovery of the fees or salary annexed to it. However, as is obvious, this manner of determining title may be resorted to only by a claimant who can establish a valid title in himself, for it is a purely private action which in no way concerns the public.

§ 452. *Writ of quo warranto*.—The writ of *quo warranto* at common law was a high prerogative writ, in the na-

ler (1899), 25 Nev. 131, 58 P. 284, 83 Am. St. R. 573; Lyon vs Granville County (1897), 120 N. C. 237, 26 S. E. 929; State vs Craig (1900), 21 Ohio Cir. Ct. 175; Clark vs Commonwealth (1858), 29 Pa. St. 129; State vs Brown (1857), 5 R. I. 1; State vs Bowen (1827), 4 McCord (S. C.) 254; State vs Owens (1885), 63 Tex. 261; State vs

Beardsley (1896), 13 Utah, 502, 45 P. 569; State vs Boston C. & M. Ry. Co. (1853), 25 Vt. 433; Kilpatrick vs Smith (1883), 77 Va. 347; Board of Education vs Holt (1903), 54 W. Va. 167, 46 S. E. 134; State vs Wisconsin R. Co. (1874), 34 Wis. 197.

²See sec. 433.

ture of a writ of right for the King, against him who claimed or usurped any office, franchise, or liberty of the Crown, to inquire by what authority he supported his claim, in order to determine the right. It lay also in case of nonuser, misuser, or abuse of a franchise. It was prosecuted by the attorney-general, at the suit of the King, without a relator, and the judgment, if for the King, was of seizure into the King's hands, but where the franchise was such that it could not be held by the Crown, there was merely a judgment of ouster, to turn out the party who usurped it.³ The writ was a civil remedy and not a criminal prosecution.⁴ Centuries ago, however, it fell into disuse in England, the reason assigned by Blackstone being the finality and conclusiveness of the judgment pronounced thereon even against the Crown, together with the length of its process.⁵ But it seems that in a few American jurisdictions, the writ may still be used on behalf of the State.⁶

§ 453. Information in the nature of quo warranto.—

The information in the nature of quo warranto, which has generally superseded the old writ, was originally a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the Crown. But, in England, it long ago lost its character as a criminal proceeding in everything except form, and came to be used for the mere purpose of trying civil rights, and seizing franchises or ousting unlawful pos-

³³ Bl. Comm. 262.

⁴R. vs Marsden (1765), 3 Burr. 1812, 1817; Ames vs Kansas (1883), 111 U. S. 449, 4 Sup. Ct. R. 437; Atty.-General vs Sullivan (1895), 163 Mass. 446, 40 N. E. 843, 28 L.R.A. 452.

⁵³ Bl. Comm. 263.

⁶State vs Boston & R. Co. (1853), 25 Vt. 433; Com. vs Walter (1876), 83 Pa. St. 105, 24 Am. R. 154; Bland & Giles Co. Judge Case (1880), 33 Gratt. (Va.) 443; Reed vs Canal Corporation (1874), 65 Me. 53.

sessors of offices, the fine being nominal only.⁷ And, by recent legislation, it has been made a purely civil proceeding "whether for purposes of appeal or otherwise."⁸ In the United States the information has generally, if not always, been regarded as substantially civil in effect, though in some of the States it has sometimes been treated as criminal in form, and matters of pleading and jurisdiction regulated accordingly.⁹

§ 454. **Quo warranto information extended by statute of Anne.**—The information in the nature of quo warranto is said to have existed contemporaneously with the writ of quo warranto;¹⁰ but, before the passage of the statute of Anne,¹¹ the remedy only extended and applied to usurpations on the prerogative rights of the Crown.¹² By that statute, it was made a mode of investigating and determining civil rights between private parties, the proceeding being thereby authorized in all cases of intrusion into or usurpation of *corporate offices in corporate places*, on the relation of a private individual. But the remedy was not affected so far as it concerned offices not mentioned in the Act. As to those, the attorney-general's authority remained the same as it was prior to the passing of the statute. This statute is still the basis of the remedy in England. So it is in the American States, where the common law proceeding by information has not been modified or superseded,¹³ but in most of

⁷ 3 Bl. Comm. 263. *R. vs Francis* (1788), 2 Term (D. & E.) 484.

⁸ 47 & 48 Vic. c. 61, s. 15.

⁹ *Ames vs Kansas* (1883), 111 U. S. 449, 4 Sup. Ct. 437; *State vs Gleason* (1869), 12 Fla. 190; *State vs Ashley* (1839), 1 Ark. 279; *People vs Utica Ins. Co.* (1818), 15

John. (N. Y.) 353, 8 Am. Dec. 243.

¹⁰ *State vs Ashley* (1839), 1 Ark. 279.

¹¹ Anne, c. 25, or c. 20 (Buff.).

¹² *State vs Kearn* (1891), 17 R. I. 391, 22 A. 1018.

¹³ *Territory vs Virginia Road Co.* (1874), 2 Mont. 96.

the States special statutes have been passed creating or regulating proceedings in the nature of quo warranto.

§ 455. **Statutory substitutes.**—In New York, Minnesota, North Carolina, South Carolina, Oregon, and several other States, the writ of quo warranto and the proceeding by information in the nature thereof are expressly abolished, and the remedies that were obtainable at common law in those forms may now be had by a civil action in the nature of quo warranto.¹⁴ In other States the abolition of the common law remedies may not be so expressly declared or may effect only certain tribunals, but a similar action is also authorized by statute.¹⁵ Again, in others, special statutory proceedings are provided to obtain the same result as at common law; and in Tennessee, the method adopted is by bill in equity, said to be a bill in the nature of quo warranto.¹⁶

In Ontario there is a statute which, after excepting certain cases where a summary statutory remedy may be resorted to, provides that all proceedings against any person who unlawfully claims, or usurps, or is alleged unlawfully to claim, or to usurp, any office, franchise, or liberty, or who has forfeited, or is alleged to have forfeited any franchise, by reason of non-user, or mis-user, thereof, which have heretofore been instituted or taken by writ of quo warranto, or by information in the nature of a writ of quo warranto, hereafter shall be instituted and taken, where the proceeding is by

¹⁴People vs Hall (1880), 80 N. Y. 117; State vs Minnesota Thresher Mfg. Co. (1889), 40 Minn. 213, 41 N. W. 1020; Saunders vs Gatling (1879), 81 N. C. 298; Alexander vs McKenzie (1870), 2 (Rich.) S. C. 81; State vs Douglas Road Co. (1881), 10 Or. 198; Territory vs Hauxhurst (1882), 3 Dak. 205.

¹⁵State vs Baker (1875), 38 Wis. 71; People vs Havird (1889), 2 Idaho, 531, 25 P. 294; State vs Price (1874), 50 Ala. 568; State vs Haskell (1879), 14 Nev. 209; People vs Clayton (1886), 4 Utah, 421, 11 P. 206.

¹⁶Atty-General vs Leaf (1849), 9 Hump. (Tenn.) 753.

the Attorney-General ex officio without a relator, by notice of motion; and, where the proceeding is taken at the instance of some person as relator, by order nisi, calling on the person against whom the proceeding is taken to show cause why he unlawfully exercises, or usurps, such office, franchise, or liberty.¹⁷

But however varied these statutory substitutes may be, they only operate a change in the form and not in the substance and effect of the remedy, and therefore they continue to be regulated by common law principles,¹⁸ unless it is provided otherwise by legislation. This is the reason they are commenced and prosecuted in the name of the sovereign power. In a few States, however, the claimant of an office is allowed to bring an action in his own name to try the title thereto.¹⁹

§ 456. Statutory proceedings to try validity of elections—Their effect upon quo warranto.—But, in addition to the above substitutes, which partake so much of the character of the common law processes that they are generally designated by the name of “quo warranto,” there are other statutory proceedings which are entirely dissimilar therefrom both in form and in substance. These often infringe upon, and variously affect, the remedy by quo warranto or the statutory substitutes therefor, and create other means of determining, in particular instances, disputed questions of title to office. The proceedings, we refer to, are those which

¹⁷R. S. O. (1897), c. 324, s. 31. As to a writ of summons in the nature of a quo warranto to controvert municipal elections, see R. vs Street (1905), 6 Ter. Law R. 137.

¹⁸People vs Hall (1880), 80 N. Y. 117; State vs Meek (1895), 129 Mo. 431, 31 S. W. 913; State

vs Elliott (1898), 117 Ala. 172, 23 So. 43; People vs Dashaway Ass'n. (1890), 84 Cal. 114, 24 P. 277; Bradford vs Territory (1893), 1 Okla. 366, 34 P. 66.

¹⁹Brown vs Jeffries (1889), 42 Kan. 605, 22 P. 578; Tillman vs Otter (1893), 93 Ky. 600, 20 S. W. 1036.

are provided for the purpose of testing the validity of popular elections and determining the rights of the rival claimants. The remedy they afford can generally be had before the ordinary courts of the country by following certain prescribed modes of procedure; but at times not only the proceedings but the tribunal itself is of statutory creation; as, for instance, where election courts are established or municipal bodies are made the judges of the election and qualification of their own members,—the latter jurisdiction being often conferred by special Acts known as charters, instead of general statutes.

In all these cases it often becomes necessary to determine whether the proceedings so authorized by statutory legislation were intended to be exclusive of, or merely cumulative with, the remedy by quo warranto. In some instances no difficulty arises inasmuch as the statute expressly prohibits recourse to quo warranto, either absolutely, or as to all matters which may be investigated by the statutory proceeding. This is the case in England, under the Municipal Corporations Act, 1882, Sec. 87, after specifying several grounds upon which a municipal election may be contested or controverted by election petition, concludes by declaring “that a municipal election shall not be questioned on any of those grounds except by an election petition.” So it is in Nova Scotia where the statute, after providing a certain remedy to controvert municipal elections, declares that “no election or return of a municipal, or town councillor, or warden, or mayor of any incorporated town shall be questioned, except in accordance with the provisions of this chapter.”²⁰ In view of these express provisions, it is manifest that, in general,²¹ recourse to quo warranto may be had only where the

²⁰R. vs Kirk (1892), 24 Nov. Scot. 168.

²¹R. vs Morton (1892), 1 Q. B. 39.

ground relied on is not within the purview of the statutes,²² or the disqualification is not merely for election, but also for "holding" the office,²³ that is, is a continuing one.²⁴

The Quebec Municipal Code also provides a procedure to contest municipal elections, "on the ground of violence, corruption, fraud or incapacity, or on the ground of the non-observance of certain of the necessary formalities," to be instituted before certain courts, *to the exclusion of all others*.²⁵ This statutory remedy has generally been held exclusive of quo warranto, where the election is attacked on any of the grounds mentioned in the Code;²⁶ though a few authorities hold that it does not exclude quo warranto, where the disability or disqualification is of a permanent nature.²⁷

Similar statutes are found in some of the American States.²⁸ Sometimes, however, the courts or certain courts in a State derive their jurisdiction in quo warranto directly from the Constitution, and then, as to such courts, it is evident that the legislature is incompetent to take away or impair the power so vested in them,²⁹ unless authority to do so is conferred by the Constitution itself.³⁰

²²R. vs Cooban (1886), 18 Q. B. D. 269.

²³R. vs Beer (1903), 2 K. B. 693.

²⁴R. vs Mack (1906), 41 Nov. Scot. 128.

²⁵Arts. 346-348. As to Ontario, see 3 Edw. VII, c. 19, s. 244a.

²⁶Paris vs Couture (1883), 10 Que. Law R. 1; Lajeunesse vs Nadeau (1896), 10 Que. R. (S. C.) 61; Delage vs Germain (1886), 12 Que. Law R. 149; Marois vs Lafontaine (1905), 27 Que. R. (S. C.) 174.

²⁷Bedard vs Verret (1904), 25 Que. R. (S. C.) 537; Allard vs Charlebois (1898), 14 Que. R. (S.

C.) 310; Sigouin vs Viau (1899), 16 Que. R. (S. C.) 143.

²⁸Parks vs State (1893), 100 Ala. 634, 13 So. 756; Anderson vs Gossett (1882), 9 Lea. (Tenn.) 644.

²⁹Kane vs People (1876), 4 Neb. 509; State vs Equitable & Co Ass'n (1897), 142 Mo. 325, 41 S. W. 916; People vs Bingham (1889), 82 Cal. 238, 22 P. 1039; People vs Reid (1887), 11 Col. 138, 17 P. 302; State vs Allen (1869), 5 Kan. 213; People vs Londoner (1889), 13 Col. 303, 22 P. 764, 6 L.R.A. 444; Convery vs Conger (1891), 53 N. J. L. 658, 22 A. 549.

³⁰State vs Marlow (1864), 15

§ 457. *Same subject.*—But whenever the legislative intent is not expressed in positive terms, nor the scope of the statute made obvious by a simple reference to the organic law, the point whether or not the statutory remedy excludes quo warranto must be determined by the courts, as best they can, in the light of general principles. The solution of the question naturally depends largely upon the language of the statutory provision, but apart from that, there is lack of harmony among the authorities as to the fundamental rule of construction which should prevail.

The better opinion appears to be, that the remedy by quo warranto is not excluded, unless the legislature has declared so in express terms, or made it manifest by necessary implication. At first blush, this principle of construction may seem to conflict with the rule that quo warranto will not lie where there is another adequate remedy. But this apparent conflict disappears when the distinctive features of the two remedies are closely examined. The statutory proceeding confers on the elector, in his individual capacity, a right to contest the election, or enable a municipal body to pass upon the election and qualification of its members, but in such a proceeding the paramount interest of the State in public offices is lost sight of. Quo warranto on the other hand, as already explained, whether it be prosecuted by a State officer, *ex officio*, or on the relation of a private citizen, has for primary object the vindication of the prerogatives or rights of the Crown or the people, whose sovereignty is encroached upon whenever public offices are usurped or unlawfully intruded into. Hence, the latter remedy belongs to the Crown or to the people in the right of sovereignty, and the jurisdiction of the courts to issue the same should remain, unless

it appears with unequivocal certainty that the legislature intended to take it away.³¹

The above view receives additional support from the canon of interpretation, that where a remedy already exists at common law, and a subsequent one is created by statute, the latter is to be deemed merely concurrent or cumulative with the former, unless a contrary intention, expressed or implied, is to be found in the statute.³²

§ 458. *Same subject.*—In accordance with the foregoing principles, it has generally been held that a provision in a city charter that the city council shall “be the judges of the election and qualification of their own members,” or words of a like import, without anything else to indicate an intention to exclude quo warranto proceedings, constitutes merely a cumulative remedy.³³ The same has been held with reference to statutes providing various modes of contesting elections.³⁴

³¹People vs Hall (1880), 80 N. Y. 117; Ex p. Heath (1842), 3 Hill (N. Y.) 42; People vs Londoner (1889), 13 Col. 303, 22 P. 764, 6 L.R.A. 444; People vs Bingham (1889), 82 Cal. 238, 22 P. 1039; Snowball vs People (1893), 147 Ill. 260, 35 N. E. 538; State vs Fitzgerald (1869), 44 Mo. 425; State vs Fransham (1897), 19 Mont. 273, 48 P. 1; State vs Frazier (1890), 28 Neb. 438, 44 N. W. 471; State vs Anderson (1890), 26 Fla. 240, 8 So. 1; State vs Gates (1886), 35 Minn. 385, 28 N. W. 927; State vs Passaic County (1856), 25 N. J. L. 354; State vs Shay (1884), 101 Ind. 36; State vs Elliott (1898), 117 Ala. 172, 23 So. 43.

³²Coke, 2 Inst. 200; Great Northern S. Fishing Co. vs Edgell (1883), 11 Q. B. D. 225; Mayor of Lichfield vs Simpson (1845), 8 Q. B. 65.

³³People vs Hall (1880), 80 N. Y. 117; State vs Gates (1886), 35 Minn. 385, 28 N. W. 927; State vs Morris (1896), 14 Wash. 262, 44 P. 266; State vs Fitzgerald (1869), 44 Mo. 425; People vs Bird (1886), 20 Ill. App. 568; State vs McKinnon (1880), 8 Or. 494; State vs Kempf (1887), 69 Wis. 470, 34 N. W. 226.

³⁴People vs Holden (1865), 28 Cal. 123; People vs Londoner (1889), 13 Col. 303, 22 P. 764, 6 L.R.A. 444; State vs Adams (1879), 65 Ind. 397; Tarbox vs Sughrue

But, as the judicial power cannot trench upon the independence of parliamentary or legislative bodies, the proceedings established by them or by constitutional provisions to investigate the title and qualification of their own members, whether the investigation be by a committee of their own or by designated courts or judges, are exclusive of all other remedies.³⁵

Another qualification of the general rule of interpretation is, that where a new office is created, and the statute creating it provides a method of determining questions of title to it, no other remedy may be resorted to,³⁶ at any rate where the State is not directly interested.³⁷ This is only an extension or a modification of the well known principle, that where a new right or the means of acquiring it, is conferred by statute and an adequate remedy for its infringement is given by the same authority which created the right, parties injured are confined to the statutory redress.³⁸ But this principle has sometimes been invoked in cases where, according to the weight of authority, it had no application.³⁹

Furthermore, there are cases where a distinction is taken between proceedings on behalf of the State and those on behalf of individuals; and it is declared that the fact that an

(1887), 36 Kan. 225, 12 P. 935; Kane vs People (1876), 4 Neb. 509; Lemire vs Neault (1898), 15 Que. R. (S. C.) 33; Roy vs Martineau (1902), 22 Que. R. (S. C.) 1. See also R. vs Calloway (1886), 3 Man. 297; In re Kelly vs Macarow (1864), 14 U. C. C. P. 313. With reference to last case, see recent legislation in Ontario: 3 Edw. VII, c. 18, s. 45; now consolidated in 3 Edw. VII, c. 19, s. 244a.

³⁵State vs Tomlinson (1878), 20

Kan. 692; State vs Peers (1885), 33 Minn. 81, 21 N. W. 860.

³⁶Baxter vs Brooks (1874), 29 Ark. 173.

³⁷Snowball vs People (1893), 147 Ill. 260, 35 N. E. 538.

³⁸Smith vs Wood (1852), 13 Barb. (N. Y.) 209; Lang vs Scott (1825), 1 Blackf. (Ind.) 405, 12 Am. Dec. 257; Vestry of St. Pancras vs Batterbury (1857), 2 C. B. (N. S.) 477.

³⁹State vs Marlow (1864), 15 Ohio St. 114; Com. vs Leech (1863), 44 Pa. St. 332, 334.

interested person may be confined to the statutory remedy when seeking merely private redress, does not oust the courts of jurisdiction in quo warranto when the interests of the State are involved.⁴⁰ Again, in others it has been held, that the statutory proceedings may be deemed exclusive as to all matters which may be tried therein, without excluding quo warranto to determine other questions not so triable.⁴¹

§ 459. **Same subject.**— Finally, there are a few decisions that lay down principles entirely at variance with those already enunciated, and maintain that the existence of a statutory remedy to contest elections, or of power in a municipal council to try the election and qualification of its own members, entirely excludes quo warranto proceedings.⁴² But, upon a close examination of the cases supporting such view, it becomes obvious that the majority of them are based upon peculiar constitutional or statutory provisions, and hence their conflict with those holding an opposite doctrine, is more apparent than real. In some, the courts expressly refer to the language of the constitution;⁴³ while in others, it is found that the statutes creating the proceedings contain special words of exclusion of other remedies; such as “sole,” “exclusive,” “conclusive,” “final,” or other similar words.⁴⁴

⁴⁰*Snowball vs People* (1893), 147 Ill. 260, 35 N. E. 538; *People vs Holden* (1865), 28 Cal. 123; *State vs Buckland* (1880), 23 Kan. 259; *Gray vs State* (1898), 19 Tex. Civ. App. 521, 49 S. W. 699.

⁴¹*Cutts vs Scandrett* (1899), 108 Ga. 620, 34 S. E. 186; *Com. vs Messer* (1863), 44 Pa. St. 341; *State vs O'Brien* (1890), 47 Ohio St. 464, 25 N. E. 121.

⁴²*State vs Marlow* (1864), 15 Ohio St. 114; *Stine vs Berry* (1894), 96 Ky. 63, 27 S. W. 809;

State vs Mason (1882), 77 Mo. 189; *Simmons vs People* (1886), 18 Ill. App. 588; *Peabody vs Boston* (1874), 115 Mass. 383; *Seay vs Hunt* (1881), 55 Tex. 545; *R. vs Roach* (1859), 18 U. C. Q. B. 226, slightly qualified in *In re Kelly vs Macarow* (1864), 14 U. C. C. P. 313.

⁴³*State vs Baxter* (1873), 28 Ark. 129; *State vs Berry* (1890), 47 Ohio St. 232, 24 N. E. 266.

⁴⁴*State vs Lewis* (1883), 51 Conn. 113; *Selleck vs Common*

§ 460. Different kinds of quo warranto proceedings.—

In England, informations in the nature of quo warranto are of two kinds: those filed *ex officio* by the Attorney-General (or Solicitor-General) on behalf of the Crown; and those exhibited by the Master of the Crown Office at the instance of private individuals, who must enter into the recognizance required by 4 & 5 Will. & M., c. 18. They may, however, conveniently be divided into three classes: First, those filed by the Attorney-General *ex officio*, without leave of the court, and without relators; Second, those filed with the leave of the Court by the Master of the Crown Office, by virtue of his common law power, as His Majesty's attorney and coroner; and, Third, those filed by the Master of the Crown Office on the relation of some person, and by leave of the Court, under the statute of 9 Anne, c. 20.

In the United States, there are also two kinds of quo warranto proceedings: those instituted on behalf of the State *ex officio* by the Attorney-General or other public officer; and those brought at the instance of private individuals, with leave of the Court. But in the American statutes no distinction is made, as in the Statute of Anne, between corporate and other offices, so that private persons are authorized to maintain quo warranto whenever they are interested, irrespective of the nature of the office. Again, as there is no officer in the United States corresponding to the Master of the Crown Office in England, the functions of such officer are generally exercised by the Attorney-General, or the District or County Attorney; and hence whenever quo warranto is not issued in the name of the relator or directly on his relation by the Court, it is exhibited by some one of such officers.

Council of South Norwalk (1873),
40 Conn. 359; Darrow vs People
(1885), 8 Col. 417, 8 P. 661;
Com. vs Garrigues (1857), 28

Pa. St. 9, 70 Am. Dec. 103; Bat-
man vs Megowan (1859), 1 Met.
(Ky.) 533.

§ 461. **Quo warranto on behalf of the State—Discretion of prosecuting officers.**—In legal contemplation, public offices are instituted for the benefit of the State, and proceed immediately or mediately from the sovereign power.⁴⁵ Though their usurpation frequently involves little else than private rights, it is in the eye of the law, as already intimated, a public offense,⁴⁶ an encroachment upon the prerogatives of the Crown or the people, according to the form of government. Hence, as a general rule, whatever may be their character, high or low, the sovereign or the State has a paramount right, and is primarily the proper party, to institute proceedings to prevent their being usurped, intruded into, or unlawfully held.⁴⁷ The prosecution of such proceedings in England is, as we have seen, entrusted to the Attorney-General who, as the attorney and legal guardian of the Crown, is clothed with discretionary power to exhibit on behalf of the Sovereign, a quo warranto information *ex officio*, and without leave of the Court, whenever in his opinion, public interests demand that the official title of any incumbent should be inquired into.⁴⁸

In the United States, while the right of the Attorney-Gen-

⁴⁵Darley vs The Queen (1845), 12 Cl. & Finn. 520.

⁴⁶People vs Atty.-General (1856), 22 Barb. (N. Y.) 114.

⁴⁷R. vs Marsden (1765), 3 Burr. 1812; State vs Gleason (1869), 12 Fla. 190; Atty.-General vs Sullivan (1895), 163 Mass. 446, 40 N. E. 843, 28 L.R.A. 452; People vs Holden (1865), 28 Cal. 123; State vs Thompson (1878), 34 Ohio St. 365; Wheeler vs Commonwealth (1895), 98 Ky. 59, 32 S. W. 259; Harrison vs Greaves (1882), 59 Miss. 453; Wallace vs

Anderson (1820), 5 Wheat. (U. S. 291; Com. vs Walter (1876), 83 Pa. St. 105, 24 Am. Rep. 154; State vs Berkley (1897), 140 Mo. 184, 41 S. W. 732; Mills vs State (1891), 2 Wash. 566; s. c. sub. nom. State vs Mills, 27 P. 560; People vs Hatch (1886), 60 Mich. 229, 26 N. W. 860.

⁴⁸R. vs Philipps (1764), 3 Burr. 1564; R. vs Marsden (1765), 3 Burr. 1812; R. vs Trelawney (1765), 3 Burr. 1616; R. vs Philipps (1767), 4 Burr. 2089. See also other cases cited before.

eral to proceed on behalf of the State is generally conceded,⁴⁹ yet his power is usually controlled by legislation, and is not, as a rule, so exclusive as in England. For instance, in most States his authority is, in some measure, shared by local officers, such as district, county or prosecuting attorneys, who, within limits prescribed by law, are also empowered to file quo warranto informations *ex officio*, on behalf of the State, with or without leave of the courts, according to the power vested in them.⁵⁰

Again, in many jurisdictions the discretion of the American Attorney-General or other prosecuting officer is not as absolute as is that of the English Attorney-General, but is subject to the control of the Courts or of some other superior authority.⁵¹ It also sometimes happens that, upon the refusal of the representative of the State to originate proceedings, the Courts will allow a private individual to proceed in his stead.⁵² But, as a rule, whenever discretion is given to

⁴⁹State vs Gleason (1869), 12 Fla. 190; People vs Fairchild (1876), 8 Hun (N. Y.) 334, 67 N. Y. 334; Com. vs Allen (1880), 128 Mass. 308; State vs Sharp (1880), 27 Minn. 38; State vs Deliesseline (1821), 1 McCord L. (S. C.) 51; Miller vs Seymour (1902), 67 N. J. L. 482, 51 A. 719; Com. vs Walter (1876), 83 Pa. St. 105, 24 Am. Rep. 154; State vs Vail (1873), 53 Mo. 97; State vs Brown (1857), 5 R. I. 1; Caldwell's Admr. vs Bell (1845), 6 Ark. 227; State vs Anderson (1887), 45 Ohio St. 196; 12 N. E. 656.

⁵⁰State vs McMillan (1891), 108 Mo. 153, 18 S. W. 784; State vs Rose (1884), 84 Mo. 198; People vs Regents (1897), 24 Col. 175, 49 P. 286; Mills vs State (1891), 2 Wash. 566; s. c. sub. nom. State vs

Mills, 27 P. 560; State vs Matthews (1898), 44 W. Va. 372, 29 S. E. 994; People vs North Chicago Ry. Co. (1878), 88 Ill. 537; Territory vs vs Armstrong (1889), 6 Dak. 226, 50 N. W. 832; State vs Douglas County Road Co. (1881), 10 Ore. 198.

⁵¹Giles vs Hardie (1840), 23 N. C. 42; Scott vs Clark (1855), 1 Iowa, 70; Bank of Mount Pleasant (1831), 5 Ohio 250; Thompson vs Watson (1891), 48 Ohio St. 552, 31 N. E. 742; Lamoreaux vs Ellis (1891), 89 Mich. 146, 50 N. W. 812.

⁵²State vs Dahl (1897), 69 Minn. 108, 71 N. W. 910; People vs Regents (1897), 24 Col. 175, 49 P. 286. Doctrine of State vs Dahl limited in State vs Olson (Minn. 1909), 119 N. W. 799.

the Attorney-General or other proper officer, to institute quo warranto or not, and he bona fide exercises such discretion, the Courts will not interfere.⁵³

§ 462. **When State has exclusive right of prosecuting quo warranto.**— There is one instance where the State alone is empowered to exhibit quo warranto. It is where the purpose of the proceeding is to impugn the legal existence of a corporation as a body. Corporations can only exist by the authority of the Crown or the State, of which they wield a portion of the sovereignty through the exercise of their franchises, and it is, therefore, the peculiar and exclusive province of the sovereign power to inquire into the usurpation or misuser of corporate franchises, and thereby protect its own sovereignty.⁵⁴ Accordingly, an officer of a de facto municipality cannot be ousted at the instance of a private relator, on the ground that such corporation has no legal existence, because to allow an inquiry into the corporate existence, under such circumstances, would be to permit a private citizen to do indirectly what he has no right to do directly.⁵⁵ But it has been held not to be a valid objection to the granting of quo warranto, at the instance of a private relator against a member of a municipal corporation, that the grounds affect-

⁵³People vs Fairchild (1876), 8 Hun (N. Y.) 334, 67 N. Y. 334; People vs Atty.-General (1856), 22 Barb. (N. Y.) 114; State vs Schnierle (1852), 5 Rich. (S. C.) 299.

⁵⁴R. vs Corporation of Carmarthen (1759), 2 Burr. 869; R. vs Ogden (1829), 10 B. & C. 230; R. vs Taylor (1840), 11 A. & E. 949; R. vs Staples (1867), 9 B. & S. 928, note (a); Askew vs Manning (1876), 38 U. C. Q. B. 345; Chicago vs People (1875), 80

Ill. 496; State vs Tracy (1892), 48 Minn. 497, 51 N. W. 613; Robinson vs Jones (1873), 14 Fla. 256; Gibbs vs Somers Point (1887), 49 N. J. L. 515. See also ante, sec. 64.

⁵⁵Steelman vs Vickers (1889), 51 N. J. L. 180, 17 A. 153, 14 Am. St. R. 675; Richman vs Adams (1896), 59 N. J. L. 289, 36 A. 699; R. vs Taylor (1840), 11 A. & E. 949. See further as to collateral attacks on de facto corporations, sec. 64.

ing his individual title may be equally invoked against the title of every member of the corporation, so that it may have the effect of dissolving the same.⁵⁶

It may also be mentioned, that there are many instances where the right of the State to institute quo warranto, though not absolutely exclusive as in the case of corporations, yet is not the less so *accidentally*. This occurs where the usurpation or unlawful holding of an office does not affect private rights, but merely constitutes an invasion of the prerogatives of the sovereign power or the rights of the people at large.⁵⁷

§ 463. Quo warranto at the instance of private individuals.—At common law, a quo warranto information could not be filed at the instance of a private individual, without the intervention of the Attorney-General or other proper officer, but, as already explained, under the statute of Anne,⁵⁸ and various American statutes of still wider scope, a private person may apply to the Court for leave to institute quo warranto proceedings upon his own relation.⁵⁹ But, under these statutes, the remedy may only be invoked by a person who has some special interest in opposing the usurpation complained of, distinct from that of the rest of the public. If his interest is only co-extensive with that of the citizens at large, his application will be denied, and the State alone, as we have seen, will be entitled to institute the proceedings.⁶⁰

⁵⁶R. vs White (1836), 5 A. & E. 613; R. vs Parry (1837), 6 A. & E. 810; Mitchell vs Tolan (1868), 33 N. J. L. 195.

⁵⁷Caldwell Adm'r vs Bell (1845), 6 Ark. 227; Barnum vs Gilman (1881), 27 Minn. 466, 38 Am. Rep. 304; Harrison vs Greaves (1882), 59 Miss. 453.

⁵⁸9 Anne, c. 25 or c. 20 (Ruff.).

⁵⁹Atty.-General vs Sullivan

(1895), 163 Mass. 446, 40 N. E. 843, 28 L.R.A. 452; Goddard vs Smithett (1854), 3 Gray (Mass.) 116; State vs Ashely (1839), 1 Ark. 279; State vs Gleason (1869), 12 Fla. 190; Miller vs Utter (1833), 14 N. J. L. 84; State vs Stewart (1881), 6 Houst. (Del.) 359; Com. vs Swank (1875), 79 Pa. St. 154.

⁶⁰R. vs Hodge, 2 B. & Ald. 344,

So influenced indeed are the courts by this cardinal principle, that it will be constantly found to underlie their interpretation of statutes conferring, in general terms, power on private individuals to institute quo warranto proceedings. Thus, a statutory provision declaring that informations in the nature of quo warranto may be exhibited at the relation of any person desiring to present the same, has been held to mean any person having an interest in the subject-matter of the proceedings.⁶¹ So where a statute provides for the filing of an information by any person "whenever he claims an interest in the office," this is interpreted to mean an interest different from and greater than that possessed by all citizens in common.⁶² The like construction has been placed on statutory words empowering a private party to undertake quo warranto proceedings on his own relation, in the name of the State, upon the refusal or neglect of the prosecuting officer to do so.⁶³ But, in England, in cases not falling within the statute of Anne, the relator need not prove special interest, as his relation is only *pro forma*, and the proceedings might be carried on without his name being used.⁶⁴

n; *R. vs Kenp* (1789), 1 East, 46, n; *R. vs Saunders* (1802), 3 East, 119; *Barnum vs Gilman* (1881), 27 Minn. 466, 38 Am. R. 304; *Demarest vs Wickham* (1875), 63 N. Y. 320; *State vs Taylor* (1893), 50 Ohio St. 120, 38 N. E. 24; *Scott vs State* (1898), 151 Ind. 556, 52 N. E. 163; *Com. vs Burrell* (1847), 7 Pa. St. 34; *Com. vs Cluely* (1867), 56 Pa. St. 270, 94 Am. Dec. 75; *State vs Matthews* (1898), 44 Va. 372; 29 S. E. 994; *Hines vs Vann* (1896), 118 N. C. 3, 23 S. E. 932; but see *State vs*

Dahl (1897), 69 Minn. 108, 71 N. W. 910.

⁶¹*State vs Boal* (1870), 46 Mo. 528; *Com. vs Cluely* (1867), 56 Pa. St. 270, 94 Am. Dec. 75; *State vs Mason* (1882), 77 Mo. 189.

⁶²*Mills vs State* (1891), 2 Wash. 566, s. c. sub. nom. *State vs Mills*, 27 P. 560.

⁶³*People vs Grand R. B. Co.* (1889), 13 Col. 11, 21 P. 898, 16 Am. St. R. 182.

⁶⁴See *R. vs Parham* (1849), 13 Q. B. 858; *Arch. Crown Office*, Pr. p. 127.

§ 464. When private person has sufficient interest to maintain quo warranto.—It is impossible to lay down rules of universal application, in regard to the interest required on the part of a private individual to enable him to maintain quo warranto proceedings on his own relation. Every case must depend upon its own set of circumstances. Moreover, the authorities are not harmonious on this subject, though in many instances this lack of harmony is more attributable to the difference in the terms of the various statutory provisions, than to essential diversity of opinion among the Courts.

It is generally conceded that a citizen and a taxpayer (not a mere stranger) of a municipality has such an interest in the due administration of public affairs, as will entitle him to institute proceedings to oust an incumbent unlawfully assuming to exercise the functions of one of the public offices of the municipality.⁶⁵ But a number of cases hold that the mere status of citizen and taxpayer is insufficient, and that a party cannot be relator unless he can show that by the usurpation he is injured or affected in his private rights especially, that is, differently from the other citizens and taxpayers.⁶⁶

⁶⁵R. vs Kemp (1789), 1 East, 46 n; R. vs Davies (1828), 1 M. & R. 538; R. vs Hodge, 2 B. & Ald. 344, n; R. vs Parry (1837), 6 A. & E. 810; R. vs Quayle (1840), 11 A. & E. 508; R. vs Briggs (1864), 11 L. T. (N. S.) 372; In re McPherson & Beeman (1859), 17 U. C. Q. B. 99; R. vs St. Jean (1881), 16 U. C. Q. B. 77; Sigouin vs Viau (1899), 16 Que. R. (S. C.) 143; Churchill vs Walker (1882), 68 Ga. 681; State vs Hall (1892), 111 N. C. 369, 16 S. E. 420; State vs Hammer (1880), 42 N. J. L. 435; State vs Gastinel

(1868), 20 La. Ann. 114; Com. vs Jones (1849), 12 Pa. St. 365; Com. vs Messer (1863), 44 Pa. St. 341; Lamoreaux vs Ellis (1891), 89 Mich. 146, 50 N. W. 812; State vs Vail (1873), 53 Mo. 97; State vs Leischer (1903), 117 Wis. 475, 94 N. W. 299; State vs Martin (1878), 46 Conn. 479; Darrow vs People (1885), 8 Col. 417, 8 P. 661.

⁶⁶Voisin vs Leche (1871), 23 La. Ann. 25; Demarest vs Wickham (1875), 63 N. Y. 320; State vs Matthews (1898), 44 W. Va. 372, 29 S. E. 994; Miller vs Palmero

A school supporter is a good relator in an information to try the title of a person to the office of school trustee.⁶⁷ So are school directors entitled to maintain quo warranto to oust and exclude from their board, a person claiming to be a member thereof through an invalid election.⁶⁸

Again, the claimant of an office by election or appointment has sufficient interest therein to institute quo warranto proceedings against the unlawful incumbent.⁶⁹ But when his sole interest in the office is that of claimant, he must be able to show a valid title in himself,⁷⁰ and therefore where his title is equally defective with that of the incumbent, he is not a good relator.⁷¹ On the same principle, a defeated candidate not entitled to the office in any event, and hence having no legal claim whatever thereto, cannot originate quo warranto proceedings to try his opponent's title,⁷² unless he shows

(1873), 12 Kan. 14; *State vs Stein* (1882), 13 Neb. 529, 14 N. W. 481.

⁶⁷*R. vs Nagle* (1894), 24 Ont. R. 507; *Askew vs Manning* (1876), 38 U. C. Q. B. 345; *Chaplin vs Woodstock School Board* (1889), 16 O. R. 728.

⁶⁸*Com. vs Fletcher* (1897), 180 Pa. St. 456, 36 A. 917.

⁶⁹*State vs Morgan* (1902), 79 Miss. 659, 31 So. 338; *State vs Owens* (1885), 63 Tex. 261; *Manahan vs Watts* (1900), 64 N. J. L. 465, 45 A. 813; *People vs Ryder* (1855), 12 N. Y. 433, 16 Barb. (N. Y.) 370; *Guilotte vs Poincy* (1889), 41 La. Ann. 333, 6 So. 507, 5 L.R.A. 403; *Com. vs Bunn* (1874), 10 Phila. (Pa.) 162, 31 Leg. Int. (Pa.) 340; *Parker vs Smith* (1859), 3 Minn. 240, 74 Am. Dec. 749; *State vs Taylor* (1893), 50 Ohio St. 120, 38 N. E. 24; *Yonkey vs State* (1866), 27

Ind. 236; *Magee vs Calaveras County* (1858), 10 Cal. 376.

⁷⁰*Com vs McCarter* (1881), 98 Pa. St. 607; *Com. vs Cluely* (1867), 56 Pa. St. 270, 94 Am. Dec. 75; *Crovatt vs Mason* (1897), 101 Ga. 246, 28 S. E. 891; *State vs Moores* (1899), 58 Neb. 285, 78 N. W. 529; *State vs Wheatley* (1903), 160 Ind. 183, 66 N. E. 684; *State vs Hammer* (1880), 42 N. J. L. 435.

⁷¹*R. vs Bond* (1788), 2 Term (D. & E.) 767; *R. vs Cudlipp* (1796), 6 Term (D. & E.) 503; *R. vs Cowell* (1825), 6 D. & R. 336; *State vs Stuht* (1897), 52 Neb. 209, 71 N. W. 941; *Collins vs Huff* (1879), 63 Ga. 207.

⁷²*Miller vs English* (1848), 21 N. J. L. 317; *State vs Bieler* (1882), 87 Ind. 320; *Reynolds vs State* (1878), 61 Ind. 392; *Harrison vs Greaves* (1882), 59 Miss.

that he is a citizen and taxpayer, and the court sees fit to uphold his application on that ground.⁷³

§ 465. Discretion of Court in granting or refusing leave to file quo warranto.—As already seen, no private individual is entitled, as of right, to institute quo warranto proceedings, but he must obtain the sanction of the Court. The granting or withholding leave is within the sound discretion of the tribunal or judge to which the application is made. Leave, on the one hand, is not granted as a matter of right upon the part of the relator; and, on the other hand, a Court or judge is not at liberty to arbitrarily refuse the same, but must exercise a sound discretion in accordance with principles of law.⁷⁴ “It would be very grievous,” says Lord Mansfield, “that the information should go of course, and it

453; *Andrews vs State* (1892), 69 Miss. 740, 13 So. 853; *State vs Matthews* (1898), 44 W. Va. 372, 29 S. E. 994.

⁷³*Crovatt vs Mason* (1897), 101 Ga. 246, 28 S. E. 891; *Londoner vs People* (1891), 15 Col. 557, 26 P. 135; *People vs Londoner* (1889), 13 Col. 303, 22 P. 764, 6 L.R.A. 444.

⁷⁴*R. vs Parry* (1837), 6 A. & E. 810; *R. vs Trevenen* (1819), 2 B. & Ald. 479; *R. vs Sargent* (1793), 5 Term. (D. & E.) 466; *R. vs Cousins* (1873), L. R. 8 Q. B. 216; *R. vs Ryan* (1850), 6 U. C. Q. B. 296; *Guay vs Fortin* (1903), 24 Que. R. (S. C.) 210; *Gunton vs Ingle* (1834), 11 Fed. Cas. (No. 5870) p. 116, 4 Cranch (C. C.) 438; *Roche vs Bruggemann* (1890), 53 N. J. L. 122, 20 A. 730; *People vs Keeling* (1878), 4 Col. 129;

State vs McLean County (1902), 11 N. Dak. 356, 92 N. W. 385; *State vs Stewart* (1862), 32 Mo. 379; *People vs Richardson* (1825), 4 Cow. (N. Y.) 97, note (a); *State vs Dowlan* (1885), 33 Minn. 536, 24 N. W. 188; *McPhail vs People* (1896), 160 Ill. 77, 43 N. E. 382, 52 Am. St. R. 306; *Com. vs McCarter* (1881), 98 Pa. St. 607; *Atty.-General vs Erie etc Ry. Co.* (1884), 55 Mich. 15, 20 N. W. 696; *Mills vs State* (1891), 2 Wash. 566, s. c. sub. nom. *State vs Mills*, 27 P. 560; *State vs Brown* (1857), 5 R. I. 1; *State vs Elliott* (1896), 13 Utah, 200, 44 P. 248; *State vs Stein* (1882), 13 Neb. 529, 14 N. W. 481; *State vs Smith* (1876), 48 Vt. 266; *State vs Schnierle* (1852), 5 Rich. L. (S. C.) 299; *People vs Sweeting* (1807), 2 John. (N. Y.) 184.

would be a breach of trust in the Court, to grant it as of course.”⁷⁵

But, once the Court has passed upon an application for quo warranto and granted leave to file the same, it is held by some authorities that the Court has exhausted its discretionary powers, and the issues of fact and law involved in the proceeding must be determined in accordance with the strict rules of law as in ordinary cases.⁷⁶ Other authorities, however, hold that when leave is granted improvidently, the judge or Court may, upon the hearing, refuse the relief sought, upon the same ground and for the same reason, that the application could have been denied in the first instance.⁷⁷ But, in connection with this subject, it may not be amiss to repeat here the remark of Lord Tindal, C. J.,⁷⁸ viz:—That the cases in which there has been a refusal to allow an information to be filed are not necessarily authorities against the validity of an information when filed, because in the cases of refusal the courts may have proceeded on the ground that the circumstances were not such as to call for their interference; while, on the other hand, those in which information have been granted, are authorities in favor of their validity.

§ 466. Circumstances affecting the discretion of the Court.—In the exercise of its discretion, the Court is guided by the particular circumstances of each case, viewed and

⁷⁵R. vs Wardroper (1766), 4 Burr. 1963.

⁷⁶State vs Shank (1892), 36 W. Va. 223, 14 S. E. 1001; State vs Brown (1857), 5 R. I. 1; People vs Golden Rule (1885), 114 Ill. 34; People vs Regents (1897), 24 Col. 175, 49 P. 286; State vs Eliott (1896), 13 Utah, 200, 44 P. 248.

⁷⁷State vs Hoff (1895), 88 Tex. 297, 31 S. W. 290; Com. vs Cluely (1867), 56 Pa. St. 270, 94 Am. Dec. 75; People vs Hamilton (1886), 24 Ill. App. 609.

⁷⁸Darley vs The Queen (1845), 12 Cl. & Finn. 520.

appreciated in the light of precedents and general principles.⁷⁹ The matter to be investigated by the Court may cover a wide range of subjects; such as, the propriety of the remedy under the circumstances,—the grounds upon which it is invoked, involving as a rule questions of law and fact affecting the incumbent's title,—the possible effect of granting the same, upon the interests of the public and third persons,—the character of the office and its tenure,—the interest, motive and conduct of the relator,—and the like. A brief reference will be made to these various points.

As to the proceeding itself, the rule is that where there is no other remedy leave is usually granted,⁸⁰ but where the aggrieved party may obtain complete and adequate relief by a civil action or some other legal proceeding, it will be refused.⁸¹ So, the remedy is generally allowed where the right, or the fact on which the right depends, is disputed;⁸² or where the right turns on a point of new or doubtful law.⁸³ But where the application is manifestly groundless, frivolous, vexatious, or based on merely technical grounds, it will be denied.⁸⁴ So where the proceeding would be useless, as where the application is made by a person who would be liable

⁷⁹R. vs Dawes (1767), 4 Burr. 2022; R. vs Stacey (1785), 1 Term. (D. & E.) 1; State vs Mead (1883), 56 Vt. 353; Mitchell vs Tolan (1868), 33 N. J. L. 195; Cain vs Brown (1897), 111 Mich. 657, 70 N. W. 337.

⁸⁰Bacon Abr. Informations (D); State vs Burnett (1841), 2 Ala. 140.

⁸¹R. vs Cann (1737), Andr. 14; State vs Wilson (1883), 30 Kan. 661; People vs Whitcomb (1870), 55 Ill. 172; State vs Moriarty (1900), 82 Minn. 68, 84 N. W. 495; Lord vs Every (1878), 38 Mich.

405; Hunter vs Chandler (1870), 45 Mo. 452.

⁸²R. vs Carter (1774), Cowp. 58; R. vs Latham (1764), 3 Burr. 1485; State vs Burnett (1841), 2 Ala. 140.

⁸³R. vs Godwin (1780), 1 Doug. 397; Miller vs Utter (1833), 14 N. J. L. 84.

⁸⁴R. vs Lewis (1759), 2 Burr. 780; R. vs Carpenter (1736), 2 Stra. 1039; State vs McCreary (1897), 69 Vt. 461, 38 A. 165, 44 L.R.A. 446; State vs Fisher (1856), 28 Vt. 714.

to immediate dismissal from the office in which he seeks to be reinstated;⁸⁵ or where it is sought to test the title of a person whose official term has expired,⁸⁶ or will expire before the termination of the proceedings.⁸⁷

But where the object of quo warranto is not solely to oust the incumbent from office, but also to punish him for usurpation, or where the rights and interests of the relator or third persons are incidentally involved, the court may pronounce a judgment of ouster, although the official term has expired.⁸⁸

§ 467. **Same subject.**—Again, leave will not generally be granted on the mere ground of irregularities in an election, unless it is affirmatively shown that the result of the election was affected by such irregularities. “The rule always acted upon,” says Blackburn, J., “is, that if the right person has been elected, and it is not shown that any one else has been kept out, nor the result of the election in any way affected, the Court will not allow the writ to issue.”⁸⁹

The Court will go still further and deny leave where the incumbent’s title is clearly defective, if there are other considerations outweighing the injury complained of, such as

⁸⁵Ex p. Richards (1878), 3 Q. B. D. 368.

⁸⁶In re Harris (1837), 6 A. & E. 475; State vs Jacobs (1848), 17 Ohio, 143; Morris vs Underwood (1856), 19 Ga. 559.

⁸⁷R. vs Hodson (1842), 4 Q. B. 648; People vs Sweeting (1807), 2 John (N. Y.) 184; Com. vs Reigart (1826), 14 S. & R. (Pa.) 216; State vs Ward (1867), 17 Ohio St. 543; Com. vs Athearn (1807), 3 Mass. 285. See also R. vs Callo-way (1886), 3 Man. 297.

⁸⁸R. vs Blizzard (1866), L. R. 2 Q. B. 55; R. vs Williams (1757),

1 Burr. 402; People vs Hartwell (1864), 12 Mich. 508, 86 Am. Dec. 70; Com. vs Smith (1863), 45 Pa. St. 59; People vs Rodgers (1897), 118 Cal. 393, 46 P. 740; People vs Loomis (1832), 8 Wend. (N. Y.) 396, 24 Am. Dec. 33; Dean vs Millar (1898), 56 Neb. 301, 76 N. W. 555; State vs Pierce (1874), 35 Wis. 93.

⁸⁹R. vs Cousins (1873), 8 L. R. Q. B. 216; R. vs Ward (1873), 8 L. R. Q. B. 210; Roche vs Brugge-man (1890), 53 N. J. L. 122, 20 A. 730; Ex p. Murphy (1827), 7 Cow. (N. Y.) 153.

that of great inconvenience and detriment to the public and third persons.⁹⁰ Thus, though strictly, an information may be allowed even where it may have the effect of dissolving a municipal corporation,⁹¹ yet where this result is to be apprehended, leave is usually withheld.⁹² Accordingly, it was held not to be sufficient ground to obtain leave to institute quo warranto proceedings against the members of a municipal council, that the election at which they were elected was held on a wrong day, where it appeared that the irregularity was due to a bona fide mistake and that the effect of the proceedings, if successfully carried through, would be to deprive the people interested, of municipal government until the next annual election.⁹³

So, if the office be of very small importance, or for a short term and no other person complains of being deprived of it, the court will generally refuse to grant leave.⁹⁴ Likewise, in the absence of exceptional circumstances, considerable lapse of time or long user of the office, will be a bar to an information, as stale applications will not be favored.⁹⁵

§ 468. Same subject.—Lastly, the motives, conduct and standing of the relator will largely influence the court in the

⁹⁰R. vs Parry (1837), 6 A. & E. 810; Com. vs McCarter (1881), 98 Pa. St. 607; State vs McNaughton (1884), 56 Vt. 736; People vs Boyd (1889), 30 Ill. App. 608; State vs Mead (1883), 56 Vt. 353.

⁹¹R. vs Trevenen (1819), 2 B. & Ald. 479.

⁹²R. vs Parry (1837), 6 A. & E. 810; R. vs Bond (1788), 2 Term (D. & E.) 767.

⁹³People vs Keeling (1878), 4 Col. 129; Mitchell vs Tolan (1868),

33 N. J. L. 195; State vs Hoff (1895), 88 Tex. 297, 31 S. W. 290.

⁹⁴Anon. (1729), 1 Barnard 279; State vs Fisher (1856), 28 Vt. 714.

⁹⁵R. vs Trelawney (1765), 3 Burr. 1616; R. vs Stephens (1757), 1 Burr. 433; R. vs Newling (1789), 3 Term (D. & E.) 310; R. vs Dicken (1791), 4 Term (D. & E.) 282; State vs Westport (1893), 116 Mo. 582, 22 S. W. 888; State vs Gordon (1882), 87 Ind. 171; People vs Boyd (1889), 30

exercise of its discretion.⁹⁶ Thus, it has been laid down that quo warranto will be denied where it appears that the relator is not acting in good faith in attempting to test the title to the office;⁹⁷ as where he is animated by a mere spirit of personal revenge.⁹⁸ But it is seemingly no objection that he is actuated by party spirit.⁹⁹

Again, an information will be refused, where the facts show such conduct on the part of the relator as precludes him from making the inquiry. Thus, it was held a good ground for refusal, that the relator had acquired knowledge of the defect in the defendant's title, by insidiously drawing him into a confession.¹ So it was denied where the applicant had agreed not to enforce a by-law upon which he grounded his attempt to impeach the defendant's title.² Likewise where the relator was the legal adviser of the defendant, and had advised him that he was duly elected.³

Moreover, as already intimated, no information will be allowed on the relation of one who has been guilty of laches in applying therefor.⁴ Nor will a relator be permitted to question the validity of any proceedings, in which he participated, concurred or acquiesced, with knowledge of their irreg-

Ill. App. 608, affirmed 132 Ill. 60; *People vs Schnepf* (1899), 179 Ill. 305, 53 N. E. 632; *People vs Oakland County Bank* (1844), 1 Doug. (Mich.) 282.

⁹⁶*R. vs Dawes* (1767), 4 Burr. 2022; *R. vs Parry* (1837), 6 A. & E. 810; *Soucy vs People* (1885), 113 Ill. 109; *Com. vs Jones* (1849), 12 Pa. St. 365.

⁹⁷*Miller vs Seymour* (1902), 67 N. J. L. 482, 51 A. 719.

⁹⁸*Com. vs McCarter* (1881), 98 Pa. St. 607.

⁹⁹*R. vs Benney* (1831), 1 B. & Ad. 684.

¹*R. vs Dicken* (1791), 4 Term (D. & E.) 282.

²*R. vs Mortlock* (1789), 3 Term (D. & E.) 300.

³*R. vs Wardroper* (1766), 4 Burr. 1963; *R. vs Payne* (1818), 2 Chitty, 369.

⁴*R. vs Newling* (1789), 3 Term. (D. & E.) 310; *People vs Schnepf* (1899), 179 Ill. 305, 53 N. E. 632; *State vs Gordon* (1882), 87 Ind. 171.

ularity.⁵ Thus, where an election is held on a wrong day or at an improper place, and a person, who is himself a candidate, has been instrumental in calling it on that day, or knows that it is irregular, he will be estopped from afterwards disputing its validity.⁶

So a corporator, who voted at an election of corporate officers, is not a competent relator to impeach that election on the ground of an objection to the presiding officer, unless he shows that at the time he voted he was ignorant of the objection.⁷ So a borough officer who administered to a councillor the declaration prescribed by law, knowing of his disqualification, cannot be heard as a relator, although he took no part in the election other than by supporting an unsuccessful candidate and acquiescing in the result.⁸ So, as elsewhere seen, an information will be refused, where the relator seeks to impeach the title of another on account of a defect which equally applies to his own, or to the title of those under whom he claims.⁹

Furthermore, where it appears that the relator has no interest but is a mere stranger to the corporation, prowling into other men's rights, leave will be refused.¹⁰ So it will, where the relator is in low and indigent circumstances and there are strong grounds of suspicion that he is applying, not

⁵R. vs Stacey (1785), 1 Term (D. & E.) 1; R. vs Parkyn (1831), 1 B. & Ad. 690; R. vs Cusac (1876), 6 Ont. Pr. R. 303; Roy vs Thibault (1878), 22 L. Can. Jur. 280; R. vs Street (1905), 1 W. Law. R. (Can.) 202; State vs Tipton (1887), 109 Ind. 73, 9 N. E. 704; Cole vs Dyer (1859), 29 Ga. 434; People vs Moore (1874), 73 Ill. 132; People vs North Chich. Ry. Co. (1878), 88 Ill. 537; Cate vs Furber (1875), 56 N. H. 224.

⁶Dorsey vs Ansley (1884), 72 Ga. 460; People vs Waite (1873), 70 Ill. 25, 6 Chic. Leg. News, 175.

⁷R. vs Slythe (1827), 6 B. & C. 240; see also State vs Tipton (1887), 109 Ind. 73, 9 N. E. 704.

⁸R. vs Green (1843), 2 Q. B. 460.

⁹R. vs Cudlipp (1796), 6 Term (D. & E.) 503.

¹⁰R. vs Kemp (1789), 1 East, 46 (n.) See sec. 464, as to interest required of relator.

on his own account, but in collusion with others, at least where the proceeding, if successful, would be productive of grave consequences.¹¹ So, the court will not assist one who attempts to gain admission to an office he is manifestly incapable of filling. Thus, the court refused a quo warranto for the purpose of placing the applicant in the position of township clerk, where it appeared by his application that he could not write.¹²

§ 469. Time within which quo warranto proceedings must be instituted.—In 1791, the court of King's Bench resolved to limit in future their own discretion in granting quo warranto applications to six years; beyond which time they would not under any circumstances suffer a party, who had been so long in possession of his franchise, to be disturbed.¹³ But now, by the Municipal Corporations Act (1882), it is declared ¹⁴ that “an application for an information in the nature of quo warranto against any person claiming to hold a corporate office, shall not be made after the expiration of twelve months from the time when he became disqualified after election;” and that ¹⁵ every municipal election not called in question within twelve months after the election shall be deemed to have been to all intents a good and valid election. But independently of statute, the practice of the court has generally been to refuse a quo warranto application where the same concerned an annual office on which the title to no other depended, and the motion was made at such a time that the case could not come to a judgment before the expiration of a year.¹⁶ As to all offices, however, not affected by

¹¹R. vs Trevenen (1819), 2 B. & Ald. 479.

¹²R. vs Ryan (1850), 6 U. C. Q. B. 296.

¹³R. vs Dicken (1791), 4 Term (D. & E.) 282.

¹⁴S. 225.

¹⁵Sec. 73.

¹⁶R. vs Hodson (1842), 4 Q. B. 648, note (b.) Also State vs Fisher (1856), 28 Vt. 714; Com. vs Athearn (1807), 3 Mass. 285.

the foregoing statute or practice, the six year limit laid down by the Court of Queen's Bench still governs; but of course this rule does not affect quo warranto informations filed *ex officio* by the Attorney-General, as they are exhibited without the leave of the court.

In some American jurisdictions, also, there is legislation limiting the time within which quo warranto may be prosecuted.¹⁷ In Illinois, it has been held that the statute of limitations applies to quo warranto, where the object is to enforce private rights,¹⁸ but not where it is on behalf of the State.¹⁹ On the other hand, in Virginia, it was held that statutes limiting penal actions could not apply to quo warranto, since the same is a civil proceeding.²⁰ But even where the court does not deem itself bound by any statute of limitations, yet it is sometimes guided by analogy thereto in the exercise of its discretionary power.²¹ However, in the absence of express legislation, lapse of time in the United States, as in England, is generally no bar to an information in the nature of quo warranto prosecuted on behalf of the people by the Attorney-General or other proper officer.²²

§ 470. Public offices respecting which quo warranto lies.—Three tests of the applicability of quo warranto are given in *Darley vs The Queen*:²³ the source of the office, the

¹⁷State vs Beecher (1847), 16 Ohio, 358; State vs Buckley (1899), 60 Ohio St. 273, 54 N. E. 272.

¹⁸People vs Boyd (1889), 30 Ill. App. 608, affirmed in (1890), 132 Ill. 60, 23 N. E. 342.

¹⁹McPhail vs People (1896), 160 Ill. 77, 43 N. E. 382, 52 Am. St. R. 306.

²⁰Com. vs Birchett (1816), 2 Va. Cas. 51.

²¹State vs Gordon (1882), 87 Ind. 171. See ante, secs. 466 et seq.

²²People vs Gary (1902), 196 Ill. 310, 63 N. E. 749; State vs Pawtuxet (1867), 8 R. I. 521, 94 Am. Dec. 123; Com. vs Allen (1880), 128 Mass. 308.

²³(1845), 12 Cl. & Fin. 520.

tenure, and the duties. As to the source, it was thought at one time that the remedy was limited to usurpations of offices directly created by the Crown, but in the above case it was laid down that it could be used in respect to all public offices whether immediately created by the sovereign, or only mediately so, as where the creation is by Act of Parliament. As to the tenure, all that is requisite is that the office be of a public nature, and not merely the function or employment of a deputy or servant held at the will and pleasure of others. And lastly, the duties must be such that the public is interested in their performance.²⁴

Analogous principles have been adopted in the United States.²⁵

§ 471. Officer must be in possession of the office.—

There must be a possession and user of the office, in order to found an application for quo warranto. The remedy being based upon an alleged or assumed usurpation, it can only be maintained after an assumption of the office. In other words, the pretended officer must not only claim to be a public officer, but must be *de facto* in office.²⁶ Thus, it is not sufficient

²⁴See also *R. vs St. Martin's* (1851), 17 Q. B. 149; *R. vs Corporation of Bedford Level* (1805), 6 East, 356; *R. vs Fox* (1858), 8 E. & B. 939; *R. vs Boyles* (1729), *Ld. Ray.* 1559; *Askew vs Manning* (1876), 38 U. C. Q. B. 345, 358.

²⁵*People vs Hills* (1869), 1 Lans. (N. Y.) 202; *Ptacek vs People* (1900), 94 Ill. App. 571; *Atty.-General vs Cain* (1890), 84 Mich. 223, 47 N. W. 484; *Atty.-General vs Drohan* (1897), 169 Mass. 534, 48 N. E. 279, 61 Am. St. R. 301; *State vs Jennings* (1898), 57 Ohio

St. 415, 49 N. E. 404; 63 Am. St. R. 723; *Eliason vs Coleman* (1882), 86 N. C. 235; *State vs Brown* (1857), 5 R. I. 1; *State vs Cronan* (1897), 23 Nev. 437, 49 P. 41.

²⁶*R. vs Whitwell* (1792), 5 Term. (D. & E.) 85, 2 R. R. 545; *R. vs Slatter* (1840), 11 A. & E. 505; *R. vs Ponsonby* (1755), 1 Ves. Jr. 1; *People vs McCullough* (1871), 11 Abb. Pr. (N. S.) (N. Y.) 129; *Haines vs Freeholders of Camden* (1885), 47 N. J. L. 454; *Roberson vs Bayonne* (1896), 58 N. J. L. 326, 33 A. 734; *Updegraff*

to state that the defendant who was elected to an office, has tendered himself to be sworn in.²⁷ But the taking of the required oath of office by one who claims the right to exercise its functions, is a sufficient acceptance and user to authorize proceedings in quo warranto.²⁸ And where a person has actually acted as a public officer, it is not necessary to prove a formal acceptance by showing that he has subscribed the official oath or declaration.²⁹

§ 472. Dual purpose of American statutory quo warranto in some cases—Burden of proof.—At common law and in the absence of legislation changing the rule, the only questions that are triable in quo warranto are those directly affecting the title of the incumbent;³⁰ and even where the proceeding is instituted on the relation of a private person, the status of the latter need not be inquired into further than to ascertain that he is sufficiently interested to prosecute the same. But, under the American statutory proceedings in the nature of quo warranto, both the title of the incumbent and that of the claimant may often be determined, at the same time.³¹

vs Crans (1864), 47 Pa. St. 103; Sublett vs Bedwell (1872), 47 Miss. 266, 12 Am. R. 338; Osgoode vs Jones (1881), 60 N. H. 543.

²⁷R. vs Whitwell (1792), 5 Term (D. & E.) 85.

²⁸R. vs Tate (1803), 4 East, 337; R. vs Harwood (1802), 2 East, 177; People vs Callaghan (1876), 83 Ill. 128; State vs Meek (1895), 129 Mo. 431, 31 S. W. 913.

²⁹R. vs Quayle (1840), 11 A. & E. 508.

³⁰R. vs Bedford Level (1805), 6 East, 356; Com. vs Swasey (1882), 133 Mass. 538; State vs

Vail (1873), 53 Mo. 97; People vs Knox (1885), 38 Hun (N. Y.) 236; People vs Miles (1852), 2 Mich. 348; Manahan vs Watts (1900), 64 N. J. L. 465, 45 A. 813; Edelstein vs Fraser (1894), 56 N. J. L. 3, 28 A. 434; Holmes vs Sikes (1901), 113 Ga. 580, 38 S. E. 978; State vs Palmer (1869), 24 Wis. 63; Clark vs People (1853), 15 Ill. 213; State vs Gleason (1869), 12 Fla. 190; People vs Shorb (1893), 100 Cal. 537, 35 P. 163, 38 Am. St. R. 310.

³¹People vs Ryder (1855), 12 N. Y. 433, 16 Barb. (N. Y.) 470;

In those cases the common law rule requiring the defendant to justify his possession of the office,³² which rule is generally followed in the United States when the interests of the State are really at stake,³³ is modified, and the burden of proof is on the relator to make out a better title than that of the defendant.³⁴ In the words of the Supreme Court of North Carolina, "the plaintiff's right to recover depends upon his right to the office. If he is not entitled to it, it is a matter of no importance to him who is."³⁵

But this reasoning has no force where the relator has suffi-

People vs Nolan (1886), 101 N. Y. 539, 5 N. E. 446, affirming (1884), 32 Hun. 612; People vs Banvard (1865), 27 Cal. 470; People vs Londoner (1889), 13 Col. 303, 22 P. 764, 6 L.R.A. 444; Brown vs Goben (1890), 122 Ind. 113, 23 N. E. 519; Vrooman vs Michie (1888), 69 Mich. 42, 36 N. W. 749; Com. vs Cullen (1850), 13 Pa. St. 133, 53 Am. Dec. 450; State vs Heinmiller (1882), 38 Ohio St. 101; Davis vs State (1889), 75 Tex. 420, 12 S. W. 957; State vs Shank (1892), 36 W. Va. 223, 14 S. E. 1001; Crovatt vs Mason (1897), 101 Ga. 246, 28 S. E. 891; State vs Herndon (1887), 23 Fla. 287; State vs Elliott (1896), 13 Utah, 200, 44 P. 248. See also R. vs Street (1905), 1 W. Law R. (Can.) 202.

³²R. vs Leigh (1768), 4 Burr. 2143.

³³People vs Thacher (1874), 55 N. Y. 525, 14 Am. R. 312; People vs Utica Ins. Co. (1818), 15 John. (N. Y.) 353, 8 Am. Dec. 243; People vs Bruennemer (1897), 168 Ill. 482, 48 N. E. 43; Keeler vs Robertson (1873), 27 Mich. 116;

State vs Beecher (1847), 16 Ohio, 358; State vs Sharp (1880), 27 Minn. 38; State vs Chatfield (1898), 71 Conn. 104, 40 A. 922; State vs Powles (1896), 136 Mo. 376, 37 S. W. 1124; State vs Allen (Tenn. Chy. App. 1900), 57 S. W. 182; Atty.-General vs Barstow (1856), 4 Wis. 567; State vs Davis (1902), 64 Neb. 499, 90 N. W. 232; State vs Kearn (1891), 17 R. I. 391, 22 A. 1018; State vs Foster (1901), 130 Ala. 154, 30 So. 477; Simonton vs State (1902), 44 Fla. 289, 31 So. 821; State vs McDiar-mid (1871), 27 Ark. 176; People vs Clayton (1886), 4 Utah, 421, 11 P. 206; State vs Stevens (1896), 29 Or. 464, 44 P. 898.

³⁴People vs Perley (1880), 80 N. Y. 624; Vrooman vs Michie (1888), 69 Mich. 42, 36 N. W. 749; State vs Boyd (1892), 34 Neb. 435, 51 N. W. 964; State vs Miltenberger (1881), 33 La. Ann. 263; Tillman vs Otter (1893), 93 Ky. 600, 20 S. W. 1036.

³⁵Stanford vs Ellington (1895), 117 N. C. 158, 23 S. E. 250, 53 Am. St. R. 580.

cient interest in the office to maintain quo warranto, independently of his claim thereto.³⁶ In such case, if the proceeding is carried on in the name of the State, the failure of the relator to prove his own title should not inure to the benefit of the defendant, but the latter should be called upon to show his right to the office, with the usual consequences in the event of his failing to do so. This has been, substantially at least, the opinion of several courts.³⁷

Again, in connection with the common law rule in regard to the burden of proof, it should be noted that the same has been held not to prevail where only a forfeiture of office is charged. In such case, as it is admitted that the incumbent was not a usurper *ab initio*, he is presumed to be a good officer until the presumption is rebutted by positive evidence on the part of the prosecution.³⁸

§ 473. **Scope of inquiry in quo warranto.**—All matters having a bearing upon the incumbent's title and tending to defeat it are, as a rule, proper subjects of investigation in quo warranto. But, as the remedy presupposes a usurpation of a lawfully existing office, some authorities hold that it will not lie where there is no such office to be usurped;³⁹ as, for instance, where the office pertains to a supposed corpora-

³⁶Crovatt vs Mason (1897), 101 Ga. 246, 28 S. E. 891.

³⁷People vs Thacher (1874), 55 N. Y. 525, 14 Am. R. 312; People vs Ryder (1853), 16 Barb. (N. Y.) 370; Keeler vs Robertson (1873), 27 Mich. 116; Gano vs State (1859), 10 Ohio St. 237; People vs Londoner (1889), 13 Col. 303, 22 P. 764, 6 L.R.A. 444; Atty.-General vs Barstow (1856), 4 Wis. 567.

³⁸State vs Haskell (1879), 14 Nev. 209; State vs Talbot (1894),

123 Mo. 69, 27 S. W. 366; State vs Trinkle (1904), 70 Kan. 396, 78 P. 854. In a Quebec case, where it was charged that the defendant had not sufficient property qualification to hold the office of municipal councillor, it was held that the burden of proof was on the relator. Trudel vs Boucher (1905), 28 Que. R. (S. C.) 192.

³⁹Hedrick vs People (1906), 221 Ill. 374, 77 N. E. 441.

tion, which does not legally exist. According to this view, if the prosecutor in quo warranto proceedings disputes the legality of the office he has no standing in court.⁴⁰ "The reason is obvious," says a learned Judge, "the State interposes only on the ground that its sovereign rights are interfered with by a usurpation of one of its offices, (that is, of an office that at least derives its authority from the State), and seeks to clear the office of a usurping incumbent for the purpose of instating the person rightly entitled."⁴¹ The case of *R. vs Saunders*⁴² has often been quoted in support of the above principle. There an individual claimed to be alderman of a municipal corporation which had been dissolved, and which had not even color of lawful existence. The Court suggested that it might be a proper case of some kind of prosecution by the Attorney-General, but not for a quo warranto on the relation of a private person.

But, however logical and well founded in theory may be the above opinion, the weight of authority seems to be opposed to it. "A man," says Littledale, J., "may be liable to a quo warranto information for acting as if he were an officer, if the office, though not existing in the particular instance, is one known to the country at large, and he pretends to exercise it."⁴³

Another judge remarks that the objection "seems to be purely technical, and its enforcement would not tend to promote the ends of justice."⁴⁴

Accordingly, it has been held, that in a proceeding by the Attorney-General against an individual for usurping a munic-

⁴⁰*State vs Lehre* (1854), 7 Rich. (S. C.) 234.

⁴¹*Phelps, J.—State vs North* (1875), 42 Conn. 79.

⁴²(1802), 3 East, 119.

⁴³*R. vs Thomas* (1838), 8 A. & E. 183. Also *R. vs Boyles* (1729),

2 Stra. 836, Ld. Ray. 1559; *Lloyd vs Queen* (1862), 2 B. & S. 656; *State vs Parker* (1878), 25 Minn. 215.

⁴⁴*Vories, J.—State vs Coffee* (1875), 59 Mo. 59.

ipal office in a town, the question of the legal creation of the town, and consequent legal existence of the office, could be raised and determined.⁴⁵ The Court observed: "It was said, that if there was no such town as the plaintiffs alleged, then there could be no office of supervisor of the town, which did not exist; and, consequently, the defendant did not in fact usurp the duties of any office. But we think this objection too technical."⁴⁶ Upon the same principle, the constitutionality of an Act by or under which an office is created may be tested by quo warranto proceedings against the incumbent.⁴⁷

As to all other matters more directly affecting the incumbent's title, such as his eligibility, election, appointment, and the like, it goes without saying that they all are proper subjects to be inquired into by quo warranto. For instance, where the right to office depends on the result of an election, the court has jurisdiction to go behind the election canvasser's certificate, and award the office to the person who in fact received the plurality of the votes cast.⁴⁸

Again, where an officer duly elected or appointed fails to qualify as required by law,⁴⁹ or accepts another office incompatible with the first,⁵⁰ or does or omits to do anything

⁴⁵People vs Carpenter (1861), 24 N. Y. 86.

⁴⁶See also Askew vs Manning (1876), 38 U. C. Q. B. 345; Cheshire vs People (1886), 116 Ill. 493.

⁴⁷State vs Coffee (1875), 59 Mo. 59; Bolt vs Riordan (1889), 73 Mich. 508, 41 N. W. 482; Hinze vs People (1879), 92 Ill. 406; People vs Draper (1857), 24 Barb. (N. Y.) 265, 4 Abb. Pr. 333, 14 How. Pr. 233, 15 N. Y. 532; State vs Scott (1853), 17 Mo. 521.

⁴⁸State vs Pierpont (1872), 29

Wis. 608; Atty-General vs Barstow (1856), 4 Wis. 567; People vs McCausland (1877), 54 How. Pr. (N. Y.) 151.

⁴⁹State vs Bernoudy (1865), 36 Mo. 279; Hyde vs State (1876), 52 Miss. 665; Mayor of Penryn's Case (1724), 1 Str. 582, 2 Bro. P. C. 294; R. vs Ellis (1735), 9 East, 252.

⁵⁰King vs Pateman (1788), 2 Term (D. & E.) 777; Wood vs State (1892), 130 Ind. 364, 30 N. E. 309; Woodside vs Wagg (1880), 71 Me. 207; Com. vs Hawkes

which causes a forfeiture of his office,⁵¹ he is liable to be ousted by quo warranto, unless there is another special and exclusive remedy provided by statute or the Constitution, to determine the questions of forfeiture involved.⁵² And whenever quo warranto lies, all the facts connected with the forfeiture can be fully investigated in the proceeding, without a previous adjudication thereon by any court,⁵³ except of course where the removal from office is sought on the ground of a prior conviction of a criminal offence.

§ 474. **Judgment in quo warranto.**— If the incumbent against whom quo warranto is exhibited is unable to establish a valid title to the office, a judgment of ouster is pronounced against him.⁵⁴ The effect of such judgment is to *legally* exclude him at once from the office, and to render all acts done by him in an official capacity, subsequent to the rendition thereof, null and void.⁵⁵ It is self-executing,

(1877), 123 Mass. 525; *Burgess vs Davis* (1891), 138 Ill. 578, 28 N. E. 817.

⁵¹*R. vs Phippen* (1838), 7 A. & E. 966; *Youville S. District vs Bellemere* (1904), 14 Man. 511; *Chaplin vs Woodstock School Bd.* (1889), 16 O. R. 728; *R. vs Hertford* (1699), 1 Salk. 374; *State vs Norman* (1880), 82 N. C. 687; *Com. vs McWilliams* (1849), 11 Pa. St. 61; *State vs Trinkle* (1904), 70 Kan. 396, 78 P. 854; *Bland & Giles Co. Judge Case* (1880), 33 Gratt. (Va.) 443.

⁵²*State vs McLain* (1898), 58 Ohio St. 313; *State vs Gardner* (1869), 43 Ala. 234.

⁵³*R. vs Owen* (1850), 15 Q. B. 476; *Royall vs Thomas* (1877), 28 Gratt. (Va.) 130, 26 Am. R. 335;

Com. vs Allen (1872), 70 Pa. St. 465; *Brady vs Howe* (1874), 50 Miss. 637; *State vs Wilson* (1883), 30 Kan. 661.

⁵⁴*R. vs Leigh* (1768), 4 Burr. 2143; *Mayor of Penryn's Case* (1724), 1 Str. 582; *People vs Snedeker* (1856), 3 Abb. Pr. (N. Y.) 233; *People vs Denton* (1877), 35 Mich. 305; *Gano vs State* (1859), 10 Ohio St. 237; *State vs Brown* (1857), 5 R. I. 1; *Place vs Banvard* (1865), 27 Cal. 470.

⁵⁵*Fulgham vs Johnson* (1869), 40 Ga. 164; *People vs Stephenson* (1893), 98 Mich. 218, 57 N. W. 115; *R. vs Serle* (1724), 8 Mod. 332; *R. vs Hull* (1724), 11 Mod. 390. But see what is said under sec. 94.

and no writ or other process is required to enforce or give effect to it.⁵⁶

Whenever the sole question at issue is, as at common law, whether the defendant is legally entitled to hold the office or not, the judgment can only deal with or affect the title of the incumbent.⁵⁷ But where, under American Statutes, the proceeding is brought both to oust the defendant from the office and to induct the relator therein, judgment may be rendered upon the right of the defendant, and also upon the right of the claimant, or only upon the right of the former, as justice may require.⁵⁸ However, under some statutes, as we have already seen, it is held that if the claimant fails to prove his title, no judgment of ouster can be pronounced against the defendant.⁵⁹ Moreover, it has also been held, that where the proceedings are authorized to be brought *in the name of the claimant*, they are in the nature of a private controversy in relation to the incumbency of the office, and if the claimant can show no good title, judgment should be for the defendant irrespective of his title.⁶⁰

Whenever a judgment of ouster is pronounced against the defendant, the American courts are generally authorized

⁵⁶R. vs Mayor of London (1692), 1 Show. 274; Wilson vs North Carolina (1898), 169 U. S. 586, 18 Sup. Ct. R. 435; People vs Conover (1858), 6 Abb. Pr. (N. Y.) 220; Jayne vs Drorbaugh (1883), 63 Iowa, 711, 17 N. W. 433; Caldwell vs Wilson (1897), 121 N. C. 480, 28 S. E. 554, 61 Am. St. R. 672.

⁵⁷R. vs Bedford Level (1805), 6 East, 356; People vs Knox (1885), 38 Hun (N. Y.) 236; State vs Fowler (1895), 66 Conn. 294, 32 A. 162; Harwood vs Marshall (1856), 9 Md. 83; Peo-

ple vs Londoner (1889), 13 Col. 303, 22 P. 764, 6 L.R.A. 444; State vs Lane (1889), 16 R. I. 620, 18 A. 1035.

⁵⁸People vs Ryder (1855), 12 N. Y. 433, 16 Barb. (N. Y.) 370; Gano vs State (1859), 10 Ohio St. 237; People vs Connor (1865), 13 Mich. 238; Benson vs People (1897), 10 Col. App. 175, 50 P. 212; State vs Price (1874), 50 Ala. 568.

⁵⁹Stanford vs Ellington (1895), 117 N. C. 158, 23 S. E. 250, 53 Am. St. R. 580.

⁶⁰Manahan vs Watts (1900), 64 N. J. L. 465, 45 A. 813

to impose upon him a fine as a punishment for his usurpation.^{60a} But in the absence of bad faith or some affirmative wrong, such penalty should, if imposed at all, only be nominal.^{60b} In many States, also, the relator is entitled, in the quo warranto proceeding itself, to recover as damages the salary or emoluments received by the intruder while he unlawfully held the office.^{60c}

Finally, it may be observed that, though a judgment upon quo warranto operates *eo instanti* to divest the incumbent of all official authority, yet he may refuse to comply with it and retain the actual possession of the office, and of its insignia, books and records. In such case it may be necessary for the lawful officer to have recourse to mandamus or some other adequate remedy, to compel the unlawful incumbent to give up possession.^{60d} But in some States the courts are authorized to provide in the quo warranto judgment itself for the delivery of the office to the claimant.⁶¹

^{60a}Davis vs Davis (1894), 57 N. J. L. 203, 31 A. 218. No fine now imposed in England. See 47 & 48 Vic., c. 61, s. 15.

^{60b}Atty.-Gen. vs James (1889), 74 Mich. 733, 42 N. W. 167.

^{60c}People vs Nolan (1886), 101 N. Y. 535, 5 N. E. 446; Rule vs

Tait (1888), 38 Kan. 765, 18 P. 160.

^{60d}As to Ontario, see ante, sec. 447a.

⁶¹People vs Banvard (1865), 27 Cal. 470; State vs Owens (1885), 63 Tex. 261.

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