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## EFFECT OF CONSTITUTIONAL INELIGIBILITY OF PUBLIC OFFICER UPON HIS OFFICIAL ACTS— STATUS OF PUBLIC OFFICER HOLDING OFFICE CREATED BY UNCONSTITUTIONAL STATUTE

### *Kimble v. Bender*[1]

Defendant had been appointed a justice of the peace at large for Allegany County pursuant to the provisions of Chapter 153 of the Acts of 1936. At the time that this statute was passed, he was a member of the General Assembly as Senator from Allegany County. His eligibility to hold the office of justice of peace was challenged by mandamus proceedings on the ground, among others, that he was ineligible to hold the same by virtue of section 17 of Article 3 of the Maryland Constitution.[2] From an order directing the writ to issue, defendant appealed. *Held:* Affirmed. Defendant's eligibility was dependent upon whether the office in question was one created by the Act of 1936. Prior statutes dealing with the appointment of justices of the peace in Allegany County were invalid under the holding in *Humphrey v. Walls*.[3] There was in consequence no valid provision in existence at the time of the passage of the Act of 1936 for the office to which defendant was appointed, and such office was therefore one created by that Act, within the meaning of the above provision of the Constitution, although the office of justice of the peace has attained constitutional recognition and in a certain sense is one created by the Constitution.[4]

It was further stated that though the appointment of defendant was unconstitutional and a nullity, his official acts under such appointment, made under a valid act, were those

[1] 196 Atl. 409 (Md. 1938).

[2] "No Senator or Delegate, after qualifying as such, notwithstanding he may thereafter resign, shall during the whole period of time for which he was elected be eligible to any office which shall have been created, or the salary or profits of which shall have been increased during such term."

[3] 169 Md. 292, 181 Atl. 735 (1935).

[4] Cf. Levin v. Hewes, 118 Md. 624, 629, 86 Atl. 233, 240 (1912).

of a de facto officer and consequently valid and effectual until his title to the office should be judged insufficient. This is the generally accepted view and is well settled in Maryland.[5]

In view of the fact that the Court found it necessary for its decision in the case to examine into the constitutionality of the prior statutes dealing with the appointment of justices of the peace in Allegany County, and of the further fact that throughout an extended period of time numerous persons had been appointed to and had fulfilled the duties of the offices created by such statutes, now for the first time held to have been unconstitutional and invalid, the Court took occasion to rule upon the status of such persons, and the validity of their official acts. It was declared that here also such officers had the status of de facto officers, and that their official acts should be recognized as valid.

As stated above, it has been very generally held that the incumbent of a de jure office, though not entitled to its occupancy through some defect in his appointment or election, is on grounds of public policy a de facto officer whose official acts are given validity and cannot be collaterally attacked. There is, however, a sharp division of opinion among the courts as to whether this can be true where the office itself has never been validly created, and whether a different rule does not prevail in the situation where an invalid statute purports to create an office from that where there is an invalid appointment or election to fill an office created by an entirely valid statute.

So, in the leading and frequently quoted case of *Norton v. Shelby County*,[6] the Supreme Court said, through Mr. Justice Field:

> "There can be no officer, either de jure or de facto, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. . . . The idea of an officer 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 exist only by force of law. . . . Their (plaintiff's counsel's) position is that a legislative act, though unconstitutional may in terms create an office, and nothing fur-

[5]Koontz v. Burgess and Commissioners of Hancock, 64 Md. 134, 20 Atl. 1039 (1885); Izer v. State, 77 Md. 110, 26 Atl. 282 (1893); State, use of Mayor and City Council of Havre de Grace v. Fahey, 108 Md. 533, 70 Atl. 218 (1908); Claude v. Wayson, 118 Md. 477, 84 Atl. 562 (1912).

[6]118 U. S. 425, 30 L. Ed. 178, 6 S. Ct. 1121 (1886).

> ther than its apparent existence is necessary to give validity to the acts of its assumed incumbent. . . . It is difficult to meet it by any argument beyond this statement: An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation an inoperative as though it had never been passed."

If, however, we accept the logic of this statement, it is not apparent why it does not apply equally to an unconstitutional appointment to an office created by a constitutional statute. For if an unconstitutional act, by the very fact of its unconstitutionality, is "in legal contemplation, as inoperative as though it had never been passed", it should also be true that an unconstitutional appointment, by the very fact of its unconstitutionality, would be as inoperative as though it had never been made.

A recent writer has this to say of the above-quoted statement of Mr. Justice Field:

> "It does not purport to be an argument but is expressly put forth as a dogmatic statement, and such it surely is. There is only one effective answer to it: it is not true. Courts have held that unconstitutional statutes have imposed duties, have granted rights, have created offices, and have some operative effect. The statement is, therefore, not an accurate statement of the rule of law in this regard. . . . The real weakness in this portion of the opinion of Justice Field is that it assumes the very point to be decided. . . . This dictum, then, is a statement of a view, not an argument."[7]

Possibly this does less than justice to Mr. Justice Field's logic, which might readily be said to follow necessarily from our entire theory of judicial review and of the power of the courts to declare legislative and executive acts unconstitutional. That no court has applied this "void ab initio" doctrine in all cases must, however, be admitted; and it is in fact admitted by Mr. Justice Field in the same case, when he accepts it as proper, on grounds of "policy and necessity", to give legal validity and effect to acts of public officers unconstitutionally appointed to offices created by a valid statute.

The general acceptance of this exception to the "void ab initio" theory is invariably justified on the ground that doc-

[7] Field, The Effect of an Unconstitutional Statute (1935) 91; and see the general discussion of different views as to the effect of unconstitutionality in Chapter 1 of the same work.

trinaire logic must yield to practical considerations of governmental necessity. It seems strange then that, if the same practical considerations exist, as they well may and frequently do, in the case of appointment to an office created by an unconstitutional statute, many courts have yet refused to apply the de facto doctrine to that situation as well. There is respectable and increasing authority to the effect that the situations present essentially the same questions, and that the de facto rule should be equally applicable in both.[8]

As was well stated in *State v. Poulin*:[9]

> "The de facto doctrine is exotic, and was engrafted upon the law, as a matter of policy and necessity to protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers."

Whether the doctrine should be applied, therefore, should depend, not upon any difference between an unconstitutional appointment to a validly created office and an appointment to an office created by an unconstitutional statute, but rather upon whether in either case the protection of the public interest requires giving validity to the acts of the officer appointed.

In the instant case, the Court of Appeals cannot be said to have disapproved entirely the rule of *Norton v. Shelby County* in according validity to the acts of justices appointed under invalid statutes, inasmuch as it differentiates between the nature of the office involved in the *Norton* case and that of the justice of the peace in Maryland, emphasizing the ancient origin of the latter office and its recognition as part of our judicial system under the State Constitution. It emphasizes also, however, that "on the facts here presented public policy required obedience from the citizens of the provisions of these public statutes, even though unconstitutional"; and definitely states that, though the statutes creating the offices involved were invalid, the incumbents were officers de facto until the statutes were declared unconstitutional.

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[8] See cases cited in the opinion in the instant case, particularly State v. Gardner, 54 Ohio St. 24, 42 N. W. 999 (1896); Burt v. Winona and St. Peter R. Co., 31 Minn. 472, 18 N. W. 285, 289 (1884); State v. Poulin, 105 Me. 224, 74 Atl. 119 (1909); Lang v. Mayor of Bayonne, 74 N. J. L. 455, 68 Atl. 90 (1907).

[9] *Supra*, note 8; and see comment in Note (1910) 8 Mich. L. R. 229, 236.

The opinion therefore, though somewhat guarded, would seem on the whole to adopt the views of the cases refusing to apply, as an inexorable rule, the "void ab initio" theory when an office is created by an unconstitutional statute. In so doing, it is submitted that the Court has followed the sounder line of authority.[10]

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## THE SEAL AS CONSIDERATION ON A NEGOTIABLE INSTRUMENT

### *Citizen's Nat. Bank of Pocomoke City v. Custis*[1]

Plaintiff, the payee of a sealed instrument, brought this action against the defendant bank, the executor of John T. M. Sturgis, maker of the instrument. The pleader declared on it as upon a bill obligatory "payable to the said Bertha D. Custis on demand". The writing proved to possess all the requirements of negotiability as specified in Art. 13, Sec. 20. The trial court treated the instrument as a specialty and maintained that the seal precluded a defense on the ground of absence of consideration, and a verdict was rendered for the plaintiff. On appeal, *Held*: Reversed and new trial awarded. Since the instrument was in writing signed by the maker, and contained an unconditional promise to pay to the order of the appellee a sum certain in money on demand,[2] it was a valid and negotiable promissory note despite the presence of the seal.[3] That the Negotiable Instruments Act[4] was within the contemplation of the parties and was anticipated in the formation and execution of the instrument could be inferred from the provision wherein the "maker and endorser" engaged to waive demand, protest and notice of non-payment.[5] The position taken by the trial court was prejudicial to the appellant as it had apparently accepted the appellee's argument that, even though without consideration, the instrument was enforceable as a gift. The Court gave the following clear statement of the Maryland law as to the effect of a seal as consideration on a negotiable instrument:

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[10] For a penetrating analysis of the question in various aspects, see Field, *op. cit supra* note 7, particularly Chapter IV.

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[1] 153 Md. 235, 138 Atl. 261, 53 A. L. R. 1165 (1927).
[2] Md. Code, Art. 13, Sec. 20.
[3] Md. Code, Art. 13, Sec. 25 (4).
[4] Md. Code, Art. 13, Secs. 13-208.
[5] Md. Code, Art. 13, Sec. 24 (3).