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De Facto Municipal Corporations

Francis T. Ready

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Editorial Comment



DE FACTO MUNICIPAL CORPORATIONS

It will be interesting to note what effect the Supreme Court of Indiana will give to acts done under the city manager or commission form of government which has existed in Michigan City, Indiana, during the past five years, and which has recently been declared unconstitutional under the Indiana state constitution.

A *de facto* corporation may be defined as one which has been organized through a *bona fide* attempt of its organizers to comply with the requirements of a then existing valid enabling statute. Such a corporation may still be *de facto* though in fact all of the requirements have not been complied with. A *de jure* corporation is one which has been validly organized under a then existing valid enabling statute. The existence of neither a *de facto* nor a *de jure* corporation may be questioned collaterally, the State alone having the power to bring their existence into question, and then only by the direct proceeding of *quo warranto*. *Doty v. Patterson* (1900) 155 Indiana 60. When, however, a corporation has neither a *de facto* nor a *de jure* existence—and a corporation which is organized under an unconstitutional statute has no existence—its existence may be questioned collaterally. *Harriman v. Southam* (1861), 16 Indiana 190.

Generally speaking, the same classification which applies to corporations generally applies to municipal corporations. It has accordingly been held in the federal courts that when a state statute under which a municipal corporation has been organized is later declared to be unconstitutional under the federal Constitution, all of the acts of the corporation are void and the officers who assume to act under its authority are held personally liable, the unconstitutional statute affording them no protection. *Norton v. Shelby County*, 185 U. S. 135.

It is held, however, by a number of states that a municipal corporation, though created under an unconstitutional

enabling statute, is a *de facto* corporation, and, so long as the State does not terminate its existence by a direct proceeding in *quo warranto*, which, incidentally, must be instituted by the attorney general, it may exercise through its officers the powers ostensibly conferred upon it as completely as if it were created by a valid law. Courts so holding have based their decisions on the theory that public policy requires obedience from its citizens. *Lang v. Mayor, etc., of City of Bayonne*, 1917 (N.J.), 68 Atlantic 90. *State ex rel. Braswell v. Tucker*, 48 Missouri Appellate 531. *Bert v. Winona, etc., Railroad Company* (Minnesota), 18 North Western 285.

While the cases holding that an officer who acts under an unconstitutional statute acts at his peril, since the statute never had a valid existence and was void *ab initio*, are founded on much the better logic, yet it seems to the writer that those state courts which have held that for reasons of public policy a municipal corporation organized under an unconstitutional statute will be held to have *de facto* powers until its enabling statute is actually held to be unconstitutional, have the equities on their side. If an ostensible municipal corporation assumes to carry on the functions usually carried on by municipal corporations, under a supposedly valid enabling statute, why should not the public and, conversely, the officers who assume in good faith to execute the duties for which they were appointed, be protected for the period during which the municipality acted under the unconstitutional enabling statute? There seems to the writer to be no good reason why acts done by a municipal corporation under unconstitutional authority should be held absolutely void *ab initio*. Every police officer who made an arrest under the unconstitutional enabling act would be subject to a civil action for false imprisonment and every contract entered into in the name and on behalf of the municipality would be unenforceable. It seems unjust that in the name and for the sake of legal logic innocent persons should thus be made to suffer.

—F. T. R.