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Note and Comment

Henry M. Bates
University of Michigan Law School

Edson R. Sunderland
University of Michigan Law School

Harry W. Isenberg

James H. Brewster
University of Michigan Law School

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NOTE AND COMMENT.

THE RIGHT OF PRIVACY AT COMMON LAW.—It is quite evident that the question as to whether there is a right of privacy at common law must be met by the courts in most of our states in the not distant future, unless indeed the right is created or declared by the legislatures. The latter course has been followed in the state of New York, whose legislature in 1903 passed an act "to prevent the unauthorized use of the name or picture of any person for the purposes of trade." (Chapter 132 of the Laws of New York of 1903, page 308.) This act makes persons offending against it, guilty of misdemeanor, and liable, in civil actions, in damages, to persons injured by such violations of the statute. The Court of Appeals of New York in 1908, in the case of *Rhodes* v. *Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097, declared that this statute violated neither the federal nor the state constitution. The same court in 1902, in *Roberson* v. *Rochester, etc., Co.*, 171 N. Y. 539, 64 N. E. 442, by a vote of four to three, had held that the right of privacy did not exist at common law in the state of New York. The act referred to was passed at the very next session, perhaps, upon the suggestion to that end made by PARKER, C. J., in the opinion of the majority of the court in the *Roberson* case, supra, certainly in response to a growing demand for a greater regard for the

decencies of life. This *Roberson* case was the first in which any court of last resort had been compelled to squarely decide whether or not the common law recognizes a right of privacy. It is unfortunate that the one additional vote needed to make into a majority of the court, the minority which, in an able dissenting opinion, declared for the existence of the right, was not forthcoming. The history of this question from the time when it was first placed prominently before the country in 1890, by Messrs. S. D. Warren and L. D. Brandeis in an article in 4 HARV. L. REV. 193, down to 1905, when the case of *Pavesich* v. *N. E. Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, was decided, has already been traced in this REVIEW, Vol. 3, p. 559. In that case the Supreme Court of Georgia held unanimously that the right does exist at common law.

Thus the matter rested, so far as courts of last resort are concerned, until last summer, when two other state courts of final appeal passed upon the question. In *Henry* v. *Cherry & Webb* (1909), — R. I. —, 73 Atl. 97, upon facts not unlike those in the *Pavesich* case, supra, in an unanimous opinion, the existence of such a right at common law was denied. The conclusion was based mainly upon the grounds that until the *Pavesich* case was decided, the right had never been admitted by a court of authority, that while something like the right of privacy, the "right to be let alone," had been judicially asserted in many cases, it had always been in connection with a right of property, or in cases in which slander or libel were the gist of the action, and that no property question is involved in this alleged right. It is an elaborately argued and very able opinion, following the brief for the defendants somewhat closely, but it is narrow and technical and certainly does not present that view of the elasticity and adaptability of the common law of which we are so fond of boasting.

In *Foster-Milburn Co.* v. *Chinn* (1909), — Ky. —, 120 S. W. 364, Chinn brought action against the Foster Co., which manufactured a patent medicine, for printing in its advertising matter, his picture and a copy of a spurious letter purporting to have been signed by him recommending the medicine. The opinion in the case contains references to this publication as libellous, but the decision is clearly based not upon the theory of libel, but of an invasion of the right of privacy. The court says (120 S. W. 366) "While there is some conflict in the authorities, we concur with those holding that a person is entitled to the right of privacy as to his picture, and that the publication of the picture without his consent * * * is a violation of the right of privacy, and entitles him to recover *without proof of special damages*;" citing the *Pavesich* case, supra.

It may well be doubted whether legislative declaration and definition of this right will prove as satisfactory, especially under rapidly changing conditions, as will the judicial recognition of the right. The narrowness and rigidity of the New York statute are apparent. H. M. B.

LIMITATION OF A CARRIER'S LIABILITY FOR NEGLIGENCE.—This is one of the subjects which never seems to be set at rest. In making contracts, shipper and carrier do not stand upon an equality. The shipper cannot exist without the

aid of the carrier, but the carrier can easily forego the business of any particular shipper. Hence the ordinary rules of contract fail in many respects to meet the demands of the situation. To properly define the limitations necessary to be placed upon these rules is not an easy task.

While there are some cases to the contrary, it is almost universally held that a carrier cannot exempt himself by contract from liability for his own negligence. But many of the same courts which lay down this principle in its broadest form, at the same time hold that a carrier may by contract limit the amount of such liability. That is to say, he may by agreement avoid a portion of his liability but not all of it. This result is arrived at by holding that the parties to the contract of carriage may agree upon the valuation to be placed upon the goods carried, and since the freight rate is dependent upon the valuation, the agreement for a diminished valuation is supported by the consideration of a reduced rate. Such is the holding of the United States Supreme Court in the leading case of *Hart* v. *Pennsylvania Railroad Company*, 112 U. S. 331.

In *Winslow Brothers & Company* v. *Atlantic Coast Line Railroad Company* (1909), — N. C. —, 65 S. E. 965, a car load of mules was shipped over defendant's line, and by negligence of the defendant, one of the mules, of the value of $201, was killed. The bill of lading provided for an agreed valuation of $100 for each animal. Following the *Hart* case, the court held that the recovery was limited to the agreed valuation. There is, however, a vigorous and well-reasoned dissenting opinion by Chief Justice CLARK, who contends that the opinion of the majority practically abolishes the general rule that a carrier cannot by contract exempt himself from liability for negligence.

Under the facts of this case the agreement as to valuation was a mere form. No sane man would voluntarily stipulate that an animal conceded to be worth $201 was in fact worth $100. No effort was made when the animals were shipped to ascertain their true value. The carrier merely used a printed form whereon it was stated that the shipper agreed that the value of each animal should be taken as $100. Such a contract is obviously not primarily an agreement as to valuation, but it is intended by the railroad and in fact operates as a mere contractual limitation upon liability for negligence.

In the case under discussion the shipper was offered two rates, one of $200 per car under the "agreed valuation," and one of $450 per car without that provision, and yet the court held that the shipper "has reaped the advantage of the special contract" and hence must abide by its terms. In other words, because the carrier consented to forego robbing the shipper, the latter has enjoyed a valuable consideration for his agreement to let the carrier off for half the loss caused by the carrier's negligence.

The case affords a good illustration of the academic nature of the rule in the *Hart* case. It will not work, for it permits, under the guise of an agreed valuation, the very thing which the courts which adopt that rule declare to be unlawful.

If the rule that carriers may not by contract exempt themselves from liability for their own negligence, is to be enforced, the strictly logical position taken by the Supreme Court of Alabama in the recent case of *Southern*

Express Company v. *Owens,* 146 Ala. 412, must be adopted. In that case the court squarely overruled an earlier decision—*Louisville & Nashville Railroad Company* v. *Sherrod,* 84 Ala 178—which had held that "Limitations as to value do not come under the operation of the rule that a carrier cannot, by special contract, exempt himself from liability for the consequences of his own negligence, and ordinarily are not calculated to induce negligence. To the amount of the agreed valuation the carrier is responsible for loss occasioned by his neglect * * * Such special contract is in the nature of an agreement to liquidate the damages, proportionately to the compensation received for the carriage and the responsibility of safely carrying and delivery." In overruling this decision the court said: "The agreement urged in the *Sherrod* case makes the degree of care requisite in the handling of goods depend, not on the nature of the thing to be carried—which ought to be the test of degree of care to be used by all persons or corporations pursuing the business of common carriers, even where a lawful contract limiting liability exists—but on the amount of compensation to be paid. * * * But would it not be a very dangerous rule which permits care to be measured by value? It would lead to a holding that the carrier owes but a slight degree of care when the thing to be carried is of small value intrinsically or by an agreed valuation, and the rule would be as fluctuating as is the value of the things carried. * * * It seems to us that such contracts do induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause. * * * The rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the property lost or destroyed, can the limitation of its liability to $50 be upheld in this court, if it should appear that its loss resulted from the negligence of the company, and that it was in fact worth 30 times that amount, as the court found it to be? We think not. To our minds it is clear that the two kinds of stipulation—that for total and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground and must be tested by the same principles." E. R. S.

VALIDITY OF CORPORATE BY-LAW VESTING IN DIRECTORS THE DISCRETIONARY POWER OF DENYING STOCKHOLDERS THE RIGHT TO EXAMINE THE CORPORATE BOOKS.—There seems to be a great paucity of judicial interpretation upon the question here involved. The Supreme Court of Delaware has, however, been confronted with the problem in the very recent case of *State ex rel. Lindsey* v. *Jessup & Moore Paper Co.* (1909), — Del. —, 72 Atl. 1057, and has solved it in both a satisfactory and unmistakable manner. In this case, plaintiff, a stockholder in the defendant corporation, applied for an alternative writ of mandamus to compel the defendant to permit plaintiff to inspect the corporate books. Plaintiff set up sufficient facts to entitle him to the relief prayed for. Defendant relied mainly on a corporate by-law, which absolutely vested in the discretion of the directors the right either to forbid or to permit the

stockholders from having access to the corporate books, and which made their decision final. Plaintiff had been refused permission to make the desired inspection. *Held,* that mandamus should issue.

The above case is not, it is believed, in conflict with any previously adjudged case, though it would seem to be contrary to a statement of SIMONTON, D.J., in *Ranger* v. *Champion Cotton-Press Co. et al.,* 51 Fed. 61, to the effect that in this country a shareholder has the right, under proper safeguards, to inspect the books of the corporation, *unless the charter or by-laws otherwise provide.* The proviso about "by-laws" may be considered as a mere *obiter dictum* as no by-laws were involved in the case and the remark was therefore in no wise necessary to the decision of the case. The remark is, however, most disconcerting, and had there been a by-law in the *Ranger* case similar to that in the principal case, there is ample foundation for the belief that the federal court would have held it effective, and would have further held that it was competent for the shareholders to so delegate this authority to the directors. Indeed, looking at the question from a contractual view only it would seem to be competent for the shareholders to so delegate this power to the directors. For this reason, the courts holding to the view of the principal case are naturally compelled to base their conclusions on the less stable doctrines of public policy. Here again, public policy, though not always strictly logical, offers a safe, sane and equitable solution of the problem.

Of course, were there a statute in Delaware, as there is in many of the states, giving to the shareholders the right to examine the corporate books, the question would have been one easy of solution. If a corporation undertakes to make by-laws in contravention of some statute, they are ultra vires and of no effect. *Briggs* v. *Earl,* 139 Mass. 473, 1 N. E. 847; *Presbyterian Mut. Assur. Fund* v. *Allen,* 106 Ind. 593, 7 N. E. 317; *Bergman* v. *St. Paul Mut. Bldg. Assoc.,* 29 Minn. 275, 13 N. W. 120; *Rex* v. *Cutbush,* 4 Burr. 2204; *Chicago City R. Co.* v. *Allerton,* 18 Wall. 233; *Harscots Case,* Comb. 202 (per HOLT, C.J.). The only statutory right of the stockholders in Delaware is *the* right to examine the stock ledgers of the corporation, and as this by no means includes all the books the court found it necessary to revert, in part at least, to the common law doctrines. The Supreme Court of Delaware held that notwithstanding the by-law it was the duty of the directors to afford every reasonable opportunity for the shareholders to get the information sought for. The by-law was considered both unreasonable and unlawful. The court further said that the books should not be subject to "unnecessary, unreasonable or untimely inspection."

The best and practically the only other discussion of the question is found in *State ex rel. Burke* v. *Citizens' Bank of Jennings,* 51 La. Ann. 426, 25 South 318. Here the facts were substantially the same as in the principal case, and the Supreme Court of Louisiana held that the right of a shareholder with a laudable object to accomplish, and an actual interest in the corporate affairs, to an inspection of the books, is given by the fundamental law, and that any statute securing the right would merely be declaratory of the common law doctrine. It is the right to refuse inspection and not the right to inspect that must be given by statute. Many other cases involve points somewhat similar

but in no other case we have been able to find has the exact question been raised. A question somewhat similar in character has arisen where the validity of by-laws limiting the rights of the stockholders to transfer their shares of stock has been attacked. They have generally been held invalid. *Bloede Co.* v. *Bloede,* 84 Md. 129, 57 Am. St. R. 373; *Moore* v. *Bank of Commerce,* 52 Mo. 377; *In re Klaus,* 67 Wis. 401. But see contra, *Barrett* v. *King et al.,* 181 Mass. 476, 63 N. E. 934.

The essentials to the validity of corporate by-laws are nicely summed up in ANGELL & AMES, CORPORATIONS, p. 373. "The legislative power of a corporation is not only restricted by the constitutional and statute law of the state in which it is established, but by the general principles and policy of the common law as it is accepted there. Indeed, whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights, or endangering the security of individuals or the public, a statute or other special authority, emanating from the creating power, must be shown to legalize it, either expressly or by implication."

There are further requisites to the validity of a by-law. It must not disturb vested rights. *Kent* v. *Quicqksilver Mining Co.,* 78 N. Y. 159. It must not operate retrospectively. *People* v. *Detroit Fire Dept.,* 31 Mich. 458. It must operate equally upon all persons of the class which it is intended to govern. *People* v. *Young Men's Father Matthew Total Abstinence Benev. Soc. No. 1,* 41 Mich. 67, 1 N. W. 931; *Goddard* v. *Merchants Exch.,* 9 Mo. App. 290; *Budd* v. *Multonomah St. R. Co.,* 15 Ore. 413, 15 Pac. 659, 3 Am. St. Rep. 169. It must not be unreasonable, oppressive or extortionate. *Shannon* v. *Howard Mut. Bldg Assoc.,* 36 Md. 383; *State* v. *Overton,* 24 N. J. L. 435, 61 Am. Dec. 671; *Citizens Mut. Loan, etc., Assoc.* v. *Webster,* 25 Barb. (N. Y.) 263; *People* v. *Throop,* 12 Wend. (N. Y.) 183; *Buffalo* v. *Webster,* 10 Wend. (N. Y.) 100; *Forrest City United Sand, etc., Assoc.,* v. *Gallagher,* 25 Ohio St. 208; *Hagerman* v. *Ohio Bldg., etc., Assoc.,* 25 Ohio St. 186. See 10 CYC., pp. 355-357, for numerous citations to cases holding particular by-laws reasonable and valid, or unreasonable and invalid according to the peculiar facts of these cases. An excellent summary of the requisites to the validity of by-laws is also to be found there. It is believed, however, that none of the cases there cited involves the particular question decided in the principal case.

The principal case seems to be in accord with the policy of the American law on the subject of the inspection of corporate books—the policy exhibited when the American courts refused to follow the old common law doctrine that in the absence of statutory enactment the shareholders have no right to inspect the corporate books for the purpose of ascertaining whether the company's affairs are being properly managed. *Rex* v. *Master and Wardens of the Merchant Tailors' Company,* 2 Barn. & Adol. 115. To put any other interpretation upon the effect of the by-law than to hold it invalid would greatly jeopardize the interests of the stockholders and would put a dangerous weapon into the hands of the directors. Once grant the directors this power and it would be difficult to properly circumscribe them in the exercise of it. Since a stockholder has no right to inspection if he seeks it from improper

motives, and since the courts will grant him the right to inspect only when he has a substantial interest in the corporate affairs, it would seem that such a by-law as that in the principal case could serve no useful purpose.

R. T. H.

A SINGLE ACTION OR SUCCESSIVE ACTIONS FOR A NUISANCE.—A very interesting case in the law of nuisance as illustrating the difficulties courts experience in distinguishing injuries which are original and permanent from those which are continuing and intermittent is that of *Pickens* v. *Coal River Boom & Timber Co., et al.* (1909), — W. Va. —, 65 S. E. 865. The facts are as follows, plaintiff, who owned a mill situated on the Coal River, brought an action against two boom companies, the one owning and the other leasing a certain boom on the said river below his mill, to recover damages for lessening the fall of water over his dam and thus the grinding capacity of his mill by the piers and boom holding and backing up in the stream large quantities of sand and sediment. The works of the defendant were constructed properly, but after the dam and mill, and were operated without negligence. The boom companies were corporations of the state of venue chartered under what is known as the Boom Act, Laws of West Virginia, 1877, page 189, c. 121; West Virginia Code Annotated, Chapter 54A, for the purpose of erecting and operating a boom in the Coal River. This act provides for the creation of corporations for booming logs and specifies that such corporations may construct "Any boom or booms with or without piers, dam or dams, in the rivers, creeks or other streams" within certain counties, "which may be necessary for the purpose of stopping and securing boats, rafts, logs, masts, spars, lumber and other timber," except in navigable streams. The act further provides, "That nothing in this act shall be so construed as to deprive the owners of mill property, and other proprietors on the said river and branches thereof from recovering damages for injury to their property by the said corporation, their agents or employees."

This case is the last of a series of cases against these very defendants, deciding the question of the right of one whose mill or other property is injured by the construction and maintenance of a boom in a proper manner to recover for the same. *Rogers* v. *Coal River Boom & Driving Company* (1894), 39 W. Va. 272; *Rogers* v. *Same* (1895), 41 W. Va. 593; *Pickens* v. *Coal River Boom & Timber Co.* (1902), 51 W. Va. 445.

In the principal case, the court in its opinion discussed two extremely difficult and perplexing questions, first, to what extent does legislative authority to do an act, which would otherwise be an abatable nuisance, operate to shield those to whom authority is given from liability for damages for injuries suffered by others therefrom, and, second, whether the construction and injury were such as to compel the plaintiff to seek all his damages in one action, or to allow him to recover in successive actions. As there is no decided agreement of authorities on these questions, it is not strange that in a case involving both of them there should have been a difference of opinion between the judges and that a dissenting opinion should have been filed by Judge WILLIAMS.

There are numerous cases to the effect that where a private corporation constructs a work authorized by law and such work, even though it be done skillfully and without negligence, injures the property of an individual or other corporation, it is liable for the injuries, direct or consequential, thus caused. *Evansville & Crawfordsville R. R. Co.*, (1857), 9 Ind. 433; *Indiana Central Ry. Co.* v. *Boden* (1858), 10 Ind. 96; *New Albany & Salem R. R. Co.* v. *Huff, et al.* (1862), 19 Ind. 315; *Baltimore & Potomac R. R. Co.* v. *Reamy* (1847), 42 Md. 117; *King* v. *Vicksburg Ry. & Light Co.* (1906), 42 South 204, 88 Miss. 456; and, indeed, to hold otherwise would seem to authorize the "taking or damaging" of property without compensation contrary to the constitutional provisions of most states. The court discussed this question in this case, it seems, not for the purpose of determining whether a person injured by the construction of a boom, under this act, can recover, as the statute expressly so provides, but to determine whether such an injury shall be called a private nuisance and so be subject to the rules applied in the case of a nuisance to determine whether all the damages shall be recovered in one action or in successive actions. The difficulties of the case might have been lessened had the court considered whether the boom in this case were an *abatable* nuisance. As it was constructed under authority of law and without negligence and operated in a proper manner, it seems it should not have been so regarded.

The second question, *i. e.*, whether the damages present and prospective should be recovered in one or in successive actions, occupied the larger share of the court's attention. The authorities on this subject are confused and seemingly irreconcilable. The confusion has arisen as Judge WEAVER says in *Harvey* v. *Mason & F. D. R. Co.*, 129 Iowa 465, "not so much from the statement of governing principles as from the inherent difficulty in clearly distinguishing injuries which are original and permanent from those which are continuing and in assigning each particular case to its appropriate class." Different courts have suggested different tests to determine whether in cases of this sort all the damages both present and prospective should be recovered in one action or successive actions should be brought to recover the damages as they accrue. Each one of these tests has something to recommend it, no doubt, but no one of them seems better than that suggested by Judge BELL in his opinion in the case of *Troy* v. *Cheshire R. R. Co.* (1851), 23 N. H. 83, in which after suggesting that two things are to be considered in determining the damages caused by a nuisance, (1) whether the structure producing the injury is permanent, and (2) whether the injury is continuous and permanent or only temporary or intermittent, he says, "Whenever the nuisance is of such a character, that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change for any cause but human labor, then, the damage is an original damage, and may be at once fully compensated. * * * But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may, or may not be, injurious, or may, or may not be, continued, then the injury to be compensated in a suit, is only the damage that has happened." Applying this test to the facts in the principal case, it seems that all the dam-

ages suffered by the plaintiff should have been recovered in one action. The boom certainly should be looked upon as a "permanent structure" as that term is used in the law of nuisance and the injury seems continuous and as permanent as the dam, since according to the plaintiff's own testimony the water commenced backing on him as soon as the defendant began operating the boom. Many cases seem to sanction this view. *Powers* v. *Council Bluffs* (1877), 45 Iowa 652; *Powers v. St. L. etc. Ry. Co.* (1900), 158 Mo. 87; *Ridley* v. *Seaboard & Roanoke R. R. Co.* (1896), 118 N. C. 996; *Beatrice Gas Co.* v. *Thomas* (1894), 41 Neb. 662, 39 N. W. Rep. 925, 43 Am. St. Rep. 711; *Illinois Central R. R. Co.* v. *Lockard* (1903), 112 Ill. App. 423; *Illinois Central R. R. Co.* v. *Ferrell* (1902), 108 Ill. App. 659. Judge WILLIAMS in his dissenting opinion, in the principal case, favored the application of this rule, while the majority opinion opposed it. W. G. S.

STATUS OF ONE HOLDING OFFICE UNDER AN UNCONSTITUTIONAL STATUTE.—Poulin, having been indicted and found guilty of selling intoxicating liquors, moved in arrest of judgment, alleging in support of the motion that an attorney appointed to fill the office of special attorney, created under an unconstitutional statute, assisted, counseled, and advised the grand jury as a prosecuting attorney is required to do in the performance of his official duties in criminal cases. The motion was overruled on the ground that the special attorney was a de facto officer, although the law creating the office was unconstitutional. *State* v. *Poulin* (1909), — Me. —, 74 Atl. 119.

The term "officer" necessarily implies the existence of an office. It is laid down, not without vigorous dissent, that there can not be an office de facto under a constitutional government, and more particularly, there can not be an office de facto or de jure created by an unconstitutional law. MECHEM, PUB. OFF., §§324, 325; THROOP, PUB. OFF., §638ff; DILLON, MUN. CORP., §276; 29 CYC., 1391; *Hildreth* v. *McIntire*, 1 J. J. Marsh (Ky.). 206, 19 Am. Dec. 61; *Norton* v. *Shelby County* (1886), 118 U. S. 425; *People* v. *Knopf*, 183 Ill. 410; *Town of Decorah* v. *Bullis*, 25 Iowa 12; *In re Norton*, 64 Kan. 842; *Carleton* v. *People*, 10 Mich. 250; *State* v. *O'Brian*, 68 Mo. 153; *In re Quinn*, 152 N. Y. 89; *Ex Parte Bassitt*, 90 Va. 679; *Herrington* v. *The State*, 103 Ga. 318; *Yorty* v. *Paine*, 62 Wis. 154; *Clark* v. *Inhabitants of Easton*, 146 Mass. 43; *Ruohs* v. *Athens*, 91 Tenn. 20; *People* v. *Toal*, 85 Cal. 333; *Gorman* v. *People*, 17 Colo. 596. Contra, *Burt* v. *Winona etc. Ry Co.*, 31 Minn. 472; *State* v. *Gardner*, 54 Ohio St. 24; *Donough* v. *Dewey*, 82 Mich. 309; *Lang* v. *Bayonne* (1907), 74 N. J. Law 455, 6 MICH L. REV. 354; *State* v. *Bailey* (1908), 106 Minn. 138; and see, *Speer* v. *Kearney County*, 88 Fed. 749.

Norton v. *Shelby County*, supra, is the leading case to the effect that there can not be an officer de facto where the office is created by an unconstitutional statute. Mr. JUSTICE FIELD says: "But the idea of an officer implies the existence of an office which he holds. * * * Their [counsels'] position is, that a legislative act though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. * * * An unconstitutional act is

not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The courts in the principal case and in *Norton* v. *Shelby County* both quote from and thoroughly approve *State* v. *Carroll,* 38 Conn. 449, which is the leading case on de facto officers. The Maine court, relying on *Lang* v. *Bayonne* and *State* v. *Carroll,* takes three strong positions against the doctrine announced in *Norton* v. *Shelby County.* They will be presented in the following paragraphs.

In the first place, the Maine court is of the opinion "that an office created or authorized by the legislature should be treated as de jure until otherwise declared by a competent tribunal." It is admitted that this is a principle of constitutional construction, at the same time it is declared binding upon the public. *State* v. *Carroll* is cited as "a perfect precedent" for the conclusion at which the Maine court arrives: "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 law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society." It is necessary to note that Mr. JUSTICE FIELD in *Norton* v. *Shelby County* contends that this discussion above quoted refers to "the unconstitutionality of the act by which the officer is appointed to the office legally existing." See *Lang* v. *Bayonne,* supra.

Secondly, the Maine court concludes that public policy and expediency demand that the acts of de facto officers be held valid as to the public and third persons, whether the officer "hold a de jure or a de facto office." "The authorities are in harmony that the doctrine of de facto officers was invented to deal with effects, not with causes. * * * If the effects are alike, it is immaterial that the causes differ." The court here touches the main reason why some courts are struggling to free themselves from the logic of Mr. Justice FIELD in *Norton* v. *Shelby County.* All but one of the cases cited above as contrary to the principles announced in *Norton* v. *Shelby County* bring forth vigorously this phase of the problem. The modern tendency as mirrored in the last three cases is against *Norton* v. *Shelby County.* It is the writer's opinion that the beneficial result accomplished by these recent cases will not only justify the reasons supporting their decision, but also win followers.

Finally, the Maine court sets forth that the rule requiring "obedience from the citizens to the provisions of the public statute which creates a municipality * * * even though unconstitutional justifies obedience to every other law which the legislature has seen fit to enact until such has been judicially decided to be invalid." This idea finds a clear expression as follows: "Where a municipal corporation is acting under color of law, and its existence is not questioned by the state, it cannot be collaterally drawn in question by private parties; and the rule is not different although the constitution may prescribe the manner of incorporation." DILLON, MUN. CORP., §43a. See

Lang v. *Bayonne, Spear* v. *Kearney County,* and more particularly the recent Minnesota case of *State* v. *Bailey.* It is a "mere verbal distinction" to say that "the law does not recognize a municipality so created as an existing corporation, that it does not recognize the acts of its pretended officers as valid; but that it merely refuses to permit the right of such officers to exercise their functions to be challenged, in order that a government which exists in fact may not be overthrown until another is provided"; *Lang* v. *Bayonne.* This attack on the principle in *Norton* v. *Shelby County,* although not new, is rarely mentioned in the cases; it undoubtedly will not be overlooked in future litigation where this question is involved. H. W. I.

Two Recent Decisions Preventing the Presbyterian Re-union.—"What is the gude o' being a Presbyterian gin ye canna object?" says Peter Macintosh in "Days of Auld Lang Syne," and he represents a very large class of persons who appear to regard it as both a right and a duty to object. When, a few years since, the General Assemblies of The Cumberland Presbyterian Church and The Presbyterian Church in the United States of America determined that there should be a re-union of the two bodies there were, of course, many objectors. Disputes concerning property have brought the objectors to the re-union before the courts, and in Missouri and Tennessee they have recently obtained victories.

In *Landrith* v. *Hudgins,* — Tenn. —, 120 S. W. 783, and in *Boyles* v. *Roberts,* — Mo. —, 120 S. W. 805, the supreme courts of these states have held that the proceedings had in 1906 for re-uniting the two denominations were ineffective for that purpose. These decisions are obviously most important. They have been rendered after very careful consideration. The opinions are well written and the whole subject is discussed in them with dignity and learning well suited to the nature of the controversy. The decisions are entitled to respect. Nevertheless, with all due respect and having regard to the difficulties involved in the dispute, we must say that their validity may well be doubted.

The two courts base their judgments upon somewhat different grounds. The Missouri court holds that the Cumberland Presbyterian Church had, under its constitution, no power to form a union with another church; the Tennessee court holds that the church had inherent power to form such a union, but that this union was not formed in accordance with the fundamental law of the church. There certainly appears to be in the church's constitution no express prohibition of the exercise of such a power, and the doctrine of the Tennessee court on this point—the existence of the power—seems to be supported by all the recent decisions that have been rendered in this same controversy. *Mack* v. *Kime,* 129 Ga. 1; *Wallace* v. *Hughes,* — Ky. —, 115 S. W. 684; *Brown* v. *Clark,* — Tex. —, 116 S. W. 360; *Ramsay* v. *Hicks* — Ind. App. —, 87 N. E. 1091.

Both courts agree that the revision, made in 1903, of the Confession of Faith of the mother Presbyterian Church did not go far enough to remove

from the creed certain doctrines that had caused the separation of the Cumberland Presbyterian Church from the older body.

The General Assemblies of the two denominations had concurrently declared that: "In adopting the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, as a basis of union, it is mutually recognized that such agreement now exists between the system of doctrine contained in the Confessions of Faith of the two churches as to warrant this union—a union honoring alike to both." This concurrent declaration had been made after careful consideration. There can be no suspicion on the part of anyone that the earnest and able Commissioners were either ignorant or fraudulent in arriving at this conclusion. It may be that some of them, after making the declaration for union, put election before faith, and that others put faith before election, but, in a spirit of tolerance, all who voted for the declaration must have recognized the fact that there never can be a union of denominations if an absolute uniformity of belief is required.

The supreme judicatories of the two churches were satisfied, and one might well ask why the civil courts should require more. The answer given is that when property rights are involved the civil courts will examine into doctrinal questions and determine them for themselves. This is proper when the property has been devoted, by the express terms of the gift or grant by which it was acquired, to the support of some specific religious doctrine or belief, but it does not follow that it is proper in cases like those under discussion. The ownership of property depends upon the determination of certain doctrinal questions: if, under the form of government of the church, certain judicatories have jurisdiction to determine these doctrinal questions, and have determined them, there is little for the civil courts to do in the matter. *Watson* v. *Jones,* 13 Wall. 679, 726, 727; *Trustees of Trinity M. E. Church* v. *Harris,* 73 Conn. 216; *Brundage* v. *Deardorf,* 92 Fed. 214.

There has been in recent years a marked tendency towards church unity, but the effect of such decisions as these of the supreme courts of Missouri and Tennessee will be to check this tendency. Moreover, if these decisions are to be followed the task will more generally be imposed upon the courts of investigating theological questions of great complexity—a task which need be undertaken in a limited class of cases only if the principles established by *Watson* v. *Jones,* supra, are adhered to. J. H. B.