Recovery of Salary by a De Facto Officer

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RECOVERY OF SALARY BY A DE FACTO OFFICER

I.

The de facto doctrine in the law of officers has been a continual source of difficulty to the courts for more than a century. Many questions connected with the application of this doctrine to this branch of the law have been settled beyond controversy. Even the phase of this question which the writer proposes to discuss cannot be classed as new or novel. Recent years, however, have seen the development of certain tendencies on the part of some of the American courts in the application of this doctrine, which will furnish the subject for the major part of our consideration.

A "de facto officer" has been defined by Lord Ellenborough\(^1\) to be "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 definition has been enlarged upon by Chief Justice Butler in the leading case of State v. Carroll,\(^2\) as follows, "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, (italics ours) where the duties of the office 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 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 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." This statement is generally recognized as the best and most comprehensive definition ever given of the term "de facto officer."

Having before us this definition let us proceed at once to examine

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\(^{1}\) Rex v. Bedford Level (1805), 6 East 356.

\(^{2}\) (1871), 38 Conn. 449, 471.
the right, if any, which a *de facto* officer has to the salary of the office whose duties he has performed. The cases in the courts of this country which have considered this question may be divided into three classes or groups, which are (1) those cases holding that in an action for the salary or emoluments of an office the plaintiff must show a good title to the office and therefore the *de facto* officer cannot recover in such an action; (2) those cases holding that the right to the salary and emoluments of an office arises not out of the title thereto but out of the actual performance of the duties of the office and therefore the *de facto* officer can recover in an action for the salary of an office, which he has claimed and held without force or fraud although there was, in fact, another rightful claimant to the office; (3) those cases which hold that as between the *de jure* and the *de facto* officer the former is entitled to the salary and emoluments of the office even though the latter may have performed the duties thereof, but when there is no other claimant, the *de facto* officer holding in good faith under color of title may recover from the State or municipality the salary or fees of the office.

The cases falling within the first class above named greatly outnumber the cases in both of the other classes. The only cases which fall within the second class are those decided by the New Jersey courts. The law on this question in New Jersey is declared by three cases. The first case dealing with this question is that of *Stuhrt v. Curran*, in which it was held, by a court divided seven to five, that a *de jure* officer could not recover from the *de facto* officer the installments of salary received by the latter while in possession, and performing the duties, of the office, which he claimed and held in good faith and without fraud. Two years later the New Jersey Court of Errors and Appeals decided the case of *Meehan v. Freeholders of Hudson County*, holding therein that a *de facto* officer could not recover in an action for salary where he gained possession of the office by force or fraud. Several years later in 1897, to be exact, the same court decided the case of *Erwin v. Mayor, etc., of Jersey City*, by which the doctrine as it now exists in New Jersey was fully established. In the case last mentioned the court held

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8 Philadelphia v. Given (1869), 60 Pa. St. 136; Matthews v. Supervisors (1876), 33 Miss. 715; Coughlin v. McElroy (1902), 74 Conn. 397, 50 Atl. 1025; (This was not an action for salary, but the opinion contains statements concerning the point in question.) Christian v. Gibbs (1876), 33 Miss. 314; People ex rel. Morton v. Teaman (1879), 30 Barb. 193; People ex rel. Culbertson v. Potter (1883), 63 Cal. 127; See cases cited under note No. 16, which are all in point on the proposition stated above.

4 (1884), 65 N. J. L. 276.

4 (1884), 65 N. J. L. 141.
"that one who becomes a public officer de facto without dishonesty or fraud, and who has performed the duties of the office, may recover such compensation for those services, as is fixed by law, from the municipality which is by law to pay such compensation." It is worthy of note in connection with the foregoing case, even though the court made no mention of the fact, that there was no de jure claimant of the office during the time of the plaintiff's service.

In the courts of five states—Utah, South Carolina, Arizona, New Hampshire, and Oklahoma—there have been decided cases which properly fall within the third class. Justice McCarty, in Peterson v. Benson, speaks of the courts in this class of cases as following an "intermediate course, namely, that as between an officer de facto and a de jure officer the latter is entitled to whatever salary and other compensation may be attached to the office, even though the de facto officer may have performed all the duties of the office. This doctrine is based upon the theory that unless the de jure officer is protected, dishonest intruders will lay claim to the office, and, obtaining possession thereof, will claim the emoluments to the detriment of the public and the injury of the de jure officer. In cases, however, where there is no de jure officer, the line of decisions last mentioned hold that a de facto officer who, in good faith, has had possession of the office and has discharged the duties pertaining thereto, is legally entitled to the emoluments of the office (italics ours), and may, in an appropriate action, recover the salary, fees and other compensation attached to the office." The court in this case believed the rule stated to be "more in consonance with the principles of equity than the opposite rule," and allowed the de facto officer to recover the salary of the office. This case furnishes the best statement, known to the writer, of the doctrine of the cases belonging to the third class.

The case of Dickerson v. City of Butler is often cited as supporting this doctrine of the third class of cases. This case cannot be properly so used since the decision therein is based on the principle that in an action of mandamus for the purpose of compelling the auditing and payment of a salary claim by the disbursing officers of the State or municipality the title to the office cannot be decided and therefore one having prima facie title to the office, i.e., the person in possession of the office and executing its duties and holding the

7 Peterson v. Benson (Utah, 1910), 112 Pac. 801; Elledge v. Wharton (So. Car. 1911), 71 S. E. 637; Behan v. Davis (1892), 3 Ariz. 399, 31 Pac. 521; Adams v. Directors (1895), 4 Ariz. 327, 40 Pac. 185; Cousins v. Manchester (1892), 67 N. H. 229; Blackburn v. Oklahoma City (1893), 7 Okla. 292.
8 Supra, Note No. 7.
9 (1887), 27 Mo. App. 9. See also Reynolds v. McWilliams (1873), 49 Ala. 552 and Henderson v. Glynn (1892), 2 Col. App. 363.
same under color of right, at the time of bringing the action, may recover the salary of the office. Without approving or disapproving this doctrine, which, perhaps, receives some support from the courts of some other States, it is certainly safe to say that neither the Missouri case cited, nor any other decided by the courts of that State, upholds the principle enunciated in the cases of the third class above mentioned. In Missouri, in all cases where the de facto officer with prima facie title seeks to compel the payment to him of the salary of the office by a mandamus directed to the proper disbursing officers, he is allowed to recover irrespective of whether there is another claimant of the office, who later may be determined to be the de jure officer. The courts of that State, however, intimate that if such recovery is allowed and later another than the person de facto in office is determined to be the de jure officer, he may recover, in a suit against the de facto officer, that portion of the salary of the office which the latter has received. As in the third class of cases mentioned, however, there are no other claimants than the de facto incumbent of the office, the practical result under such circumstances would be the same in Missouri as in those States which adhere to the principles of the said third class, provided the de facto officer resorts to mandamus for his relief. For in Missouri, in such a proceeding, the de facto officer with prima facie title would recover the unpaid salary, and, there being no one who could later be determined to be the de jure officer and allowed to recover the salary paid to the de facto officer in an action against the latter for that purpose, the de facto officer would retain the installments paid unmolested, unless the State or municipality were allowed to recover from him the sum so received, which would happen infrequently even were it allowed by the courts.

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10 See also State ex rel. v. John (1883), 81 Mo. 133; State ex rel. v. Draper (1871), 48 Mo. 213; State ex rel. v. Clark (1873), 52 Mo. 508; Hunter v. Chandler (1870), 45 Mo. 472.
11 Ex parte Lusk (1886), 82 Ala. 515; Mannix v. State (1885), 15 Ind. 245; Meredith v. Supervisors (1872), 50 Cal. 433; State v. Sherwood (1873), 15 Minn. 221; Duane v. McDonald (1874), 41 Conn. 517; (These cases are all on the general proposition that mandamus is not the proper proceeding to try title to office, except the California case which seems more directly in point in support of the Missouri doctrine.) The doctrine of the Missouri cases is directly opposed by the case of State ex rel. Hamilton v. Grant (1895), 14 Wyo. 41, 81 Pac. 795, and the case of City of Chicago v. People (1904), 117 Ill. App. 594, and of course by those cases which allow mandamus generally to be used to try the title to office. See Lindsay v. Luckett (1857), 20 Tex. 516; Harwood v. Marshall (1856), 9 Md. 83; Putnam v.Langley(1882), 133 Mass. 204.
12 Mullery v. McConnell (1888), 95 Mo. 579; State ex rel. Vail v. Clark (1873), 52 Mo. 508.
than mandamus, by the de facto officer against the State or municipality to recover his salary, the courts of this State would not allow him to recover, for they hold that the officer's right to salary is dependent upon the legal title to the office rather than on the performance of the duties thereof, and this is true even though, under the facts, there is no other claimant to the office.

As expressly opposed to the cases which fall in class three, there are decisions in at least five jurisdictions—Illinois, Kansas, Mississippi, Arkansas and Kentucky. And as opposed to such cases by inference from the facts, in other words refusing to allow the de facto officer to recover the salary of the office where the facts themselves show there was no other claimant though the opinion does not comment on this feature, are cases in at least nine other jurisdictions—Missouri, California, United States (Court of Claims), Pennsylvania, Massachusetts, Minnesota, Nevada, Ohio, and North Carolina.

What are the reasons which can be offered in support of the rule which allows a recovery of salary by the de facto officer where there is no de jure claimant of the office? One naturally looks to two sources for such reasons, and expects either to find them in the de facto doctrine itself or to deduce them from the nature of the right which any officer has to the salary of his office. In the foregoing pages Chief Justice Butler's definition of a de facto officer has been quoted. In the extract from his opinion we have emphasized, by italicizing, a certain clause. This calls attention to the fact that the de facto doctrine, as Justice Butler understood it, and, indeed, as it has been generally understood and applied in the law of officers, is only a means to protect the interests of the public and third parties in their dealings with persons exercising the duties of public

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14 State ex rel. v. Walbridge (1899), 153 Mo. 194, 203; Gracey v. St. Louis (1908), 213 Mo. 384, 111 S. W. 1159.
15 Sheridan v. St. Louis (1904), 183 Mo. 25.
16 Scott v. Chicago (1903), 205 Ill. 281; Garfield Twp. v. Crocker (1901), 63 Kan. 272; City of Vicksburg v. Groome (1898), Miss. unreported, 24 So. 306; Cobb v. Hammock (1907), 82 Ark. 584, 102 S. W. 382; Stephens v. Campbell (1900), 67 Ark. 434; Eubank v. Montgomery County (1897), 127 Ky. 261, 32 Ky. L. 91, 105 S. W. 418.
17 Sheridan v. St. Louis (1904), 183 Mo. 251; Burke v. Edgar (1887), 67 Cal. 582; Romero v. United States (1889), 24 Ct. of Claims 331; Commonwealth ex rel. Bowman v. Slifer (1855), 25 Pa. St. 23; Dolliver v. Parks (1884), 136 Mass. 499; Egan v. Scram (1901), 82 Minn. 420; Meagher v. County of Storey (1869), 5 Nev. 244; Phelan v. Granville (1886), 140 Mass. 386; State v. Newark (1898), 8 Ohio Dec. 344; Darby v. Wilmington (1877), 76 N. Car. 133; Northup v. United States (1909), 45 Ct. of Claims 50.
18 See page 178 of this article.
19 McCue v. Circuit Court of Wapello County (1879), 51 Iowa 69; Jewell v. Gilbert (1885), 64 N. H. 13, 5 Atl. 80; State ex rel. Cosgrove v. Perkins (1897), 139 Mo. 106, 217, 140 S. W. 650; People v. White (1840), 24 Wend. 520, 539.
offices under color of right but without good claim to be the *de jure* officers. In the words of Chief Justice Butler, "The *de facto* doctrine was introduced into 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."20 A moment's reflection will convince one of the imperative necessity for the adoption of such a doctrine. Public business would soon be at a standstill but for this doctrine. Will anyone contend that the public at large would be ready to deal with the one occupying the office though not decided to be the *de jure* officer, if the individuals dealing with such a person were obliged to ascertain at their peril whether he was the *de jure* officer? Surely, if this were the rule, it is not difficult to imagine circumstances under which the business connected with a public office would be entirely suspended until a decision was had in a court of last resort on the title to the office. Under such a rule no one could feel safe in dealing with the incumbent of a public office until such a decision was had. It does not seem absurd, or even exaggerated, to say that without the *de facto* doctrine the public business would be demoralized and the orderly conduct of a public office would be absolutely impossible. As Justice Cooley said in his dissenting opinion in an early Michigan case involving the *de facto* doctrine,21 "The public who have an interest in the continuous discharge of official duty, and whose necessities cannot wait the slow process of a litigation to try the title, have a right to treat as valid the official acts of the incumbent, with whom alone, under the circumstances, they can transact business. This rule is an obvious and necessary one for the protection of organized society; for as was said in *Weeks v. Ellis*, 2 Barb. 325, the affairs of society cannot be carried on unless confidence were [is] reposed in the official acts of persons *de facto* in office." Again in the opinion in the case of *Mallett v. Uncle Sam Mining Company*,22 it is said, "The rule (i. e., of *de facto* officer) is dictated by the most obvious necessity. If the acts of public officers could at any time be overthrown by the showing of some irregularity or informality in their election or appointment, all confidence in the judgment of the courts would be destroyed, and all judicial proceedings would ever be involved in doubt and uncertainty."

It is this reason of public policy and public necessity which has in-

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20 State v. Carroll, 38 Conn. 449, 467.
22 (1865), 1 Nev. 188.
introduced the *de facto* doctrine into the law of officers. To justify any extension of the application of the doctrine the original reason for its use must be present. If, then, we are to justify the rule which allows "one who has the reputation of being the officer, without in fact being" it, to recover the salary of the office where there is no other claimant, by a resort to the *de facto* doctrine, we should find in the situation at hand the reason of public policy and necessity demanding the application of the *de facto* doctrine. Is there any such reason present in the situation suggested? Does public policy require that one who has performed the duties of an office, but whose appointment or election is defective, or who has not qualified, shall be paid the salary of the office where there is no *de jure* claimant? The adoption of the rule allowing such an incumbent to recover the salary of the office would tend to encourage carelessness in the appointment or election of the officer and in his acts complying with the conditions precedent to becoming a *de jure* officer as its practical effect is to abolish all distinction between the person *de facto* in office and the *de jure* officer. This, certainly, is a result which is not for the public good. To allow this rule to prevail in its logical fullness would result in the encouragement, in some instances, of the non-observance of statutes. For example, in those States where the filing of a bond is made a condition precedent to becoming a *de jure* officer, the adoption of the rule suggested above, and the consequent abolition of the last distinction between a *de jure* officer and a person *de facto* in office, would remove the most effective spur to urge compliance with such a statute. The courts which have adopted this rule allowing recovery by the *de facto* officer have found it necessary to limit it in its application to those cases where the claimant has become a *de facto* officer without dishonesty or fraud.\(^2\) The illustration above offered suggests the necessity of another limitation barring from recovery those persons who, though they have acted in good faith, are not *de jure* officers because they have failed to do some act or acts which the law imposes upon them. These very limitations indicate the illogicalness of the rule itself. If dishonesty and fraud would be encouraged by allowing men *de facto* in office to recover the salary of the office, so likewise would carelessness be encouraged by allowing men *de facto* in office through carelessness to recover the salary thereof. And even granting that the original carelessness has occurred in the appointment or the election, and is not directly that of the claimant of the office, will not he be less likely to scrutinize carefully the method and powers of appointment or

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\(^2\) Elledge v. Wharton, supra; Peterson v. Benson, supra.
election if he will have the same rights as a de facto officer as he would have as an officer de jure? And will not the abolition of this distinction have the same injurious effect upon the performance of their duties by the officers who appoint to office or conduct elections of officers?

It is true that the public must have servants and any rule which will seriously interfere with supplying this need is certainly opposed to public policy. Likewise any rule which has a tendency to cause men to regard lightly any statutory provision for the regulation of the appointment, election or qualification of public officers is injurious to the public weal. The argument, advanced by some lawyers, that a denial of the rule allowing recovery of salary by one de facto in office will tend seriously to cripple the public service, since it puts upon each claimant the duty, at his peril as regards his salary, of determining the validity of his appointment or election or the sufficiency of his compliance with the conditions precedent to the assumption of office, which will in many cases deter the claimant from accepting the office and thus result in leaving it vacant, is not likely to commend itself to the majority of thinking men. So long as we have so many men of bad character who risk prison sentences by adopting improper methods to gain office and so many men of good character who, with their bondsmen, are willing to take such great financial risks as are imposed upon the incumbents of offices having to do with the collection or administration of the State and national revenues in those jurisdictions in which the officer and his bondsmen are held liable to make good any money stolen or lost without the fault of the officer, no one will easily be persuaded that it is necessary to take steps to encourage men to accept office.

Undoubtedly some, if not all, of the courts which have declared themselves in favor of allowing the man de facto in office, when there is no other claimant, to recover the salary of the office, have reached this conclusion partly because they attached some peculiar significance to the term "de facto officer." It is, perhaps, not strange that this should be the case and that the "de facto officer" so called should be regarded as an officer, though a little different from the de jure officer. The history of the de facto doctrine, however, shows the fallacy of this conception. No one but the person de jure in office can be properly called an officer. The person de facto in office is really no officer at all, but is simply a person who, without right, is performing the duties of the office and whose acts the law, be-

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cause public policy requires it, regards as valid and binding when they affect the public and third persons in good faith dealing with him as an officer. The incumbent of an office is treated as an officer \textit{de facto}, as was said by Chief Justice Butler,\textsuperscript{25} "not because of any quality or character conferred upon the officer, or attached to him by reason of any defective election or appointment, but a name or character given to his acts by the law for the purpose of validating them." So we conclude there is no basis in the \textit{de facto} doctrine itself for allowing the incumbent of an office without legal right to recover the salary of the office, even in the absence of another claimant. And it is believed that courts which have found support for this rule in the \textit{de facto} doctrine have misunderstood the term "\textit{de facto} officer" and regarded it as a "quality or character" of the man rather than a "quality or character" given to his acts.

[To be continued]

\textbf{GORDON STONER.}

\textsuperscript{25} State v. Carroll, 38 Conn. 449, 467.
RECOVERY OF SALARY BY A DE FACTO OFFICER

II.

Can the rule allowing one de facto in office to recover the salary thereof derive any support from the basis of the title or right which a de jure officer has to the salary of the office which he occupies? In order to answer this question it will be necessary to inquire into the basis of a de jure officer’s right to salary. Various theories have been advanced as to the basis of such a right. The oldest hypothesis is that of the property right. BLACKSTONE, in his Commentaries, classifies office, which he defines to be “the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging,” as an incorporeal hereditament. And it is there said that “a man may have an estate in them, either to him and 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 they might perhaps vest in executors or administrators.” This is distinctly an English theory, based on the English conception of an office which is held under a grant from the Crown. Offices in this country are created by statute or constitution, for the benefit of the public, the authority of the incumbents to perform the functions and to discharge the duties thereof being conferred on, or delegated to, them by commission. With these characteristics of an office in view, the courts of this country, with a few exceptions, have refused to adopt the theory of absolute property right in office or the salary thereof.

Courts have sometimes spoken of the rendition of services as the basis of an officer’s right to salary. In few, if any, jurisdictions has this principle been consistently and logically applied. It has been held repeatedly that where there have been two claimants of an office and one of these has performed the duties thereof and received installments of salary from the State or municipality, if the other is

25 Blackstone’s Comm. 36. 27 State v. Henderson (1910), 145 Iowa 657, 122 N. W. 767; State v. Hawkins (1886), 44 Ohio St. 98, 109; Taylor and Marshall v. Beckham (1909), 178 U. S. 548; Nichols v. McLean (1886), 103 N. Y. 526; Donahue v. Will County (1881), 100 Ill. 94; Contra: see Hoke v. Henderson (1833), 15 N. Car. 1. This case was expressly overruled in the case of Mial v. Ellington (1903), 134 N. Car. 131, which brings North Carolina into line with the rest of the States holding there is no property right in an office.

finally declared to be the *de jure* officer, he may recover from the former the salary which such claimant has received. This rule is supported even by the courts of some of the States where the *de facto* officer is allowed to recover the salary of the office to which there is no other claimant. It is also a rule generally adhered to that the *de jure* claimant may recover the salary of the office from the State or municipality, where the duties of the office have been performed by one *de facto* in office to whom the salary has not been paid. Where a *de jure* officer has been improperly suspended or removed, it is held he may recover the salary for the period while out of office, even though the duties have been performed by another who has been appointed and paid in his stead. Other generally well recognized rules of the same sort might be mentioned, but these will suffice to illustrate our position. Not a single one of these decisions is consistent with the theory of service as the basis of an officer’s right to the salary of his office. One class of cases, at first glance, seem to lend support to this theory—these are the cases which deny to the *de jure* officer the right to recover from the State or municipality any installments of salary paid to the person *de facto* in the office. This is the general, though not universal, rule. The courts which do uphold this rule give as a reason therefor, not that the officer has performed the duties of the office, but that this is a proper case for the application of the *de facto* doctrine, as it would result in a definite injury to the public service to require

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Dolan v. Mayor (1877), 68 N. Y. 274; State ex rel. Chapman v. Walbridge (1859), 153 Mo. 194.

Bullis v. Chicago (1908), 235 Ill. 472, 85 N. E. 614.

Gracey v. City of St. Louis (1908), 213 Mo. 384, 111 S. W. 1155.

State v. Babcock (1904), 106 Mo. App. 72, 80 S. W. 45; City of New York v. Voorhis (1911), 199 N. Y. S. 822; Dolan v. Mayor (1877), 68 N. Y. 274; State ex rel. Cronin v. Estelby (1886), 5 Ohio Cir. Dec. 592; Coughlin v. McElroy (1902), 74 Conn. 397, 90 Atl. 1025; Gorman v. Commissioners (1877), 1 Idaho 655; Board of County Commissioners v. Rhode (1907), 41 Colo. 258, 95 Pac. 553; Stuhr v. Curran (1882), 44 N. J. L. 181.

People v. Smyth (1865), 28 Cal. 21. And see Rasmussen v. Commissioners (1899), 8 Wyo. 277, 55 Pac. 1098, and Blydenburgh v. Commissioners (1899), 8 Wyo. 303, 56 Pac. 1106.
the disbursing officer to inquire into and determine, at his peril, whether the person performing the duties of the office is the officer *de jure* before making payment to him of any part of the salary of the office. This rule, it is argued and not without considerable force, if insisted upon would generally result in a refusal by the disbursing officers to pay any salary to the one performing the duties of the office until the courts pass on his title to the office and find him to be the officer *de jure*. Judge ANDREWS, in the case of *Dolan v. Mayor*, 3 said, "It is plain that in many cases the duty imposed upon the fiscal officers of the State, counties or cities to pay official salaries, could not be safely performed unless they are justified in acting upon the apparent title of claimants. ** If fiscal officers, upon whom is imposed the duty of paying 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 legal right and title. This, in many cases, as we have said would be impracticable. ** 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 subsequently be 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." The courts of no State except New Jersey have been consistent in the application of the principle of service as the basis of an officer's claim for salary. In this jurisdiction the *de jure* officer has been refused the right to recover from the person *de facto* in office the fees of the office received by the latter while in possession and in the execution of the duties thereof. 37 This, however, is against the great weight of authority; 38 and, we believe, there can be found in the law of officers no great support for the theory that service is the basis

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36 68 N. Y. 274, 280-1.
37 Stuhr v. Curran, supra.
38 See cases cited under note No. 29.
of the officer's right to salary. Finally, contract is not the basis of the right to salary.

If we concede, as it seems we must, the correctness of the general principles above stated, we have limited considerably our field of inquiry. But the question, what is the basis of the officer's right to salary, is still unanswered. It is, indeed, one of those inquiries which are easier answered by the eliminating process than by stating affirmatively the answer sought. Courts have made various general statements respecting the basis of this right. It has been said, "The legal right to the office carried [carries] with it the right to the salary or emoluments of the office," and, "The commissions or fees provided by law were [are] incident to, and as clearly connected with, the office as the rents of real estate or interest on securities."

Again it has been said "The salary is incident to the title to the office and not to its occupation and exercise," and, "The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office." Perhaps the clearest statement of this sort is that made by Justice Brande in the case of State v. Walbridge, where he said, "The right of a public officer to the salary of his office is a right created by law, is incident to the office and not the creature of contract nor dependent upon the fact or value of services actually rendered." Even this statement does not give as clear and definite notion of the right as the reader may wish. Undoubtedly the courts mean to say that it is a right given by statute to the de jure office, the intent of the legislature being that the salary should go to the rightful claimant of the office so long as the office exists and the statutory provision as to a salary remains unchanged by any subsequent statute. In other words, the right is in the nature of a qualified property right. As respects anyone except the State or munici-

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39 See O'Brien v. City of St. Paul (1898), 72 Minn. 256; and Philadelphia v. Given (1869), 60 Pa. St. 135, holding that the right to salary is not a quantum meruit for services performed in office. See also the case of State ex rel. v. Walbridge (1899), 153 Mo. 195, 54 S. W. 447, where it is said, "The right of a public officer to the salary of his office is a right created by law, is incident to the office and not the creature of contract nor dependent upon the fact or value of services actually rendered." See further Gracey v. City of St. Louis, supra.

40 State ex rel. v. Walbridge, supra; Fitzsimmons v. Brooklyn (1886), 102 N. Y. 526; Stubenville v. Cup (1882), 38 Ohio St. 18; Butler v. Pennsylvania (1850), 16 How. (U. S.) 402; Koontz v. Franklin County (1874), 76 Pa. St. 154; Farwell v. Rockland (1872), 62 Me. 396; Wyandotte v. Drennan (1881), 46 Mich. 478; Coffin v. State (1885), 7 Ind. 157; State v. Kalb (1886), 59 Wis. 176.

41 Andrews v. Portland (1887), 79 Me. 484; Chicago v. Luthardt (1901), 191 Ill. 516.


43 Bullis v. Chicago, supra; Philadelphia v. Given, supra.

44 Sheridan v. St. Louis (1904), 183 Mo. 25; Burke v. Edgar (1889), 67 Cal. 182; Dolan v. Mayor, supra; People ex rel. Morton v. Tieman (1859), 30 Barb. 193.

45 Supra, see page 203 of the report.
palty, i.e., the public, his claim to the office and the salary is enforceable; but he has not such a right as will hinder the legislature from abolishing the office during his tenure, or changing the compensation, or the duties attached to the office, unless such action by the legislature is forbidden or limited by the constitution. Even the legislature, however, cannot legislate the officer out of office without abolishing the office, not even by abolishing it by name and creating another office under a different name to which are attached practically all of the duties of the old office. This being the nature of the right, there is nothing in it on which to base the claim of the person de facto in office to the salary thereof, though there is no other claimant. The person de facto in office has no sort of title to the office, and, granting the legislative intent to be as above expressed, the statute attaching a salary to the office does not give such an incumbent any claim thereto.

What, if any, reason is there for awarding the salary of the office to the de facto incumbent? This question is best answered by considering the reasons which the courts have offered for so holding. The New Jersey cases, as has been said, rely on services performed as the basis of recovery. In the cases in other States the courts have allowed the recovery on the basis of equitable right, i.e., the State or municipality having received the service should pay for the same and there being no other person except the one de facto in office who has any right in law or equity to claim the compensation, the de facto officer who has in good faith performed the duties of the office is entitled thereto. In the case of Peterson v. Benson, which is one of the best of those cases allowing the person de facto in office to recover the salary thereof, Justice McCarty said, "We think the rule as declared by these authorities (i.e., allowing a recovery by the de facto officer) is more in consonance with the principles of equity than the opposite rule, which holds that an officer de facto cannot, under any circumstances, maintain an action for the salary, fees, or other compensation attached to the office which he holds." This quotation seems to warrant the assumption that the intent of the Justice was to rest the right to recover on equitable grounds. This is in conflict with a statement occurring earlier in the opinion, to which in

46 Malone v. Williams (1907), 118 Tenn. 390; State v. Leonard (1887), 86 Tenn. 485, 7 S. W. 453; People v. McAllister, (1804), 10 Utah 357, 37 Pac. 578; Prat. v. Board (1897), 15 Utah 1, 49 Pac. 747; Adams v. Roberts (1904), 119 Ky. 364, 83 S. W. 1035; State v. Wiltz (1858), 11 La. Ann. 439.
47 Malone v. Williams, supra.
48 See page 179 of this article.
49 Supra.
a former quotation we have called attention by the use of italics, in which the Justice says that the decisions allowing the recovery of salary by the de facto officer do so on the ground that the de facto officer “is legally entitled to the emoluments of the office.”

The earliest decided case in which recovery was allowed was that of Behan v. Davis. The Arizona court in that case admits “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” and then goes on to say that the case at bar is different because in this case “there is no dispute as to the title to the office; no adverse contestant for it” and, without considering the question whether the differentiating facts call for a different rule, allows mandamus to issue to compel the auditing of the claim. The reason given in this case for the rule refusing recovery of salary to the de facto officer when there is a de jure claimant is that to adopt a contrary rule would encourage usurpation of office. If we accept this reason as the proper one, it does permit of a distinction between cases where there are de jure claimants and those where there are none. But the reason usually offered for refusing recovery to the person de facto in office, even where there is another claimant, is that in an action for salary the person de facto in office can show no title to the salary, no qualified property right therein, and this is as true where there is no claimant as where there is. In the recent case of Elledge v. Wharton, the South Carolina court thinks “it not only just, but consonant with sound law to hold” the de facto officers, who are de facto because of defective appointments, where there are no de jure claimants, entitled to the salaries of the offices whose duties they have performed. These are as satisfactory reasons as have been given by the courts for allowing the one de facto in office to recover.

An attempt has been made in this article to show that there is no basis in either the de facto doctrine or the legal right which a de jure officer has to the salary of his office for the recovery of salary by the de facto officer. What other legal right can there be upon which the de facto officer can base his claim? We can find none and none of the authorities suggest any. If it is true that there is no legal basis, is there no basis in equity for the recovery? In considering this question, it should be remembered that the actions to recover salary are in two forms, either mandamus directed to the disbursing officers or an action in the form of a contract action by the

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# See page 298 of this article.

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RECOVERY OF SALARY BY DE FACTO OFFICER

claimant against the State or municipality. These are both in form and nature actions at law and hence equitable principles are not properly applied to them. But granting, for the sake of argument, that they may be employed, what equitable principles are there which may be invoked to aid recovery in the case at hand? "Equity" is sometimes spoken of as synonymous with natural right and justice; but courts of equity, as well as courts of law, do not afford relief in a case because to deny it would be repugnant to one's sense of natural right and justice. And a recovery in a court of law or equity is allowed on the ground that it is "equitable" only when such a holding is supported by some one of the established rules of equity.53 No matter what the history of the development of equitable jurisdiction may have been, that jurisdiction is now fixed, and it is only when a case falls within its rules that equity will aid the injured or oppressed complainant. So let us inquire, what equitable principle will aid the de facto officer in recovering his salary? The only equitable doctrine which occurs to the writer as at all warranting a recovery of salary by the de facto officer is the doctrine of unjust enrichment so frequently applied in actions in quasi-contract. Conceding for the moment that this principle should be applied in the sort of cases under discussion, it has in no case with which we are acquainted been properly applied—for if this principle is to direct the recovery certainly the amount recovered should be measured by the value of the services rendered by which the State is enriched rather than by the salary which the statute allows to the de jure officer. But is not the principle itself opposed to the spirit of the law of public officers and of public law in general? Is it not the intent of the legislature in creating an office and affixing a salary thereto that only the officer regularly appointed or elected and properly qualified shall be allowed to perform the duties thereof and receive compensation therefor? If this question be answered affirmatively, it does not seem proper for the courts to allow this intention to be defeated by allowing another person, as the officer de facto, to recover compensation for the service rendered simply because some officer has failed to do his duty in respect to issuing a commission to the de facto officer or in respect to having him removed by proper proceedings, or because the public, usually without any knowledge of the facts has dealt with and regarded him as the officer de jure. As to the hardship, imposed on the person de facto in office, of refusing him the salary after he has in good faith performed the duties of the office, is it greater in this case than in others in the law of officers where the courts uniformly

53 See Bispham's Principles of Equity, sec. 1.
hold that the claimant cannot recover? It is undisputed that even though a de jure officer has faithfully performed the duties of his office he cannot recover in implied assumpsit for the value of his services unless the right to salary is expressly given him by statute or ordinance. In such cases the officer will receive no compensation unless the legislature see fit to subsequently reward him for his time and labor. The basis of this rule is that the officer is deemed to have "accepted his office with knowledge of and with reference to the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor." Is it any more of a hardship or any more repugnant to our sense of right and justice to charge the one who seeks to hold office with the knowledge that he must receive it in the proper way, through the proper channels, and that all of the statutory requirements must be complied with before he can be an officer de jure and entitled to compensation for the services which he renders than to charge the de jure officer with the knowledge that there is no compensation attached to the office, as above stated? We believe not, and we think the de facto officer should not be allowed to recover on the theory suggested because we believe to allow him to do so would be a plain disregard by the courts of the legislative intent in the creation of offices and would amount to putting the official sanction on a plain evasion of the statutes.

It not infrequently happens that courts in their desire to grant relief in cases in which their natural sense of right and justice inclines them to aid the plaintiff adopt principles which are inconsistent with the general principles governing other cases of the same class. As the result of such action, the way is frequently opened to infinitely more injury and hardship than would have resulted had the particular case been decided according to the generally accepted principles of the law. It appears to the writer that the courts which have allowed the de facto officer to recover the salary of the office where there is no other claimant have made this mistake. The rule introduces confusion and contradiction into the law of officers and no one can predict with any degree of accuracy the number of unfair and unjust decisions that may result therefrom.

It is true that where one in good faith has performed the duties of an office without being the de jure officer because of some defect

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54 White v. Inhabitants of Levant (1887), 78 Me. 568; Doolan v. Manitowoc (1879), 48 Wis. 312; Brazil v. McBride (1879), 69 Ind. 244; Fernald v. Dover (1889), 70 N. H. 43; Perry v. Cheboygan (1884), 55 Mich. 250; Sikes v. Hatfield (1859), 13 Gray (Mass.) 347.

in appointment, election, or qualification, it is a hardship to be denied any compensation therefor. The remedy in such a case, however, lies not in a resort to the courts but in an appeal to the legislature to compensate the injured person by special act.\(^6\) If the legislature in any instance fails in the performance of its duty and refuses to compensate the \textit{de facto} officer in a case where he should receive compensation, the fault lies with it, and it is not the province of the court to undertake the performance of this duty of the legislature in order to prevent a hardship to the individual. And if it is deemed the part of wisdom to give the compensation in every case to the one who performs the services of the office in good faith where there is no \textit{de jure} claimant, or where there is an election contest and another than the person who performs the services is found to be the officer \textit{de jure}, is it not desirable that this should be accomplished by the passage of a statute rather than by judicial legislation? Statutes of this sort are, indeed, not unknown for the State of California has an act which allows one who has received the \textit{prima facie} evidence of election to an office, where the election is contested, to recover the salary of the office during the time he serves and prior to the decision of such contest.\(^7\)

It is to be hoped that the courts which have injected this new rule into the law of officers will see the inconsistency and illogicalness of it, and retrace their steps. If this does not happen, it is still much to be desired that they do not extend the rule of recovery to a person \textit{de facto} in office, in good faith, but through his own fault because from lack of knowledge he has failed to comply with one or more of the conditions precedent which the law has imposed upon him.

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\(^6\) Romero v. United States, supra, note No. 17.
\(^7\) See Chubbuck v. Wilson (1907), 151 Cal. 162; 90 Pac. 524.