RECENT CASES

Administrative Law—Public Officers—De Jure Officer's Right to Salary Paid De Facto Incumbent—[Illinois].—The plaintiff, who was declared an elected municipal judge after a recount, sued the city for the salary of that office. The salary had been paid in good faith to the de facto incumbent who had received a certificate of election following the regular canvas. On appeal from a decision for the plaintiff, *held*, that a payment of the salary to the incumbent de facto officer is a good defense to the suit of the de jure officer. *McKinley v. City of Chicago.*[1]

A de jure officer's right to salary for a period that the office was occupied by a de facto officer has been adjudicated in nearly every jurisdiction of the United States.[2] In those cases where the de jure officer sues the municipality, a majority of the jurisdictions have adopted the view applied by the Illinois court in the instant case, basing their conclusions upon a public policy argument.[3] This argument is supported on two grounds; the officer, who discharges the duties, should be paid with reasonable promptness to insure the efficient continuance of public service, and the city should not be required to pay twice for services it receives.[4] Some jurisdictions, however, hold that payment to the de facto officer is no defense, basing their conclusions on the theory that the salary is attached to and depends upon the legal title to the office.[5] In those states where the de jure officer cannot recover from the municipality, he can, usually, recover from the de facto officer the salary that that officer has received.[6] This general

[1] 16 N.E. (2d) 727 (Ill. 1938).

[2] See cases collected in 55 A.L.R. 997 (1928); 2 McQuillin, Municipal Corporations § 537 (2d ed. 1928).

[3] Auditors of Wayne County v. Benoit, 20 Mich. 176 (1870); Dolan v. Mayor, 68 N.Y. 274 (1877); Comm'rs of Saline County v. Anderson, 20 Kan. 298 (1878); Shaw v. County of Pima, 2 Ariz. 399, 18 Pac. 273 (1888); Coughlin v. McElroy, 74 Conn. 397, 50 Atl. 1025 (1902); Brown v. Tama County, 122 Iowa 745, 98 N.W. 562 (1904).

[4] It should be noted that in these jurisdictions, whenever the de facto officer has not been paid for his services, the de jure officer is allowed to recover from the city on the theory that the salary is attached to the legal title to the office. Comstock v. Grand Rapids, 40 Mich. 397 (1879); Whitaker v. City of Topeka, 9 Kan. App. 213, 59 Pac. 668 (1900); Chicago v. Luthardt, 191 Ill. 516, 61 N.E. 410 (1901); Bullis v. City of Chicago, 235 Ill. 472, 85 N.E. 614 (1908).

[5] People *ex rel.* Dorsey v. Smyth, 28 Cal. 21 (1865); Philadelphia v. Rink, 1 Sadler (Pa.) 390, 2 Atl. 505 (1886); Andrews v. Portland, 79 Me. 484, 10 Atl. 458 (1887); Rasmussen v. Carbon County, 8 Wyo. 277, 56 Pac. 1098 (1899); Tanner v. Edwards, 31 Utah 80, 86 Pac. 765 (1906). Tennessee has reached the same result, but on the theory that the de jure officer has a property right in his office. Memphis v. Woodward, 59 Tenn. 499 (1873). Ohio found in one case that the de jure officer has a contract with the public. City of Cleveland v. Luttner, 92 Ohio St. 493, 111 N.E. 280 (1915).

[6] Nichols v. MacLean, 101 N.Y. 526, 5 N.E. 347 (1886); Kreitz v. Behrensmeyer, 149 Ill. 496, 36 N.E. 983 (1894); Coughlin v. McElroy, 74 Conn. 397, 50 Atl. 1025 (1902); Jones v.

rule is usually based on one of two theories: first, a public policy argument, carried over from old English law, that the court will not protect a usurper; or, second, the theory that the salary is annexed to the legal title to the office. The only state found which has not accepted this rule is New Jersey, where in the leading case of *Stuhr v. Curran*[7] the courts of that state denied recovery to the de jure officer on the grounds that only the officer who has performed the services of the office can claim its salary. The consequence of this rule is that the de jure officer cannot recover the salary, for the period he has not been incumbent, either from the city[8] or the de facto officer.[9]

While the rules seem clear, the confusion that exists in these cases arises because the states following the majority rule apply two or more inconsistent theories.[10] If the court, in holding for the city against the de jure officer, bases its reasoning upon the theory that it is a good public policy to pay the de facto officer so that services will be performed efficiently, it does not seem to follow that the de jure officer should recover in a suit against the de facto officer merely because the de facto officer had no right to the office. Furthermore, the argument, which brands the de facto officer a usurper and intruder, seems to be definitely outmoded in many of the present day cases which arise either from close elections or where technical questions of legal construction concern the appointing or dismissing power. Only in those cases where the de facto officer was the beneficiary of a corrupt and fraudulent practice, either by himself or by his political machine, should he be left without relief.[11]

The more just rule seems to be that enunciated by the minority jurisdictions. In the first place, the de facto officer, who is not an unauthorized person gaining possession of a public office by force or fraud, should retain some compensation for the services he has performed.[12] In the second place, the de jure officer, although he has performed no services, should not be left without relief for, if anyone is at fault, it is the governmental agency that kept him from obtaining his rightful office.

Dusman, 246 Pa. 513, 92 Atl. 707 (1914); Farr v. Neeley, 66 Colo. 70, 179 Pac. 139 (1919). In addition, the majority rule is that a de facto officer cannot maintain an action to recover the salary incident to an office, even though he has performed the duties. People *ex rel.* Winstanley v. Weber, 89 Ill. 347 (1878); Luzerne County v. Trimmer, 95 Pa. 97 (1880); Romero v. United States, 24 Ct. Cl. 331 (1889). However, some courts have held that the de facto officer is entitled to the salary when there is no de jure officer, Behan v. Davis, 3 Ariz. 399, 31 Pac. 521 (1892); Blackburn v. Oklahoma City, 1 Okla. 292, 31 Pac. 782 (1893).

[7] 44 N.J.L. 181 (1882).

[8] McDonald v. Newark, 58 N.J.L. 12, 32 Atl. 384 (1895).

[9] Stuhr v. Curran, 44 N.J.L. 181 (1882).

[10] See 10 Mich. L. Rev. 291 (1912) for a discussion of the various theories.

[11] In this situation the de jure officer is usually granted relief, either against the de facto officer, Glasscock v. Lyons, 20 Ind. 1 (1863); or against the city when it is shown that city officials helped perpetrate the fraud, Warden v. Bayfield County, 87 Wis. 181, 58 N.W. 248 (1894); City of Ardmore v. Sayre, 54 Okla. 779, 154 Pac. 356 (1915). Although there have been few cases on the subject, it appears that a city may recover salary paid to one gaining an office by corruption through a tax-payer's suit. Briare v. Matthews, 202 Cal. 1, 258 Pac. 939 (1927). *Cf.* Woodruff v. Shea, 152 Ky. 657, 153 S.W. 1005 (1913).

[12] The de facto officer is protected in the minority jurisdictions for the city cannot recover back the salary it has paid him. Badeau v. United States, 130 U.S. 439 (1889). *Cf.* note 11, *supra.*

It is unfortunate that the Illinois court in the instant case followed the dictates of *stare decisis*.[13] Probably the only solution now lies in recourse to the legislature, a step which has already been taken by several states.[14]

Conflict of Laws—Civil Death—Application of Local Penalty to Conviction in Another State—[Federal].—The plaintiff was sentenced in Florida to life imprisonment for murder. Having been paroled, he brought suit in a federal court in New York on a tort claim arising in New York. The sole question was whether § 511 of the Penal Law of New York,[1] which states that "a person sentenced to imprisonment for life is thereafter deemed civilly dead," prevented the plaintiff from suing. *Held*, that the New York statute was not applicable to a person sentenced to life imprisonment in another state. *Panko v. Endicott Johnson Corporation*.[2]

The restriction placed upon the application of the New York statute in the instant case is in accord with the tendency to mitigate the harshness of common law civil death.[3] This policy has reduced the effect of civil death in New York to the dissolution of the marriage of the person sentenced,[4] the loss of his political rights, and the loss of his right to sue. But this latter vestige of common law civil death seems to be without justification today.[5] It cannot be supported as a deterrent to crime. It may

[13] For cases holding that the de jure officer may not recover salary from a city after it has already been paid to the de facto incumbent see: People *ex rel.* Sartisan v. Schmidt, 281 Ill. 211, 117 N.E. 1037 (1917); People *ex rel.* Durante v. Burdett, 283 Ill. 124, 118 N.E. 1009 (1918); Hittell v. Chicago, 327 Ill. 443, 158 N.E. 683 (1927). Two widely cited cases have held that the de jure officer may recover from the de facto officer the salary the latter has received: Mayfield v. Moore, 53 Ill. 428 (1870); Kreitz v. Behrensmeyer, 149 Ill. 496, 36 N.E. 983 (1894).

[14] See Cal. Pol. Code 1937, § 936, 7; Mo. Rev. Stat. 1929, § 11423.

[1] Cahill's Cons. L. of New York 1930, c. 41, § 511.

[2] 24 F. Supp. 678 (N.Y. 1938).

[3] Strict common law civil death which resulted only from profession in religion, abjuration of the realm, and banishment from the realm, had practically the same effect on one's legal rights as natural death. Co. Litt.* 133a (§ 200); 2 Woerner, Administration 699 note 11 (3d ed. 1923). Civil death following attainder for treason or felony had less radical consequences. It resulted primarily in the loss of political rights, such as the right to vote or hold office, and in the loss of the right to sue and to be a witness. 1 Chitty, Criminal Law 723 (2d ed. 1826); 3 Coke, Institutes 215 (1797). It is this milder form which the New York courts have held to be the pattern of civil death in that state. New York statutes abolishing disqualification of a person sentenced to life imprisonment as a witness and providing the appointment of a committee to manage the real and personal estate of a life convict have further abated the rigour of the early form of civil death.

[4] Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (1888); Gargan v. Sculley, 82 Misc. 667, 144 N.Y. Supp. 205 (1913); Glielmi v. Glielmi, 72 Misc. 511, 131 N.Y. Supp. 373 (1911).

[5] Before the abolition of forfeiture and corruption of blood, the suspension of the right to sue might have been supported on the ground that a person convicted of a felony could not be a party in any action as a consequence of the forfeiture of his estate and the corruption of his blood.