DE FACTO OFFICERS.

By OWEN DIXON.

THE fashions of thought which seem now to have set in do not favour strict logic and high technique as qualities of the legal system. But the strength which enabled the common law to withstand the onset of the Renaissance civilians was seen by Maitland to arise from the possession of these two qualities; "not vulgar common sense and the reflection of the layman's unanalyzed instincts; rather . . . strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries."[1] The very word "convenience" meant consistency, not expedience; and reason, even in the presence of expedience, did not shrink from pressing to a conclusion all the consequences of an established legal concept. In the operation given to the legal conception of a void act, or a nullity, we have an example of this resolute logic which, in our own time when many governmental and other powers are rigidly defined by or under the law, has produced effects well nigh prodigious. The purpose of conferring even the humblest power or authority is that rights and duties of some kind may be called into existence. To treat what purports to be done in the exercise of a power as if it had never taken place, as the theory of invalidity demands, is to affix to acts done and things brought into being upon the assumption that the power has been well exercised, legal qualities and legal consequences which are sometimes as oppressive as they are unexpected. No doubt these difficulties are seen at their worst when an elaborate enactment of a legislature of limited powers is found to be *ultra vires* after a substantial period of time during which its provisions have been administered and enforced by the Executive. Yet such a case is but an impressive example of the general doctrine that when for want of, or excess of, legal power or authority or for non-fulfilment of the conditions required by law, any purported act in the law is invalid, then rights and liabilities are to be ascertained upon the same footing as if the act had not been attempted.[2]

From an early time, however, one clear qualification to the application of the general rule has existed, a qualification which should be conspicuous, but which for some reason has fallen strangely out of notice among us. It relates to the invalidity of the title of a person apparently filling a public office. It is no new thing to find that a man who is in point of fact performing duties and exercising authorities of a public nature has in point of law no title to do so. His want of title may be due to some defect in his original appointment, or it may arise subsequently by disqualification, effluxion of time or some other cause, or he may be a mere usurper or intruder. Indeed

1. Selden Society. Y.B. Series, Vol. I, introd. p. xviii.
2. For a full discussion of the operation of and qualifications upon this doctrine in the United States see "The Effect of an Unconstitutional Statute," by Oliver P. Field, 1935, University of Minnesota Press.

the reasons why it may appear that one who has assumed the exercise of public functions has nothing but a void foundation for performing them are almost infinite in their variety. An inexorable application of the general principle that a nullity produces no legal consequences would mean that, since such a man was no more than a private citizen, his public acts must be considered ineffectual. It would mean, for instance, that an order of a Court of summary jurisdiction would bind no one, if the appointment of a magistrate who made it were found to be invalid for want of the requisite qualifications:[3] that an assessment for income tax was no assessment if the appointment of the Deputy Commissioner by whom it was authenticated were found to be void;[4] and, to take an ancient example which has not lost its application, that a permit to land goods would not avail to make the landing lawful if the appointment of the officer of customs who gave it were bad.[5] Such consequences were intercepted by an independent principle which can be traced as far back as the Lancastrian period at least. Under that principle the acts of an officer *de facto* done in the apparently regular execution of his office have equal force and effect with those of an officer *de jure* when they concern the rights and duties of the subject. There are questions outstanding as to the limits of this principle or the conditions controlling its operation. It is, for instance, a question whether it can apply if in contemplation of law the office itself has no valid existence, as when the statute establishing the office is *ultra vires*.[6] Again, although it may be taken to be a necessary condition that the officer *de facto* must have a colourable authority,[7] what will fulfil this condition is not clear.[8] But the principle holds and forms part of the modern law and, it might be supposed, a part of much importance. It proved of the utmost importance in New Zealand after the decision of the Privy Council holding void the appointment of Mr. Justice Edwards as a Judge of the Supreme Court.[9] It sufficed to sustain the validity of the convictions obtained before the Court over which he had actually presided and of the judgments he had pronounced.[10] But occasions for its application have arisen of late years in Australia, and it has not been invoked. A curious, if not remarkable, incident in the history of our Courts took place in New South

3. See e.g. Section 42 of the Public Service Act 1928, Victoria.
4. Income Tax Assessment Act 1936, Sections 11, 12, 13 and 165.
5. *Leak v. Howell* (1597), Cro. Eliz. 534: 78 E.R. 780 and cp. Customs Act 1901-1935, Section 74.
6. *Norton v. Sherby County* (1886), 118 U.S. 425; 30 L.Ed. 178; *De facto* office, by K. Richard Wallach, 1907, 22 Political Science Quarterly, 460.
7. *Knowles v. Luce* (1580) Moore, K.B., 252: 72 E.R. 473-4, "The other diversity was between a copyhold granted by a steward who has colour and no right to hold the Court and one who neither has colour nor right; for if one who has colour convenes the tenants and they perform their service, the acts which he does are good; as an under-steward where the head steward is dead, or a clerk of the lord of the Manor who holds without protest or disturbance from the lord on the ground that he had no patent or express authority to be steward: And the reason of this is because the tenants are not called on to inquire if the authority of the steward is lawful and he is not called on to give an account of it to them."
8. *Vide post.*
9. *Buckley v. Edwards* [1892] A.C. 387.
10. *re Aldridge* (1893) 15 N.Z.L.R. 361 where Richmond J. dealt fully with the rule citing English and American authority.

Wales. The Judges Retirement Act 1918-1919 N.S.W. provides that a judge who attains the age of seventy years shall retire on the day on which he attains that age unless he is granted retiring leave, in which case he shall retire on the expiration of his leave. In 1929, some uncertainty arose as to the year of the birth of one of the Judges of the Supreme Court. He obtained retiring leave, but it was thought that, owing to a mistake, he had continued to act as a Judge after he had in fact reached the age of seventy and before the grant of leave. A defendant in a civil action against whom a verdict had been found at a trial held before the learned Judge during the period in question applied before another Judge to set aside the verdict on the ground that the proceedings were *coram non judice*. An issue as to the true date of the Judge's birth was then tried, and the Judge himself was called as a witness. At length the application was dismissed on the ground that proof of the date of the Judge's birth had failed.[11] The application, it will be seen, involved a collateral attack upon the Judge's tenure of office. He had presided over a Court held in due form of law as and for the Supreme Court in the place where that Court commonly was held and with the full recognition and allowance of the officers of the State. His title to remain in office might have been directly called in question by *quo warranto*. But he acted as a Judge *de facto* and with colourable authority. The matter in question did not concern the Judge's own right to any of the personal advantages or benefits attached to the office. It concerned the effect produced upon the rights of others by his public transactions; the effect upon the rights of those over whom he had exercised his apparent authority. "When a Court with competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge who presides in the Court to his office. If the Court exists under the Constitution and laws, and it had jurisdiction of the case, any defect in the election or mode of appointing the Judge is not available to litigants."[12]

The same rule applies where, through mistake a judicial officer holds over after his term of office has expired.[13] In the case

11. *Celebrity Pictures Ltd. v. Turnbull.* The case is not fully reported, but the facts and the course of the proceedings sufficiently appear from 46 W.N. N.S.W. 121, the Melbourne *Argus*, p. 22, 1st June, and p. 7, 14th June, 1929, and the *Sydney Morning Herald*, p. 8, 21st June, and p. 10, 25th June, 1929. A validating Act was passed: No. 29 of 1929 N.S.W.

12. *Curtin v. Barton* (1893), 139 N.Y. 505, at p. 511.

13. "One who assumes an office legally, and in good faith remains in it after his title has ended is a *de facto* officer. *State v. Farrier*, 1 Cent. Rep. 696: 47 N.J.L. 383." Note to *Ball v. U.S.* (140 U.S.) (118): 35 L. Ed. at 378. See further Cooley Constitutional Limitations, Ch. xvii, p. 897-8 of 7th ed. and American cases there cited. In *Ellis v. Bourke* [1899], 15 V.L.R. 163: 10 A.L.T. 218 the defendant offered evidence before the Licensing Court composed of three members that two of its members, sitting as police magistrates, although at a former time holding that office had not been re-appointed. The evidence was rejected, and its rejection was upheld by the Supreme Court, without reference, however, to authority. Higginbotham C.J. distinguishes between objections to the jurisdiction of a Court and objections to the validity of its constitution. In *re Armstrong* [1878], 4 V.L.R. (L.) 101 the fact that a Chairman of General Sessions was invalidly appointed was held no ground for a habeas for a prisoner convicted before him.

in question there may have been some good reason which does not appear for not invoking or giving effect to the rule, but the embarrassing nature of the inquiry into the Judge's age as well as the object of the defendant's application illustrates the soundness of the policy contained in the principle.

Some years earlier the validity of the appointment of a deputy Judge of the Supreme Court of the Northern Territory had been successfully attacked on proceedings by way of appeal from an order he had made. The objection was not made that inasmuch as he was a Judge *de facto* his title to the office must be directly impeached and his orders could not be appealed against on the ground that his appointment was void. Substantially the Crown was a party to the proceedings, and it was thought desirable that the validity of the appointment should be decided by the Court, which, however, made no curial order.[14]

An appeal of the kind to which we are now accustomed is the creature of modern statute,[15] and as yet it has not been decided that an objection to the validity of the constitution of the Court pronouncing the decree appealed against is outside its scope. But it was no ground for a writ of error,[16] and in America the principle that the judgments pronounced by a person occupying the judicial office *de facto* under a colourable title are valid has been considered to afford a conclusive answer, although the proceedings in which the judgment is impeached are by way of appeal.[17]

The origin of the principle is not, I think, to be found in considerations of public policy although, no doubt, its growth has been fostered and its maintenance is demanded by the justice of its operation and the expediency of the protection it gives against collateral attacks upon the title to public offices. The principle owes its origin, I believe, to the conception of an office as an incorporeal thing, in which there might be a freehold, and for which an assize lay against a disseisor.[18] A disseisor, even what Coke calls a "disseisor incontinent," obtained against all, except him who had the right of entry, an estate, a tortious estate it is true, yet an estate. The disseisee had

14. *Presley v. Geraghty* [1921] 29 C.L.R. 154. A further instance of the relevance of the principle here is supplied by the ingenious argument contributed to 6 A.L.J., p. 123, by Mr. Garran entitled, "Are Victorian Judicial appointments valid?" Even if the argument were accepted, its practical consequences would be avoided by the application of the doctrine.

15. See *Victorian Stevedoring, etc., Co. v. Dignan* [1931] 46 C.L.R. 73.

16. "On a writ of error upon a judgment given at the Great Sessions in Wales where by the Statute, 34 Henry VIII, the Justices may appoint deputies who may give judgments; and this judgment was given by J.S., who is supposed by the record to be a deputy of the Justice; it cannot be assigned for error that the said J.S. was not the deputy of the said Justice for that is against the record." 12 *Jac.* 1 K.B. *Floyd v. Best.* Rolle. Abr. Error X, 3; *Hipsley v. Tucke* (1676), 3 Keble 606; 84 E.R. 905, as to which see note "30" *infra.* See *per* Richmond J. *re Aldridge* (1893), 15 N.Z.L.R. 361 at p. 377-8; *McDowell v. U.S.*, 1895, 159 U.S. 596 at p. 601; 40 L. Ed. 271 at p. 273.

17. *e.g. State v. Carroll* (1871), 38 Conn. 449: 9 Am. Rep. 409.

18. Tomlins' Law Dictionary, 4th ed., *S.V.* Office III: 2 Pollock & Maitland, p. 135: 1 Holdsworth H.E.L., 246-8: *Vaux v. Jefferson* (1556), 2 Dyer 114 b.: 73 E.R. 251, in which there is a curious note that the jury on a view examined the place where the plaintiff, who claimed in a novel disseisin to be one of the filazers of the Common Pleas, sat when first admitted to the office, "which was next the post at the higher end of the place in the hall."

nothing but a right of entry.[19] Thus it was easy, if not necessary, to regard the occupant of an office as the effective instrument for the exercise of the authorities appertaining to it. Twice[20] we find an officer *de facto* likened to a disseisor by Sir Roger Manwood, who held the office of Chief Baron under Elizabeth, a judge whose authority is entitled to respect, notwithstanding a statement by Foss that "in his progress towards that advancement he seems to have owed much to the popularity of his manners and a happy choice of friends."[21]

The treatment by our law of public offices has undergone an entire change, and the course of legal history should teach us that there is no cause for wonder if a rule originating in the "high technique" of disseisin should now survive as a principle founded on public policy and be esteemed as "essential to the preservation of order, the security of private rights, and the due enforcement of the laws."[22] But, if this be the source of the rule, a difficulty may be felt in accounting for the requirement that the incumbent *de facto* of the office shall occupy under a colourable title or colourable authority. It might be thought that a disseisor was a disseisor, whether he was a bare intruder or came under colour of right, and that his occupation of the office must always receive the same effect. Thus from such a seed, it might seem that no plant could grow in the shape we find it. Many stranger things grew from or upon the concepts of disseisin. Witness the doctrine of disseisin at election.[23] But the suggestion may be ventured that, at a time when the notion of colour was much in favour, it was carried into the substantive rule because of the place it happened to take as the test of the sufficiency of the plea upon which everything turned in what must have been regarded as the foundation case. It was the case of the Abbot of Fountains, which occurred in 1431, and is referred to in almost all the later cases. The question which it raised may be said to be the goodness or badness of a plea pleaded by the party denying the validity of an act of a *de facto* incumbent of an office, a plea which would certainly be bad under the principles of pleading unless it gave colour to the latter's title to the office, and would be still worse unless it showed his title to be void. The abbot for the time being was sued upon an obligation under the seal of the Abbey and made by a certain person as abbot. The abbot was a corporation sole and an obligation made by one incumbent of the Abbacy would bind his successors.

19. Coke Littleton, 367 a.: Holdsworth H.E.L., Vol. 3, p. 91, Vol. 7, p. 46 *et seq.*

20. *Knowles v. Luce* (1580), Moore K.B., 252, p. 112: 72 E.R. 473, 474: *Leak v. Hall* (1597), Cro. Eliz. 533, 534: 78 E.R. 780, 781, where Manwood C.B. says:—"Here Richard Enys was deputy *in facto* and exercised the place in the custom house; and although he were not *de jure*, that shall not prejudice the merchants who made their compositions with him; for it would be very mischievous unto them to examine by what authority they sit and make their composition. And for that purpose *vide* 9 Edw. 4, 5, Grant of liberty by a King an usurper.—21 Hen. 6. Attornment by a disseisor—18 Eliz. Lord Arundel's case, Surrender to a disseisor, and a regrant by him held to be good." The reference 9 Edw. 4, 5, is probably to *Bagot's* case, 9 Ed. 4: 1 and 9, not 5. This is discussed by Richmond J. *re Aldridge* (1893), 15 N.Z.L.R. at p. 369. See Statutes at Large, Vol. 2, p. 1, 1 *Ed.* 4, *c.* 1.

21. Foss; Dictionary of Judges, 430.

22. See note "12" *supra.*

23. As expounded by Butler, Note to p. 330 b. of Co. Litt. *cf.* Holdsworth H.E.L. Vol. 7, pp. 52-57.

The defendant's answer to the suit was that the person who placed the seal upon the obligation was improperly inducted and occupied the office as a usurper. A plea of the general issue would have included a denial that the instrument was an obligation of the Abbacy, but it would have remitted the whole matter to the verdict of a jury. A special plea amounting to the general issue would have been bad.[24] But a plea by way of confession and avoidance would be useless if it included an absolute admission of the contents of the declaration. The principles of pleading did not, however, demand such an absolute admission. At the close of the history of common law pleading the position could be stated thus:—"The extent and nature of the admission required is defined by the following rule—'that "pleadings in confession and avoidance should give colour."' 'Colour' is a term of the ancient rhetoricians, and was adopted at an early period into the language of pleading. It signifies an apparent or *prima facie* right: and the meaning of the rule that pleadings in confession and avoidance should give colour, is that they should confess the matter adversely alleged, to such an extent at least, as to admit some apparent right in the opposite party, which requires to be encountered and avoided by the allegation of new matter."[25]

Without going into the intricacies of express and implied colour,[26] it is enough to say that unless the abbot could plead facts which would "give the plaintiff a shew at first sight that he hath a good cause of action where in truth it is no just cause, but only a colour and face of a cause"[27] this plea would necessarily fail for one or other of two reasons. For unless it gave colour the abbot's plea would state facts amounting either, on the one hand, to the general issue, or, on the other, to a confession of the cause of action. The pleader of the defendant abbot began by a protestation that the former abbot was never an abbot in right, but for a plea said that he claimed and occupied as by usurpation. Then one of the Judges said—"This is not a plea. For it is nothing but an argument to prove that it was not the deed of the abbot and the convent, for it openly appears from his plea that the said (former abbot) never had any colour to be abbot."

The Year Book[28] reports a long but inconclusive discussion which seems to illustrate the dilemma of the defendant, namely, that unless his plea gave colour it was bad, but, if it conceded too good a colour to the title of the former abbot, the obligation might be considered that of the defendant.

Apart from the declaration made under Edward IV in favour of the Charters, etc., of the three Henrys who were treated as usurpers,[29] it would seem that the question is not again dealt with

24. Bacon Abr. Pleas and Pleading, G.3.
25. Stephen—Principles of Pleading, 1838, 4 Ed., p. 228: 1866, 7th Ed., p. 187.
26. Bacon Abr. Pleas and Pleading. I. 8: Holdsworth H.E.L., Vol. 9, p. 299: Vol. 3, p. 639: Thayer Preliminary Treatise on Evidence, p. 232.
27. *Termes de la Ley, s.v.* Colour.
28. Y.B. 9 H. VI. 32, pl. 3.
29. See n.20 *supra.*

in the reports until Elizabeth. In the line of authorities, a rather slender line which stretches up to the beginning of the nineteenth century, the case of the Abbot of Fountains seldom escapes citation. The doctrine becomes well settled, but its statement usually includes the qualification for which reliance is almost invariably placed upon what is there said, the qualification that the *de facto* officer shall have a colourable title or authority.[30]

The exact nature of this requirement has not been worked out by English authority. Probably it will be found to be satisfied by the existence of any set of circumstances which reasonably justifies a general assumption by those dealing with or coming under the supposed authority of the *de facto* officer that he is a lawful officer.

In the United States, the matter has received much consideration. As a result, the view appears to be accepted that sufficient colour exists, not only when the assumption of, or continuance in, office is referable to a title supposedly good though actually defective, but also when there is such a general or official acquiescence in the *de facto* incumbent's execution of the office that, in the circumstances of the case, a public reputation or assumption of the lawfulness of his authority arises.[31]

The condition that the *de facto* officer must act under colourable title or authority has been used in a controversy which may prove of importance in any jurisdiction where, as with us, legislative powers are rigidly delimited. The Supreme Court of the United States has adopted the view that, if the attempt to create the office is *ultra vires*, the doctrine is inapplicable. But this view had not been adopted by State Courts,[32] and it has been attacked.[33] The main ground of the attack is that the condition for the applica-

30. The cases appear to be:—*Knowles v. Luce* (1580), Moore K.B. 252; 72 E.R., 473: *Leak v. Howell* (1597), Cro. Eliz. 534; 78 E.R., 780; *Harris v. Jay (s)* (1599), Cro. Eliz. 699; 78 E.R. 934; 4, Co. Rep. 30 a, 76 E.R. 956 and *cf.* Butler's note 5 to Co. Ltt. 58 a: *Reuan O'Brien v. Knivan* (1620), Cro. Jac. 552, 554: 79 E.R. 473, 475: *Hipsley v. Tucke* (1676), 3 Keble 606; 84 E.R. 905 (where Sir Matthew Hale in reference to the failure of a Mayor to take the oaths under the first Test Act said:—"This is void as an undue election, but as to the interests of a stranger as acts of jurisdiction they are not void, as judgments here in Westminster would not be void by any one or all not having duly taken the oaths: these matters are collateral and therefore not void.": a decision which, although reversed, 3 Keble 721-2: 84 E.R. 973: 2 Levinz 185: 83 E.R. 510; 2 Mod. 194: 86 E.R. 1019 was, according to the last report, re-established shortly afterwards; in *R. v. Lisle* (*infra*) *Lee C.J.* said that the reversal is against law and has always been so held. See, too, *Andrews v. Linton* (1703), 2 Ld. Raym. 885: 92 E.R. 92: *Knight v. Corporation of Wells* (1695), 1 Lutwyche 508, 519: 125 E.R. 267, 273: *Parker v. Kett*, 702, 12 Mod. 466, 470: 88 E.R. 1454, 1457: 1 Ld. Rayn. 658: 91 E.R. 1338, 1340: *R. v. Lisle* (1738), Andrews 163, 95 E.R., 345 (containing an account of the previous authorities and turning on the need of colour; in this case and the cases upon stewards *de facto* a distinction is drawn between acts of necessity, i.e., those done in fulfilment of the office and voluntary acts, e.g., those done gratuitously for the officer's own ends): *per* Buller J. in *Milward v. Thatcher* (1787), 2 T.R. 81 at p. 87: 100 E.R., 45 at p. 48: *R. v. Bedford Level Corporation* (1805), 6 East, 356: 102 E.R. 1323: 2 Smith K.B. 535 (a case the decision in which may be difficult to understand unless it is borne in mind that the registrar was held to be a mere servant and the deputy no more than his ministerial agent; See at bottom, p. 368-370, and *Darby v. Reg.* (1845), 11 Cl. & F. at p. 542: 8 E.R. at p. 152: *cf. R. v. Hertford College* (1878), 3 Q.B.D. 704): *Margate Pier Co. v. Hannam* (1819), 3 B. & Ald. 266: 106 E.R., 661.

31. *State v. Carroll* (1871), 38 Conn. 449: 9 Am. Rep. 409, at p. 427. *Petersilea v. Stone* (1876), 119 Mass, 465.

32. *e.g., State v. Carroll supra,* at p. 427-8. See, too, Field: Effect of Unconstitutional Statute, p. 90 *et seq.*

33. See note "6" *supra.*

tion of the principle giving validity to the acts of a *de facto* officer is simply that he shall have a colourable title or authority. If the acts in question would be effective if done in the exercise of an office validly created by an incumbent *de jure,* then, it is said, the fact that the purported creation of the office is void does not exclude the possibility of satisfying the necessary condition.

A court to whose lot it may fall to decide this or any other question involving colourable title or authority to an office may perhaps do well to recall that upon the great occasion in our constitutional history when the *de facto* doctrine was applied to the kingly office little or nothing was heard of colour, perhaps because the Whig lawyers could find none for William III's title. If Maitland's discussion of the legal character of the Revolution[34] is considered with reference to the principles giving validity to the acts of a *de facto* officer of State, little difficulty will be found in discerning both the significance, not to say purpose, and the inherent weakness of Macaulay's vivid description of the ancient ceremonial with which the transactions beginning on 13th February, 1689 were clothed.[35]

34. Constitutional History, 1st Ed. p. 284 *et seq.*

35. Macaulay's History of England, Ch. X, p. 651-4 of Longman's popular ed. The Statute of Treasons had long been extended to a King *de facto*: Coke, 3 Inst. 7.