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PROTECTION OF OFFICERS WHO ACT UNDER UNCONSTITUTIONAL STATUTES

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BY the great weight of authority a public officer who acts under a statute which has subsequently been declared unconstitutional cannot successfully rely on the statute as a defense to a suit brought against him to recover damages caused by the attempted enforcement of the statute.¹ Sheriffs, constables, justices of the peace and other inferior officers, even when acting in a judicial capacity, have been held liable in damages to parties injured by the attempted enforcement of unconstitutional statutes. Nevertheless, there are a number of well-reasoned cases holding that an officer who has acted in good faith in enforcing such statutes is not liable.

Prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts. The only exception was in cases where the officer executed a warrant fair on its face. In such cases the officer was exempt from liability even though his action was one step in the enforcement of an unconstitutional statute.² The officer was not expected to go back of the warrant to determine whether it was issued under a valid law. But in 1880 the Iowa supreme court departed from the old rule and laid the foundation for the minority rule.³ In the case of *Henke v. McCord* the Iowa court carefully re-examined the whole problem of liability in such cases and reached an independent conclusion that the ma-

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¹23 Am. & Eng. Ency. of Law, 2d ed., 369; Cooley, Constitutional Limitations, 8th ed., 382-84.

²Trammell v. Russelville, (1879) 34 Ark. 105, 36 Am. Rep. 1.

³Henke v. McCord, (1880) 55 Iowa 378, 7 N. W. 623.

majority view was unsound, and today the case is regarded as the leading authority in support of the minority view. The writer, upon an analysis of the reasoning in the cases supporting the majority and minority views, has reached the same conclusion as the Iowa court, and it will be one of the objects of this article to point out the unsoundness of the majority view.

The reason most generally given for holding the officer liable is expressed in the following quotation from *Norton v. Shelby County*.⁴

“An unconstitutional statute 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 theory of the majority view is that the statute which has been declared unconstitutional is void ab initio and totally without effect. Of course, if we take that view of statutes which have been declared unconstitutional, it follows logically that the statute can offer no protection to the officer, and the courts which accept that view concern themselves almost entirely with determining whether the statute under which the officer acted is constitutional or unconstitutional. If they find that the statute is unconstitutional, they almost automatically hold that the officer is liable on the theory that he has acted without the authority of law. Hence, if it can be demonstrated that the “void ab initio” doctrine is unsound, we shall have gone a long way in eliminating the main argument of the courts which hold the officer liable.

Although it is generally stated in the cases and by writers⁵ that unconstitutional statutes are void ab initio and of no effect, it is submitted that the statements are too broad and that the rule of *Norton v. Shelby County* cannot be applied, without some limitation, in a majority of cases involving the constitutionality of statutes. There is another view of unconstitutional statutes which requires consideration. It is the view that such statutes have the effect of law until they are declared unconstitutional by the courts. This is the view taken by the courts which hold that the officer is not liable in the type of case under consideration in this study. Where criminal proceedings have been brought against the officer because of the attempted enforcement of an unconstitutional statute, he has been protected.⁶ Or, suppose that the statute is held

⁴(1885) 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.

⁵Even such an eminent writer as Cooley repeats the statement without any qualification. See Cooley, *Constitutional Limitations*, 8th ed. 382.

⁶*State v. Goodwin*, (1898) 123 N. C. 697, 31 S. E. 221.

constitutional today and that a year later the state supreme court reverses itself; that within the year a municipality had issued bonds pursuant to the statute? The federal courts hold that the statute is to be regarded as if it were constitutional for the period that the decision sustaining the statute was in force so far at least as necessary to uphold contracts made in the interim.⁷ Again, suppose that a statute was declared unconstitutional as contrary to the federal constitution and that later Congress permits the states to enter the previously prohibited field? It has been held that the old state statutes are revived without a reenactment by the legislature.⁸

Another strong argument against the doctrine of *Norton v. Shelby County* is found in cases which fall in the class with *Shephard v. Wheeling*⁹ and *Allison v. Corker*¹⁰ which hold that the statute is void only with reference to the particular claims based upon it. In *Shephard v. Wheeling* the court said:

“ . . . it does not annul or repeal the statute if it finds it in conflict with the constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no existence. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinions or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute books; it does not . . . repeal the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit upon the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and the basis of the fundamental rule that a court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the cause before it.”

From what has been said above it is clear that the doctrine of *Norton v. Shelby County* cannot be applied, without limitation, to all cases where the constitutionality of statutes is involved. Thus, it appears that the main prop in the reasoning of the courts which support the majority view does not rest on a sound foundation.¹¹

⁷*Gelpcke v. Dubuque*, (1864) 1 Wall. (U.S.) 175, 17 L. Ed. 520.

⁸*In re Rahrer*, (1891) 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; *McCullum v. McConaughy*, (1909) 141 Iowa 172, 119 N. W. 539.

⁹(1887) 30 W. Va. 479, 4 S. E. 635.

¹⁰(1902) 67 N. J. L. 596, 52 Atl. 362.

¹¹For a more detailed discussion of the Effect of Unconstitutional Statutes see an article by O. P. Field, 1 Ind. L. Jour. 1, 60 Am. Law Rev. 232.

A second reason advanced by some courts in support of the majority rule is that everyone is presumed to know the law, and therefore, if an officer acts under an unconstitutional enactment of the legislature, he does so at his peril and must suffer the consequences. That was the main argument of the court in *Sumner v. Beeler*¹² which is the leading case supporting the view that the officer is liable. Of course, such reasoning is open to criticism for even if the officer knows the words of the statute, he may not be able to guess correctly on its constitutionality. It seems grossly unjust to compel an officer of ordinary ability to make a guess which may result to his detriment when even the judges of our highest courts cannot agree as to whether a particular act is constitutional. In *Sumner v. Beeler* the statute was declared unconstitutional because the subject matter of the act was not expressed in the title of the act as required by the constitution.¹³ At the time the act was declared unconstitutional, there was a vigorous dissent by two judges; and yet we penalize a minor officer who acted under it because he did not think the same as the majority of the judges of a supreme court if he thought about the matter at all.

There is another group of cases in which the courts seek to justify this doctrine of holding the officer liable on the ground that when a statute is unconstitutional there is no duty on anyone to obey it and no duty on the officer to enforce it.¹⁴ The argument is made that the officer might have waited until someone brought mandamus proceedings against him and then the constitutionality of the statute could have been tested before anyone was harmed. On grounds of policy this argument is held impracticable by the courts holding the minority view. If the officer adopted the attitude of waiting to enforce laws until someone stirs him to action, many of our laws would never be enforced. Then too, there are many states which hold that a ministerial officer cannot question the constitutionality of statutes in mandamus proceedings against him. The courts in those states take the attitude that it is the duty of the officer to enforce the law as he finds it. It will depend

¹²(1875) 50 Ind. 341, 19 Am. Rep. 718.

¹³The statute involved in *Sumner v. Beeler* was held unconstitutional in *State v. Young*, (1896) 47 Ind. 150.

¹⁴*County Commissioners of Wyandotte County v. Kansas City Ft. & S. & M. R. Co.*, (1896) 5 Kan. App. 43, 47 Pac. 326; *Campbell v. Bryant*, (1905) 104 Va. 509, 52 S. E. 638; *Campbell v. Sherman*, (1874) 35 Wis. 103; *State ex rel. University of Utah v. Candaland*, (1909) 36 Utah 406, 104 Pac. 285, 140 Am. St. Rep. 834; *Norton v. Shelby County*, (1886) 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.

largely upon the type of mandamus statute in the particular state whether the officer can raise the question of constitutionality.

An important consideration in originally fastening responsibility on the officer was the fact that in many of the cases there was no other convenient party upon whom the responsibility could be placed, and in their desire to protect private property rights the courts made the innocent officer, who faithfully tried to enforce the laws, bear the burden. Under the old doctrine that "the king can do no wrong" the government could not be held liable for the torts of its officers, and in principle it still remains true that the federal government and practically all the states deny responsibility for the torts of their officers and employees.¹⁵ Since the government could not be held liable the king's officers were frequently held responsible for their torts, and the American courts adopted the same policy. The courts seem to feel that as between the individual property owner and the officer the former ought to be protected. Though the courts do not say point blank that they hold the officer liable because there is no one else who can be held, there is that sentiment behind their arguments. In *Yale College v. Sanger*,¹⁶ in enjoining the state treasurer from diverting the income from certain land scrip, the court said:

"It is equally well settled that an officer of the state who, as an aggressor, invades the private or vested pecuniary rights of an individual in his specific or real property, cannot, in a suit at law against him for his tort, or in a bill in equity to restrain the commission of the intended injury, when adequate relief cannot be otherwise afforded, successfully justify his conduct upon the ground that he is acting in obedience to the authority of an unconstitutional state statute."

Where the officer attempts to enforce the statute after it has been declared unconstitutional by the courts, he is enjoined,¹⁷ and no doubt all courts would hold him liable for any injury done, for there would be no ground on which his action could be justified and there is no need of protecting the officer in such cases.

In a number of the cases holding the officer liable the question has been raised whether it is not really a suit against the state and therefore prohibited under the eleventh amendment of the federal constitution. The question seems to have been first raised

¹⁵For an elaborate discussion of government liability in tort see E. M. Borchard, *Government Liability in Tort*, 34 *Yale L. Jour.* 1, 129, 229 and 36 *Yale L. Jour.* 1.

¹⁶(C.C. Conn. 1894) 62 Fed. 177.

¹⁷*Woolsey v. Commercial Bank*, (C.C. 7th cir. 1854) 6 McLean 142.

in the federal Supreme Court in *Osborn v. Bank of United States*.¹⁸ Marshall in that case held that the eleventh amendment was not applicable unless the state was a party to the record. But such a construction had the effect of nullifying the amendment and so it was rejected in *Poindexter v. Greenhow*¹⁹ where the court worked out a new rule which takes into consideration the effect that the decision will have upon the state. If the state is the real party in interest and the decree would operate adversely against the state, it is still to be considered a suit against the state though an officer is the nominal defendant. So suits against the higher officials may turn out to be suits against the state²⁰ and thus the officer may be protected if he acted in his official capacity in enforcing the unconstitutional act.

The argument advanced by the courts when they hold that it is not a suit against the state when an officer is being sued in connection with the enforcement of an unconstitutional statute is that there was no state action. They regard the officer as a private wrongdoer who has acted without the authority of law.²¹ Such reasoning is only a fiction, for the action of the officer is exactly the same when he acts to enforce a statute which later proves to be unconstitutional, as it is when he enforces a constitutional statute. But the result of resorting to the fiction is that in most cases, unless the state treasury is going to be affected, it will not be regarded as a suit against the state and the officer will be subject to suit. Though suits will not lie against state officers where the treasury would be affected, suits will be entertained by the courts quite readily where the suit is brought to enjoin the officer from enforcing an unconstitutional statute where serious injury to property rights would result, and it will not be considered a suit against the state under the eleventh amendment.²²

¹⁸(1824) 9 Wheat. (U.S.) 738, 6 L. Ed. 204.

¹⁹(1884) 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185.

²⁰*Kentucky v. Dennison*, (1860) 24 How. (U.S.) 66, 16 L. Ed. 717.

²¹In *Poindexter v. Greenhow*, (1884) 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, the court said: "The case, then, of the plaintiff is reduced to this. He paid the taxes demanded of him by a lawful tender. The defendant has no authority of law thereafter to attempt to enforce other payments by seizing his property. In so doing, he ceased to be an officer of the law, and became a private wrongdoer." To the same effect see *Saratoga State Waters Corporation v. Pratt*, (1920) 227 N. Y. 429, 125 N. E. 834.

²²*Pennoyer v. McConaughy*, (1890) 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Scott v. Donald*, (1897) 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648; *Davis v. Gray*, (1872) 16 Wall. (U.S.) 203, 21 L. Ed. 447. *Philadelphia Co. v. Stimson*, (1912) 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; *Bonnett v. Vallier*, (1908) 136 Wis. 193, 116 N. W. 885, 128 Am. St. Rep. 1061.

It does not seem possible to lay down any rule by which the courts are guided in determining when we have a suit against the state. Each decision seems to depend upon the facts of the particular case and it seems that had the courts desired to protect the officers, they might have held more generally that it really was a suit against the state. In fact, it would have been a very logical thing to have so held in all cases where the officer was being sued in connection with the enforcement of an unconstitutional statute. If the courts had taken that more liberal attitude towards protecting the officers, there is little doubt that the legislatures would have made provision for protecting those who were injured by the enforcement of statutes which later proved to be unconstitutional.

Judging from the positiveness of some of the expressions used by the courts which hold officers liable, one might be led to the conclusion that there is only one side to the question of liability of officers who act under unconstitutional statutes.²³ But as a matter of fact there are decisions in at least seven states which gave protection to the officers in one respect or another; and one decision in a federal court²⁴ which protected all the parties who acted under an invalid ordinance,²⁵ including the person who made the complaint.

It seems that the reasoning of the courts which protect the officer is more convincing than that of the courts holding the majority view. In *Henke v. McCord*,²⁶ which is the leading case supporting the minority view, the court held that the justice of the peace was not liable where he had issued the warrant for the seizure of liquor under an invalid ordinance. The court con-

²³In *Sumner v. Beeler*, (1875) 50 Ind. 341, 19 Am. Rep. 718, the court said: "No question is better settled . . . than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void." The court does not cite a single case in support of its decision. It just assumes that if the statute is unconstitutional, the defendants who acted under it are liable. And again in *Osborn v. Bank of United States*, (1824) 9 Wheat. (U.S.) 738, 6 L. Ed. 204, the Supreme Court said: "The counsel for the appellants are too intelligent, and have too much self respect, to pretend that a void act can afford any protection to the officers who executed it."

²⁴*Borhi v. Barnett*, (C.C.A. 7th cir. 1906) 75 C. C. A. 327, 144 Fed. 389.

²⁵The courts seem to make no distinction whether it was a statute or a municipal ordinance that was involved. The city ordinances are regarded the same as legislative acts for the purpose of considering constitutionality. See *Davis and Farnum Mfg. Co. v. Los Angeles*, (1903) 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778.

²⁶(1880) 55 Iowa 378, 7 N. W. 623.

cluded that the justice had acted in a judicial capacity²⁷ and having been called upon to exercise his judicial powers the court held that he ought not to be liable for mere errors of judgment when acting strictly within his jurisdiction. The same argument is advanced by a number of other courts which hold that the officer is not liable.²⁸ Another argument advanced by some courts for exempting the officer from liability is that imposing liability on the officers impedes the enforcement of the laws and weakens the whole structure of government.²⁹ The courts which advance this argument doubt the advisability of allowing every officer of the government to question the constitutionality of every statute before proceeding to enforce it. They feel that the constitutionality of statutes ought to be determined by the higher courts. If that view is sound, and it seems that it is, it logically follows that the officer ought not to be held liable if the statute happens to be declared unconstitutional.

Still other courts would excuse the officer on the theory that there is a presumption that all legislative enactments are constitutional and are to be regarded as law until declared void by the courts.³⁰ And it is a fixed rule in constitutional law that the courts will not pass upon the constitutionality of statutes unless it is essential to the disposition of the case at hand and even then, they will regard the statutes as constitutional until it is demonstrated beyond a reasonable doubt that the statutes are unconstitutional.³¹ Now, if judges receive the benefit of such a presumption, surely the officer ought also to be permitted to indulge in the presumption. In *Ortman v. Greenman*,³² a justice of the peace who tried the case held a statute unconstitutional; on appeal the supreme court of Michigan disapproved of the action of the justice on the theory that only the highest judicial tribunals should

²⁷For other cases holding that a justice of the peace is not liable for enforcing an invalid ordinance because he acts in a judicial capacity, see *Bohri v. Barnett*, (C.C.A. 7th cir. 1906) 75 C. C. A. 327, 144 Fed. 389; *Brooks v. Mangan*, (1891) 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137.

²⁸*Goodwin v. Guild*, (1895) 94 Tenn. 486, 29 S. W. 721; and *Trammell v. Russelville*, (1879) 34 Ark. 105, 36 Am. Rep. 1, in which cases mayors were held not liable for attempting to enforce an invalid ordinance on the ground that they were acting in a judicial capacity.

²⁹*Goodwin v. Guild*, (1895) 94 Tenn. 486, 29 S. W. 721; *Brooks v. Mangan*, (1891) 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137.

³⁰*Birdsell v. Smith*, (1909) 158 Mich. 390, 122 N. W. 626; *State v. Goodwin*, (1898) 123 N. C. 697, 31 S. E. 221; *Dexter v. Alfred*, (1892) 64 Hun 636, 19 N. Y. S. 770.

³¹See R. E. Cushman, *Constitutional Decisions by a Bare majority of the Court*, 19 Mich. L. Rev. 771.

³²(1856) 4 Mich. 291.

pass upon questions of constitutionality and only after great deliberation. And, in *State v. Kelsey*,³³ a new Jersey court had this to say:

“Statutes are not avoidable even by judicial decision except upon very satisfactory grounds; and nothing short of absolute certainty with respect to the entire validity of an act would afford an excuse to an officer for his refusal to execute it. Any less stringent rule of official conduct in such a respect would be a public evil of great magnitude. For a financial agent of the government to refrain from putting into operation a legislative policy plainly evidenced by a formal enactment, acting on his own judgment, unassisted by any judicial tribunal, would unless in the instance of such clear illegality that the flaw would be at once admitted by every enlightened mind, be inconsistent with every dictate of law and public policy.”

The above quotation expresses the general attitude of the courts as to the duty of the officer; so it may be asked how can the same courts justify holding the officer liable if the statute under which he acted is pronounced invalid? It can well be argued that officers as well as others have a duty to obey the law and that to hold the officer liable is to punish him for his obedience to the law. Still other judges stress the principle of fairness and justice to the officer who acts in good faith.³⁴

A comparison of the liability of judges with the liability of other law-enforcing officers shows that the former, who are better educated and in a better position to know what the law is, are more adequately protected. Judges of superior courts are not liable for errors of judgment, or when they act in excess of their jurisdiction; or if acting within their jurisdiction, they are not liable even if they act corruptly and maliciously.³⁵ Judges of inferior courts who act in excess of their jurisdiction are generally held liable.³⁶ But if the judge of an inferior court keeps within his jurisdiction, he is generally not held liable though he acted erroneously,³⁷ or without due care,³⁸ or corruptly and maliciously.³⁹

³³(1882) 44 N. J. L. 1.

³⁴See *Henke v. McCord*, (1880) 55 Iowa 378, 7 N. W. 623; *State v. Goodwin*, (1898) 123 N. C. 697, 31 S. E. 221 and *Bohri v. Barnett*, (C.C.A. 7th cir. 1906) 75 C. C. A. 327, 144 Fed. 389.

³⁵On Liability of Judges generally see note to *Kelly v. Bemis*, (1855) 4 Gray (Mass.) 83, 64 Am. Dec. 50; *Biddle, Liability of Officers Acting in a Judicial Capacity*, 15 Am. L. Rev. 427, 492; notes 14 L. R. A. 138; also *Burdick, Torts*, 3d ed. 35; *Cooley, Torts*, 3d ed. 797; *Bradley v. Fisher*, (1871) 13 Wall. (U.S.) 335, 20 L. Ed. 646

³⁶23 Cyc. 567-570; *Cooley, Torts* 3d ed. 797; *Waterville v. Barton*, (1876) 64 Me. 321; *Vanderpool v. State*, (1879) 34 Ark. 174; *Piper v. Pearson*, (1854) 2 Gray (Mass.) 120, 61 Am. Dec. 438; *Clarke v. May*, (1854) 2 Gray (Mass.) 410.

³⁷*Cope v. Ramsey*, (1870) 2 Heisk. (Tenn.) 197; *Fausler v. Parsons*,

Surely there is as much reason for exempting the inferior officer from liability, in cases where he attempted to enforce an unconstitutional statute before it was declared invalid, as there is for exempting judges who act maliciously and corruptly. It seems that of the two classes of officers, the inferior officer has the more difficult task in the matter of doing his duty and still avoiding encroachment upon the rights of others.

Of course, if we regard the officer as acting in excess of his jurisdiction when attempting to enforce an unconstitutional statute, we can get no arguments from the cases dealing with the liability of judges of inferior courts, in support of the proposition that the officer ought not to be held liable. But certainly the reasoning of the cases which hold that judges, including those of inferior courts, are not liable when acting within their jurisdiction, though they act corruptly and maliciously, can be fairly urged in behalf of the officer who attempted to enforce an unconstitutional act. The judges are exempted on the theory that they could not enforce the laws impartially and fearlessly if litigants could annoy them with suits whenever they felt aggrieved. The same argument applies with equal force to the other officers. The probability of a lawsuit and of financial loss is as likely to make the officer timid as it is the judge.

Since judges of superior courts are never held liable when they act judicially and within their jurisdiction, though their action

(1873) 6 W. Va. 486; 20 Am. Rep. 431; *Alexander v. Gill*, (1891) 130 Ind. 485, 3 N. E. 525; *McIntosh v. Bullard*, (1910) 95 Ark. 227, 129 S. W. 85; *Willis v. Linn*, (1912) 148 Ky. 841, 148 S. W. 11.

³⁸*Ayers v. Russel*, (1888) 50 Hun 282, 3 N. Y. S. 338, 20 N. Y. St. Rep. 323.

³⁹The writer had thought that judges of inferior courts were liable generally if they acted corruptly and maliciously, but *Cooley, Torts*, 3d ed. 797 says that there are dicta in some cases that a justice is civilly responsible when he acts maliciously or corruptly, but that they are not well founded and that the express decisions are against them. An examination of the cases seems to confirm *Cooley's* view. See *Kruegel v. Cobb*, (1910) 58 Tex. Civ. App. 449, 124 S. W. 723 for a recent case confirming that view. The court quotes from *Weaver v. Devendorf*, (1846) 3 Denio (N.Y.) 117 as follows:

"No public officer is responsible in a civil suit for judicial determination, however erroneous it may be, and however malicious the motive which prompted it. Such acts when corrupt may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against an officer for what he does in the performance of his duty. The rule extends to judges from the highest to the lowest, to jurors and to all public officers, whatever name they may bear, in the exercise of judicial power." To the same effect are: *Kruegel v. Murphy*, (Tex. 1910) 126 S. W. 343; *Woodruff v. Stewart*, (1879) 63 Alabama 393; *Broom v. Douglas*, (1912) 175 Ala. 268, 57 So. 860; *Kress v. State*, (1878) 65 Ind. 106; See also *Philbrook v. Newman*, (C.C. Calif. 1898) 85 Fed. 139.

may have been corrupt and malicious, they would probably not be liable for errors in judgment in enforcing an unconstitutional statute. There seem to be no cases where that particular question came before the court. As to judges of inferior courts, we saw that justices of the peace are held liable for acting under an unconstitutional statute, though they act judicially, by the courts which regard the statute as void *ab initio*. It is on the theory that they acted without jurisdiction. It may be questioned whether it was not within their jurisdiction to pass upon the constitutionality of the statute, and if so, they ought to be protected.

There is one class of cases where it seems particularly unjust to hold the officer liable. That is where the officer executes a warrant fair on its face. Ordinarily, such an officer is not liable if the issuing officer had jurisdiction of the subject matter⁴⁰ and the lack of jurisdiction was not apparent on the face of the warrant.⁴¹ Now suppose that the warrant were issued by a justice of the peace under an unconstitutional statute? There is the same kind of a command to the officer to execute the warrant as if it were issued under a valid statute. There is nothing to suggest to him that he is acting without authority. It seems that the officer ought to be protected, but probably most of the courts, which hold officers liable at all, would hold these ministerial officers liable. The writer of a note⁴² to *Kelly v. Bemis* in 1855 stated that it was the only case which goes to the extreme of holding a ministerial officer liable when he has acted under a warrant fair on its face, though issued by a justice of the peace under an unconstitutional statute. It seems that the writer is mistaken for in *Fisher v. McGirr*,⁴³ which was decided the year before, the same court held a constable liable for seizing liquor under a warrant issued pursuant to a statute which was later declared unconstitutional. The constable was held liable on the theory that the law, relied on for a justification of the officer's action being void, gave the magistrate no jurisdiction and no authority to issue the search warrant, and, therefore, the officer could not justify the seizure under it. Since then there have been other cases holding the officer liable where he executed a process issued under an unconstitutional statute.⁴⁴ The injustice of holding such officers

⁴⁰*Clarke v. May*, (1854) 2 Gray (Mass.) 410.

⁴¹*Waterville v. Barton*, (1876) 64 Me. 321.

⁴²(1855) 64 Am. Dec. 50.

⁴³(1854) 1 Gray (Mass.) 1, 61 Am. Dec. 50.

⁴⁴*Merritt v. City of St. Paul*, (1866) 11 Minn. 223; *Campbell v. Sherman*, (1874) 35 Wis. 103.

liable is brought out forcefully by a case like *Campbell v. Sherman*,⁴⁵ where a sheriff was held liable for the conversion of a large vessel. In that case an act of the legislature purported to create a maritime lien on vessels, which lien was to be enforceable by an action in rem. The circuit court of Wisconsin issued the warrant commanding the sheriff to seize the vessel. When the sheriff was sued for conversion after the statute had been declared unconstitutional, it was contended, on behalf of the defendant, that inasmuch as the warrant was fair and regular on its face, it was not the duty of the sheriff to inquire whether the court which issued it had jurisdiction. An argument was also made on the point that the warrant was issued by a superior court. Nevertheless, the supreme court of Wisconsin held the sheriff liable, relying chiefly on the argument that ignorance of the law does not excuse. It said:

"If the act which the writ commanded him to do was a trespass, he was not required to perform it. Nor would he be liable in that case to the plaintiff for refusing to execute a process void for want of jurisdiction."

Such reasoning is not tenable, for at best the sheriff could only make a guess as to the constitutionality of the statute. He had no means of knowing that he was committing a trespass. Suppose he had refused to execute the process and the plaintiff had sued him for refusal to do so: he would be liable for failure to perform his duty if the statute proved to be constitutional. The sheriff did what any reasonable man would do in like circumstances for on the average the chances are that a statute will be constitutional rather than unconstitutional. And looking at the matter from a practical viewpoint, what would happen if every subordinate officer questioned the validity of his orders before proceeding to execution? The sensible view would seem to be that which was expressed in *State v. McNally*,⁴⁶ the court held that an officer is not liable when acting under a warrant fair on its face though issued under an unconstitutional statute. The court further held that it is no part of the officer's duty to examine into and decide upon the constitutionality or construction of the statute which authorized the warrant.⁴⁷

⁴⁵(1874) 35 Wis. 103.

⁴⁶(1852) 34 Me. 210, 56 Am. Dec. 650.

⁴⁷For other cases holding a similar view see *Ortman v. Greenman*, (1856) 4 Mich. 291; *Trammell v. Russelville*, (1879) 34 Ark. 105, 36 Am. Rep. 1, and *Brooks v. Mangan*, (1891) 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137.

A question which is frequently raised in these suits against officers is whether a ministerial officer may question the constitutionality of a statute, in mandamus proceedings against him. If the officer may raise the question, it gives him one avenue of escape from liability. He can wait until some one takes the initiative in enforcing the statute, though it was pointed out above that such delay was not desirable from the standpoint of good government. On the other hand, if the officer is not allowed to raise the question of constitutionality in mandamus proceedings, it is an additional argument in favor of exemption from liability. It is unfair not to permit the officer to raise the issue of the validity of the statute, if he is to be held liable when the act is later declared unconstitutional. When we look into the authorities we find a conflict.⁴⁸ Some courts make a distinction between different classes of officers, allowing those of the higher grade to raise the question but denying the privilege to those of the lower grade.⁴⁹ For our purposes the interesting thing in these mandamus cases is the reasoning of the courts. The chief argument of the courts which refuse the officer the privilege of challenging the validity of a statute is that a government whose laws can be ignored by those whose duty it is to enforce them will be feeble and likely to fail in its purpose.⁵⁰ In *State v. Heard*,⁵¹ which is a leading case holding that a ministerial officer cannot question the constitutionality of a statute in madamus proceedings, the court said:

“Executive officers of the state have no authority to decline the performance of purely ministerial duties which are imposed upon them by law, on the ground that it contravenes the Constitution. Laws are presumed to be and must be treated and acted upon by subordinate functionaries as constitutional and legal, until their unconstitutionality or illegality is judicially established, for in a well regulated government obedience to its laws by executive officers is absolutely essential and of paramount importance. Were it not so, the most inextricable confusion would inevitably result, and produce such collusion in the administration of public affairs

⁴⁸For a more complete discussion of the subject, see 19 Am. & Eng. Ency. of Law 2d ed. 764; 12 C. J. 765; 47 L. R. A. 512; 72 Cent. L. Jour. 301.

⁴⁹*Maynard v. Board of Canvassers*, (1889) 84 Mich. 228, 47 N. W. 756; *Commonwealth v. Mathues*, (1904) 210 Pa. 372, 59 Atl. 961.

⁵⁰*State v. Leech*, (1916) 33 N. D. 513, 157 N. W. 492; *State v. Shakespeare*, (1889) 41 La. Ann. 156, 6 So. 592; *State v. Heard*, (1895) 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512; *People ex rel. v. Salomon*, (1850) 54 Ill. 39.

⁵¹(1895) 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512.

⁵²*Gilmer v. Holton*, (1887) 98 N. C. 26, 3 S. E. 812.

as to materially impede the proper and necessary operations of the Government.”

Another court stated that the officer ought to be permitted to raise the issue only in cases of “plain and palpable” violations of the constitution, or where irreparable harm may follow.⁵² Another reason given is that the officer is not affected and that only those affected can properly raise the issue of constitutionality.⁵³ Still other courts refuse to allow the issue to be raised on the ground that the law is presumed to be valid until declared unconstitutional.⁵⁴ And some courts content themselves with merely saying that the defendant cannot raise the issue because he is a ministerial officer.⁵⁵ It is evident that there is no uniformity in the reasoning of the cases denying the right to raise the issue of constitutionality in mandamus proceedings, but these same courts are quite agreed that the officer should enforce the law as he finds it. If that view is sound, it leads to the logical conclusion that the officer should be protected when the statute under which he acted is declared unconstitutional.

The embarrassing position of the ministerial officer under our present state of the law is well illustrated by the case of *People ex rel. v. Salomon*.⁵⁶ A clerk of court refused to obey a peremptory writ of mandamus because he doubted the constitutionality of the law under which the board of equalization acted and at whose instance the writ was issued. The defendant had refused to extend upon the collector's books the taxes according to the increased valuation of the state board of equalization. The court held that the clerk could not justify his refusal on the ground that the statute might be unconstitutional and fined him one thousand dollars. The attitude of the court is well summarized in the following excerpt:

“To allow a ministerial officer to decide upon the validity of a law, would be subversive of the great objects and purposes of the government, for if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is subjection

⁵²*Mohall Farmers State Elevator Co. v. Hall*, (1920) 44 N. D. 430, 176 N. W. 131.

⁵⁴*State v. Cease*, (1911) 28 Okla. 271, 114 Pac. 251, and *State v. Heard*, (1895) 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512.

⁵⁵*Estus v. State*, (1921) 83 Okla. 181, 200 Pac. 1002; *Commonwealth v. James*, (1890) 135 Pa. 480, 19 Atl. 950; *United States ex rel. Marble* (1883) 3 Mackey (D.C.) 49; *State v. Tyler*, (1922) 64 Mont. 124, 208 Pac. 1081.

⁵⁶*People ex rel. v. Salomon*, (1850) 54 Ill. 39.

to law. Being a ministerial officer, the path of duty was plain before you . . . your duty was obedience. The collective will of the people was embodied in that law. A decent respect to them required that all their servants should obey it."

Turning to the courts which permit ministerial officers to question the constitutionality of statutes in mandamus proceedings, we again find that there is no uniformity in the reasoning. One court says that it is a matter of convenience to have the question of constitutionality settled at the outset.⁵⁷ Other courts say that an unconstitutional statute is no law and binds no one and that therefore the constitutionality can be questioned by any one in direct proceedings.⁵⁸ Another group reasons that it is the duty of certain public officials, particularly financial officers, to raise the question of constitutionality before paying out public funds if there is any doubt about the matter.⁵⁹ Still others permit the issue to be raised chiefly for the reason that the officer is subject to liability if he acts under unconstitutional statutes.⁶⁰

It is evident that there is much conflict concerning the right of a ministerial officer to raise the issue of constitutionality in mandamus proceedings against him; and the decisions cannot be reconciled. But it seems that under either view the officer should be permitted to raise the issue if the result of his action, in event that the statute is declared unconstitutional, would be a violation of his duty under his oath of office, or would otherwise render him liable.

One other reason, not mentioned by the courts but which, it seems, might be legitimately advanced in support of exempting the officer, is that in many cases the injured party could have protected himself by injunction proceedings in advance of the injury. There are many cases where that has been effectively done.⁶¹ For instance, in a Nebraska case⁶² the legislature passed

⁵⁷Hindman v. Boyd, (1906) 42 Wash. 17, 84 Pac. 609.

⁵⁸McDermott v. Dinnie, (1897) 6 N. D. 278, 69 N. W. 294; Commonwealth v. Mathues, (1904) 210 Pa. 372, 59 Atl. 961; Denman v. Broderick, (1896) 111 Cal. 96, 43 Pac. 516; Van Horn v. State, (1895) 46 Neb. 62, 64 N. W. 365.

⁵⁹Norman v. The Ky. Board of Managers, (1892) 93 Ky. 537, 20 S. W. 901; Stockton v. Leddy, (1912) 55 Colo. 24, 129 Pac. 220; Denman v. Broderick, (1896) 111 Cal. 96, 43 Pac. 516; State v. Snyder, (1923) 29 Wyo. 163, 212 Pac. 758.

⁶⁰State ex rel. University of Utah v. Candaland, (1909) 36 Utah 406, 104 Pac. 285, 140 Am. St. Rep. 834; State v. Malcolm, (1924) 39 Idaho 185, 226 Pac. 1083.

⁶¹Minneapolis Brewing Co. v. McGillivray, (C.C. S.D. 1900) 104 Fed. 258; Central Trust Co. of N. Y. v. Citizens St. Ry. Co., (C.C. Ind. 1897) 80 Fed. 218; Dahler v. Washington Suburban Sanitary Commission, (1919) 133 Md. 644, 106 Atl. 10; Smyth v. Ames. (1897) 169 U. S. 466, 18 Sup.

a law creating a stallion registration board. The owner of a stallion refused to register his stallion and pay the registration fees on the ground that the law was unconstitutional since the executive offices are enumerated in the constitution; and because under the decisions of the state courts such an office would be an additional executive office. The statute was later held invalid on the above grounds, but in the meantime the courts restrained the board from taking any action against the owner. So, in those cases where the plaintiff could have secured an injunction, is it not fair that he should be made to assert his rights earlier rather than place the burden on the officer when the statute is later held invalid? Let the plaintiff do some of the guessing as to whether the statute is constitutional. There are, however, courts which place a very heavy burden upon the plaintiff of showing almost conclusively that the statute is unconstitutional, and that its enforcement would inflict a direct injury upon him for which he could have no other redress⁶³ before they will issue an injunction. Of course, in those courts our argument would not hold good. But many of the equity courts are rather lenient in granting injunctions and will even restrain the enforcement of a criminal statute where irreparable injury would result.⁶⁴ Where there would be no serious injury to property, equity courts would follow the general rule that they will not ordinarily enjoin criminal prosecutions;⁶⁵ in such cases the plaintiff's only redress may be against the officer.

It also falls within the scope of this paper to consider the liability and protection of de facto officers. Most of the courts hold

Ct. 418, 42 L. Ed. 819; *Yale College v. Sanger*, (C.C. Conn. 1894) 62 Fed. 177; *Pennoyer v. McConnaughy*, (1890) 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Scott v. Donald*, (1897) 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648; *Davis v. Gray*, (1872) 16 Wall. (U.S.) 203, 21 L. Ed. 447; *Bonnett v. Vallier*, (1908) 136 Wis. 193, 116 N. W. 885, 128 Am. St. Rep. 1061, and *Philadelphia Co. v. Stimson*, (1912) 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570.

⁶²*Iams v. Mellor*, (1913) 93 Neb. 438, 140 N. W. 784.

⁶³*Gibbs v. Green*, (1877) 54 Miss. 592; *Cohen v. Commissioners of Goldsboro*, (1877) 77 N. C. 2.

⁶⁴*Truax v. Raich*, (1915) 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D 545; *Davis & Farnum Mfg. Co. v. Los Angeles*, (1903) 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; *Dobbins v. Los Angeles*, (1904) 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; *Ex Parte Young*, (1908) 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N.S.) 932. See also *Terrace v. Thompson*, (1923) 263 U. S. 197, 68 L. Ed. 255, 44 Sup. Ct. 15; *Hygrade Provision Co. v. Sherman*, (1925) 266 U. S. 497, 69 L. Ed. 402, 45 Sup. Ct. 141.

⁶⁵*In re Sawyer et al.*, (1887) 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; *City of Ranger v. Southern Ice Co. and Utilities Co.*, (Tex. Civ. App. 1924) 262 S. W. 839; *Sokel v. Roche*, (1888) 27 Ill. App. 423.

that there can be no officer de facto where there is no de jure office.⁶⁶ From that it follows that where there was an attempt to create an office under an unconstitutional statute there can be no de facto officer and, consequently, the party would not be entitled even to the benefits which de facto officers ordinarily share under the law. It has been held in a number of cases that de facto officers are entitled to the salary where they have performed the duties of the office and there are no other claimants.⁶⁷ Though there is also some authority to the contrary,⁶⁸ it would seem that such officers should be paid, since the public has had the benefit of their services as much as if they were de jure officers. But where the courts hold that there can not be even a de facto office created under an unconstitutional statute, they would logically have to hold that the person occupying the office is not entitled to the benefits of a de facto officer. So in *Nagel v. Bosworth*⁶⁹ the Kentucky court, by way of dictum, said that the judge whose circuit was created under an unconstitutional statute and who had served six months was not entitled to compensation. But in *State v. Poulen*⁷⁰ the Maine supreme court was of the opinion that an office created under an unconstitutional statute should be treated as de jure until declared otherwise by a competent tribunal. With the exception of *Nagel v. Bosworth* all the cases, where the question has been passed upon, support the views of the Maine court.⁷¹

As the law stands today in the great majority of states, officers are penalized when they act in utmost good faith in enforce-

⁶⁶Mechem, Public Officers, sec. 324, 325; 29 Cyc. 1391; Norton v. Shelby County, (1886) 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; Flaucher v. City of Camden, (1893) 56 N. J. L. 244, 28 Atl. 82; Coquillard Wagon Works v. Melton, (1910) 137 Ky. 189, 125 S. W. 291; State ex rel. Elliot v. Kelly, (1913) 154 Wis. 482, 143 N. W. 153. For a discussion of the status of a person holding office under an unconstitutional statute see 13 Ill. L. Rev. 229. Also State v. Carrol, (1891) 38 Conn. 449, 9 Am. Rep. 409; People v. Knopf, (1899) 183 Ill. 410, 56 N. E. 155.

⁶⁷State ex rel. Elliot v. Kelly, (1913) 154 Wis. 482, 143 N. W. 153; Malaley v. City of Marysville, (1918) 37 Calif. App. 638, 174 Pac. 367; Lavin v. Commissioners of Cook County, (1910) 245 Ill. 496, 92 N. E. 291.

⁶⁸Meagher v. Storey County, (1869) 5 Nev. 244.

⁶⁹(1912) 148 Ky. 807, 147 S. W. 940.

⁷⁰(1909) 105 Me. 224, 74 Atl. 119.

⁷¹Burt v. Winona & St. Peter Ry. Co., (1884) 31 Minn. 472, 18 N. W. 285, State v. Bailey, (1908) 106 Minn. 138, 118 N. W. 676; Nagel v. Bosworth, (1912) 148 Ky. 807, 147 S. W. 940; Rude v. Sisack, (1908) 44 Colo. 21, 96 Pac. 976; Lang v. Mayor of City of Bayonne, (1907) 74 N. J. L. 455, 68 Atl. 90, 15 L. R. A. (N.S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961; see also Adams v. Lindell, (1878) 5 Mo. App. 197 where it was held that there was a de facto officer even after the office was abolished.

ing statutes which are later held invalid. The awkward position of the officer where the situation is reversed is well illustrated by a New York case.⁷² The plaintiff brought an action against a town supervisor because of failure to perform his duty of presenting the plaintiff's claim to the county board of supervisors for audit. A new law provided that when a man's land is taken for a road the damages should be assessed by three commissioners appointed by the county court. The law also provided for reassessment by a jury if the owner was not satisfied with the assessment of the commissioners, and made it the duty of the town supervisors to present such reassessment to the county board of supervisors. The plaintiff obtained a reassessment by a jury and requested the defendant to present it, but the defendant refused on the ground that he thought the law was unconstitutional. Later the law was held valid and the defendant was held liable for the full amount of the assessment, the court saying:

"In this course he was not justified, unless the law in question is actually unconstitutional. Under our system of government no power is given to public officers to refuse or suspend their obedience to laws on any opinion of their own that the law is unconstitutional. If, on the other hand, it is constitutional, it binds everyone to obedience. Disobedience on such a ground is always at the peril of the party disobeying, whether a private individual, a public officer, or a board of public officers. That the defendant thought the law unconstitutional, and that this view was shared by the town officers, and that his refusal to obey that statute went upon that ground, is, in a legal point of view, of no consequence. It may affect the moral quality of his acts, but it does not alter his legal responsibility."

So the officer is in a nice predicament. If he acts under a statute and it proves to be unconstitutional, he is liable for damages, and if he refuses to act because he thinks the statute is unconstitutional and later the courts hold the law to be valid, he is no better off.

The proper solution of the problem would seem to be to let the officer enforce the law as he finds it and not to require him to pass upon its constitutionality. The state should assume the responsibility for all injury due to the enforcement of unconstitutional statutes. It might develop the practice of allowing the injured party to sue the officer and then reimburse him from the state treasury. England has developed that system in respect to

⁷²Clark v. Miller, (1874) 54 N. Y. 528.

suits in tort.⁷³ It is unfair and socially undesirable that the subordinate officers of the government should assume the risk of constitutionality of legislative enactments. In recent years there has been a growing legislative tendency on the part of both the state and the national governments to assume liability to a greater degree for the torts of their servants. The reasons for assuming responsibility for injury caused because of the enforcement of unconstitutional statutes are even more cogent. When the government refuses to indemnify for the torts of its servants there is an injustice to the injured party. In the officer cases there is not only the same injustice but, in addition, we discourage the enforcement of the laws.

Legislatures pass laws for the benefit of all and even the most careful and conscientious legislatures will pass some laws which will be held unconstitutional. To discharge their functions properly, legislatures must necessarily do considerable experimenting. If the experiment succeeds, the people reap the benefits and it is only fair if it fails, the burden be so distributed as to be borne by all. Many years ago the state of New York came to realize that it was impolitic to make health officers bear the risk of "good faith" mistakes and it passed a statute⁷⁴ exempting health officers from liability for such mistakes and for omissions in the performance of their duties. In order to avoid injustice to the injured party, the statute permitted the city to be sued in such cases. And in the field of criminal law, two states have passed laws providing for compensation to innocent parties who have been erroneously convicted of crime.⁷⁵ They go on the theory that the state has by mistake deprived the individual of his liberty in performing the public function of protecting the rest of society. The two states recognized the injustice of imposing the burden upon the private individual. So there are ways and means of remedying the situation if we will but recognize the injustice of imposing liability on the officer. We have done little to encourage our officers in the faithful performance of their duties. We are far behind continental countries in that respect. In France the government has gone a long way in protecting its servants and the practical effect of the laws in that country is that if the damage was done by an official of the state while acting officially the state may be liable, but the official is never liable. It is only where the

⁷³Borchard, *Government Liability in Tort*, 34 *Yale L. Jour.* 1, 13.

⁷⁴*N. Y. Laws 1901*, see 466, sec 1196.

⁷⁵*Cal. Stat. 1913*, ch. 165; *Wis. Stat. 1921*, sec. 320a.

official clearly goes outside of his functions that he would be held responsible.⁷⁶ There is no doubt that an officer would be free from liability in France in the type of cases with which we are concerned in this discussion. In England there is also some legislation protecting public officers.⁷⁷ In the United States practically nothing has been done to encourage the officer in the prompt performance of his duties. As the law stands there is an injustice done to the officer as well as to the party injured by the enforcement of the unconstitutional statute. And in addition to that we have a shirking of a responsibility by the state which it ought to bear.⁷⁸

⁷⁶See F. P. Walton, *The French Administrative Courts and the Modern French Law as to the Responsibility of the State for the Faults of its Officials*, (1918) 13 Ill. L. Rev. 205. Also H. Laski, *Responsibility of the State in England*, 32 Harv. L. Rev. 447.

⁷⁷On the liability of officers in England see Chaster, *Public Officers*, 617-706; J. S. Chartres, *Protection of Public Authorities* 1-10; Emden, *the Scope of the Public Authorities Protection Act*, 39 L. Q. Rev. 341.

⁷⁸The writer found that the cases under consideration in this study were not well classified in the digests and for that reason deemed it advisable to include all cases that have not been previously cited in this note. Other cases holding the officer liable are: *Dennison Mfg. Co. v. Wright*, (1923) 156 Ga. 789, 120 S. E. 120; *Waterloo Woolen Mfg. Co. v. Shanahan*, (1890) 58 Hun 50, 11 N. Y. S. 829, 33 N. Y. St. Rep. 361; see also *Hopkins v. Clemson College*, (1911) 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890; *Huntington v. Worthen*, (1887) 120 U. S. 97, 7 Sup. Ct. 469, 30 L. Ed. 588; *Kinneen v. Wells*, (1887) 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105; *Astrom v. Hammond*, (C.C. 7th cir. 1842) 3 McLean 107; *Saratoga State Waters Corporation v. Pratt*, (1920) 227 N. Y. 429, 125 N. E. 834; contra: *Shafford v. Brown*, (1908) 49 Wash. 307, 95 Pac. 270; *Schloss v. McIntyre*, (1906) 147 Ala. 557, 41 So. 11. See also *Miller v. Dunn*, (1887) 72 Calif. 462, 14 Pac. 27.