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THE VALIDITY OF ACTS OF OFFICERS OCCUPYING OFFICES CREATED UNDER LAWS DECLARED UNCONSTITUTIONAL

We have forgotten what happens when an irresistible force meets an immovable object. We can, however, illustrate this interesting physical phenomenon, in the field of law, by ranging, on the one side, the proponents of the legitimacy of acts of officers occupying an office under an unconstitutional statute, before having been so declared by the Courts, and those sturdy opponents, who aver that there can be no officer in fact, where there is in law no office, and hence no valid act by such an alleged officer.

Students of law require slight impetus to rush afresh into the fray of a seemingly irreconcilable conflict. Such fresh occasion, spelling fresh opportunity, is the recent decision in the Circuit Court of Hudson County, New Jersey, validating the acts of the Hudson County Park Commission in discharging the plaintiff officers.[1] The Court of Errors and Appeals had, in another action,[2] declared the act which created the Park Commission unconstitutional. The plaintiffs, Byrnes and others, in

1. Byrnes et al. v. Boulevard Commissioners of Hudson County, 197 Atl. 667 (Cir. Ct. Hudson Co.) (1938).

2. McCarthy et al. v. Kleffman et al., 108 N.J.L. 282, 156 Atl. 772 (1931).

the action *sub judice* sued to recover back salaries since their discharge by the Park Commission on the ground that no constitutional office existing, no acts of the Commission could be valid. The likelihood of an appeal from this decision makes a reexamination of the authorities on this controversial question opportune—particularly since the New Jersey high court in *Lang v. Bayonne*,[3] made a courageous break from the precedents of the Supreme Court of the United States and the weight of authority elsewhere, in declaring that in reason and justice there ought to be, and therefore there might in law be a *de facto* officer of a *de facto* office. The reason for such reexamination becomes the more valid because we find our Court of Errors and Appeals recently questioning and delimiting the decision in *Lang v. Bayonne*.[4]

We are driven, therefore, to examine the existing state of the law at the time (1907) of the late Chief Justice Gummere's pronouncements in the *Lang v. Bayonne* case. It was then universally conceded that the acts of a *de facto* incumbent of a legally existing office, are valid, in so far as the rights of the public or third persons are concerned.[5]

The universal acquiescence of the judiciary in this doctrine came as a matter of recognized necessity to protect the rights of the public and individuals involved in the official acts of persons exercising the duties of, and occupying offices under

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3. Lang v. Mayor etc. of the City of Bayonne, 74 N.J.L. 455, 68 Atl. 90 (1906).

4. Hyman v. Long Branch Kennel Club, Inc., 13 N.J.Misc. 57, 176 Atl. 335 (Sup. Ct.); 115 N.J.L. 123, 179 Atl. 105 (E. & A. 1935).

5. Bownes v. Meehan, 45 N.J.L. 189 (1883); State v. Carroll, 38 Conn. 449; Degan v. Farrier, 47 N.J.L. 383, 1 Atl. 751 (1885); Taylor v. Skrine, 3 Brevard 516 (S. Car.); Cocke v. Halsey, 16 Pet. 71 (Miss.); Clark v. Commonwealth, 29 Pa. 129; Brown v. O'Connell, 36 Conn. 432; Blackburn v. State, 3 Head. 690 et. al.

color of law. As early as *Knowles v. Luce,*[6] it was conceded that the man on the street could not reasonably be expected to inquire into the validity of the title to the office under which the incumbent acted. In other words, sound public policy demanded such a doctrine, and such became the settled principle of the law.

It was likewise universally conceded, as an essential concomitant to the successful operation of a republican form of government, that municipal corporations, created by unconstitutional laws, were *de facto* corporations, the legality of whose existence could be questioned only by the State itself, through its Attorney General and whose acts, so long as the State did not interfere, exercised upon the citizen, through its officers, all the powers conferred by the law, as fully as though the law had been constitutional.[7]

It was, however, by the weight of authority, at that time, assumed that in order that there may be an officer *de facto,* there must actually exist the office by operation of a law valid under the constitution. Carrying the banner for this valiant band, was the Supreme Court of the United States, by its decision in *Norton v. Shelby County.*[8] Thronging behind, came, and still come, an impressive number of state courts, which even today, outnumber—though not greatly—those who side with Justice Gummere in his reasoning enunciated in *Lang v. Bayonne* (supra).

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6. Knowles v. Luce, Moore 109 (15th Century). "The public could not reasonably be compelled to inquire into the title of an office, nor be compelled to show title."

7. Devlin et al. v. Wilson et al., 88 N.J.L. 180, 96 Atl. 42 (E. & A. 1915); Attorney General v. Town of Dover, 62 N.J.L. 138, 41 Atl. 98 (1898); St. Paul Gaslight Co. v. Village of Sandstone, 75 N.W. 1050 (Sup. Ct. Minn. 1898); Burt v. Winona etc. R.R. Co., 31 Minn. 472, 18 N.W. 285 at p. 289, and numerous cases therein cited; cited by C. J. Gummere as in point, but really broader in its application.

8. Extein Norton v. Shelby County, Tenn., 118 U.S. 425 (1886).

The case of *Norton v. Shelby County* involved an action on bonds issued by the County Commissioners of Shelby County, Tennessee, whose lawful existence had been called in question in the Supreme Court of that State, which Court had declared that the statute creating the office of County Commissioners was unconstitutional.

Confronted with the responsibility of denying obligation on the bonds against a holder for consideration, or validating the act of the Commissioners, the Supreme Court of the United States, through Justice Field, held the acts of the Commissioners, in issuing the bonds, invalid, and stated that:

> "The idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office and a public office can exist only by force of law. * * * An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. * * * Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached."

Justice Field, in making this decision, had before him the famous case of *State v. Carroll*,[9] which had exhaustively examined all prior adjudications relating to the matter both in England and the United States.

The controversy involved in the *Carroll* case, briefly stated, was as follows:

The Constitution of Connecticut provided that all judges should be elected by its General Assembly. An Act of the Legis-

9. State v. Carroll, 38 Conn. 449 (1871).

lature authorized the clerk of a city court, in case of the sickness or absence of its judge, to appoint a justice of the peace to hold the court during his temporary sickness or absence. Because a justice of the peace, had thus been called in and acted, the question arose whether the judgments rendered by him were valid.

It will, of course, be perceived, that here we are dealing with a validly existing office (judge) to which the court held the appointment was illegally made. The judge's acts were, therefore, held valid, as those of a *de facto* officer. The case cannot, however, be thus easily dismissed because Justice Field, in *Norton v. Shelby County,* cited the case as supporting his conclusions above set forth. That the *Carroll* case did support them. Justice Gummere questioned, and we think rightly.

After tracing the history of the *de facto* doctrine from 1431, through more than two hundred English and American cases involving it, Chief Justice Butler in the *Carroll* case, laid down the following classical definition of a *de facto* officer:

> "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised * * *
>
> 1. Without a known appointment or election but under circumstances of reputation or acquiescence.
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> 2. Under color of a known and valid appointment or election but failure to conform to some precedent condition.
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> 3. Under color of a known election or appointment but officer was ineligible.
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> 4. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

Justice Butler further set forth this challenging dictum:

> "Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but must be received and obeyed, as to all intents and purposes as law, until questioned in and set aside by the courts."

He then carefully drew his conclusion:

> "If then the law of the legislature, *which creates an office and provides an officer to perform its duties*, must have the force of law until set aside as unconstitutional by the courts, it would be absurd to say that an officer so provided had no color of authority."

Realizing that the fourth statement of Chief Justice Butler's definition of a *de facto* officer and the conclusion he reached, if taken as broadly as expressed, negatived the conclusion reached by him, Justice Field stated that none of the cases cited by Chief Justice Butler "recognize such a thing as a *de facto* office, or speak of a person as a *de facto* officer, except when he is an incumbent of a *de jure* office". He thereupon reached the conclusion that Chief Justice Butler, in part four of his definition, "refers, not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing". Justice Gummere seems to have acquiesced in Justice Field's statement that the cases cited in the *Carroll* case relate to illegal occupants of legally existing offices, but explains that Chief Justice Butler did not refer to those cases as decisions "upon

the very point embraced in his proposition, but merely for the purpose of showing that by their reasoning, they supported it".

We cannot agree that all of the cases cited in the *Carroll* case relate to illegally appointed officers of legally existing offices. In at least two of the cited cases, no office of any kind had been created by the legislature, at the time the acts of the officer presuming to act were validated as those of a *de facto* officer.[10]

In the first of these, *Carleton v. People,* the Constitution of Michigan provided that no act of the legislature should take effect until 90 days after adoption. The legislature by statute created a new county, with its attendant offices. Long before the effective date of the law, officers were appointed, and acted, and their acts were held to be those of *de facto* officers, and so valid. In the latter, *Fowler v. Beebe,* there was a specific provision in the act itself that the enactment (creation of a county) should not take effect prior to a date fixed therein. Notwithstanding this provision, prior to that date, officers were appointed and acted, and their acts were upheld by the court as those of *de facto* officers.

It seems a trifle absurd to say that *no* law creating an office, in effect at the time an officer exercises the duties of the office, shall stand in a better position than a duly enacted act creating the office, which is later held to contravene the fundamental law. Yet to such absurdity we are brought by Justice Field's conclusion with respect to the cases cited by Chief Justice Butler in the *Carroll* case.

We submit, therefore, that it would have been fair for Justice Field to say that the language of Chief Justice Butler in stating, "If then the law of the legislature, *which creates an office* and provides an officer to perform its duties, must have

10. Carleton v. People, 10 Mich. 250; Fowler v. Beebe, 9 Mass. 231.

the force of law until set aside as unconstitutional by the courts, it would be absurd to say that an officer so provided had no color of authority," was not necessary for the determination of the case of *State v. Carroll,* since the office of police judge was a *de jure* office, and hence, that this language was obiter; but that it was not fair to state that the Connecticut court was in accord with his pronouncement that there could be no *de facto* officer without a *de jure* office.

When we proceed to an examination of the argument and authorities supporting the conclusion of Justice Field, in *Norton v. Shelby County,* we find two cases cited, clearly in support of his decision.[11]

In passing, let us point out that in neither the Kentucky nor the Michigan case is any mention made of the doctrine that municipalities, with incidental offices, created by unconstitutional laws, were none the less immune from attack at the hand of public or individual, though the Kentucky case confidently states, "there never was and never can be, under the present constitution, a *de facto* office."

The decision in *Norton v. Shelby County* is barren of reasoning. The argument that an Act of the legislature, though unconstitutional, which in terms creates an office, may thereby give rise to a *de facto* officer whose acts are valid is, in the judgment of the Court, so absurd as to be unworthy of a reasoned reply. The Court naively says: "It is difficult to meet it by any argument beyond this statement. An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Those who have followed *Norton v. Shelby County* have, for the most part, contented themselves with repeating the broad negations above

11. Hildreth v. McIntire, 1 J. J. Marsh 206 (Kentucky Court of Appeals); Carleton v. People, 10 Mich. 259 (Sup. Court, Mich.).

quoted.[12] The rationale of such a procedure leaves something to be desired, when the light of logic is let in upon it, as we think will be made clear when we analyze the reasoning of Chief Justice Gummere in *Lang v. Bayonne.*

The lower federal courts, which courts are bound by the decision in *Norton v. Shelby County,* have nevertheless exhibited great ingenuity in avoiding the consequences of the decision in that case. In some, we find that the Norton case is distinguished on the ground that in that case the body acting was "not known to the constitution of the state and was an anomaly in its system of administration of county affairs".[13] In others, a similar distinction is sought to be drawn between acts which are unconstitutional and acts which are *manifestly* unconstitutional

The Court in a case involving an action against the collector of internal revenue for refunds of processing taxes paid under the A. A. A. Act of 1936[14] said:

> "It may be that, if a congressional act is on its face so arbitrary and unreasonable, so beyond power, and so violative of natural rights, as that any reasonable person must

12. State v. Malcolm et. al., 226 Pac. 1083 (Idaho) 1924; People *ex. rel.* Stuckart v. Knopf, 56 N.E. 155, Sup. Ct. of Ill. 1900, (*dictum*); People *ex. rel.* Sinkler v. Terry, 42 Hun. (N.Y.) 273, Sup. Ct. of N. Y. 1886. (Reversed by the Court of Appeals on the ground that the Act was constitutional); Koch v. Keen, 255 Pac. 690, Sup. Ct. of Oklahoma, 1927; Davis v. Williams et al., 12 S.W. (2d) 532, Sup. Ct. of Tenn. 1928; State v. Gillette's Estate et. al., 10 S.W. (2d) 984, Texas, 1928; Hamrick v. Simpler, 95 S.W. (2d) 357, Texas, 1936; People v. Toal, 24 Pac. 603, Sup. Ct. of Cal., 1890; Walcott v. Wells, 24 Pac. 367 (*obiter*) Sup. Ct. Nevada, 1890; King Lumber Co. v. Crow, 46 So. 646, Sup. Ct. Alabama, 1908; Brandon v. State, 173 So. 240, Alabama, 1936; Buck v. City of Eureka, 42 Pac. 243, Sup. Ct. of Cal. 1895.

13. Ashley v. Board of Supervisors, 60 Fed. 55, Sixth C. C. of U. S. 1893.

14. Anniston Manufacturing Co. v. Davis, 87 Fed. (2d) 773 Fifth C. C. of U. S. 1937

know its invalidity, persons acting under it before its unconstitutionality has been declared will not be protected from a personal accounting. When, however, as in this case, the unconstitutionality of the law was far from plain, no common-law action will be raised, we think, against collectors who, before its unconstitutionality has been searched out and declared, have, by virtue of their office, collected money and paid it over."

The Supreme Court, on certiorari, had an opportunity to reconsider its decision in *Norton v. Shelby County* when the *Anniston Manufacturing Co.* case came before it, but declined to do so because the administrative remedy was fair and adequate, and other questions with respect to the liability of the collector they declined to consider.[15]

Other Federal Circuit Courts have applied the doctrine of estoppel as affecting municipalities;[16] others have sought to distinguish the *Norton v. Shelby County* case on the ground that the Court, in that case, was dealing with the laws of the State of Tennessee, and the conclusions reached were in harmony with the previous decisions of the supreme court of that state, whereas, other states have precedents contrary thereto.[17]

The United States Supreme Court has once followed the doctrine in its rigor,[18] and once by obiter cited it with approval.[19]

When one attempts to distinguish between cases unconsti-

15. Anniston Mfg. Co. v. Davis, 57 S.C. 816.

16. Speer v. Board of County Commissioners, 88 Fed. 749, Eighth C. C. of U. S. 1898.

17. Miller v. Perris Irrigation Dist. et al., 85 Fed. 693 C. C. (So. Dist. Cal.) 1898

18. Chicago, Indianapolis & Louisville R. R. v. Hackett, 228 U. S 559. S. C. of U. S. 1913.

19. United States v. Royer, 268 U. S. 394, S. C. of U. S. 1925

tutional and cases *manifestly* unconstitutional, he finds the line of demarcation too tenuous for support. To illustrate, possibly the two most fruitful sources of litigation under the constitution of the State of New Jersey are, (1) bill-styling, and (2) private or special laws in certain instances. It would, I suppose, be perfectly manifest to a lawyer that an Act of the legislature whose title indicated two objects would as to one, if the question were raised, be held unconstitutional, yet, many states have no provision requiring any particular bill-styling and it does not appear either that any natural rights of citizens have been abused or that the orderly functions of government have been embarrassed thereby. So, too, with local, private and special laws. To one, the unconstitutionality may be manifest, while to another it may be exceedingly doubtful. It therefore seems that to take the stand that if an act is not *too* unconstitutional, the doctrine of *Norton v. Shelby County* shall not apply, but if flagrently so. it will apply, is to take a stand on an unsound footing.

Having thus reviewed the cases holding that there can be no *de facto* officer of a *de facto* office, let us turn now to the decision of Chief Justice Gummere in *Lang v. Bayonne,* supra, which we think may justly stand with *State v. Carroll,* supra, as a land mark of the law concerning the question. The facts in the *Lang v. Bayonne* case are as follows:

Plaintiff had been appointed to the Police Department of Bayonne on July 3, 1893. The Legislature, on March 30, 1905, passed an act, by the provisions of which, a Board of Police Commissioners was created for Bayonne with power to appoint and discharge officers for cause. On April 17, 1905, plaintiff was brought up on charges before the Board and discharged. On November 13, 1905, the Supreme Court of New Jersey declared the act creating the Board unconstitutional.[20] Plaintiff

20. State v. Nealon, 62 Atl. 182, 73 N.J.L. 100 (1905).

thereupon sought to regain his position on the ground that the Board which discharged him had no legal existence.

Chief Justice Gummere was immediately confronted by the decision of the Supreme Court of New Jersey in the case of *Flaucher v. City of Camden*,[21] in which the Court had squarely held that, "where the office itself is created by an unconstitutional statute, there can be no incumbent of such office, either *de jure* or *de facto*". He was, of course, also confronted by the U. S. Supreme Court decision in *Norton v. Shelby County* holding to the same effect and the line of cases which we have already cited. Notwithstanding this, the Court, by unanimous decision, repudiated the doctrine of *Flaucher v. City of Camden* and that of *Norton v. Shelby County*, and in doing so, enunciated a principle of far reaching consequence.

Chief Justice Gummere said:

> "I am unable to accept as sound, the doctrine upon which it, (*Norton v. Shelby County*) is rested, namely, that an unconstitutional law is invalid *ab initio* and affords no protection for acts done under its sanction."

and he finally said:

> "I conclude that an officer appointed under authority of a statute to fill an office created by the statute is a *de facto* officer, and that acts done by him antecedent to a judicial declaration that the statute is unconstitutional are valid, so far as they involve the interests of the public and third persons. * * * "

The reasoning which lead him to this conclusion and in

21. Flaucher v. City of Camden, 56 N.J.L. 244, 28 Atl. 82 (S. C. 1893).

which he found support in the case of *State v. Carroll,* was, that it is the right of every citizen to accept the law as it is written; that he is not required, therefore, to determine its validity; that the provisions of a solemn act of the Legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him, so long as it remains unreversed. He pointed out that great hardship would result if a contrary view were adopted and that insufferable conditions would ensue. He stood squarely upon the principle that courts are not vested with the right of general supervision over legislation, that they act, if at all, in *personam* and not in *rem,* and hence, the judicial function of determining the validity of statutes is confined within a very narrow scope.

In this connection he cited *Allison v. Corker.*[22] It may be well to repeat the words of the Court in that case dealing with the functions of the judiciary with respect to the constitutionality of a law. Mr. Justice Collins for the Court of Errors and Appeals stated:

> "But I am prepared to go farther, and hold that an unconstitutional statute is nevertheless a statute; that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable, because in conflict with a paramount law. If properly to be called void, it is only so with reference to claims based upon it. Neither of the three great departments to which the constitution has committed government by the people can encroach upon the domain of another. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised in *rem,* but always in

22. Allison v. Corker, 67 N.J.L. 596, 52 Atl. 362 (E. & A. 1902).

personam. The supreme court cannot set aside a statute as it can a municipal ordinance. It simply ignores statutes deemed unconstitutional. For many purposes an unconstitutional statute may influence judicial judgment, where, for example, under color of it private or public action has been taken. An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes."

To the same effect and in language which we deem unparalleled for nobility of sentiment, the principle was stated by Mr. Justice Garrison in *Booth v. McGuinness*:[23]

"There can, indeed be no greater mistake than that of regarding the power exercised by state courts in declaring legislative enactments unconstitutional as something different from and merely ingrafted upon their purely judicial functions, for such mistaken conception leads to the radical error that, if duly challenged, a legislative act will be sustained only when it is demonstrably constitutional. Such a notion in effect supplements the Constitution by requiring the affirmative concurrence of all three departments of the government where that instrument of the organic law requires but two, *viz.*, the legislative and the executive and thus in effect annexes to the judicial branch a quasi legislative function akin to that which the Constitution itself has annexed to the executive by the veto power. That no such direct participation of the judicial department in what is essentially an incident of the law-making power, *viz.*, the observance of constitutional limita-

23. Booth v. McGuinness, 78 N.J.L. 346, 75 Atl. 455 (E. & A. 1910).

tions, was contemplated by the framers of the Constitution, is conclusively shown by the fact that no such provision was made by the Constitution. If such participation, which amounts to a control equal in efficiency to the veto power conferred upon the executive, had been intended to be conferred upon the judiciary, it is incredible that a provision of such magnitude would not have received a like mention. As a matter of common knowledge, in 99 cases out of 100, or even in a larger proportion, the laws enacted by the Legislature derive their entire validity as constitutional enactments solely from the source where the Constitution itself has placed the determination of constitutional observance as an incident of the lawmaking power, *viz.*, with the legislative and executive departments. No way is provided by the Constitution, or even remotely suggested, by which the validity of such determinations *may be either anticipated or postponed or held in abeyance* until the result of a judicial participation can be heard from. In the vast majority of cases, the judicial judgment is never invoked."

Chief Justice Gummere looked at the hard practicalities of the matter, and found that of the 2400 and more Acts of the Legislature passed in New Jersey during the years 1897 to 1907, less than 400 had received judicial consideration and that the remaining 2000 upon the statute books are accepted and enforced as the law of the land.

He also considered the gross injustice that does follow where the citizen is required to examine and determine, at his peril, the validity of acts of officers which have been appointed as a result of duly enacted law. The case of *Flaucher v. City of Camden,* he cited as a "pregnant" example of such injustice. The facts in that case were that the defendant had been tried and convicted in the Police Court of the City of Camden for

selling liquor without a license. His defense was that he held a license from the County Board of License Commissioners. On writ of error this conviction was affirmed by the Supreme Court on the ground that the statute creating the County Board of License Commissioners was unconstitutional as had already been determined in a *quo warranto* proceeding brought against the members of the Board.[24]

Perceive the injustice of this situation. The Legislature had enacted a general law which made unlicensed sales of intoxicating liquor a criminal offense but legalized such sales when made by a person holding a license, and then by subsequent law the Legislature created this County Board of License Commissioners as the proper authority to grant such licenses in the County of Camden.

Thereafter, Flaucher applied for and received from this authority the very license which the general law required to legalize the sale of liquors at his saloon, and at that time, the law creating that Board stood upon the statute books apparently as valid and as much entitled to respect and obedience as the law which prohibited the sale of his liquor without a license. He scrupulously obeyed the law, and yet, by judicial action, was made a criminal for his obedience.

The much maligned founding fathers saw fit to include in the fundamental law of the land a provision that the legislature should not enact an *ex post facto* law. Such a decision, in its operation and effect, is, as Chief Justice Gummere pointed out, as much *ex post facto* as any law which makes criminal an antecedent act lawful at the time it was done.

This decision of *Lang v. Bayonne* has received wide recognition throughout the country and has been cited by approval, in so far as our examination discloses, by most of the jurisdic-

24. Loucks v. Bradshaw, 56 N.J.L. 1, 27 Atl. 939 (1893)

tions that refused to follow the doctrine of *Norton v. Shelby County.*[25]

The cases listed below antedated *Lang v. Bayonne* and held to the same doctrine.[26]

It is significant that Chief Justice Gummere in writing the opinion in the *Lang* case, saw fit to ignore the line of cases, already extant, supporting his view. He chose, rather, to rest his decision in the logic which he clearly perceived required a repudiation of the doctrine enunciated in *Norton v. Shelby Co.*

State v. Gardner (supra), decided by the Ohio court in 1896, might well have admirably served his purpose. The court, in that case, which involved an indictment for bribery, stated:

> "We are not required to find a name by which officers are to be known who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called '*de facto* officers'. They actually performed official acts authorized by a statute solemnly enacted by the lawmaking department of the government. Such a statute is presumed to be constitutional. The unbroken current of authority supports this proposition. Courts, in the practical administration of

25. Wendt v. Berry, 157 S.W. 1115, Court of Appeals, Kentucky, 1913; Nagel v. Bosworth, et al., 147 S.W. 940, Court of Appeals, Kentucky, 1912; Gildemeister v. Lindsay et. al., 180 N.W. 633, S. C. of Mich. 1920; State *ex. rel.* Bales v. Bailey, 118 N.W. 676, S. C. Minn. 1908; State v. Poulin, 105 Me. 224, 74 Atl. 119, Maine 1909; State *ex. inf.* Evans v. Holman, 144 Pac. 429, S. C. of Oregon 1914; Beaver v. Hall et. al., 217 S.W. 649, S. C. of Tenn. 1920; City of Albuquerque v. Water Supply Co., 174 Pac. 217, S. C. of N. Mexico, 1918; Texas Co. v. State, 254 Pac. 1060, S. C. of Arizona; Michigan City v. Brossman, 11 N.E. (2d) 538, Ap. Ct. of Ind. 1937.

26. Donough et. al. v. Hollister et. al., 46 N.W. 782, S. C. of Mich. 1890; Burt v. Winona & St. Paul R.R. Co., 18 N.W. 285, S. C. of Minn. 1884; State v. Gardner, 42 N.E. 999, S. C. of Ohio, 1896; Riley v. Township of Garfield et. al., 49 Pac. 85, S. C. of Kansas, 1897.

justice, should regard the substance of things, and deal with conditions as they actually exist."

In an able concurring opinion, Mr. Justice Spear put it this way:

> "All legislative authority is vested in our general assembly. That body enacts the laws. It is just as much its duty to observe the constitution as it is the duty of any other branch of the government. * * * To say, then, that a statute which, by all presumptions, is valid and constitutional until set aside as invalid by judicial authority, cannot, in the meantime, confer any right, impose any duty, afford any protection, but is as inoperative as though it had never been passed, is at least startling. To say that a statute which purports to create a constitutional office, duly enacted by our general assembly, and duly promulgated, enjoins no duty of respect or obedience by the people, and affords no corresponding right or protection, and that all who undertake to enforce its demands do so at their peril, and at the risk of being deemed trespassers and usurpers in case it shall be finally decided to be unconstitutional, by a bare majority, perhaps, of the court of last resort, no matter what public necessities existed for its enforcement, nor what public approval and acquiesence there may have been, nor for how long a term of years, and no matter how many holdings of intermediate courts there may have been sustaining its constitutionality, is to invite riot, turmoil and chaos. It is not the law in Ohio."

Three notably well reasoned cases, since the *Lang* case, have warmly embraced the reasoning of Chief Justice Gummere. These are the Kentucky decision in *Wendt v. Berry*

(supra), the Maine case of *State v. Poulin* (supra), and the Indiana case of *Michigan City v. Brossman* (supra). One is tempted to quote from all of these cases, but the limits of this article require us to content ourselves with the following excerpt from the case of *Wendt v. Berry* (supra):

> "Acts of the Legislature are presumed to be valid until declared void by the courts. The people generally and rightfully so regard them. The power and authority of public officers who exercise the duties of office under legislative enactments is recognized by all persons with whom they have dealings in their official capacity, and the public good imperatively demands that validity should be given to the acts of these officers when they are performing duties within the scope of their public authority. If individuals dealing with public officers might in every instance question their authority or deny their right to exercise the office until the courts of last resort had given sanction of their approval to the validity of the legislation under which the office was established, the conduct of public affairs would be involved in interminable confusion and doubt. No person would feel secure either in his personal or his private rights. Confusion and uncertainty would attend every official act that was performed. Such a condition as this would be disastrous to the peace and welfare of society. It would encourage the lawless to persist in their offenses and make difficult the just enforcement of the law, as persons charged with this duty and willing to exercise it would always be apprehensive of their right to do so."

Both the Maine case and the Indiana case agreed with Chief Justice Gummere, that Justice Butler intended to, and

indeed did support the principle laid down in the *Lang v. Bayonne* case.

Whether considered on the broad constitutional ground, so forcefully presented in this line of cases, or on the narrower ground of public policy, it would seem that the decision in the *Lang v. Bayonne* case was unassailable, were it not for the disturbing and perplexing opinion reached by the Court of Errors and Appeals of New Jersey, by a unanimous court, respecting the issues in the case of *Hyman v. Long Branch Kennel Club, Inc.*[27]

The facts in this case were that in a *qui tam* action, the plaintiff sued to recover as a common informer the penalty prescribed by the Gambling Act of 1877. The defendant had, pursuant to the authority of a license issued him by the State Racing Commission, as provided by Ch. 179 of the laws of 1934, operated a dog racing establishment. In defense, he pleaded the Act of 1933 which repealed the Act of 1877, and the above cited Act of 1934, legalizing and providing for the licensing of dog racing. At the time the defendant committed the acts of conducting the racing establishment, the statutes of 1933 and 1934 had not been declared unconstitutional. The trial court, relying upon *Lang v. Bayonne,* refused to permit the plaintiff to recover in his *qui tam* action, but this decision was reversed by the Court of Errors and Appeals.

In this reversal, certain statements made by the court require careful examination. The trial court, we think unfortunately, elected to take as the basis of its decision, a quotation from Chief Justice Butler's decision in the case of *State v. Carroll* which Justice Gummere had cited, to wit:

"Every law of the legislature, however repugnant to

27. Hyman v. Long Branch Kennel Club, Inc., 13 N.J.Misc. 57, 176 Atl. 335 (S. C. 1934); 115 N.J.L. 123, 179 Atl. 105 (E. & A.) decided 1935.

> the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but must be received and obeyed, as to all intents and purposes as law, until questioned in and set aside by the courts."

Those were not the words of Chief Justice Gummere, and while the court stated they were cited by him with approval, he did not express his approval. It may well be conceded that the second sentence of that quotation is too broad. It does not coincide with Chief Justice Gummere's conclusion, which he expressed thus:

> "In my judgment, the same public policy which requires obedience from the citizen to the provisions of a public statute which creates a municipality and provides for its government, even though unconstitutional, so long as it has not received judicial condemnation, equally *justifies* his obedience to every other law which the Legislature has been fit to enact, until such has been judicially declared to be invalid,"

and therefore, he reached the conclusion with respect to the validity of the acts of the Commissioners hereinbefore cited. It is to be noted that he did not say "requires his obedience" as did Chief Justice Butler, but that he did say "justifies his obedience".

We think, therefore, that the court in *Hyman v. Long Branch Kennel Club* need not have said that, "So far as that decision 'purports' to intimate that the citizen is not entitled to raise the point of unconstitutionality in assertion * * * we cannot follow him," because, as we read the decision, Chief

Justice Gummere did not say and did not intend to intimate any such proposition. Nor can we agree with the court in the *Hyman* case when it says, "All that was involved in actual decision was the validity of acts of a *de facto* officer under a statute subsequently declared unconstitutional. *The rest was obiter*".

The "rest," as we view it, so far from being obiter, was the very foundation of the decision. Chief Justice Gummere took particular pains to rest his reasoning upon the broad fundamental ground that acts of the Legislature, until declared unconstitutional, were entitled to the status of law, and that citizens acting pursuant to them were entitled to their protection. He took particular pains to repudiate the doctrine in *Norton v. Shelby County* on this express ground. If, therefore, you cut away his major premise, it is difficult to see how his conclusion could have been reached.

Moreover, he also took care expressly to repudiate the doctrine that had been promulgated in the case of *Flaucher v. City of Camden*. It would be difficult, offhand, to find two cases more nearly parallel than the *Flaucher* case and the case of *Hyman v. Long Branch Kennel Club, Inc.*, except that in the latter case we not only had a *de jure* office (State Racing Commission) whose validity was not called in question, but we had *de jure* officers acting to do that which the statute expressly authorized them to do, namely, to issue licenses for dog racing. It is apparent therefor that by a stronger reason, if we follow the logic of Chief Justice Gummere, the defendant in the latter case was entitled to the protection of the law as it stood on the books until declared unconstitutional, and it seems to us that it is apparent that the entire doctrine, as so carefully enunciated in the *Lang v. Bayonne* case has been destroyed by the reasoning in the *Hyman v. Long Branch Kennel Club* case.

It is for this reason that we shall watch with interest the decision of our Court of Errors and Appeals, when, and if, an

appeal is taken in the case of *Byrnes et. al. v. Boulevard Commissioners of Hudson County, et. al.* because that case will present an opportunity for the court again to examine the validity of the reasoning upon which the decision in *Lang v. Bayonne* rested.

Until a court shall present logical reasons to controvert the fundamental philosophy respecting the courts' function in declaring acts unconstitutional as enunciated in *Booth v. McGuinness,* supra, *Allison v. Corker,* supra, and *Lang v. Bayonne,* supra; until a court shall find logical argument for failing to extend the public policy doctrine, as applied to municipalities, to other acts of the Legislature in which the rights of citizens are involved who act pursuant thereto before such an act is declared unconstitutional; until a court shall find an answer to the indisputable fact that its act is as much *ex post facto* as the act of the Legislature would have been had it attempted retroactively to make that criminal which, when done, was free from criminality, we adhere to the belief that in a democracy given over to three independent branches of government, an act of the Legislature should have the force of law until declared unconstitutional by the courts, and that a citizen, acting pursuant to it, should be protected in his acts, and that therefore, the acts of officers occupying offices created by a duly enacted law, even though unconstitutional, until so declared, are the acts of *de facto* officers and so valid.

GEORGE S. HARRIS.