ment on demurrer does not go to the merits, the judgment is not *res judicata.*[13] The courts, in applying the doctrine of *res judicata* to directed verdicts,[14] demurrers, and judgments on the pleadings,[15] are extending the doctrine to issues of law decided by the courts without the aid of a jury. In all cases the courts stress the requirement that the judgment must be on the merits.

The cases indicate that the decision in the case under consideration should be given careful scrutiny and study. The issue cannot be brushed aside as easily as the court indicates because of the existent differences of opinion on the point.

Statutes—Invalidity of Amendatory Act as Affecting Act Amended.—In 1936 the New Jersey legislature passed an act exempting from taxation the property of all fraternal organizations or lodges.[1] This was amended in 1937, at the request of the City of New Brunswick, to remove the property of college fraternities from the exemption.[2] Plaintiff, a college fraternity claiming immunity under the 1936 act, appealed a judgment of the State Board of Tax Appeals, affirming an assessment upon its property by the defendant. The Supreme Court, by a vote of two to one, set aside the assessment, holding that plaintiff was a fraternal organization within the purview of the law, and that the 1937 amendment was unconstitutional as special legislation. The court declared that the amendment, being invalid, was as if it had never been passed. On

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dered upon proof," Brooks v. Arkansas-Louisiana Pipe Line Co. (C.C.A. 8 1935), 77 F. 2d 965, at page 968.

13. Brown v. Carpenter, 109 N.J.Eq. 208, 156 A. 471 (E. & A. 1931).

14. Mauyalis v. Philadelphia and Reading Coal and Iron Co. (C.C.A. 6 1920), 270 F. 93; McCown v. Muldron, 91 S.C. 523, 71 S.E. 386 (1912).

15. "There can be no doubt that a decision of the case on the pleadings may be as effective a bar as one on testimony." Fledderman v. Fledderman, 112 Md. 226, 76 A. 85 (1910); 38 Yale Law Journal 299.

1. Chap. 46, P.L. 1936.

2. Chap. 170, P.L. 1937.

appeal to the Court of Errors and Appeals: *Held*: *Affirmed* on the opinion below. *Alpha Rho Alumni Association v. City of New Brunswick et al.*, 127 N.J.L. 232, 21 A. 2d 737 (E. & A. 1940).

Has the Court by this decision overruled the case of *Crater v. County of Somerset*,[3] insofar as it concerns the question of the effect of an unconstitutional amendment upon a prior valid statute? The *Crater* case involved two statutes: one of 1927 regulating the salaries of county clerks, and making them variable with county populations;[4] and another of 1931 providing that the census of 1930 should not operate to increase or decrease the salaries of county officers.[5] The Court denied plaintiff's suit for the scheduled increase, holding the constitutionality of the 1931 statute to be immaterial. If it were constitutional, plaintiff could not recover; and if it were not, it was so closely connected with the earlier act that its invalidity destroyed that legislation. The two statutes were *in pari materia,* and combined to set up by legislative intent an appropriate scheme of compensation which must stand or fall as a whole. The Court evaded the distasteful problem of deciding on the constitutionality of the statutes and simply held that plaintiff could not recover.

However, a careful comparison of the opinions delivered in the *Alpha Rho* and *Crater* cases reveals that they can be substantially differentiated on the facts. The fraternity case involved the relationship between an obviously unconstitutional amendment and an earlier valid statute which it sought to affect. But the *Crater* case, on the other hand, involved the peculiar situation of two statutes, each of which by itself was admitted by the parties to be inherently constitutional but which, when construed together, might produce an unconstitutional result. Plaintiff claimed that by its incorporation into the 1927 act, the 1931 statute (suspending application of the 1930 census) would rob the earlier act of its constitutional generality in that the classification of counties by population would rest upon a distinction that had become illusory. On these bases it would seem that the *Crater* opinion was justified in holding that the two statutes must stand or fall together.

3. 123 N.J.L. 407, 8 A. 2d 69 (E. & A. 1939).
4. Chap. 204, P.L. 1927.
5. Chap. 271, P.L. 1931.

Aside from strict adherence to the decision upon the merits of the case, it must be admitted that the *Crater* opinion does contain dicta that might be interpreted as supporting the proposition that subsequent invalid legislation might cause the downfall of an earlier valid law. At one point it is said that, assuming the 1931 statute to be unconstitutional, "there is no statutory authority for the payment of the compensation sought to be received here."[6] This statement would imply that the 1927 law must fall, too, and such a decision could be based only upon the constitutional principle stated above. In this, the *Crater* opinion apparently subscribed to the general doctrine that all enactments *in pari materia* are parts of a unified whole which, as regards constitutionality, must stand or fall in its entirety.

That this interpretation of the *Crater* case was intended is evidenced by the fact that Justice Heher, who delivered the majority opinion in that case, cited it as authority for his lone dissent in the *Alpha Rho* case. But there he applied it to the relation between an earlier valid statute and an unconstitutional amendment. While Justice Heher reached what would seem to be the proper decision in the *Crater* case, it is difficult to see how he can apply exactly the same reasoning to a different set of facts. If this be the interpretation he intended, then the *Alpha Rho* decision does, in effect, deny the validity of his reasoning.

The authorities are unanimously behind the *Alpha Rho* decision and against Justice Heher's dissent. The general rule has long been established, subject to some modifications,[7] that when a statute is adjudged to be unconstitutional, it is as if it had never been.[8] Therefore, the

6. Crater v. County of Somerset, *supra*, note 3.

7. In New Jersey and Maine it has been held that an invalid act of the legislature, until it has received judicial condemnation, is binding upon a citizen. Lang v. Bayonne, 74 N.J.L. 455, 68 A. 90 (E. & A. 1907); State v. Poulin, 105 Me. 224, 74 A. 119 (1909). And several states have held that one holding office under a statute later adjudged invalid is an officer *de facto*, and his acts as such are valid as to the public. Lang v. Bayonne, *supra;* Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89 (1870); State v. Poulin, *supra;* State v. Gardner, 54 Ohio St. 24, 42 N.E. 999 (1896).

8. Central R.R. Co. v. State Board of Assessors, 75 N.J.L. 771, 69 A. 239 (E. & A. 1908); Rutten v. Paterson, 73 N.J.L. 467, 64 A. 573

subsequent adoption of an amendatory act which is in legal effect a nullity cannot in any way affect the validity of the original act sought to be amended.[9] Justice Heher in the *Crater* case cited no authority for his unique position and exhaustive research discloses none; he made no effort to overrule earlier contrary decisions in this state.[10] The fact that the majority opinion in the *Alpha Rho* case relies in part upon *Central R.R. Co. v. St. Board of Assessors*[11] would seem to indicate that it is still considered as sound New Jersey law. There, in facts quite similar to the fraternity case, the Court held that a void supplement could not operate to destroy the original act.

The *Crater* opinion placed great emphasis on legislative intent as the controlling factor in construing statutes together. It quoted established authority to the effect that, while the general rule was that a repealing clause in an unconstitutional act is considered as merely incidental and, therefore, falls with the void act of which it is a part, the question is always one of legislative intention.[12] This rule was not pertinent to the *Crater* case since, obviously, no repeal clause was involved there. But the amendment held unconstitutional in the *Alpha Rho* case did contain a general provision for the repeal of all acts or parts of acts

(S. Ct. 1906); Norton v. Shelby County, 118 U.S. 425, 6 S. Ct. 1121, 30 L. ed. 178 (1885); Hammond v. Clark, 136 Ga. 313, 71 S.E. 479 (1911) People *ex. rel.* Farrington v. Mensching, 187 N.Y. 8, 79 N.E. 884 (1907); Thomas v. State, 76 Ohio St. 341, 61 S.E. 61 (1908).

9. *Ex parte* Davis, 21 Fed. 396 (1884); Eberle v. Michigan, 232 U.S. 700, 34 S. Ct. 464, 58 L. ed. 803 (1913); Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. ed. 254 (1921); Frost v. Corporation Commission, 278 U.S. 515, 49 S. Ct. 235, 73 L. ed. 483 (1928); Clark v. Reynolds, 136 Ga. 817, 72 S.E. 254 (1911); Crowe v. Board of Commissioners, 210 Ind. 404, 3 N.E. 2d 76 (1930); Williams v. State, 81 N.H. 341, 125 A. 661 (1936); People *ex. rel.* Farrington v. Mensching, *supra,* note 8; 25 R.C.L. 906, n. 15; 66 A.L.R. 1483; 102 A.L.R. 802; 59 C.J. 886, n. 89.

10. Virtue v. Freeholders of Essex, 67 N.J.L. 139, 50 A. 360 (S. Ct. 1901); Central R.R. Co. v. State Board of Assessors, *supra,* note 8; State v. Bailey, 3 N.J.Misc. 297, 128 A. 389 (S. Ct. 1925); Eager v. Hackensack, 15 N.J.Misc. 371, 191 A. 555 (S. Ct. 1937), *aff'd* 110 N.J.L. 430, 196 A. 739 (E. & A. 1938); Baldwin v. Moskowitz, 15 N.J.Misc. 438, 192 A. 339 (Hudson Circ. Ct. 1938).

11. *Supra,* note 8.

12. 102 A.L.R. 802; 11 Amer. Juris. 841; 59 C.J. 939.

inconsistent with the substitutional statute.[13] However, there is no difficulty with the aforementioned rule in the *Alpha Rho* case. A repeal based on inconsistency cannot be supported where, by reason of the invalidity of the substitutional act, no inconsistency could arise.[14] A law cannot be inconsistent with a nullity.

Thus, if we are correct in our finely-drawn factual distinction between the *Crater* and *Alpha Rho* cases, we cannot fairly say that the latter overrules the former. The authorities unanimously affirm the *Alpha Rho* result, and we believe that, on the basis of its peculiar statutory situation, the *Crater* decision is also proper, except that it might have proceeded to the logical conclusion of passing upon the constitutionality of the laws under consideration. However, failure to do so can be ascribed to the judicial practice of avoiding constitutional decisions where possible.

But once we look behind the *Crater* decision into the general reasoning of the opinion as Justice Heher in his later dissent admits he intended it, we must conclude that it is unsound and unauthoritative, and denied by the *Alpha Rho* decision and opinion. However, controlling law is found not in speculative dicta, but in decisions based upon stated factual situations. Therefore, we conclude that the universal rule that an unconstitutional amendment can have no effect upon the status of a prior valid statute has never been changed and still remains good law in New Jersey.

Specific Performance—Contracts to Lend Money.—C, through an intermediary, X, negotiated a construction loan from D, giving a mortgage as security. The loan was to be advanced in three installments as construction progressed. C received the first installment when due, but not the second, as X, who had received the checks for both installments

13. Chap. 170, P.L. 1937.

14. AMER. & ENG. ENCYC. OF LAW, Vol. 26, p. 716-717; Campau v. Detroit, 14 Mich. 276 (1906).