ATENEO LAW JOURNAL

Published four times during the academic year by Ateneo Law Students

DEDICATED TO OUR LADY, SEAT OF WISDOM

NOTE

THE DE FACTO OFFICER IN PHILIPPINE LAW

*Santiago Ranada, Jr.**

PART I

A. *Definition*

An officer de facto is one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law.[1] He must have acted as an officer for such length of time, under color of title and under such circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election and induce people, without inquiry, and relying on the supposition that he is the officer he purports to be, to submit to or invoke his action.[2]

A most comprehensive definition is the one given in the case of *Cumigad v. Soriano*:[3]

> An officer "de facto"[4] 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:
>
> First.—Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action supposing him to be the officer he assumed to be;

* LL.B., Ateneo de Manila, 1959.

[1] MECHEM, PUBLIC OFFICERS § 212.

[2] Torres v. Ribo, 45 O. F. 5390 (1948).

[3] 55 O. G. 1952 (1958). See also Luna v. Rodriguez, 37 Phil. 186 (1917).

[4] Our Supreme Court has had several occasions to define a de facto officer as specially applied to judicial officers. Thus, in **Luna v. Rodriguez, supra**, a judge de facto was defined as an officer who is not fully invested with all the powers and duties conceded to judges, but is exercising the office of judge under some color of right. And, in **Tayko v. Capistrano**, 53 Phil. 866 (1928), it was ruled that a de facto judge is, briefly stated, one who exercises the duties of a judicial office under color of appointment or election thereto.

Second.—Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like;

Third.—Under color of a known appointment or election, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public;[5]

Fourth.—Under color of an election or an appointment by or pursuant to a public, unconstitutional law before the same is adjudged to be such.

B. *Distinctions*

1. *De Jure Officer.*—A distinction of importance must be drawn between an officer de facto and one de jure. An officer de jure may be said to be one who is in all respects legally appointed and qualified to exercise the office.[6] One distinction therefore between an officer de facto and one de jure is that while the former has only color of an appointment or election to the office, the latter is in all respects legally appointed or elected and qualified to exercise the office, and has a complete legal title to the office as against the whole world. The authority of a de jure officer rests on right, while that of a de facto officer rests on reputation. Another distinction is that an officer de facto may be removed from office in a proceeding instituted directly for that purpose, while an officer de jure may not be so removed.[7]

2. *A Mere Usurper.*—Generally, the distinction between an officer de facto and a usurper or intruder is that the former has color of right or title to the office, while the latter has none. Sometimes, it is said that it is color of authority, rather than color of title, which distinguishes an officer de facto from a usurper.[8] Thus, a judge who has ceased to be so and was, at the time his opinion was rendered or promulgated, actually in the exercise of another office outside of the judicial department, which he had accepted and upon the performance of the duties of which he had duly entered,[9] and another whose term of office has terminated and had ceased to act as judge, his successor having qualified,[10] have been held de facto

[5] This classification has found application in two Philippine cases: In **Cumigad v. Soriano,** 55 O. G. 1052 (1958), the petitioner was declared a de facto officer because the resolution of the municipal council creating the office was neither approved nor disapproved by the provincial board; and in **Rodriguez v. Tan,** G. R. No. L-3913, August 7, 1952, the defendant was declared to be a de facto officer on the reasoning that the frauds and irregularities perpetrated in the 1947 elections constituted a defect in the exercise of the right to elect.

[6] 22 R. C. L. 591.

[7] 67 C. J. S. 107.

[8] 67 C. J. S. 108.

[9] Luna v. Rodriguez, **supra** note 3.

[10] Garchitorena v. Crescini, 37 Phil. 675 (1918).

officers under Philippine law. He (de facto judge) differs from a mere usurper who undertakes to act officially without any color of right.[11]

A usurper or intruder has been defined as one who has intruded upon the office and assumed to exercise its functions without either the lawful title or the color of right to it. His acts, therefore, are entirely void. He may, however, grow into an officer de facto if his assumption to office is acquiesced in.[12] Apparently, therefore, the main distinction between an officer de facto and a mere usurper is that whereas in the former the assumption of office is acquiesced in, in the latter there is no such acquiescence.

C. *Rationale of the De Facto Doctrine*

The de facto doctrine was ingrafted upon the law as a matter of policy and necessity, to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. It was seen that it would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor the opportunity to investigate the title of the incumbent.[13] Thus, in the leading case of *Tayko v. Capistrano,*[13a] the Supreme Court declared that the principle is one founded in policy and convenience, for the right of one claiming title or interest under or through the proceedings of an officer having an apparent authority to act would not be safe, if it were necessary in every case to examine the legality of the title of the officer up to its original source, and the title or interest of such person were held to be invalidated by some accidental defect or flaw in the appointment, election or qualification of such officer, or in the rights of those from whom his appointment or election emanated.

Citing from both American and Spanish laws, our Supreme Court, in another case[14] involving the authority of a judge, stated the rationale of the doctrine thus: It is universally professed doctrine that the acts of judges considered such by common error, whether there be color or title or not.... are valid and effective in favor of the public welfare. This, according to the phrase of one law, is the most humane course, one which can injure no one, and brings no discredit upon the administration of justice.

In American Law, there can be cited the decision of the Supreme Court of the United States in the case of *Norton v. Shelby County.*[14a]

[11] Tayko v. Capistrano, **supra** note 4.

[12] MECHEM, **op. cit. supra** note 1, at 321.

[13] 43 Am. Jur. 224-225.

[13a] **Supra** note 4.

[14] U.S. v. Abalos, 1 Phil. 73 (1901).

[14a] 118 U.S. 425 (1886).

In Spanish law, law 4, title 4 of the third *Partida*, in which is reproduced the famous law of *Barbarius Philippus* of the Roman Digest, treats of the acts of a slave who had been invested with judicial authority, it not being known that he was in slavery; in such case as this, declares the law, "the judgments and orders and all other things done by virtue of his office, until the day it was discovered he was a slave, would be valid. And this the ancient sages thought just, because when a whole people commit an error it should be overlooked by all of them, as though it had never happened." The fifth law, first title of Book XI of the *Novisima Recopilacion*, concerning the same case, declares "that the judgments and orders and all other things done by virtue of his office as judge were valid up to the day he was discovered to be a slave since by common error he was regarded as free."

But it should be noted that the legal doctrine as to de facto officers rests on the principle of protection to the interests of the public and third parties, and not on the rights of rival claimants. The law validates the acts of de facto officers on the ground that, though not officers de jure, they are in fact officers whose acts public policy requires should be considered valid.[15]

D. *Title of Officer De Facto, How Questioned*

It is well settled in Philippine jurisprudence that the title to the office of a judge whether de jure or de facto, can only be determined in a quo warranto proceeding and cannot be tested by prohibition.[16] However, in the case of *Nacionalista Party v. Bautista*,[17] our Supreme Court departed from the foregoing rule and held that, in exceptional cases, prohibition would lie to question the title of a de facto officer. In that case, the Nacionalista Party and others petitioned for the issuance of a writ of prohibition commanding the respondent Solicitor General to desist forever from acting as member of the Commission on Elections under the designation rendered him by President Elpidio Quirino on November 9, 1949, unless he be legally appointed as regular member of said Commission on Elections. The court granted the writ prayed for, reasoning out that since no one is entitled to the office, there is no party who in his name may institute quo warranto proceedings, and since the respondent is the only other party who may institute the proceedings in the name of the Republic of the Philippines and would not proceed against himself, therefore, the remedy of a writ of prohibition should be allowed.

Similarly, although the writ of mandamus may not be used to try the title to a public office, there is no principle of law which prevents the issuance of this writ where it becomes necessary to pass on the question as

[15] 22 R. C. L. 589.
[16] Tayko v. Capistrano, **supra** note 4.
[17] 47 O. G. 2356 (1949).

to who is the de facto incumbent of an office, the title to which is in dispute, since, in deciding such question, the court need go no further than to determine which claimant is acting under color of authority, but the substantial right to the office.[18] But the writ will be denied where it appears that the person in possession of the books, records, etc. has color of title to the office, as in such case the title to the office is directly and unavoidably in controversy. Accordingly, it has been held that the question as to who is the de facto mayor of a city, whose orders are to be obeyed by the disbursing officers, may be determined in a mandamus proceeding against the latter to compel payment of a salary under an order of one of the rival claimants to the office, where there is no other adequate and available remedy to relieve the situation.[19]

Though the foregoing are American jurisprudence, they are inserted here in order to give us a view as to what action our Supreme Court will most probably take, should similar circumstances and questions be presented before it.

PART II

A. *Requisites for the De Facto Officer*

According to Justice Concepcion in his dissenting opinion in the case of *Salaysay v. Castro*,[20] the status of a de facto officer requires the concurrence of the following conditions, to wit:

(a) There must be a de jure office;
(b) There must be actual possession of the office; and
(c) This must be coupled with color of title.

Regular texts on Administrative Law and Public Officers give a more detailed enumeration, to wit:

(a) There must be an office de jure;
(b) There must be color of right or general acquiescence by the public;
(c) There must be actual physical possession of the office in good faith.[21]

1. *There Must Be an Office De Jure*

Any discussion on this matter will necessarily involve the controversy on whether or not an unconstitutional law is inoperative as though it had never been passed. There is an irreconcilable conflict of authority on the proposition as to whether or not it is possible to have a de facto officer in the absence of any de jure office. One line of cases holds that where an office is provided for by an unconstitutional statute, the incumbent, for

[18] 22 R .C. L. 501. See also Nacionalista Party v. Bautista, **supra**.
[19] 22 R. C. L. 592.
[20] 52 O. G. 809 (1956).
[21] Carreon, Adm. Law, Pub. Off. & Elections 256. See also MARTIN, POLITICAL LAW REVIEWER 762 (1958 rev. ed.).

the sake of public policy and the protection of private rights, will be recognized as an officer de facto until the unconstitutionality of the act has been judicially determined. This view recognizes the possibility of there being a de facto officer, though no de jure office exists, and that a person may be a de facto officer although the act creating the office is unconstitutional. It has been pointed out that public policy 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, and that the same public policy should justify his obedience to every other law which the legislature has seen fit to enact until such law has been judicially declared to be invalid. And it is obvious that 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 the 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. On the other hand, according to many authorities, the appointment or election of one to an office that has no legal existence gives no color of existence to the office or color of authority to the person so appointed or elected. In other words, there can be no such thing as a de facto office and in all cases there must be an office de jure in order that there may be an officer de facto. It has been asserted that the reasons which require the acts of a de facto officer to be upheld as far as the rights of the public and third persons are concerned, do not apply to support the necessity of recognizing an office as existing de facto. Such an office not having been created and not having been adopted into the organized system of government, its displacement does not disturb the harmony of the organization. An office attempted to be created by an unconstitutional law under this view has no existence, and is without any validity; and any person attempting to fill such a pretended office, whether by appointment or otherwise, is a usurper, whose acts are absolutely null and void.[22] There are some cases which hold that the existence of a de jure office is a condition of a de facto officer, but hold that the condition is satisfied if there is a de jure office of the general character of that which the incumbent assumed to fill, although there was none at the particular time and place in question.[23]

In Philippine jurisprudence, it is clear from the case of *Government v. Springer*[24] that the orthodox view that an unconstitutional law is as inoperative as though it had never been passed is followed. In this case, proceedings for *quo warranto* were instituted against the respondents Springer, Costas and Hilario to test their right to the offices to which they consi-

[22] 43 Am. Jur. 228-229.
[23] 22 R. C. L. 593.
[24] 50 Phil. 259 (1927).

dered themselves entitled. Respondents were elected dirctors of the National Coal Company by the legislative members of the committee created by Acts Nos. 2705 and 2822. The purpose of the proceeding was to test the validity of Section 4 of Act No. 2705, as amended by Section 2 of Act No. 2822, which provides that "the voting powers of all such stocks (in the the National Coal Company) owned by the Government of the Philippine Islands shall be vested exclusively in a committee consisting of the Governor-General, the President of the Senate and the Speaker of the House of Representatives." Counsel for the defendants contended that inasmuch as the President of the Senate and the Speaker of the House of Representatives were at least de facto officers, their right to act as members of the voting committee cannot be collaterally attacked. Our Supreme Court, after declaring unconstitutional and void such parts of the aforementioned acts as purport to vest the voting power of the government-owned National Coal Company in the two (2) above-mentioned legislative officers, proceeded to state that *although there may be a de facto officer in a de jure office, there cannot be a de facto officer in a de facto office.* Quoting from the case of Norton v. Shelby County,[25] the court added that there is no such thing as a de facto office under an unconstitutional law.

This doctrine found application in the case of *U.S. v. Abalos*,[25a] wherein the judge was declared to be de facto and not a mere usurper because, among other things, there was a de jure office, which was the new court which succeeded to the jurisdiction of that presided over by him.

At this point, let it be reiterated that the principle enunciated in the *Springer* case is still the law on the matter, as the Supreme Court has not as yet had any occasion to abandon or modify its holding therein. However, in line with the modern tendency towards a more liberal application of the De Facto Doctrine, the Court of Appeals in the recent case of *Cumigad v. Soriano, supra*, held that the existence of a de jure office is not always required for the existence of a de facto officer. In the words of the Court itself: While there is a conflict of authority as to whether or not there can be a de facto officer in the absence of a de jure office, we are of the opinion that under the facts obtaining in the present case it is more in consonance with law to hold that the petitioner was a de facto officer although the resolution creating the position of deputy chief of police is still pending approval by the provincial board.

2. *There Must Be Color of Title or General Recognition or Reputation*

From a reading of the authorities, it would appear that color of title may be based either on: first, a definite election or appointment; second, general recognition and reputation which, in turn, may arise from a de-

[25] 118 U.S. 425 (1886).
[25a] **Supra** note 14.

fective election or appointment,[26] or from a mere performance of the duties of the office for a sufficient length of time,[27] or from common error.[28] A third basis for color of title may be the holding over after the term of office has expired.[29] At this point, we realize the exactness of the third requisite for a de facto officer as given by Justice Concepcion in the case of *Salaysay v. Castro, supra.* Whereas Philippine textbooks, quoting from American authorities, state as a requisite color of title *or* general recognition and reputation (or general acquiescence by the public)[30] only color of title is enumerated in the Salaysay case and this is most exact because general recognition and reputation is nothing but one of the bases of color of title.

American Jurisprudence[31] is most enlightening on the matter of "color of title." We find that it is frequently said that a person is an officer de facto where he is in possession of an office and discharging its functions under color of authority or under color of title. By contrast a mere usurper is one who undertakes to act as an officer without any color of right. Although this color of authority may be acquired in various ways, by this term is generally meant authority derived from a definite election or appointment, however irregular or informal. Hence, the phrases "color of election" and "color of appointment" are also used to indicate the element of color of title required to establish that a particular person is a de facto officer. While expressions are found in several cases to the effect that there must be colorable appointment or election to the office to constitute the person acting as a de facto officer, the better opinion appears to be that this is not necessary, for one holding over after his term of office may be an officer de facto when not one de jure, and his color of authority may be based on his merely continuing to exercise the functions of his office.

That Philippine jurisprudence follows this line of thought is shown by the case of *U.S. v. Madamba.*[32] Here, the Supreme Court held that a municipal president who resigns his position in order to announce his candidacy for election, and who opportunely tenders his resignation in writing is, from the date of his resignation, and pending notice of acceptance, merely a de facto officer.[33]

Another source of color of title may be found in the general reputation that a particular person is the lawful incumbent of the office in question, although no election or appointment of such officer is known to have

[26] People v. Gabitanan, 43 O. G. 3207 (1947); Cumigad v. Soriano, **supra** note 5.
[27] People v. Penesa, 46 O. G (1s) 180 (1948).
[28] U. S. v. Abalos, **supra** note 14.
[29] U.S. v. Madamba, 18 Phil. 501 (1911); U.S. v. Abalos, **supra.** In **Tayko v. Capistrano, supra,** it is stated that when a judge in good faith remains in office after his title has ended, he is a de facto officer.
[30] See Carreon, **op. cit. supra** note 21, **ibid.**
[31] 43 Am. Jur. 230-231.
[32] 18 Phil. 501 (1911).
[33] See also U.S. v. Abalos, **supra,** where the color of authority of the de facto judge was based on his continuing to exercise the functions of his office.

taken place. Yet, a mere claim to be a public officer and exercise of the office will not constitute one an officer de facto. There must be at least a fair color of right or an acquiescence by the public in his official acts so long that he will be presumed to act as an officer either by right of election or appointment.

The case of *Torres v. Ribo*[34] is most directly in point. There, Torres, Ribo and another man were opposing candidates for provincial governor of Leyte in the general elections held on November 11, 1947. Ribo, then provincial governor, and two (2) members of the provincial board being candidates, were disqualified to compose the provincial board of canvassers of which they would have been under Section 158 of the Revised Election Code. Consequently, and pursuant to Section 159, the Commission on Elections, in a telegram to the provincial treasurer dated November 20, 1947, received on November 21, 1947, appointed the Division Superintendent of Schools, the District Engineer, and the District Health Officer to replace the disqualified members, with advice that they might assume office upon receipt of their appointments. But it happened that the Division Superintendent of Schools and the District Engineer were on that date on the west coast of Leyte and did not return to the capital until November 24, 1947. Thereupon, on November 22, 1947, the Provincial Treasurer, as chairman, the Provincial Fiscal, *an Assistant Civil Engineer in the District Engineer's Office, the Chief Clerk of the Office of the Division Superintendent of Schools,* and the Acting District Health Officer, as members, canvassed the votes for provincial governor and other officers, and proclaimed Ribo as Governor-elect. The assistant civil engineer and the chief clerk sat as members "representing the district engineer and the division superintendent of schools," respectively. Two days later, the provincial board of canvassers met again this time attended by the provincial treasurer, the district health officer, the division superintendent of schools, the district engineer and the provincial auditor. A new canvassing of votes was made and Ribo was again proclaimed elected. On appeal, the question arose as to whether the running of the period for filing the protest should be computed from November 22, or November 24, 1947. Counsel for the protestees contended that the period should be counted from November 22, 1947, alleging that the chief clerk and the assistant civil engineer were de facto officers and that therefore their acts should be given full effect and validity.

The Supreme Court held that the period should be computed from November 24, 1947, and declared that the two officers involved to be not de facto. After quoting Mechem's[35] definition of an officer de facto, the court proceeded to state that he (the officer de facto) must have acted as an officer for such length of time, under color of title and under such

[34] **Supra** note 2.
[35] MECHEM, **op. cit. supra** note 1, **ibid.**

circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, and induce people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action. Then the court made a sweeping statement, namely, that the assistant civil engineer and the chief clerk did not possess any of these conditions. It further declared that the two acted without appointment, commission or any color of title to the office, and there was no acquiescence, public or private, in the discharge of their positions. Then followed a significant statement: In fact, the very person most greatly affected by their assumption of office was not notified and was unaware of it.

The foregoing statements of the Court would naturally provoke some serious, discerning thoughts in the mind of a student of law, particularly of the law on public officers. First of all, did not the two officers involved possess at least one of the conditions referred to? That there was acquiescence is shown by the fact that the other members of the provincial board of canvassers willingly and knowingly sat and deliberated with them as their co-members. And with such acquiescence afforded the two by the hierarchy of provincial officials, and since the proceedings were of public notice and knowledge, could we not say that there was existent such amount of reputation as to afford a presumption of appointment?

Secondly, in the light of the facts and circumstances surrounding the case, can it be said with full accuracy that there was no color of title at all? This is closely connected with the first question because if it is admitted that there was acquiescence and reputation, then it can no longer be averred that there was no color of title at all. Interpreting the requirement of color of title liberally, the fact that the two officers were second in rank to the district engineer and the division superintendent of schools, respectively, sometimes performing both official and unofficial duties in representation of, or in the stead of their immediate superiors, could easily and logically give rise to a color of title in favor of the two.

Thirdly, is it required that before an officer may be considered de facto, the person most affected by the assumption of office be notified and be made aware of it? That it is so is clearly enunciated in this case. However, in no other case, either in Philippine or American jurisdiction is such requirement stated. The better and safer course, therefore, would be to adhere to the traditional threefold requirement as stated in the *Salaysay* case and in most Philippine textbooks on Political Law.

One of the bases for color of title is the holding over after the term of office has expired.[36] Thus, in the earliest case[37] involving a de facto officer, the defendant was convicted of grave assault. On appeal, the Solicitor General asked that the final judgment of the lower court be

[36] U.S. v. Abalos, **supra**; U.S. v. Madamba, **supra.**
[37] U.S. v. Abalos, **supra.**

annulled on the ground that the same was pronounced after the 16th of June, from which he inferred that it was rendered by one who was not a judge.

It appears from the facts that by virtue of Art. 65 of the law organizing courts of justice for the Philippine Islands, No. 136 of those promulgated by the legislative commission, the Courts of First Instance which then existed became extinguished by the substitution of those which that same act created. The latter was passed on June 11th and went into effect on June 16th.

Our Supreme Court held that a judge who in good faith continues to act and is recognized by common error after the abolition of his court by statute is deemed judge de facto of the new court which succeeds to the jurisdiction of that presided over by him, and the judgment pronounced by such judge de facto who is generally accepted and recognized by common error of the community is valid and subsisting. In this case, the term of office of the judge had already expired, but the Supreme Court noted that even if all the judges should have ceased to act on June 16th the fact was that almost all of them continued exercising their functions until the newly appointed judges arrived to take charge. The reason, according to the court, for this continuation was, as to some, due to ignorance of the new organization and as to others, the circumstance that, under previous laws which controlled the commencement and termination of the jurisdiction which they exercised, certain prior acts were necessary without which they would have incurred criminal responsibility, such as might have been incurred in the present case for abandonment of their public functions to the injury of the public, which would have been without an administration of justice during the days that elapsed until the new judges assumed charges.

Obviously, the color of title of the judge in this case could also be based on general recognition and reputation which, in turn, arose from a common error. In the words of the Supreme Court, as to the public there was nothing to induce a contrary belief, that is, that certain judges whom the public was accustomed to recognize as true and legitimate judges were incompetent. Therefore, they were judges of the new courts de facto and in good faith. No usurpation of jurisdiction can be imputed to them. As such judges they were accepted by common error.

Let us now scrutinize another case[38] involving "color of title" as interpreted and applied in Philippine Law. For purposes of clarity and brevity, the statement of facts as found in the concurring decision is adopted. Let us, therefore, just consider the dates and the events:

October 5, 1916 — trial of the election contest terminated.

January 14, 1917 — decision signed by Judge Barretto.

[38] Luna v. Rodriguez, **supra.**

January 15, 1917 — Barretto took the oath of office as Secretary of Finance.

January 17, 1917 — Decision received and filed by the Clerk of Court of the Court of First Instance of Rizal.

It is to be noted that although the judge signed the decision before entering into another office, the same was only received and filed by the Clerk of Court after the judge had ceased to be such. Since it is a requisite to the validity and conclusiveness of a judgment that there shall be a legally constituted judge, either de jure or de facto, it became material in this case to determine whether Judge Barretto could, even at least, be considered a de facto judge.

The court held that it is an essential element to the validity of the acts of a de facto judge, that he is actually acting under some color of right. If he has ceased to be judge by actually accepting and entering into some other office and has actually entered upon the performance of the duties of such other office,[39] it is difficult to understand how he can still be considered as actually occupying and performing the duties of the office which he had abandoned and vacated. Abandonment and vacation of an office are inconsistent with and repugnant to the idea of actually continuing to perform the duties of such office. Both de facto and de jure officers must be in the actual exercise of the functions of the office of judge either by an absolute right or under a color of right. If at the time the opinion is promulgated he is not acting either under an absolute right so to do or under a color of right, then he is acting neither as a judge de jure nor de facto. In the present case, it was charged and not denied that the judge had ceased to be judge and was, at the time his opinion was promulgated, actually in the exercise of another office, outside of the judicial, which he had accepted and upon the performance of the duties of which he had duly entered.

Citing American decisions, the Supreme Court further stated that in order to be a judge de facto, Judge Barretto must still be actually acting under some color of right. The Court was of the opinion that he cannot be actually under any color of right when he has ceased to be judge and has actually vacated the office by the acceptance of another office and by actually entering upon the duties of the other office.

The case of *Garchitorena v. Crescini*,[39a] decided just a few months after the preceding case involved substantially the same facts. Prior to March 31, 1917, the judge involved was one of the auxiliary judges of the Court

[39] The **Abalos** caso, **supra**, is distinguished from the case of **Luna v. Rodriguez**, **supra**, in that although the term of the judge in the respective cases had already expired, the judge in the latter case actually accepted and entered into some other office, while in the former case, the judge merely continued to perform the duties of his office, without accepting or performing any other office.

[39a] **Supra** note 10.

of First Instance of Ambos Camarines. He filed a decision with the clerk of court on April 27, 1917. Said judge, on January 27, 1917 was appointed Director of Lands, and on March 31, 1917, took his oath of office as such. Another person had also been appointed to take over the court. The latter took his oath of office on the 16th of March 1917 and entered upon the performance of his duties as auxiliary judge on the 28th of March.

The Court, taking all these facts and circumstances into consideration, and noting further that there is no law providing for two auxiliary judges of the Court of First Instance of said province, concluded that prior to the 27th of April said judge had ceased to be auxiliary judge and was, therefore, without authority to promulgate decisions in said province. He was not a judge de jure, for the reason that another judge was actually acting in his place and stead and had been for nearly a month prior to the promulgation of the decision on the 27th of April 1917. Neither a judge de facto, for the reason that there was a de jure judge actually discharging the functions of the office in question. With a total of four (4) American cases as authorities, the court proceeded to state that there can not be a de facto judge when there is a de jure judge in actual performance of the duties of his office. This statement is very significant in that it tends to give an additional requisite to the traditional three (3) requisites for a de facto officer. Whether this is so will be discussed in another part of this paper.[40]

The judge in this case was also declared to be acting without any color of right for the same reason stated in the *Luna* case, *infra*.

In still another case,[41] the judge of the trial court designated a lawyer named Valbuena as acting provincial fiscal in the absence of the regular fiscal. After sending three telegrams to the Department of Justice requesting that the designation be made effective, and receiving no answer, the trial judge proceeded with the trial, with Valbuena acting as fiscal. On appeal, the defendant averred that the court had no jurisdiction because the information was not filed by a fiscal. In disposing of this contention, the Supreme Court stated that even assuming that the appointment of Valbuena was irregular, yet he could be considered as a de facto officer and not a mere usurper. Citing American authorities, the Court explained that a de facto officer is one who derives his appointment from one having colorable authority to appoint. ... and whose appointment is valid on its face. It is not necessary that an officer should derive his appointment from one absolutely competent to invest him with a good title to the office.[42]

[40] See Comments and Recommendations, **infra**.

[41] People v. Gabitanan, **supra** note 26.

[42] In **People v. Gemora**, 69 Phil. 61 (1939), which involved substantially the same facts, the special fiscals were not deemed de facto, for the following reasons: the fiscal de jure was available and was discharging the functions of his office; the judge did not seek at all the authority of the Secretary of Justice; the special fiscal did not take their oath of office; and the country was under normal conditions.

Before closing the discussion on "color of title", mention must be made of the case of *People v. Penesa,*[42a] where it was held that a prosecuting officer who has no lawful appointment may at least be a de facto officer after the public has shown acquiescence in his acts as such officer. This case follows the statement in American Jurisprudence[43] that a colorable appointment or election is not always necessary. This liberal view is the better view, because it affords more protection to the public and third persons.

3. *There Must Be Actual Physical Possession of the Office in Good Faith*

This requisite requires the following elements: first, possession; second, such possession must be actual and physical; and third, possession must be in good faith. Therefore, it is not accurate to state merely that there must be actual possession of the office, as was done in the case of *Salaysay v. Castro, supra.* There must be good faith, otherwise there cannot be a de facto officer.

In order that a person may be an officer de facto, he must be in actual possession and control of the office, but while possession is one of the elements frequently referred to in deciding whether a particular person is or is not an officer de facto, yet, without further indicia of the right to exercise the office, it is not sufficient to make the possession even a de facto officer for he may be a mere intruder, that is, one who undertakes to act as a public officer without any color of right.[44]

In the case of *Luna v. Rodriguez,*[44a] it was held that abandonment and vacation of an office are inconsistent with and repugnant to the idea of actually continuing to perform the duties of such office. In other words, abandonment or vacation of the office negates physical possession, so that in such a case, there can not be a de facto officer. The court stated that where the judge de jure has been appointed or elected to some other office and has accepted said other office without actually entering upon the performance of the duties thereof but continues to act as judge, he may be considered a judge de facto in such case. On the other hand, the court continued, if he actually enters into the other office and commences the performance of the duties of such office and ceases to act as judge, then certainly, he can not be considered either a judge de jure or judge de facto. The reason for this ruling, obviously, must be the fact that under the given circumstances, the requisite of actual possession is already lacking.

The indispensability of good faith has been upheld in many Philippine cases, most especially in the case of *Provincial Fiscal v. Judges.*[45] Here, respondent Julio Acosta, accused in seven criminal cases, filed a petition

[42a] **Supra** not 27.
[43] 43 Am. Jur. 240.
[44] 22 R. C. L. 594.
[44a] **Supra** note 9.
[45] G. R. No. L-2502, Dec. 1, 1949.

for amnesty. The Second Guerrilla Amnesty Commission rendered a decision dated June 9, 1947 sustaining the petition for amnesty. Hence, this action for certiorari and mandamus assailing the validity of the decision on the ground that it was rendered when respondent Judges Santos, Santiago and Ceniza had ceased to be members of the Commission, it being alleged that on June 5, 1947, the Secretary of Justice appointed new members of the Second Guerrilla Amnesty Commission. The court held that since there is absolutely no showing that respondent Judges Santos, Santiago and Ceniza *knew,* when they rendered their decision on June 9, 1947, that they had been replaced by other members of the Second Guerrilla Amnesty Commission, — as a matter of fact, the petitioner admitted that the new members held sessions in Laoag only in August 1947 - they may at least be considered as de facto members of the commission on June 9, 1947. Here, as in the case of *Regala v. Judge,*[46] the decision declaring the judge a de facto officer hinged on the all-important point of good faith.

In the aforementioned *Regala* case, good faith again was the deciding point. There was a petition for certiorari asking for the annulment of a court order in a criminal case. Petitioner contended that the judge had no jurisdiction to issue such orders because his appointment was not approved by the Commission on Appointments. It appeared, however, that no official notification had as yet been given the judge. Our Supreme Court held that a judge who continues to act as such after the disapproval of his appointment by the Commission on Appointments, but before being officially informed of such disapproval, is still a de facto judge; but if he has already been informed officially of such disapproval, his acts subsequent thereto are null and void, and he cannot be considered even an officer de facto.[47]

Again in the case of *Tayko v. Capistrano, supra,* there was a petition for a writ of prohibition to enjoin respondent judge from taking cognizance of certain cases. Petitioners alleged that the respondent was appointed judge of the Court of First Instance of Oriental Negros, to hold office during good behaviour and until he should reach the age of 65 years. It appeared that even after reaching the age of 65 years, respondent judge took cognizance of certain cases. Held: that the respondent judge here can still be considered as a judge de facto. His term of office may have expired but his successor has not been appointed, and as good faith is presumed, he must be deemed as holding over in good faith. He is a de facto judge who exercises the duties of a judicial officer under color of appointment.

[46] 77 Phil. 684 (1946).
[47] The general rule is that enunciated in **People v. Tolentino,** G. R. No. L-46226, Dec. 24, 1938, namely, that a decision rendered by a judge after his appointment has been disapproved by the Commission on Appointments is null and void. The **Regala** case merely gives the exception to the foregoing rule.

PART III

A. *Comments and Recommendations*

The rule in the Philippines is clear: there cannot be a de facto officer if there is no de jure office; we adhere steadfastly to the orthodox view, as enunciated by one school of thought in the United States. This, we gather from the decision in *Government v. Springer,* supra. However, there are feelings of doubt which bother us as to the wisdom and practicality of strictly adhering to, and sticking it out with, the orthodox view.

First of all, we must bear in mind that the purpose of the de facto doctrine is to protect the interests of the public and third persons because they can not always inquire into the title of an officer or compel him to show title; but to require that there be a de jure office would be tantamount to requiring the public to inquire into the constitutionality of the act creating the office. This, in effect, would nullify the very purpose of the "de facto" doctrine. It is not asserted that the existence of a de jure office should not be required in all cases, or that we should abandon the orthodox view; but we do maintain that such requirement should be discarded if and whenever the interest of the public and third persons will be benefited thereby. Even in the United States and adherents of the orthodox view are broadminded enough to admit that the requirement is satisfied if there is a de jure office of the general character of that which the incumbent assumed to fill although there was *none* at the particular time and place in question.

Secondly, in the comprehensive definition of a de facto officer given in the case of *Luna v. Rodriguez, supra,* we gather from the fourth paragraph that it is enough that there be color of an election or an appointment by or pursuant to a public, *unconstitutional* law before the same is adjudged to be such. Clearly, therefore, under this case, there may be a de facto officer even when there is no de *jure* office. Since both the *Luna* and *Springer* cases were decided a long time ago (1917 and 1926, respectively) it is hoped that if and when a case involving the matter under discussion should come up before our Supreme Court, the ruling in the *Springer* case will be modified.

Indeed, the first progressive step towards a more liberal application of the de facto doctrine was made by the Court of Appeals in the recent case of *Cumigad* v. *Soriano, supra.* The appellate court, despite the fact that there was no de jure office, nevertheless declared the officer in question as one de facto.

A reading of all the cases in Philippine jurisprudence concerning de facto officers will inevitably lead to an interesting question: Is it required for a de facto officer that at the time of his appointment, there be no de jure officer actually discharging the functions of his office? That this question

should be answered in the affirmative is absolutely held and maintained in the cases of *People v. Gemora,*[48] and *Garchitorena v. Crescini, supra.* In the first case, the trial judge appointed three special fiscals when such power was vested only in the Secretary of Justice. The court, after declaring the apppointment to be invalid, stated: "Neither can the said attorneys be considered as fiscals de facto, *because there was at the time of their appointment a fiscal de jure who was discharging the functions of his office.*" In the second case (the facts of which have already been given) the court made the declaration that "there cannot be a de facto judge when there is a de jure judge in actual performance of the duties of his office."

Due to these declarations of our Supreme Court, it would appear that there is a fourth requisite to the existence of a de facto officer, which is, that there be no de jure officer.

However, such fourth requisite is not included, for the following reasons:

First, the three-fold requirement was reiterated in *Salaysay v. Castro, supra,* which is the latest case on the matter;

Secondly, for greater protection of the interests of the public and of third persons. For example, if a person is actually in possession of a de jure office in good faith with color of title, and people have submitted to, and invoked his action on official matters, to invalidate his actions merely because there is a de jure officer discharging the functions of the office would be to deprive the people of the protection which thy richly deserve.

With all due respect to the Supreme Court, it may be pointed out that certain statements contained in the decision of the case of *Torres v. Ribo, supra,* are not exactly accurate. It is submitted, first of all, that the assistant civil engineer and the chief clerk involved therein possessed at least one of the requisites for a de facto officer; secondly, that they had color of title; and thirdly, that it is not required that before an officer may be considered de facto, the person most affected by the assumption of office must be notified and be made aware of it. The foregoing points have been discussed already, and they need not be discussed here anymore.

[48] **Supra** note 42.