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The Status of a Private Corporation Organized Under an Unconstitutional Statute^{*}

SUPPOSE that A, B, and C associate themselves together in a corporate form of organization for carrying on a business. They comply with all of the requisites specified in the statutes as conditions precedent to the enjoyment of corporate privileges. Ten months later the corporation files a complaint against X for having cut a cable belonging to it. X defends by asserting that the statute under which plaintiff is organized is unconstitutional and that therefore plaintiff has no corporate existence. Is there no party plaintiff if the statute is held to be contrary to the state or federal Constitution?

Perhaps a subscriber for stock in a newly formed corporation becomes distrustful of the constitutionality of the statutory basis for the organization and resists an action by the corporation to collect the subscription price remaining unpaid. May he do so successfully?

What is the status of a private corporation organized under an unconstitutional statute? Is it a corporation *de jure* or *de facto*, or is it a nullity? In the following pages an attempt will be made to study the cases in which courts have been called upon to answer these questions. A preliminary statement of the general problem of the effect of an unconstitutional statute may be helpful.

At least three views of the effect of an unconstitutional statute are to be found in the cases. One of them is that a decision that a statute is invalid only applies to the particular case before the court. Under this view such a decision does not render a statute unconstitutional "in general," but only as applied to a particular state of fact, and directly affects only the parties before the court.

A second view is that an unconstitutional statute is "an empty legislative declaration without force or vitality" with no more validity than

^{*} This is one of a series of articles on the effect of an unconstitutional statute written as a Sterling Fellow, Yale University School of Law, under the direction of Professor Walter F. Dodd. The writer is also indebted to Professor Edwin M. Borchard for suggestions as to the form and content of this paper.

"a piece of blank paper." The statute is spoken of as having been void "*ab initio*" and this view is therefore often referred to as the void *ab initio* doctrine.¹ In accordance with it the statute is to be disregarded entirely in settling a case. The fact that the parties before the court have acted in reliance on the written words of the statute book is given no consideration whatever. Not only is the statute denied the force of law but its existence as one of the facts in the case is likewise ignored. When this doctrine is applied the case is disposed of exactly as though the legislature had never enacted the statute, and as though the parties had done nothing depending on the purported enactment. The void *ab initio* doctrine is then a very strict and severe doctrine. Perhaps it is for this reason that although it is applied by a number of courts to certain types of cases no court has been found which applies it to every situation.

A *third* view of the effect of an unconstitutional statute is that the purported enactment of the legislature is not to be treated as a nullity, but is to be considered as one of the facts of the case. If people have acted in reliance on the words of the statute book that fact should be given some weight in deciding the case. This view would have the statute given some effect; at least the effect of being one of the several facts in the situation presented to the court. Upon this fact, as upon other facts, legal relations may be predicated. The precise difference between the void *ab initio* view and the one under discussion is that the latter is more realistic than the former. It does not close its eyes to what actually happens when a statute is placed upon the books and people act in accordance with the terms thereof. The cases considered in this study will illustrate more in detail the nature and scope of the second and third views mentioned above. The first of the views alluded to will not be encountered in the group of cases here discussed and attention need therefore be centered only on the second and third of these doctrines.²

The order in which the various phases of the subject here treated will be taken up will be: (1) the cases themselves, and (2) a consideration of the general principles utilized by the courts in deciding these cases, with some attempt at generalization on the basis of the decisions.

¹ Throughout this paper the term "void *ab initio*" will be used in the restricted sense indicated in this preliminary explanation.

² These statements of the various views of the effect of an unconstitutional statute are based on a study of the cases in this article, in addition to the following: Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes* (1927) 11 MINNESOTA L. REV. 585; Note (1918) 28 YALE L. J. 592; Field, *Effect of an Unconstitutional Statute* (1926) 1 INDIANA L. J. 1, 60 AMERICAN L. REV. 232.

I. THE CASES

The cases involving the problem of the status of a private corporation organized under an unconstitutional statute may be divided into two large groups. There are those (A) in which there have been dealings between the parties on a corporate basis, and (B) those in which there have been no such dealings. Further subdivisions will be indicated within each of these larger groups.

A. *Where there have been dealings on a corporate basis.* These may have been (1) between a corporation and a stranger, or (2) between a corporation and one of its officers or shareholders.

1. *Cases of dealings between a corporation and a stranger.*

(a) Where the corporation is the plaintiff. Suppose that X makes a note to a bank. He fails to pay it when due. The bank sues him on it. X defends by asserting that the bank has no corporate existence because of a defective statute and that it is, therefore, not entitled to maintain suit. The Nebraska court had before it this question, the bank to which the note had been made having been organized under a territorial statute which was inconsistent with a congressional act.³ State constitutions and statutes bear much the same relation to one another that congressional statutes for territories bear to statutes enacted by territorial legislatures. Therefore, the case may be considered as at least of persuasive force if the same situation should be presented, with the state constitution substituted for the act of Congress. The court in the Nebraska case allowed the bank to maintain the suit.

The maker of a note secured by a mortgage was permitted in a Michigan case to defeat recovery on the ground that the assignee of the note and mortgage stood in no better position than the bank to which the mortgage had been executed.⁴ The bank had been organized under an invalid statute and could not have maintained the action; the result being, according to the court, that the assignee was likewise barred. Under the void *ab initio* doctrine no law would have existed authorizing organization in either of these two cases, and if viewed from the standpoint of that doctrine they would seem to be in direct conflict with one another. The Nebraska court applied the *de facto*⁵ doctrine to protect

³ Platte Valley Bank v. Harding (1870) 1 Neb. 461.

⁴ Hurlbut v. Britain & Wheeler (1845) 2 Doug. (Mich.) 191.

⁵ The phrase "*de facto*" as applied to corporations, will be used throughout this paper in the restricted sense in which it is used in Warren, *Collateral Attack on Incorporation* (1907) 20 HARVARD L. REV. 456, 464. The requisites for applying the *de facto* doctrine as set forth by Professor Warren, as well as numerous other writers, are: (1) the existence of a law under which incorporation could be had, (2) colorable compliance and organization, (3) good faith, and (4) user. The phrase "*de facto* doctrine" as herein used refers to the doctrine whereby courts accord associates corporate standing for purposes of applying corporate rules in

the bank while the Michigan court refused to apply it, the situation being very much the same in both cases. If the cases be considered from the standpoint of estoppel it will be found that the Michigan court refused to estop the defendant from collateral attack while the Nebraska court used estoppel to prevent such an attack. If the existence of a law under which organization could be had is regarded as one of the conditions precedent to the application of the *de facto* doctrine, it is perhaps difficult under the void *ab initio* view to utilize that doctrine in cases such as these. However, the maker of the note could in both of these cases have been made to repay the money he had borrowed by resorting to the doctrine of estoppel. Corporations by estoppel are perhaps only a fiction, and in the minds of many writers are objectionable fictions, but it is not necessary here to resort to the doctrine of a corporation by estoppel. It could be said by the court that the borrower should be made to repay the loan to the organization from which he had borrowed it. To accomplish this no great objection is perceived against saying that he is estopped to use the defense of no corporate existence in the plaintiff. There may be no corporation as an entity, which is of course the view of those who lean towards the void *ab initio* view, and their displeasure is not incurred in this solution of the problem as we do not say that there is a corporation, either *de jure*, *de facto*, or by estoppel. The dealings between the parties in such a case would seem to be on a corporate basis.

The Michigan court refused, contrary to the Nebraska court, to give any weight whatever to the existence of the statute in accordance with which the bank was organized. No one can doubt that it was one of the facts of the case, but by applying the void *ab initio* doctrine and the strict view of a *de facto* corporation the statute and the corporation were both totally ignored.

A slight variant from the loan transaction is that presented by a corporate promisee suing on a contract to pay money on the happening of a certain specified event, the corporate existence of the promisee being challenged by way of defense. The plaintiff in *Hudson v. Green Hill Seminary*⁶ was in this position, and to an action brought by the corporation a plea of *nul tiel* corporation was filed. A curative act seeking to validate defective incorporation was assailed as unconstitutional.

deciding the case, by labelling the organization a "*de facto* corporation." No attempt is made in these pages to settle the problem whether a so-called *de facto* corporation is a legal entity.

⁶ (1885) 113 Ill. 618. The court seems to say, at p. 627, that before a suit can be maintained on stock subscription, it must be shown that a legal corporation with capacity to issue stock was in existence, and that otherwise there would be a failure of consideration. It is not clear whether or not "legal corporation" means *de jure* corporation, or whether it is meant to include *de facto* corporation also.

tional, but as the corporation was a foreign one the Illinois court felt that it should be slow to pass upon the constitutionality of a statute of another state, and also, that the passage of the curative act in question was evidence that in the state of its creation the corporation was recognized as having *de facto* existence at least. The plaintiff corporation was therefore permitted to recover.

A somewhat different question was presented in *Clark v. Cannel Coal Company*,⁷ where the corporation brought an action to quiet title to land and to enjoin the defendant from mining thereon. The defendant claimed that the corporation lacked capacity to take title because it was formed under an invalid statute, and that if it did not have capacity to take title it could not maintain the action in the corporate name, because of its alleged corporate non-existence. The Indiana court decided that the plaintiff could not maintain the action, because it was not a corporation. The court pointed out in its opinion that at the time the deed to the land was given to the corporation the latter enjoyed *de jure* existence. Had this action been brought at that time the defense here interposed would not have been available to the defendant. But at the time the instant action was commenced the corporation existed only by virtue of an unconstitutional statute purporting to extend the period of corporate existence.⁸ The court reasoned that this was not even a *de facto* corporation because in order to have such a corporation there must be a law authorizing incorporation or extending corporate existence beyond the charter period. There was no law here, so there could not be a *de facto* corporation. Collateral attack was permitted. The court also reached the same result by another method of reasoning. Beginning with the premise that there was no statutory authority for the corporation after the charter period had expired the court reasoned that the corporation must be considered as dissolved. The conclusion from this was that a dissolved corporation could not have *de facto* existence. When it is pointed out that there was on the statute book another statute upon which corporate existence might have been predicated it will be seen that this case goes very far indeed.

In *Coxe v. State of New York*⁹ the receiver of a corporation sued to recover money paid to the state for land purchased for drainage purposes in accordance with statutory encouragement of such projects, the latter being withdrawn by means of shearing the corporation of most of its powers by virtue of a subsequent amendment of the corporate

⁷ (1905) 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217.

⁸ Another case in which a statute purporting to extend the period of corporate life was held unconstitutional in Indiana was *In re Bank of Commerce* (1899) 153 Ind. 460, 53 N. E. 950; rehearing denied, 153 Ind. 460, 55 N. E. 224.

⁹ (1895) 144 N. Y. 396, 39 N. E. 400.

charter. The defense was the non-existence of the corporation. But, in the words of the opinion,¹⁰ the court held that:

"It is not important to decide what provisions, if any, of the act can be upheld, since, even if the section creating the corporation should fall with the rest, it is undisputed that it organized, assumed and exercised corporate powers under an act of the legislature, and thus it was a corporation *de facto*, if not *de jure*, and it required the judgment of a competent court or an express act of the legislature to terminate its existence."

From this it will be seen that the court relied to some extent upon the doctrine that the state alone shall be permitted to attack the existence of the corporation, and for that reason denied collateral attack by the defendant.¹¹ That the New York court took an attitude inconsistent with that of the Indiana court in the *Clark* case seems clear despite the fact that the transactions involved in the two cases were not wholly identical.

(b) Where the corporation is the defendant. The foregoing cases have involved attempts by defendants to challenge corporate existence in the plaintiff. Cases may arise, however, in which the plaintiff is the party alleging the non-existence of a defendant corporation. For example, the plaintiff may be seeking to recover land from a corporation to which he had previously sold it, on the ground that there was insufficient statutory authority to entitle defendant to corporate standing. In *Smith v. Sheeley*,¹² which involved a territorial statute in conflict with a congressional enactment, the United States Supreme Court denied collateral attack. The court expressed the opinion that the bank in that

¹⁰ 144 N. Y. at 409, 39 N. E. at 403.

¹¹ *Quo warranto* is the proper proceeding for the state to institute to ascertain the constitutionality of an incorporation statute. *People ex rel. Deneen v. People's Gaslight and Coke Company* (1903) 205 Ill. 482, 68 N. E. 950. In *Attorney General ex rel. Mason v. Perkins* (1889) 73 Mich. 303, 41 N. W. 426; an information in the nature of *quo warranto* was filed by a stockholder to test the constitutionality of a statute under which a reorganization had been completed. See particularly the answer of the court to the contention that this amounted to permitting collateral attack, 73 Mich. at 311-312. Statutes occasionally provide that a local prosecuting attorney may institute an action to test the legality of incorporation. Cf. *In re Bank of Commerce*, *supra* n. 8. In *Commonwealth v. Philadelphia, Harrisburg & Pittsburgh R. R.* (1903) 23 Pa. Super. Ct. 235, the state indicted the company for maintaining a nuisance in the form of certain railroad crossings. The court held that the state could not in such a proceeding question the constitutionality of the statute under which the corporation had been formed in this case, holding that *quo warranto* alone was the proper proceeding in which to raise this question. See *State of Kansas v. Lawrence Bridge Co.* (1879) 22 Kan. 438, where *quo warranto* was instituted by the state to test the constitutionality of a statute extending the life of the corporation. In this case an injunction was also granted to prevent the company from continuing the collection of tolls, the highway going to the use of the public, relieved from payment of tolls.

¹² (1870) 79 U. S. (12 Wall.) 358.

case had *de facto* existence, and seemed convinced that one selling land to it should not be permitted later to question the existence of the vendee in an attempt to recover the land. The court relied to some extent upon the doctrine of estoppel and reached the result that the capacity of the corporation to take title could not be questioned by the vendor.¹³

A creditor's bill was filed in *Georgia Southern & Florida Railroad v. Trust Company*,¹⁴ in which the plaintiff asserted that bonds, given by the railroad company to third persons who sought to have a foreclosure of the mortgage securing them, were void for the reason that defendant construction company was the real owner of the road, and because the statutory basis for its organization was unconstitutional. The court held that the bonds were valid. In the course of its opinion the court stated its belief that "an organization assuming to be a corporation *de jure* but for sufficient reasons not so in fact, may be a corporation *de facto* when it is of such a character that it could, under existing laws, have full and complete corporate being and powers."¹⁵ There was in existence at the time of organization another statute under which this type of corporation could have been organized, and the court seemed disposed to allow the associates the benefit of that law "so far as to enable them to be regarded as a *de facto* corporation." But it is to be observed in this case that the court seemed to derive support for the *de facto* doctrine, as applied to this corporation, from a valid statute, and not from the unconstitutional one under which the associates organized. That the case does not furnish an authority for the proposition that an unconstitutional statute may be sufficient to sustain a *de facto* corporation appears from the following quotation:¹⁶

¹³ Cf. *Siegel Land Corporation v. City of Highland Park* (1926) 235 Mich. 133, 209 N. W. 51. The corporation in this case was formed for the purpose of holding land for parks, in trust for city use. Plaintiff was the owner of an apartment on the edge of a park. To have a fence removed, which the city had built, an injunction suit was brought against the city. The petition was denied, and the court held that plaintiff could not question the statute under which the city, through the park holding corporation, held the land. In *Schneider v. City of Grand Rapids* (1920) 211 Mich. 399, 179 N. W. 285, a taxpayer sought to prevent the conveyance by a holding corporation, similar to that in the Siegel case, of land to the city in which the taxpayer lived. Held, he may not raise the question of the constitutionality of the statute under which the holding corporation was organized. The court said, 211 Mich. at 402, 179 N. W. at 286, "It will be time enough to determine the validity of this statute when a conflict arises between a municipality and an association organized under the act over the right to exercise control of streets or other public places, or the State by appropriate proceedings questions the right of the association to function."

¹⁴ (1894) 94 Ga. 306, 21 S. E. 701, 47 Am. St. Rep. 153, 32 L. R. A. 208.

¹⁵ 94 Ga. at 316, 21 S. E. at 705.

¹⁶ 94 Ga. at 319, 21 S. E. at 705. In *Kehler & Brother v. The G. W. Jack Mfg. Co.* (1876) 55 Ga. 639, creditors sought to have a receiver appointed because of the

"Our decision is not based upon the idea that the organization of these railroad companies under unconstitutional charters would make them *de facto* corporations, but upon the idea that the purpose for which they were organized being lawful and proper, if, they had obtained charters under the general law and organized under them, which they might have done, they would, in substance, have done what they actually did; that is, they would have observed about the same forms and requirements in the one case as in the other."

That the court regarded the corporation as having *de facto* existence is clear but it is not so clear that they would have so regarded it in the absence of a valid law under which the associates might have organized.¹⁷

Corporate existence is sometimes challenged by the plaintiff when he wishes to impose partnership liability upon the associates who organize a pretended corporation under an unconstitutional statute. This was attempted in *Planters and Miners Bank v. Padgett*.¹⁸ The defendants claimed to be a corporation and had made some notes to the plaintiff. These had been signed by the president and treasurer, and the mortgage which had been given as security for the loan was also made out in the corporate name and signed by the corporate officers. The plaintiff brought suit against the corporation on the notes and obtained judgment against it, and on execution sale bought in the property. Now plaintiff sues to hold defendant liable as a partner for the amount remaining due. The court felt bound by a previous decision to hold that the statute under which defendants had attempted to organize was unconstitutional. The Georgia court decided that the plaintiff could not question the existence of the corporation. The defendant could not be held liable as a partner. The dealings which had taken place between the parties showed that they had been on a corporate basis. The first suit, judgment, conduct at the sale, coupled with the details of the loan transaction mentioned above, were held to be suffi-

alleged insolvency of a corporation. The creditors claimed that corporate assets had been wrongfully transferred to a partnership of which one of the chief incorporators was a member. The corporation was attacked because it had been incorporated by proceedings before a court when they should have been under legislative control. The receiver was not appointed and a temporary injunction against the Jack Mfg. Co. was dissolved, insolvency not being shown. There is in the opinion no indication that the court gave serious consideration to the question of the effect of unconstitutional incorporation in this case.

¹⁷ The question of the effect of an existing statute under which incorporation might have been had, but under which the incorporators did not organize, upon the status of a corporation organized under an invalid law, is not an easy one to answer. In addition to the cases mentioned in the text of this article, in which this problem has been raised, see *Jennings v. Dark* (1910) 175 Ind. 332, 92 N. E. 778, holding that the existence of such statute is sufficient to support *de facto* existence, and *City and County of San Francisco v. Spring Valley Water Works* (1874) 48 Cal. 493. See also *infra* n. 51.

¹⁸ (1882) 69 Ga. 159.

cient to estop plaintiff from questioning the *de facto* existence of the organization. The court seemed to place some reliance upon the fact that the members of the corporation had never agreed to enter into a business enterprise involving partnership liability.¹⁹ The court in the *Padgett* case was apparently willing to decide the case either on the ground of estoppel or on the basis of the *de facto* doctrine. The result of the case was that partnership liability was not imposed upon the associates.

Partnership liability was also denied in the Minnesota case of *Richards v. Minnesota Savings Bank*.²⁰ In that case a corporation was authorized to change its name and place of business, following a long period of inactivity on its part. The plaintiff sought to hold the associates liable as partners on the ground that this statute was invalid and did not therefore revive the corporation. It was held that even though the statute be considered unconstitutional it nevertheless furnished "color of law" for changing the name and place of business of the company. In this case there had been dealings on a corporate basis and the court emphasized the apparent absence of fraud in these dealings.

In the Michigan case of *State v. How*,²¹ suit was brought on a bill issued by a bank, the associates being made defendants because of the invalidity of the statute under which the bank had been organized. The banking law of the state made the notes null and void, and a prohibition in the state constitution made the organization of a banking institution illegal, under the circumstances present in this case. The decision was that the associates were not liable as partners. In the course of the opinion, however, the belief was expressed that had the factor of positive illegality been absent the associates should have been held to partnership liability. The court adopted the void *ab initio* view of the effect of the statute and held that the defendants could not be charged as members of a banking corporation because no such corporation existed. Although the case was decided on the ground that the attempted formation of the corporation was illegal²² the court dwelt at length upon the general subject of partnership liability in the absence of the element of illegality, saying:²³

¹⁹ For a detailed consideration of the arguments *pro* and *con* on this factor see Dodd, *Partnership Liability of Stockholders in Defective Corporations* (1927) 40 HARVARD L. REV. 521; Carpenter, *Are the Members of a Defectively Organized Corporation Liable as Partners?* (1924) 8 MINNESOTA L. REV. 409.

²⁰ (1899) 75 Minn. 196, 77 N. W. 822.

²¹ (1846) 1 Mich. 512. *Accord*: *Green v. Graves* (1844) 1 Doug. (Mich.) 351.

²² The Michigan cases are sometimes distinguished by this fact. There is in some of the cases a tendency to confuse illegality and unconstitutionality, as the latter is normally understood. 2 MORAWETZ ON PRIVATE CORPORATIONS (2d ed. 1886) § 759.

²³ (1846) 1 Mich. 512, 513.

"If the act in question had had for its object the incorporation of associations for manufacturing purposes, instead of banking, the only effect of the unconstitutionality of the law would have been to make them liable for the debts of the association as general partners, instead of corporators under the act."

The peculiar facts of the case resulted in the denial of both corporate and partnership liability. This result seems somewhat odd, for it places the burden of determining illegality upon those who deal with the associates, and the associates are freed from liability if only the act they proceed under is positively illegal, instead of being merely unconstitutional.

In *Eaton v. Walker*²⁴ the Michigan court lived up to the prophecy of the *dictum* in the *How* case and held the incorporators liable as partners. The defendants argued in this case that they were subject only to corporate liability, but the court stated that merely acting as a corporation did not constitute the associates such. The statute being invalid, there was no law, said the court, and there being no law authorizing the formation of the corporation, the *de facto* doctrine could not be applied. For the same reason also, the court refused to apply the doctrine of estoppel to the plaintiffs. Estoppel was to be restricted to those cases in which there was actually a corporation *de facto*. This would merely seem to say that if a *de facto* corporation is made out, the plaintiff will be estopped. Why resort to estoppel when by the application of the *de facto* doctrine the defendants are thereby saved from partnership liability? Does not the application of either doctrine bring the same result? The lower court found that there had been dealings between the parties on a corporate basis, but the upper court thought that some evidence on this point had been erroneously excluded, and the case was disposed of as though there had been no dealing on this basis, no new trial being ordered.

While *McClinch v. Sturgis*²⁵ may be distinguished from the foregoing cases on the ground that in it the existence of a foreign corporation was being questioned, the case is nevertheless indicative of the attitude which the Maine court might be expected to take if a domestic corporation were involved. In that case a suit was brought on a con-

²⁴ (1889) 76 Mich. 579, 43 N. W. 638. In *Brown v. Killian* (1858) 11 Ind. 449, a bank had been organized in the absence of any statute authorizing incorporation. The holder of a note brought an action against the person who had formed the organization, but in view of the fact that such an organization was held to be "illegal" recovery was denied, although the court in its opinion intimates that the consideration could have been recovered. For an opinion that a corporation organized in the absence of statute should be treated as one organized under an unconstitutional statute, see 2 MORAWETZ, *op. cit. supra* n. 22.

²⁵ (1881) 72 Me. 288.

tract which the defendants claimed had been entered into with the corporation which they had formed, and not with them as individuals. The court did not pass upon the constitutionality of the Rhode Island statute under which organization had been completed, but the fact that Rhode Island had thus far abstained from instituting *quo warranto* proceedings against the corporation was emphasized as being sufficient to warrant treating it as having *de facto* existence. It was said that "so long as the State raises no objection, it is immaterial to other parties whether it is a corporation *de facto* or *de jure*."²⁶

In *McCarthy v. Lavasche*²⁷ an action of debt was brought by a depositor in a bank against the defendant who was a member of the banking corporation. The allegation was that the bank was insolvent and that the defendant was by statute subject to double liability under a statutory provision. It was held that the defendant should be subjected to double liability even though the statute under which organization had been perfected was unconstitutional. This decision is quite understandable but the reasoning whereby the court reached the result is somewhat puzzling. In the first part of its opinion the court seemed to rely on the doctrine of estoppel. It was pointed out that defendant knew when he became a member of the corporation that he was subject to double liability. The very fact that shareholders in the corporation were subject to this statutory liability doubtless contributed, thought the court, to the amount of business which came to the bank which the pretended corporation operated. People relied upon this additional liability in depositing money with the bank. The defendant and the other shareholders increased their profits thereby and the defendant by holding out to the public as subject to double liability had been partially responsible for the loss incurred by plaintiff. So reasoned the court. Therefore, defendant was estopped to set up the invalidity of the statute under which the bank had been organized. The court went so far as to say that independent of the double liability provision in the statute the defendant would be held liable for the consequences of his "illegal and unauthorized" acts and would not be permitted to escape by showing that the statute in question was invalid.

²⁶ 72 Me. at 295.

²⁷ (1878) 89 Ill. 270. *Dows v. Naper* (1878) 91 Ill. 44 is sometimes cited as supporting the same conclusion as that of *McCarthy v. Lavasche*, *supra*. But, although the court referred to the latter case in its opinion, the *Dows* case is clearly distinguishable from it, because although the situation was such as to justify the court in using estoppel, there was in the case an existing corporation, and the only point touching constitutionality was one with regard to an amendment of the corporate charter. The statute of amendment seems not to have been voted on by the people, as required by the constitution. Original incorporation was, however, completed under a valid act.

The court rather rhetorically asked whether people could go to the legislature and procure the passage of a law known to be unconstitutional, organize under it, obtain money in the course of the business established, and then later escape all liabilities which may have been incurred by showing that the statute was invalid? The obvious answer, and the one given with emphasis by the court, was in the negative. Therefore, the defendant was estopped by his conduct to assail the existence of the corporation. Had the opinion stopped at this point there would have been nothing particularly extraordinary about the reasoning of the decision. But the opinion proceeds to a consideration of the situation of the defendant viewed from the standpoint of partnership law. The court opened this phase of the reasoning by adopting the view that if defendant here was a partner he would be subject to statutory liability. This was clearly an unnecessary assumption because he was liable for the statutory amount whether he was a partner or not. But, having taken the stand that it did, the task confronting the court was to determine whether defendant was a partner. After much laborious discussion the court finally concluded that the associates were partners and that the charter of the corporation constituted the articles of partnership. The defendants were liable — but liable for what amount? To the statutory amount. That the court finally intended to dispose of the case on the basis of partnership liability is evident from their statement that:²⁸

"We are therefore of opinion, that, independent of all constitutional questions, each shareholder became liable under the charter as articles of partnership, as it operated as an agreement by each subscriber to be liable to creditors to double the amount each subscribed."

But is this consistent with orthodox partnership liability? The statute stated that "each stockholder shall be liable to double the amount of stock held by or owned by him . . ." and this was interpreted to impose

²⁸ 89 Ill. at 276. In *Gardner v. Minneapolis & St. Louis Ry.* (1898) 73 Minn. 517, 76 N. W. 282, an action was brought by a creditor to enforce double liability on defendant stockholder. The statute consolidating several corporations into one, of which defendant was a member, was assailed as unconstitutional. The court said (73 Minn. at 527), "Since its formation, in 1881, it has acted openly in all respects as a corporation. It has borrowed money, giving security therefor upon the property of the new corporation to the amount of millions of dollars, which it has presumably used for its own benefit. It has operated its road, carrying freight and passengers, and receiving large sums of money therefor. It made construction, traffic and trackage agreements, and various leases, and in all of these matters it participated in the benefits derived therefrom. To all of these things the stockholders are presumed to have consented, and to have had knowledge of such transactions, and enjoyed the fruits of them." The *Lavasche* case was approved, and estoppel invoked to prevent a denial of corporate status. Double liability was imposed.

several liability. But is partnership liability several as to creditors not having notice? Or could it be contended that the depositor here had notice of the limited liability imposed by statute? To him this would doubtless come as a surprise, because he had most likely viewed the statutory liability as an added safeguard rather than as a restriction. But whatever the theoretical difficulties may be in harmonizing the various portions of the opinion there can be no doubt but what the result reached in the case was the correct one. One might wish, however, that the court had not felt called upon to discuss at such length both bases for its decision. The case might have been disposed of on either basis, and to have used only one of them would have been less confusing. It is difficult to know whether to classify this case as one imposing partnership liability on members of a corporation organized under an unconstitutional statute or not.²⁹ Perhaps the safest course is to restrict its use as an authority to the estoppel portions of the opinion because that is clearly stated and is a commonly used basis for decision in the types of cases dealt with in this study.³⁰ Another case in which statutory liability was imposed on the shareholders arose in Alabama,³¹ and in that case also the defense was made that the statute under which organization took place was invalid. The estoppel basis of the court's decision is well brought out in the following quotation from the opinion:³²

"Whatever merit there may be in this contention, a sufficient answer to it is found in the fact, that the defendants, who seek to raise this objection, are estopped from setting up the illegality or irregularity of their corporate organization. They are stockholders in the company, and have undertaken to organize and hold themselves out to the public as such, and as a lawful body corporate. They have obtained credit, and issued policies on the faith of this representation, whereby they have solemnly affirmed the validity of the law under which they organized, and consequently the legality of the organization. This was an admission of the constitutionality of the amendment now assailed as void; and this admission can not now be retracted, to the prejudice of those who have accepted policies upon the faith of its affirmed validity. To repeat in brief: All stockholders, situated as are the defendants in this case, must be held to be estopped to deny the constitutionality of the law under which they organized, and for eighteen years uninterruptedly carried on their business as a *de facto* corporation."

²⁹ The Lavasche case is not listed in the group of cases found in Dodd, *supra* n. 19, at p. 562.

³⁰ CLARK, PRIVATE CORPORATIONS (3d ed. 1916) 113, 121, cites this case as an authority on the application of estoppel.

³¹ McDonnell v. Alabama Gold Life Insurance Company (1888) 85 Ala. 401, 5 So. 120.

³² 85 Ala. at 410.

Had it not been for the last three words of the quotation no doubt could be entertained as to the basis of the court's decision. But to introduce the phrase "*de facto*" injects a confusing element. It is evident that the phrase is not here used in the restricted sense. The liability imposed was incidental to membership in the corporation, and was not partnership liability.

The same difference of judicial opinion relative to partnership liability is evident in the group of cases just considered as is true of cases involving defectively organized corporations under a valid statute. Much difference of opinion exists as to the propriety of imposing such liability in the ordinary case of the so-called *de facto* corporation, although the weight of authority probably favors its imposition.³³

The question naturally presents itself as to whether partnership liability should be imposed upon incorporators in the case of an unconstitutional statute, or whether they should be treated differently than in the case of a defectively organized corporation under a constitutional statute. It is perhaps difficult to give a conclusive answer to this question because so much depends upon the particular facts of the case. If the associates organize a corporation in good faith under the authority of a statute believed to be valid, one instinctively objects to holding them liable as partners. On the other hand, if the associates seem, as might be true in rare instances, to have organized under a particular statute because they thought that it was unconstitutional and because they believed that they would escape all liability by so doing, one feels that they should not be permitted to "get away with it." It is very difficult to tell in the particular case whether the motives of the associates were *bona fide* or not, but in the usual case little question could be raised on this score, because in the average case the incorporators themselves are doubtless the most surprised of all to learn that they have not formed a corporation. It is doubtful, however, whether partnership liability should be imposed or denied on the sole ground of a particular view which a court may take of the effect of an unconstitutional statute. Fairness between the parties, the social and economic consequences in the particular class of cases which may follow from the adoption of a particular rule in such cases, as well as the doctrinal side should be given weight in choosing which of the two rules shall be followed in such a case, and in most instances these factors are given some weight.³⁴

³³ Magruder, *A Note on Partnership Liability of Stockholders* (1927) 40 HARVARD L. REV. 733. See also the articles cited in note 19.

³⁴ That the courts have not always given sufficient weight to economic considerations in these situations is the opinion expressed in 1 THOMPSON, PRIVATE CORPORATIONS (3d ed. 1927) 304. It is there stated that the better theory is prob-

2. Disputes between a corporation and its officers or members.

The cases thus far considered have involved dealings between the corporation and a stranger. There are some cases, however, in which the contesting parties are the corporation and one of its officers or members. Take for example, an action brought by the corporation against a shareholder to recover on subscription notes, on calls, or on assessments. Three Indiana cases are of interest in this connection. In the earliest of them³⁵ a corporation brought an action against a city upon a subscription which it had failed to pay. Answering the contention of counsel that the statute under which the railroad company had been organized was unconstitutional the court said that the city was estopped "by the contract, to deny the legal existence of the corporation." This was *dictum*. One year later a similar case came before the court and the following statement was made:³⁶ "Hence, if an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply." Concerning the plea of *nul tiel* corporation the court said that such a plea goes not to the power to organize, but only to the existence of a *de facto* corporation when a *de jure* one could have been organized. The position of the court seemed to be that there is no estoppel unless there is at the same time a *de facto* corporation.³⁷ In the later case of *Snyder v. Studebaker*³⁸ the plaintiff conveyed land to a corporation on account of a stock subscription. The corporation later conveyed it to the defendant and the plaintiff then sought to regain the land, because, as he alleged, at the time of the conveyance to the corporation it did not have legal existence and therefore the title to the land never passed out of the plaintiff. The plaintiff was held to be

ably that an invalid statute is insufficient to support a *de facto* corporation. Following this statement the author says: "But practically, and more consistent with other views relating to the doctrine of corporation *de facto*, the advantage is with the courts taking the opposing view; and this is certainly more consistent with sound business principles. The rule that no corporation *de facto* can exist under an invalid law casts upon the incorporators the responsibility of deciding the constitutionality of an act, or, at the peril of individual liability and ultimate corporate ruin, of organizing a corporation under a statute that may be declared unconstitutional. The business interests of the country cry out against such jeopardy."

³⁵ *Evansville, Indianapolis & Cleveland Straight Line R. R. v. City of Evansville* (1860) 15 Ind. 395, 416.

³⁶ *Heaston v. Cincinnati & Ft. Wayne Ry.* (1861) 16 Ind. 275, 79 Am. Dec. 430.

³⁷ Estoppel was also the basis of the decision in *East Pascagoula Hotel Co. v. West* (1858) 13 La. Ann. 545.

³⁸ (1862) 19 Ind. 462. This case was a little peculiar in that the act in question under which the organization was completed was a special one, enacted by the legislature at a time when permissible under the then existing constitution, but which was at the time of acceptance and organization, forbidden by a new constitution which had been adopted in the meantime.

estopped from raising this question. Some nice distinctions were made by the court and the opinion initiates the discussion of the problem by stating the general rule that if one contracts with a corporation he is estopped to deny its corporate existence. But, said the court, this applies only to estoppel on fact. "Hence, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void, the contract does not estop the party making it, to dispute the existence of the corporation." Does this then not cover the instant case? Apparently not, because the court proceeds with its explanation that if there is a law and the question is one of compliance with it, that is a question of fact and as to it plaintiff is estopped. In this case incorporation was permitted under special act until the new constitution went into effect. Whether organization occurred before the new constitution took effect was a question of fact. As to this question the plaintiff was held to have admitted by his contract that the corporation had been organized while the law permitted them to do so. The net result of the case is that plaintiff was not permitted to recover the land, and as to him the associates were accorded corporate standing. The *Studebaker* case expressly overruled the first of the Indiana cases referred to. The two cases are distinguishable on their facts and on the party raising the question in each of them, but the court apparently thought the differences immaterial, and properly so. The situation presented in the *Studebaker* case was one calculated to persuade most courts to apply either estoppel or the *de facto* doctrine for the protection of the holder of the land.

A Michigan case holds that a shareholder may defend against an action by a receiver to collect an assessment by showing that the statute under which organization took place was invalid.³⁹ A Pennsylvania case takes a contrary view, on the ground of estoppel.⁴⁰ Estoppel has also

³⁹ *Skinner v. Wilhelm* (1886) 63 Mich. 568. In *Krutz v. Paola Town Co.* (1878) 20 Kan. 399, same case on another point in (1879) 22 Kan. 725, the company sued a member to recover money alleged to be due it. Held, the corporation had no capacity to sue as a corporation, because the statute extending the period of corporate existence was invalid. No facts were present which called for the application of estoppel, thought the court.

⁴⁰ *Freeland v. Pa. Central Ins. Co.* (1880) 94 Pa. 504. In this case counsel sought to show that the assessments were *ultra vires*. To this contention the court answered, p. 513, "But how is it made out? Simply by alleging that the legislature had not conferred the power by a constitutional enactment, in other words, repeating the objections to the *validity* of the act. A corporation contract is *ultra vires* when it is beyond the powers conferred. But here the power *was* conferred, whether rightfully or not, and the contract in question was within the very letter of the act. It cannot be said, therefore, that it was *ultra vires* within the proper meaning of that expression. If the act itself was invalid in attempting to confer the power, of course the power did not exist. But this defendant cannot be heard to make that objection, and hence the defence on this ground falls." See the ref-

been utilized by courts to prevent defendant shareholders from assailing corporate existence in actions to recover calls.⁴¹ In one of these cases the court said:⁴²

"He is not dealing with it as a stranger, but as a member who has participated in its organization and claimed and exercised authority under and by virtue thereof. It will not do for him now to deny the rightful existence of this company as to himself and his own stock subscription, which he has affirmed as to all others."

Corporate existence is sometimes assailed by defendants in actions by building and loan associations to enforce repayment of loans made by them to members. An early Michigan case held that a mortgage given by a member to the association should be surrendered and cancelled upon repayment of the amount equitably due.⁴³ Some years later the same court held that the incorporators must sue for an accounting in equity, but that they could not sue at law as a corporation.⁴⁴ Some emphasis was placed in the opinion upon the fact that building and loan associations were not forbidden by positive law, as had been the case in some of the earlier Michigan cases.⁴⁵ The estoppel in this case seemed to be not one which operated to deny attack upon corporate existence, but rather one arising from recognition of the receiver by payments to him prior to the action, and based in part on the receipt of money by the defendant from which he had benefited. The court felt that defendant should be compelled to repay the loan but seems not to have decided the case on the *de facto* or estoppel bases, in the sense in which these have been applied in the other cases considered in this study.

However, both the *de facto* doctrine and estoppel were made use of by the South Dakota court to enable the plaintiff building association to foreclose a mortgage given to it by one of its members.⁴⁶

erence to the Freeland case in *Burkhard v. Pa. Water Co.* (1912) 234 Pa. 41, 42 Atl. 1120, in the lower court opinion. In another case, involving somewhat different circumstances, the Pennsylvania court had this to say in answer to a contention that a corporation had been organized under a statute invalid because of title defects: "their corporate existence must be attacked directly and not collaterally in a proceeding for a different purpose." *Commonwealth v. County of Philadelphia* (1899) 193 Pa. 236, 44 Atl. 336.

⁴¹ *St. Louis Colonization Assn. v. Hennessy* (1882) 11 Mo. App. 555; *Weinman v. Wilksburg & L. P. Ry.* (1888) 118 Pa. 192, 12 Atl. 288.

⁴² *Weinman v. Wilksburg etc. Ry.*, *supra* n. 41, at 203.

⁴³ *Mok v. Detroit Building and Savings Assn.* No. 4 (1875) 30 Mich. 511.

⁴⁴ *Burton v. Schildbach* (1881) 45 Mich. 504, 8 N. W. 497.

⁴⁵ See cases in notes 4 and 21.

⁴⁶ *Building & Loan Assn. of Dakota v. Chamberlain* (1893) 4 S. D. 271, 56 N. W. 897. In *McLaughlin v. Citizens Building, Loan and Savings Assn.* (1878) 62 Ind. 264, there is a *dictum* that estoppel would be applied in a case where a member of such an association attempted to defend against an action to enforce repayment of a loan. In *Building & Loan Assn. of Dakota v. Chamberlain*, *supra*, the court said

Sometimes the shareholder as plaintiff, rather than as defendant, seeks to assail the existence of the corporation. An illustration is furnished by the case of *Huber v. Martin*.⁴⁷ In that case a reorganized corporation had taken over some of the property belonging to a corporation of which plaintiff claimed to be a shareholder. He brought suit to have the property transferred back to the original corporation. The statute authorizing the reorganization was held unconstitutional and the court declared that it was "not sufficient to support even a *de facto* corporation." The court held that the assets of the old corporation could be recovered from the pretended new one. That the whole scheme in the *Martin* case looked as though a small group was to benefit from the reorganization at the expense of the other shareholders was doubtless an important factor causing the court to disregard the alleged existence of the new corporation. By filing a counterclaim against a corporation a defendant shareholder has been estopped to deny the existence of the corporation. As to the defendant the corporation was held to have *de facto* existence.⁴⁸

B. *Where there have been no dealings on a corporate basis.*

The cases to be considered in this section comprise a number of divergent situations and have little in common except that all of them involve the question of the status of a private corporation alleged to have been formed under an invalid statute.

The question of corporate existence is occasionally raised by a corporation attempting to exercise the power of eminent domain. In Pennsylvania the Superior Court⁴⁹ has held that an injunction would not be granted against a corporation about to condemn petitioner's land, the petitioner asserting the invalidity of the statutory basis for one of the corporations in a merger. The court went on the ground

at p. 283: "Any other doctrine would be contrary to the plainest principles of reason and good faith, and involves a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have helped to make appear to exist, and upon which others have relied." Another *dictum* on the *de facto* doctrine, as applied to this type of case, is to be found in *Winget v. Quincy Bldg. & Homestead Assn.* (1889) 128 Ill. 67, 84, 21 N. E. 12, 16: "A party who has contracted with a corporation *de facto* as such, can not be permitted, after having received the benefits of his contract, to allege any defect in the organization of such corporation, as affecting its capacity to enforce such contract, hut all such objections, if valid, are available only on behalf of the sovereign power of the State . . . And this rule applies even where the corporation is organized under a law alleged to be unconstitutional."

⁴⁷ (1906) 127 Wis. 412, 105 N. W. 1031.

⁴⁸ *Black River Improvement Company v. Holway* (1893) 85 Wis. 344, 55 N. W. 418.

⁴⁹ *Yeingst v. Philadelphia, Harrisburg & Pittsburgh R. R. Co.* (1909) 40 Pa. Super. Ct. 106.

that only the state may assail the existence of the corporation. That defendant in this case was already on the land and had made some improvements may have been sufficient to differentiate this case from *Etowah Light and Power Company v. Yancey*.⁵⁰ There a demurrer to a petition in condemnation proceedings was sustained because the statute authorizing the incorporation of the petitioner was invalid. The New Jersey court has taken a similar view, for the reason, it is said, that the question of unconstitutionality is one of law and not one of inference or fact.⁵¹ In the New Jersey case the attempted condemnation was characterized as "mere usurpation" because of the invalidity of the statute authorizing organization. Although there is a conflict in these cases, the two latter decisions perhaps indicate the attitude which many courts are likely to take in condemnation proceedings. Had the court been disposed to do so in the *Etowah* case, it could easily have applied the *de facto* doctrine, because there existed at the time of organization another valid statute under which the organization might have been formed.⁵² That the corporations involved in these cases were public service companies does not seem to have been given any explicit consideration. The tendency seems to be to view quite strictly the exercise of the power of eminent domain by private corporations. Its exercise is regarded as an imposition upon the individual and is tolerated only because of necessity, and if others than the government are to exercise this power they must be above reproach so far as the legality of their organization is concerned. This factor may be sufficient in the minds of many judges to offset any general feeling which they may have that *bona fide* organization under a statute should be given *de facto* effect even though the statute should subsequently be declared invalid. On the other hand, there is of course the inconvenience which may result from a refusal to apply the *de facto* doctrine in such cases. There is also the question whether any different rule should be followed in condemnation proceedings in the case of a defectively organized corporation as compared with the case of a corporation organized in compliance with all of the requisites of an invalid statute.⁵³

Somewhat similar to the situation in the eminent domain cases is that presented when a private landowner asks for an injunction to prevent a corporation from laying tracks in a street on which the plaintiff

⁵⁰ (C. C. Tenn. 1911) 197 Fed. 845.

⁵¹ *Sisters of Charity of St. Elizabeth v. Morris R. R.* (1913) 84 N. J. L. 310, 86 Atl. 954.

⁵² *Supra* n. 17.

⁵³ There is a division of authority as to the rule to be applied in cases of defectively organized corporations under valid acts, in eminent domain cases. 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 592.

owns lots, or in which he may own the fee, subject to a servitude. For an example of the attitude likely to be met with in this type of case mention might be made of the Maine case in which the court held plaintiff estopped to deny the status of the defendant because he had asked for an injunction against *the corporation*.⁵⁴ The court expressed the view that it ill befitted the plaintiff to assail the status of the very legal person against whom he was seeking relief. The *de facto* doctrine was also mentioned by the court as a possible basis for the decision and the judges did not seem to feel disposed to give serious consideration to the contention of the plaintiff that his property was being taken from him without compensation. The Georgia court has taken the same attitude in a *dictum*, and has expressed the opinion that estoppel may be used in such a case even though the facts were not such as to warrant the application of the *de facto* doctrine.⁵⁵

Another situation in which corporate status has been questioned is one in which a will comes before a court for construction, the will containing bequests to corporations to be formed in the future or already in existence. Thus by the terms of a will made in New York, property was given to a corporation to be formed in Ohio. The Ohio corporation was organized and now its existence is attacked in proceedings by an executor to procure a construction of the will. The New York court was asked to hold that the statute in question was contrary to the constitution of Ohio, and that therefore it could not take under the will. The court refused to take this view of the case and held that inasmuch as the state of Ohio had not questioned the corporate status of the beneficiary by *quo warranto* proceedings it looked as though that state recognized it as having *de facto* existence.⁵⁶ The corporation was permitted to take under the will. The *de facto* doctrine was also applied in a Missouri case⁵⁷ presenting a similar question, and the court said in the course of its opinion:⁵⁸

"... its existence cannot be questioned in a collateral proceeding, if it appear to be acting under color of law, and recognized by the State as such. The question of its being must be raised by the State itself, on a *quo warranto* or other direct proceeding; and this, although the act incorporating it, or authorizing its incorporation, is violative of the constitution of the State."

The desire to carry out the intention of the testator as manifested in the

⁵⁴ Taylor v. Portsmouth etc. Street Ry. (1898) 91 Me. 193, 39 Atl. 560.

⁵⁵ Brown v. Atlanta Ry. & Power Co. (1901) 113 Ga. 462, 39 S. E. 71.

⁵⁶ St. John v. Andrews Institute For Girls (1907) 117 App. Div. 698, 102 N. Y. Supp. 808.

⁵⁷ Catholic Church v. Tobbein (1884) 82 Mo. 418.

⁵⁸ 82 Mo. at 424.

will in such a case must be balanced against the policy involved in discouraging people from forming corporations under unconstitutional statutes. There is, however, some element of public policy in favor of protecting persons who have *bona fide* relied upon legislative action.

The general problem of the effect of an unconstitutional statute on civil and criminal proceedings instituted in reliance thereon will not be dealt with in this study, but mention should be made of the case of *De Bow v. People*.⁵⁹ There a person was charged with forging bank notes and defrauding a bank. The defense was that the statute under which the bank had been organized was unconstitutional, and the court sustained this contention, saying that "it is utterly void, and the banking companies which have been organized under it have no legal existence." There being no statute under which the bank could be organized, the indictment which charged that a *bank* had been defrauded was defective. People may have thought that there had been in existence a banking corporation with which they had done business, but as applied in a criminal case this was all a mistake. There was no bank, and therefore it could not very well have been defrauded. So the scoundrel went his way. The court in its opinion bewailed the fact that business in the state should thus be made to suffer, but asserted that the statute was clearly unconstitutional, and that their course in the situation was marked out for them as one of duty and could not be avoided. No attention was paid by the court, in the opinion at least, to the social consequences which might ensue from letting a man go unpunished who had committed an offense punishable by statute, and one certainly of an anti-social nature. Criminal cases would appear to present a situation wherein the court might well hold that the doctrine of a *de facto* corporation would be applicable.⁶⁰ The South Dakota court has applied that doctrine to a case in which a cashier of a bank which had been organized in the absence of any statutory authority was indicted for accepting deposits when he knew that the bank was insolvent.⁶¹ Surely if the *de facto* doctrine could be applied to a corporation which had been formed in the absence of any legal authority in a criminal case it should have been possible, even under the strict void *ab initio* view of unconstitutionality to have applied it in the *De Bow* case.

If the use of this doctrine is ever justifiable it certainly would be in such cases as these. A person accused of crime should be tried on the basis of the act committed and the surrounding circumstances, and not on the basis of the legal existence of the corporation to whom the

⁵⁹ (1845) 1 Denio (N. Y.) 9.

⁶⁰ The tendency seems, however, to be the exact contrary in the criminal law generally, when unconstitutionality is involved.

⁶¹ *State v. Stevens* (1902) 16 S. D. 309, 92 N. W. 420.

indictment charged that injury had been done. The depositors in the New York case probably had little consolation in the realization that it was not the bank that had been defrauded. The South Dakota case doubtless goes the limit in applying the *de facto* doctrine, but it is submitted that it goes no further than is desirable in this class of cases.

*Dobey & Union Telegraph Co. v. De Magathias*⁶² was a tort case in which an action was brought against the defendant for cutting a cable belonging to the plaintiff. The ship of the plaintiff had been anchored in such a position that when the anchor was raised it caught the cable, and to disentangle it the cable was cut. The defense was that the corporation had been organized by a court when under the constitution of the state this type of corporation was to be incorporated by legislative act alone. The court decided that the incorporation proceedings under the control of a court were unconstitutional, and from this the court concluded that plaintiff was not a corporation. It followed that the state of Georgia had not authorized it to lay the cable which had been cut. There being no corporation there was, said the court, no plaintiff, because "plaintiff corporation disappears from the record and leaves not a wrack behind." There being no plaintiff and nobody to take advantage of the cause of action, it followed quite logically that the case should be dismissed, which the court promptly did. That the *Dobey* case carries the doctrine of void *ab initio* to the uttermost lengths seems clear. The defendant had cut the cable. An injury had been committed for which redress could in the ordinary case properly have been obtained. The result of the case seems highly objectionable.

An interesting and somewhat curious case is *Chenango Bridge Company v. Paige*.⁶³ Plaintiff in that case had obtained an exclusive franchise to build a bridge across a river at a certain designated place, no other bridge to be allowed within a specified distance up and down the river. Later the legislature gave permission to a corporation to build a bridge within the prescribed area. Defendant's testator had been the moving figure in organizing the venture which resulted in the second bridge. A flood carried away this second bridge, and hurled it into the plaintiff's bridge, causing considerable damage thereto. The plaintiff, owner of the first bridge, brought suit against the defendant in his representative capacity, to recover (1) for the damage done by the flood, and (2) for tolls collected prior to the flood. The court held that there could be no recovery on the first ground, and this would be true whether the bridge had been built and owned by a corporation or de-

⁶² (C. C. Ga. 1885) 25 Fed. 697.

⁶³ (1880) 83 N. Y. 178, 38 Am. Rep. 407.

fendant's testator. Recovery was allowed, however, on the second ground.

The statute authorizing the incorporation of the company promoted by defendant's testator seems to have been invalid, and for that reason individual liability was imposed for the invasion of the exclusive right of the defendant to take tolls within the area designated by the act granting him his privilege. The court was apparently at a loss as to what effect the invalidity of the statute should have in this case, but finally decided that whether defendant's testator "be considered to have acted for himself as a stockholder, or as an agent of the stockholders of the corporation, the statute furnished him no protection." The decision held defendant's testator to individual rather than corporate liability. The court intimated in one portion of the opinion, that as against others than this plaintiff the organization would be treated as a corporation. Thus, in speaking of the effect of the unconstitutional statute it was said: "that act unquestionably made it a corporation, and it had all the rights and powers conferred upon it by the act against the whole world except the plaintiff." The exact meaning of this statement is a little difficult to know, because it departs from the usual rule as stated in so many of the cases, that the corporation is valid against the whole world except the state. Just what there was about plaintiff's position which warranted special consideration in this case is not clear, unless the case be taken as an authority for holding that the corporation will be considered as non-existent for wrongs of this kind committed by its members. These two cases seem to indicate that the courts will not hesitate to hold that corporate privileges and immunities will not be accorded individuals who organize under an invalid statute, whether the corporation is suing for a tort committed against it, or whether the individuals are made parties defendant for a wrong committed by the group against a stranger. Viewed from the standpoint of doctrine as to the effect of an unconstitutional statute this is consistent. Viewed from the standpoint of the individual associates it means that they may not have the privileges of suing in the corporate name, but they may be held individually liable in case the organized group commits a wrong. The justice of this seems a little obscure.

No case has been found squarely in point on the doctrine of *de facto* officers as applied to private corporations. An Indiana case contains a *dictum* justifying the belief that some courts would apply the doctrine to officers of private as well as municipal corporations,⁶⁴ although the

⁶⁴ *Bradford v. Frankfort, St. Louis & Toledo R. R.* (1895) 142 Ind. 383, 40 N. E. 741. The court said, at p. 392, "If, conceding for the purposes of the inquiry the act . . . was unconstitutional, and there existed no power to reduce the number of directors from thirteen to five, we must at least assert that there was colorable

questions of public policy involved in these two situations are not identical.⁶⁵

II. CONCLUSIONS

It is clear then that there is some confusion in the cases dealing with the status of a private corporation organized under an unconstitutional statute. Not only are the courts at times divided upon the results which should be reached on a given state of facts, but even when they are agreed as to the proper result, different doctrinal bases are made use of to justify or explain it. Some of the expressions and doctrines commonly encountered in judicial opinions on the subject in hand should perhaps be considered at this point.

One of the most common of the phrases used in the opinions referred to is that of "*de facto* corporation." What is meant by that phrase? Is a *de facto* corporation a corporation or is it something else?⁶⁶ This question leads in the final analysis to a consideration of the nature of a corporation "*de jure*," so-called. What is meant by the phrase "a corporation"? Some insist that a corporation is a legal person, or at least a legal entity, apart from the natural persons who compose it. They regard it as the eleventh person, composed of the ten natural persons who form the "it", the corporation, but distinct from the ten. To say that the conception is an impossible one is to be very bold, for many persons have for a long time entertained it. Others, on the contrary, view a corporation as a group of persons who are considered for certain purposes as though they were one. There are other theories also, but these two views probably have the greater number of followers in this country.

authority for the proceeding, and that, until the law should be declared unconstitutional, the acts of those chosen under such colorable authority would be the acts of *de facto* officers." See *State ex rel. Dulin v. Lehre* (1854) 7 Rich. (S. C.) 234, 324.

⁶⁵ On the status of officers chosen to fill an office created by an unconstitutional statute see Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Effect on Official Status* (1928) 13 MINNESOTA L. REV. 439.

⁶⁶ 1 THOMPSON, PRIVATE CORPORATIONS (3d ed. 1927) 296, says of a *de facto* corporation that, "It has an actual substantial legal existence." And again, "It is essentially a body entirely separate from the individuals who compose it; it is a legal entity . . ." In 1 FLETCHER, CYCLOPEDIA OF CORPORATIONS (1917) § 273, it is said that "such corporations have a substantial legal existence." CLARK, CORPORATIONS (3d ed. 1916) 97, " . . . means a body which actually exists, for all practical purposes." On the other hand, Professor Magruder, in the article cited *supra* n. 33, refers to a *de facto* corporation as a "matter of technique", while Professor Dodd in n. 77 of the article cited *supra* n. 19, says that the doctrine of *de facto* corporations is based on policy, and not on logic. BALLANTINE, PRIVATE CORPORATIONS (1927) 74, says that the basis for denying collateral attack "is to be found in public policy and convenience in the security of business transactions and in elimination of quibbles over technicalities which are of no concern to those dealing with the corporation."

Upon one thing both sides are agreed. That is that rules of law, usually stated in statutes, create or recognize the legal relations or incidents which we think of in connection with any concept of a corporation. The legal person exists by virtue of a legal rule, or, on the other hand, the group is treated as one because of a rule of law to that effect. This idea is often expressed by the expression that a corporation is "a creature of the law".

When such a legal creature has been created in substantial accordance with the legal requirements evidenced by statute and constitution we refer to it as a "corporation *de jure*" if we follow the accepted paths of legal thought.⁶⁷ But how does a corporation *de facto* differ from this? Is it also a legal creature?⁶⁸ There seems to be no agreement among courts and textwriters as to the exact content of the concept "*de facto* corporation". Some writers attempt to clarify their exposition by stating that a *de facto* corporation is the same as one *de jure* except that its existence is subject to attack by the state because of some default or defect in the process of organization. As to all others than the state, however, the explanation runs, a *de facto* corporation is just the same as one *de jure*. All of which is known by anybody familiar with the cases to be only partially true. If it be conceded for the sake of argument that a corporation *de facto* is a legal person, or entity, or a group of legal incidents, the question may still be asked: is it created by statute or by judges? Corporations are customarily thought of as creations of statutes. Common law judges disclaimed any technique for creating corporations. But is this an exception? If judges do create corporations *de facto*, on what theory do they do so, and for what reasons? Is it on the theory of estoppel?

This leads us to a consideration of another doctrine which is often utilized in corporation cases. Most courts and writers have taken the view that corporations *de facto* are not dependent upon principles of estoppel.⁶⁹ At this point it should be noted that when courts speak of

⁶⁷ For a discussion of theories as to the nature of a corporation see: Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts* (1909) 9 COLUMBIA L. REV. 285; Canfield, *The Scope and Limits of the Corporate Entity Theory* (1917) 17 COLUMBIA L. REV. 128; Machen, *Corporate Personality* (1910) 24 HARVARD L. REV. 253, 347; Laski, *The Personality of Associations* (1915) 29 HARVARD L. REV. 404; Smith, *Legal Personality* (1928) 37 YALE L. J. 283.

⁶⁸ See quotations, *supra* n. 66.

⁶⁹ 1 FLETCHER, CYCLOPEDIA OF CORPORATIONS (1917) 547, "... the rules in relation to them [that is, *de facto* corporations] do not depend upon the ground of equitable estoppel, but may be applicable though the elements of an estoppel are not shown." CLARK, PRIVATE CORPORATIONS (3d ed. 1916) 109, "No elements of estoppel are necessary to prevent a private individual from objecting to the existence of a corporation *de facto*; and, as we shall see, a man may in some jurisdictions, on equitable grounds, be estopped to question the corporate character of an

estoppel in this connection they used that word in a different sense than is ordinarily associated with its use. Perhaps some will be aided by the distinction between estoppel by representation and estoppel by conduct, and the explanation that the latter is the sense in which the term is used in this group of cases. But to return to the relation between the *de facto* doctrine and that of estoppel, as the two are utilized in settling the problem of corporate status, is there any need for resorting to the doctrine of estoppel if the *de facto* doctrine is applied? If one says that there is a corporation *de facto* in a given case, does that not mean that the associates are to be treated as though they were a corporation, whether they are one or not? Are not corporate incidents automatically applied by such a decision? What then can it add to say that a person is estopped to deny the existence of the corporation? It is submitted that to say that a corporation exists *de facto* is to say that collateral attack is denied. Likewise, if the doctrine of estoppel is applied it is needless to resort to the *de facto* doctrine. The application of either means that the case is to be disposed of in accordance with the rules governing corporate transactions.

Some writers maintain that there cannot be a corporation by estoppel.⁷⁰ What happens when a party is denied collateral attack on the status of an alleged corporation because of the application of estoppel? Suppose that we agree that a corporation in the sense of a legal entity is not created by a court when it applies the doctrine of estoppel to deny collateral attack. Is not the case nevertheless disposed of in accordance with rules designed for corporate bodies? Is partnership liability, for example, imposed in either case? The answer would seem to be in the negative. The result is the same in either case. If it were not for the fact that writers and judges arbitrarily limit their definition and treatment of *de facto* corporations it would be very difficult indeed to distinguish the results of estoppel and of the *de facto* doctrine in these

association that is not even a corporation *de facto*." BALLANTINE, PRIVATE CORPORATIONS (1927) 91, n. 61, "Corporations by estoppel are not based upon the same principle as corporations *de facto*. Estoppel may prevail when there is no color of incorporation, or where the law under which the corporation claims to exist is unconstitutional."

⁷⁰ Many writers seem to be willing to hold that a *de facto* corporation has legal existence, but hesitate to hold that a corporation can have legal existence by virtue of the application of estoppel. Thus, for example, CLARK, PRIVATE CORPORATIONS (3d ed. 1916) 122, says that the doctrine of estoppel is unnecessary if limited to *de facto* corporations, but, on p. 122, the same author says that, "It is of course, very largely a matter of public policy whether courts shall raise an estoppel when not even the elements of *de facto* incorporation are present, and naturally the courts differ." This would indicate that this writer would distinguish *de facto* corporations in that they had legal existence as a corporation, independent of public policy. This is only typical of the vague distinctions suggested in discussions of *de facto* and estoppel doctrines.

cases. The only difference between the two doctrines seems to be that one is broader than the other, although a few courts tend to restrict the use of estoppel to cases in which the elements of a so-called *de facto* corporation are also made out. In these latter cases, there is, as indicated, no need to invoke estoppel.⁷¹

Let us next consider the point of contact between these doctrines and those dealing with the effect of an invalid statute. Suppose that a corporation is organized *bona fide* under a statute not yet declared unconstitutional. Subsequently the statute is declared invalid. Much will now depend upon which of the two views as to the effect of an unconstitutional statute the judge chooses as a premise. Let us suppose that he chooses the strict *ab initio* view. From this premise he will reason that a corporation organized under this statute cannot have *de facto* existence. The conclusion will then be that individual liability should be imposed upon the associates. Under the strict *ab initio* view the individuals cannot be saved from liability by the application of the doctrine of estoppel because the case is to be disposed of as though the parties had acted without reference to any purported statute. The charter is considered as articles of partnership and throughout the entire process of reasoning the statute as a factor in the case, either as a source of legal relations or as a fact upon which to predicate legal consequences, is ignored. Even the existence of another valid statute under which incorporation might have been had will not avail to save the corporation.⁷² This is the result reached by the application of the strict *ab initio* view.

On the other hand, if the judge adopts the view that the statute should not be entirely ignored, a different result may be reached. Assuming that the existence of a law is necessary as one of the requisites for a *de facto* corporation, let us see what happens when we proceed to settle a case on the theory that the statute is to be given some effect in disposing of the case. There will then be a basis on which to predicate a *de facto* organization, because the writing on the statute book is not to be ignored. The *de facto* doctrine can then be applied in the case, because even the requirement of a law under which incorporation could be had is substantially, though not literally, fulfilled. The invalid law is given sufficient effect to support the application of the *de facto*

⁷¹ *Supra* n. 70.

⁷² Tooke, *De Facto Municipal Corporations Under Unconstitutional Statutes* (1928) 37 YALE L. J. 935, has taken the doctrine applied by some courts in private corporation cases, to the effect that the existence of a valid law under which incorporation would have been possible is sufficient to prevent collateral attack, as a basis on which to explain the municipal corporation cases. See Field, *The Status of a Municipal Corporation Organized Under an Unconstitutional Statute* (1928) 27 MICHIGAN L. REV. 523.

doctrine. A court in this frame of mind will often be quite ready to invoke the aid of some other valid statute to support its position that there is good ground for treating the associates as a corporation, in view of the fact that such a statute expresses a policy favorable to the existence of the particular type of corporation involved. It is sometimes very difficult to know whether a court regards an invalid statute as sufficient to support the application of the *de facto* doctrine, or whether the main reliance is placed upon the existence of another valid statute under which the organization might have been incorporated. There can be no doubt, however, but what many of the courts utilize the existence of such a valid statute to sustain a result already decided upon. Courts adopting the void *ab initio* view, on the contrary, will not be influenced by the existence of another valid statute, and will usually explain that the corporation must stand or fall on the statute in reliance on which incorporation was attempted.

But, even if the court does not think that the *de facto* doctrine can be applied because the statute is not a law, it may treat the statute as one of the facts in the situation and apply the doctrine of estoppel, and thereby attain the same result that would be attained by using the *de facto* doctrine. If benefits are received, for example, the court will say that the existence of the statute, at least in the sense of some writing on the statute books, will not be disregarded, because it was, after all, one of the factors in the situation from which benefit was derived.⁷³ Under the void *ab initio* view only one result is possible while under the other view a different result may be attained, and it may be reached by the application of two separate doctrines, which, when taken together, cover a great variety of situations.

It may then be of considerable importance that the judge choose the premise which will enable him to reach the most desirable result in a given situation. For, once the premise is chosen, the whole train of consequences to follow is to a large extent determined. And as has been seen in some of the cases previously discussed, some courts march the full length of the logical course thus mapped out, bewailing the consequences of their decision. But that other courts, and doubtless the majority of modern courts, have been influenced in their selection of premises by the results they wished to attain in particular types of cases can admit of no doubt. This has probably been the very reason why other views than that of void *ab initio* have been adopted as starting points. The correct view of these doctrines, as well as those of

⁷³ BALLANTINE, *op. cit. supra* n. 66, says at p. 74, that the weight of authority sustains prevention of collateral attack when estoppel can be applied, even though the statute of organization is unconstitutional.

de facto and estoppel, would seem to be that they are tools whereby the judicial surgeon may correct a maladjustment. If they are useful in that work their use is justifiable. Whether they be logical when judged by the propositions included with them may be of interest but not of much importance so far as the administration of the law is concerned. Whether, for example, a corporation is created or not by use of the doctrines of estoppel and *de facto* is a question of relatively little significance except for purposes of correcting and testing the validity of the components of these assumed starting points, concepts. Perhaps they are not concepts, but are merely words of description. What is important is that in certain types of cases associates who organize under an invalid law are treated as individuals; in other types of cases they are treated as one. Equally important is it that courts do not agree as to the results which should be reached in a given class of cases. The examination of doctrine and theoretical explanation in this connection can only serve to indicate in what particulars courts seem to have been properly or improperly (using these words without any moral signification) influenced by them. It is quite clear that in some instances courts have attempted to decide cases in this field of the law by rules of logic, assuming as a premise one of the views with respect to the effect to be given to an unconstitutional statute. It is also clear that the number of courts who have been misled in this manner is relatively small; and many of the cases illustrating this tendency are from the past century.

Can any generalization be made on the basis of the cases herein considered? It is clear of course that in the first place there is much confusion in the cases and that the courts are divided over the question whether there can be a *de facto* corporation under an unconstitutional statute. The weight of authority seems to favor the view that there can be such a corporation in cases involving dealings between the corporation and strangers on a corporate basis. The authority is more evenly divided in the cases between the corporation and its own officers or shareholders. But if to the *de facto* cases are added those based on estoppel a slight margin probably remains in favor of preventing collateral attack even there. More uncertainty is encountered in the cases in which there have been no corporate dealings between the parties, and in the eminent domain cases, as well as in those involving crimes and torts, the courts seem to be less strict in denying collateral attack, and the *de facto* doctrine is not often applied. Otherwise, as in the cases involving wills and injunctions, the trend seems to be in favor of applying the *de facto* doctrine. The tendency is uniform to apply this doctrine in cases where foreign corporations are assailed because of organization contrary to the fundamental law of the state of incorporation.

If the case can be aided by the existence of a valid statute under which organization might have been completed, but under which no attempt to organize was made, some courts are willing to utilize the existence of such statute to support the application of the *de facto* doctrine, although some courts refuse to apply the doctrine even in the event that such other statute exists. If one should make a count of heads covering all of the situations considered in this study it would be found that the cases in which either the *de facto* doctrine or estoppel, or both, are used to prevent attack on corporate status outnumber those in which the application of either or both of those doctrines are denied.⁷⁴ The general tendency seems to be to sustain the corporation in order that the case may be disposed of in accordance with rules applicable to such bodies, and this is particularly true where to do so protects rights acquired and asserted honestly and in good faith.

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⁷⁴ 14 C. J. 216, "The great weight of authority supports the doctrine that there cannot be even a *de facto* corporation unless there is a valid law under which the corporation such as the one in question might exist *de jure*, and therefore that a corporation cannot exist even *de facto* under a *clearly* unconstitutional statute . . ." The addition of the italicized word (italicized by the present writer) adds nothing, because no case has been found involving private corporations wherein the court has attempted to make use of the doctrine sometimes applied in the officer cases, namely, that of clear and cloudy unconstitutionality. 1 THOMPSON, *op. cit. supra* n. 66, says at p. 304, that the cases are about evenly divided. That the better view is that no *de facto* corporation can exist under an unconstitutional statute is the opinion of the authors of 1 CLARK AND MARSHALL, PRIVATE CORPORATIONS (1901) 246, and 1 FLETCHER, *op. cit. supra* n. 66, at 564. In n. 77 of Professor Dodd's article, cited *supra* n. 19, the following statement is made: "The *de facto* rule, in the form in which it is stated by some courts, may be too narrow to do justice. The rule is based on policy, and not on logic, and the theory of some courts that it cannot be applied to corporations organized under unconstitutional statutes seem to the writer unduly technical. Nevertheless, it is submitted that the courts have been guided by a sound instinct in declining to extend the *de facto* doctrine, to all cases of invalid corporations."