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THE EFFECT OF AN UNCONSTITUTIONAL STATUTE IN THE LAW OF PUBLIC OFFICERS: LIABILITY OF OFFICER FOR ACTION OR NONACTION*

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INTRODUCTORY

The question of the liability of an officer for acting or failing to act under an unconstitutional statute may arise in a variety of situations.

I. Injunctive relief is often sought to prevent an officer from taking threatened action under a statute which is alleged to be invalid. If the court decides that the law is unconstitutional the decree will issue, and such a suit is not one against the state because the officer is being restrained in his private instead of in his official capacity. He is said to be stripped of his official character, and for that reason is subject to injunctive restraint.¹

*This is one of a series of articles on the effect of an unconstitutional statute written while the author was a Sterling Fellow at 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.

¹ *Astrom v. Hammond*, Fed. Cas. No. 596 (C. C. Mich. 1842); *Commissioners of Wyandotte County v. Kansas City, Ft. Scott & Memphis R. R.*, 5 Kan. App. 43, 47 Pac. 326 (1896); *Lynn v. Polk*, 8 Lea 121 (Tenn. 1881); *Board of Liquidation v. McComb*, 92 U. S. 531 (1875); see 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1819.

2. A writ of mandamus may be asked for by a private individual to compel the performance of some act which the officer asserts is thrust upon him by an unconstitutional statute. The question whether the officer may set this up as a defence is a troublesome one, and the courts are divided upon the answer which should be given to it.² Some courts refuse to permit the unconstitutionality of the statute to be used as a defence, and will issue the writ if the relator makes out a case which otherwise entitles him to it.

3. The state may bring a criminal action against the officer for failing to perform some duty with the performance of which he is charged by statute, the nonperformance of which is by the same or another statute made a criminal offence. *State v. Godwin*³ was a case of this type. There an indictment was returned against a justice of the peace for failing to make a report required by statute, an omission in the making of which constituted a statutory crime. A subsequent statute purported to relieve the justice of the peace from the performance of this duty and to provide for its performance by another officer. This second statute turned out to be unconstitutional. The justice was then indicted for his omission to make the report. The theory of the indictment was that the second statute, being unconstitutional, had no effect in transferring the duty to make the report referred to, nor did it affect the duty of the justice to make it. The court decided that the justice was not guilty. The opinion emphasizes the presumption that a statute is valid until it is declared invalid. This presumption should protect the officer as well as insure for the statute the benefit of any doubts which the court might entertain as to its constitutionality. The decision was also influenced by the manifest injustice of requiring that the justice of the peace be wiser than the legislature and the people, with respect to the possible unconstitutionality of a statute. To fine an officer for obey-

² *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N. W. 20 (1912); *Bd. of Commrs. of Newton County v. State*, 161 Ind. 616, 69 N. E. 442 (1904). For a discussion of this question, with citations of cases pro and con, and a consideration of the reasons for decision advanced by the courts, see Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes* (1927) 11 MINN. L. REV. 585.

³ 123 N. C. 697, 31 S. E. 221 (1898).

ing what appeared to be the law seemed too illogical a result for the court to reach. A strict adherence to the void *ab initio* theory⁴ might have led to a contrary decision, but this case illustrates that that doctrine will not be applied to its logical conclusion in a case of a criminal prosecution of an officer for failing to perform his duty, the officer having been relieved of the duty by what turned out to be an invalid act.

4. An action for damages may be brought against an officer who acts under an unconstitutional statute, by a party claiming to have been injured thereby. A similar action may also be instituted against the officer by a private individual who alleges that he has been injured by a refusal of the officer to take certain action under a statute which the officer believes to be unconstitutional.

In one of the senses in which the term liability is used it is perhaps correct to say that the officer is liable in the first three situations just considered, to a suit for an injunction, to a proceeding in mandamus, or to criminal prosecution. The term liability as used in this study is, however, more narrowly confined in its meaning. By it is meant liability to an action for money damages, such as was mentioned in the fourth group of cases alluded to above.

In considering the cases on the effect of an unconstitutional statute on the liability of an officer, three types of situations are easily distinguishable:

- (1) Cases in which an action is brought because of a refusal of the officer to act.
- (2) Cases of direct action by the officer, in the absence of an intervening judicial process.
- (3) Cases involving judicial process or judicial proceedings.

The problem of the protection of officers acting under invalid statutes will be considered subsequent to a review of the cases.

⁴The phrase void *ab initio* as used here refers to the view taken by some courts that an unconstitutional statute should be entirely eliminated in the decision of a case.

Unless expressly stated that the contrary is the case all of the situations discussed in this paper involve official action or nonaction under an unconstitutional statute or ordinance.⁵

I. REFUSAL TO ACT

In *Clark v. Miller*⁶ a road had been laid over the plaintiff's land. The first assessment of damages was \$185. On reassessment this was raised to \$355. The defendant, a town supervisor, presented the amount of the first assessment to the board for allowance, refusing to present the claim for \$355 on the ground that the statute under which the reassessment had been held was unconstitutional. The plaintiff refused to accept the award of \$185 and brought an action against the supervisor for refusing to present the reassessment figure to the board. The supervisor defended with the plea that he was under no duty to act in accordance with a statute which he believed to be unconstitutional. The court held for the plaintiff, allowing a recovery of \$355. In sustaining this decision the court said, in the course of its opinion, that "honest ignorance does not excuse a public officer for disobedience to the law."⁷ Disobedience in such a case was said to be at the peril of the officer, and inasmuch as the plaintiff had an interest in the performance of this function he was entitled to recover what he had lost by the refusal of the supervisor to perform the same. The attitude of the court is set out in the following quotation from the opinion:

"That the defendant thought the law unconstitutional, and that this view was shared by the town officers, and that his refusal to obey the statute went upon that ground, is, in a legal point of view, of no consequence."⁸

⁵ An officer is of course liable for action taken in the absence of a statute when such action is contrary to a constitutional prohibition which operates upon individuals. *Robinson v. Bishop*, 39 Hun 370 (N. Y. 1886) (liable on bond issued in excess of constitutional authority); *Milligan v. Hovey*, Fed. Cas. No. 9,605 (C. C. Ind. 1871) (General Hovey, in the famous Milligan case of the Civil War period, held liable for false imprisonment, in exceeding his constitutional authority).

⁶ 54 N. Y. 528 (1874).

⁷ *Ibid.* 534.

⁸ *Ibid.* 532.

The court said further:

"In my opinion it ought to be deemed settled in the law of this State that a ministerial officer, charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action if he refuses and omits to perform it."⁹

With respect to the amount of recovery, counsel contended that interest only should be allowed, and that only for the period until the claim could again be presented and allowed. The court held, however, that the gist of the wrong was the refusal to present the claim for \$355. Therefore that amount with interest should constitute the amount of the judgment. On the question of damages the court said:

"In respect to the rule of damages, I have no doubt that the defendant is answerable for the whole amount which, by his refusal to perform his duty, the plaintiff has been unable to obtain. The law will not limit his recovery to anything less than the amount of the reassessment; for such a limit would drive him to a succession of actions, in none of which could he, if the defendant's position is correct, recover more than interest. It cannot be assumed that the defendant would be taught by the result of one action and proceed to do his duty, and thus avoid another. The plaintiff is not thus to be put off. The defendant's misconduct has deprived him of obtaining his money, and the defendant must answer to the whole injury which he has occasioned."¹⁰

One cannot but feel that the court makes an insufficient allowance for the respect usually accorded its judgments, when it says that it cannot be assumed that the defendant would be taught by the result of one action. Is that not exactly what one would reasonably expect: that the defendant would learn by one action and guide his behavior accordingly?

In *Morris v. People*¹¹ a New York statute provided for a penalty of \$250 for refusal on the part of members of the board

⁹ *Ibid.* 534.

¹⁰ *Ibid.* 535.

¹¹ 3 Denio 381 (N. Y. 1846). The majority opinion was delivered by Senator Lott.

of supervisors to audit claims against the county. A claim for salary was presented to the board by a person purporting to be a judge in the county. The state legislature had provided that the judge's salary should be a charge against the county. The defendants, as members of the board of supervisors, refused to audit the claim. They alleged that the court of which the plaintiff claimed to be judge had been created by an unconstitutional statute. They concluded from this that he was not entitled to his salary and asserted that the statute making the salary in question a charge upon the county was unconstitutional because it in effect appropriated public money for a private purpose. In an action of debt brought by the prosecuting attorney at the instance of the person claiming to be judge, to recover the penalty of \$250, the court held that the defendant supervisors were liable. The court admitted that the statute creating the court was defective, but held that the legislature could nevertheless provide for the payment of services performed as judge. To do so was not, said the court, diverting public money to a private use.

In *Norwood v. Goldsmith*¹² the treasurer of a county refused to pay a warrant that had been drawn for the repayment of taxes which were alleged to have been paid under an unconstitutional statute. In the opinion of the treasurer the statute under which the taxes had been paid was constitutional. A board of commissioners to whom the claim had been presented thought differently, however, and allowed the claim. No court had declared the statute to be either constitutional or unconstitutional. Following an ineffectual application for a writ of mandamus, the plaintiff, as holder of the warrant, brought a statutory action against the treasurer and his sureties, under a statute authorizing judgment for the amount of the claim if its payment had been refused. The court found for the plaintiff. In answer to the argument that a proper proceeding should first have been instituted to have the statute declared invalid, the court said that the treasurer had passed on its constitutionality in refusing payment of the warrant, and the board had passed on the same question when

¹² 168 Ala. 224, 53 So. 84 (1910).

they allowed the claim, and the two judgments being in opposition to each other this was a proper proceeding in which to settle the matter.

The view of the court with respect to the privilege of an officer to pass upon the unconstitutionality of a statute is well expressed in the following statement:

"All persons or officers are of necessity required to pass upon the validity of all acts or proposed statutes under which they are required to act or to decline to act. In so acting or declining to act under such proposed statute he must necessarily pass upon it for himself. He may do so with or without advice from attorneys or other sources of information. But courts are the one source from which he can get no information, in advance, as to whether he should, in any particular instance, observe or decline to observe the requirements of the proposed act or statute. Every executive officer, or every person as for that matter, is presumed to know the law—a presumption often violent but always necessary. Hence, every man is his own constructionist. If two differ as to the construction of a given act, and it is acted upon or declined to be acted upon by the one, to the hurt or injury of the other, and the one is sued in the courts by the other for so acting or declining to act, and in the decision of the cause it becomes necessary to pass upon the validity of the act in order to determine the rights of the parties in that suit, the court will then—but not until then—pass upon the constitutionality of the act; and it is then only passed upon by the court in so far as the rights of these particular parties to the particular suit are concerned. When so decided by the highest court of the land all people, including executive and judicial officers, ought and usually do consider that particular question as settled and binding; but this is only so by the rules of policy, propriety, and common consent, and the credence which the people have in the opinions of such courts." ¹³

¹³ *Ibid.* 234, 53 So. at 87; cf. *Sessums v. Botts*, 34 Tex. 335 (1870). The court in that case said, at 349: "We are not willing to indorse the proposition, in its broadest sense, that a ministerial officer has the right or power to decide upon the constitutionality or unconstitutionality of an act passed with all the formality of law. It is the duty of such officers to execute and not to pass judgment upon the law, and we are of the opinion that the clerk of the district court should have refused to issue execution in violation of what appeared to be a valid and binding law, until the same had been declared void by the tribunal properly constituted for that purpose."

It is difficult to reconcile some other portions of the opinion rendered by Justice Mayfield with the views expressed in this quotation. The court adopted without qualification the sweeping dictum of Justice Field in the case of *Norton v. Shelby County*,¹⁴ stating that an unconstitutional statute is exactly as though it had never been enacted.

*Norwood v. Goldsmith*¹⁵ and *Clark v. Miller*¹⁶ are distinguishable on this ground: that in the former a statutory action was involved, while in the latter a common law action was permitted. In the former case the officer was subject to the penalty because of the statute, as interpreted by the court. In the latter the court arrived at the same conclusion in the absence of statute. One may well question the wisdom of interpreting a statute, such as that involved in the *Norwood* case, to cover a refusal to pay a warrant because of doubt as to the constitutionality of the statute which purported to authorize the claim for which the warrant was issued. Suppose that Goldsmith had paid out the money on the warrant and that subsequently the county had brought an action against him to recover it. Could the treasurer defend by saying that he paid the warrant because he thought that it was his duty to do so, although he admitted private doubts with respect to its constitutionality? The *Declaratory Judgment Act* would be available to permit the parties to obtain a judicial decree settling the question if it were in force, and such a case as this illustrates the need for such an act.¹⁷ The treasurer, on one side, and the warrant holder on the other, could have litigated the matter so that the former would have been protected, and the latter would, as a result, have obtained his money, if he was entitled to it.

In considering the justice of the results of the *Norwood* and *Clark* cases the possible use of the writ of mandamus must be taken into account. The Alabama court denied an application for a writ of mandamus in the *Norwood* case, on the ground that a

¹⁴ 118 U. S. 425, 6 Sup. Ct. 1121 (1886).

¹⁵ *Supra* note 12.

¹⁶ *Supra* note 6.

¹⁷ Alabama has no declaratory judgment act at the present time.

legal remedy was available in the form of the statutory action which was subsequently brought, and which has just been considered.¹⁸ The cases are not agreed that the existence of a statutory action is sufficient to bar the application for the writ, although if the action is summary and effective the tendency would perhaps be to deny the application.¹⁹

In *Clark v. Miller*²⁰ the case is more difficult with respect to mandamus. The writ will not issue in most cases unless there has been a default, and in this case the supervisor could not be said to be in default until the time for presenting the claim had passed. To have obtained the writ after the adjournment of the board would have been fruitless. There is authority for the view that in exceptional cases mandamus will issue even though the time for performance has not yet arrived.²¹ A common law action for damages is hardly to be considered in the same class as the statutory action in the *Norwood* case; the former being much more slow and inconvenient. For that reason it might well have been held, in *Clark v. Miller*, that not only was the legal remedy so ineffective that the writ would issue in the discretion of the court, but also, that it would issue notwithstanding that the time for performance had not yet arrived. No application for a mandamus seems to have been made in the case, but counsel contended that it, rather than the common law action, should have been brought. In disapproving of this contention the court made the following observation:

"That remedy exists, in general, only where the law affords no other, to prevent a failure of justice. But, as we have seen, in this case the plaintiff makes out a right to his action at law, and in such cases it can never be necessary to resort to a mandamus, even if that remedy happens to be legally available. In this case that remedy would not have been available to the plaintiff and effectual to procure payment of his claim. It could not have been applied for until the defendant was in default; and that default could not have

¹⁸ State *ex rel.* *Norwood v. Goldsmith*, 162 Ala. 171, 50 So. 394 (1909).

¹⁹ 38 C. J. 568; 18 R. C. L. 136.

²⁰ *Supra* note 6.

²¹ People *ex rel.* *Hotchkiss v. Smith*, 206 N. Y. 231, 99 N. E. 568 (1912); see 18 R. C. L. 122; 38 C. J. 581.

been ascertained to exist until the last moment for presenting claims for audit. That late period would have rendered an application for a mandamus, if granted, practically ineffectual to afford the plaintiff the relief he was entitled to."²²

The opinion of the court leaves unanswered the question whether mandamus would be denied because of the existence of a legal remedy or whether a legal remedy should be denied because of the existence of the remedy of mandamus. The court seems to have reasoned that legal relief should be permitted because of the fact that mandamus was not available. The possible use of mandamus in cases involving questions of constitutionality will be considered in a subsequent section.

These two cases serve to indicate that the officer acts at his peril in refusing to perform functions in accordance with statutory requirements. If the statute turns out to be unconstitutional he is safe. If it turns out to be constitutional he is liable to an action for damages. On the other hand, as will be shown in a subsequent section, the officer may not safely rely on a statute in the performance of the functions enjoined upon him by it.

In *State ex rel. Ballard v. Goodland*²³ an officer was removed from office for refusing to levy a tax in accordance with a statute which he believed to be unconstitutional. Later the statute was declared unconstitutional and the order of removal was reversed on appeal. The removal in this case was not construed to be an administrative act, but, due to the phraseology of the statute, was held to be a quasi-judicial act. The law having been declared unconstitutional the sole ground for removal failed, because "an unconstitutional law imposes no enforceable legal duty, but the duties of the office remained defined by existing valid laws and as if such unconstitutional law had never been enacted."²⁴ The court applied the void *ab initio* view of the effect of an unconstitutional statute and by so doing reached the proper result. This

²² *Clark v. Miller*, 54 N. Y. 528, 534 (1874). There is some conflict on this point, however, and the courts seem to have considerable discretion in refusing or granting the writ, in cases in which an action for damages would lie, on the ground that it is often an inadequate remedy, and not sufficiently specific to do justice. See cases collated in 38 C. J. 563; 18 R. C. L. 133.

²³ 159 Wis. 393, 150 N. W. 488 (1915).

²⁴ *Ibid.* 395, 150 N. W. at 489.

case illustrates that there are situations to which this theory should be applicable, although the number of such situations is small.

Members of a board of registrars who refuse to register a person as a voter, basing their refusal on an unconstitutional statute, are liable in an action in tort.²⁵ If the statute existing prior to the enactment of the unconstitutional law upon which the officers rely provides for the imposition of a penalty in cases of discrimination against an eligible voter, such a statute constitutes the basis for recovery.²⁶ The right to vote is more highly prized in these cases than the size of the vote in most elections would lead one to expect.

The cases considered in this section illustrate the severity with which officers have in the past been dealt, for refusing to act because they guessed that a statute was unconstitutional when it was not. It may be that the courts of today would be more lenient than those of the past century, but modern cases on this problem are rare. This is due to the development of methods of preventive justice, and to the fact that in the greater number of cases involving official action and nonaction amicable settlements or suits are possible. These suits, if settlement without a suit is either impossible or undesirable, usually take the form of an application for a mandamus or injunction, as the case may be. For these reasons suits against the officer for damages are at the present time relatively infrequent.

In all of these cases involving official responsibility for action or nonaction under an unconstitutional statute the courts are faced with the problem of determining where the cost of legislative error shall be placed. Shall the citizen or the officer suffer? In the cases involving refusal to act the courts have chosen to hold the officer more often than the citizen.

²⁵ *Kinneen v. Wells*, 144 Mass. 497, 11 N. E. 916 (1887). The court said, at 504 (this does not appear in 11 N. E.): "It is not contended by the defendants that the action cannot be maintained, unless the statute in question is constitutional." Cf. *Lincoln v. Hapgood*, 11 Mass. 350 (1814); *Meyer v. Anderson*, 238 U. S. 368, 35 Sup. Ct. 932 (1915).

²⁶ *Meyer v. Anderson*, *supra* note 25, at 382, 35 Sup. Ct. at 936: "The qualification of voters under the constitution of Maryland existed and the statute which previously provided for the registration and election in Annapolis was unaffected by the void provisions of the statute which we are considering." The Court felt that unless this were true the self-operative effect of the Fifteenth Amendment would be nullified.

II. DIRECT ACT WITHOUT THE INTERVENTION OF JUDICIAL PROCESS

A. Collection of Tax Under Unconstitutional Statute

Money paid to an officer as a tax under an unconstitutional statute may be recovered if the payment was involuntary and under protest.²⁷ Suppose that the taxpayer brings suit against the officer individually to recover the money and the latter says in defence that he has paid the money into the state treasury. Will he be compelled to make restitution out of his own pocket? The case of *Dennison Mfg. Co. v. Wright*²⁸ presented this question. The Georgia court there held that the taxpayer would prevail. In explaining the decision the court pointed out that when the defendant collected the tax in this case he acted in an individual, not in an official capacity. This resulted because of the unconstitutionality of the statute. The payment was involuntary, and was under protest, and was not subject, therefore, to the ordinary rule with respect to the recovery of payments made under a mistake of law. The protest should put the officer on notice that a suit would probably be brought to recover the tax, and for that reason the money should not have been turned over to the state treasury. The court comforted the officer with the remark that the legislature would doubtless reimburse him for his loss.²⁹

The court said in the *Wright* case that the collector was to be treated exactly as though he had made the collection in the absence of statute, as a trespasser. With respect to this, the following dictum is to be found in *Woolsey v. Dodge*,³⁰ in which case an injunction was sought to prevent a series of trespasses by a county treasurer to collect a tax under a statute alleged to be unconstitutional:

²⁷ The writer hopes to prepare a separate study on "Mistake of Law Under an Unconstitutional Statute."

²⁸ 156 Ga. 789, 120 S. E. 120 (1923). For other cases in accord see Note (1927) 48 A. L. R. 1395.

²⁹ The legislature of Georgia seems not to have lived up to the judge's prediction. See also *Rushton v. Burke*, 6 Dak. 478, 43 N. W. 815 (1889) (illegal tax, though constitutional).

³⁰ Fed. Cas. No. 18,032 (C. C. Ohio 1854); see *San Francisco & N. R. R. v. Dinwiddie*, 13 Fed. 789 (C. C. Cal. 1882); *Smith v. First Nat. Bank*, 17 Mich. 479 (1869).

"There is no axiom of the law better established than this. A void law can afford no justification to any one who acts under it; and he who shall attempt to collect the illegal tax, under the law referred to, will be a trespasser."³¹

The state cannot be sued in this case, so it is imperative that the officer be prevented from proceeding with the illegal collection, reasoned the court.

B. Destruction or Invasion of Property

The cases on this subject are in conflict. Some courts permit an unconstitutional statute to be used as justification by the defendant officer, while others refuse him this protection.

*Dexter v. Alfred*³² was a New York case in which trespass was brought against the defendant for entering upon plaintiff's land, laying out a road, and cutting trees. The defendant answered that he had been ordered to do so by the commissioner of highways. The plaintiff assailed the constitutionality of the statute under which the acts had been performed. The statute was held unconstitutional, but the court held that despite that fact it would constitute sufficient justification to defeat the action. In the opinion of the court:

"It was no part of the duty of the commissioner of highways to decide whether the law in question was or was not constitutional. His duty was to execute the law as he found it."³³

Compare this with the statement of the court in the *Norwood* case,³⁴ quoted above, to the effect that "all persons or officers are of necessity required to pass upon the validity of all acts or proposed statutes under which they are required to act or to decline to act." Referring to the rule that ignorance of the law is no excuse the court stated that this case constituted an exception to the rule.

³¹ *Woolsey v. Dodge*, *supra* note 30, at 607. See 4 POMEROY, *op. cit. supra* note 1, §§ 1805, 1819.

³² 64 Hun 636, 19 N. Y. Supp. 770 (1892).

³³ *Ibid.*, 19 N. Y. Supp. at 771.

³⁴ *Supra* note 12, at 234, 53 So. at 87.

In *Shafford v. Brown*³⁵ an action was brought to recover in trespass for the destruction of apples by "defendants while assuming to act as county fruit inspector and state commissioner of horticulture, respectively." It appeared that the county inspector had looked at the apples in question and pronounced them infected, and thereupon ordered the owners to destroy them. On appeal to the state commissioner the latter inspected them and sustained the decision of the county inspector. The actual destruction of the fruit was done by, or under the immediate direction of, the state commissioner. The statute creating the office of county inspector, and authorizing the incumbent to perform the acts in question, was unconstitutional. A demurrer was interposed to the defence that they had relied on the statute. The demurrer was overruled, apparently on the theory that the state commissioner was not liable because of valid statutory authority for his acts, and the county inspector was not liable despite the unconstitutionality of the statute authorizing him to act. The ground for exempting the latter officer is not explicitly stated in the opinion. It is perhaps not without significance that he did not actually destroy the fruit. All that he did was to examine it and order its destruction. But the following statement by the court indicates that even though he had destroyed the fruit, he would not have been held liable:

"Respondent Brown was acting in good faith under a statute of the legislature. He doubtless supposed it to be a valid statute. The owners of the fruit evidently supposed the same. They recognized Brown as county fruit inspector by appealing from his decision to the state commissioner of horticulture."³⁶

The court here seems to accord *de facto* status to Brown.³⁷ The rule of liability is the same for both *de facto* and *de jure* officers in these cases. The status, whether *de jure* or *de facto*, of an officer is immaterial in liability cases, the gist of the action being

³⁵ 49 Wash. 307, 308, 95 Pac. 270 (1908).

³⁶ *Ibid.* 309, 95 Pac. at 271.

³⁷ The author is preparing a separate study on the cases dealing with official status.

injury under an unconstitutional statute. It is the performance of an act, instead of the existence of a status, which is important in liability cases.³⁸

A third case, which by dictum, at least, supports the view that an officer is not liable for action under an unconstitutional statute, is that of *Dunn v. Mellon*.³⁹ In that case the plaintiff did not sue the officer, but brought trespass against his landlord for evicting him from a building. The defendant set up by way of defence an order received from a city officer to move the house, because the city proposed to open a street through the lot. The landlord was notified by the city officer that if he did not remove the building within a specified time the city would proceed to do so at his expense. The statute was declared unconstitutional in another case, and as a result this action of trespass was brought. The court treated the landlord as an agent of the officer, acting under his direction, and decided that he was not liable. The process of reasoning whereby the court reached this result was as follows: if an officer had done the act complained of he would not have been liable; therefore a citizen acting under the proper officer's order should not be liable. If anybody was accountable it was the city, according to the court. On this point the court said:

"If he had refused to obey it and the proper officer of the city had removed the building, undoubtedly the city would be liable for the consequences to any person injured, if the law under which the act was done was a void law. But it is just as undoubted that the officer who obeyed his orders in removing the building would not have been liable for his acts of obedience to his orders."⁴⁰

In opposition to these cases is *Hopkins v. Clemson Agricultural College*.⁴¹ In a suit against the college for damages resulting from the building of a dike the Court held that, if on a new

³⁸ *Vanderberg v. Connolly*, 18 Utah 112, 54 Pac. 1097 (1898); *Laver v. McGlachlin*, 28 Wis. 364 (1871).

³⁹ 147 Pa. 11, 23 Atl. 210 (1892); cf. *Dunn v. Burleigh*, 62 Me. 24, 38 (1873).

⁴⁰ *Ibid.* 17, 23 Atl. at 210.

⁴¹ 221 U. S. 636, 31 Sup. Ct. 654 (1911).

trial it was shown that damages resulted from the act in question, they should be allowed, because the statute authorizing the college to perform the act complained of was unconstitutional. A decree ordering the removal of the dike was refused on the ground that this amounted to a suit against the state, the school being a governmental institution.

An injunction was granted in a New York case,⁴² in addition to damages, to prevent certain state officers from interfering with the plaintiff's possession of land, and to compensate for past interferences with the same. The officer sought to justify his acts under a statute enacted subsequent to the acts complained of, but failed because the statute ratifying his acts was declared invalid.

The officers of a levee district organized under an unconstitutional statute were held liable to damages for authorizing a dam to be built in a location which resulted in the overflow of the plaintiff's land.⁴³ An injunction forbidding the maintenance of the dam was also granted in this case.

Several cases have held officers liable for the destruction of animals under the authority of an invalid ordinance or statute.^{43a}

It is impossible to say that the weight of authority protects the officer or refuses to protect him in cases involving the invasion of property rights. The courts are not agreed as to the rule to be applied in such cases.

C. Interference With Personal Liberty in the Absence of a Warrant

The cases in this section are to be distinguished from those to be considered in a subsequent section which involve arrest on a warrant. Only those cases involving arrest *without* a warrant will be dealt with at this point.

With the exception of one dictum, the cases are in accord. that an officer is liable for an arrest without a warrant under an

⁴² *Saratoga, etc., Corp. v. Pratt*, 227 N. Y. 429, 125 N. E. 834 (1920).

⁴³ *Moulton v. Parks*, 64 Cal. 166, 30 Pac. 613 (1883).

^{43a} *Loesch v. Koehler*, 144 Ind. 278, 43 N. E. 129 (1895); *Waud v. Crawford*, 160 Iowa 432, 141 N. W. 1041 (1913); *Carter v. Colby*, 71 N. H. 230, 51 Atl. 904 (1902).

unconstitutional statute.⁴⁴ In *Tillman v. Beard*⁴⁵ the president of the village ordered the village marshal to arrest the plaintiff for violating an ordinance prohibiting the operation of popcorn wagons on the streets. Other facts, immaterial so far as the action for the arrest was concerned, appeared in the case, but among the various grounds of action alleged by the plaintiff was that of assault and battery in making the arrest. It appeared that the ordinance was void, whether because it was contrary to a statute or the state constitution is not clear. The court held that the arrest was illegal, saying that in view of the fact that there had been no felony committed, and there was no likelihood of immediate escape, "By ordering the arrest, he made himself responsible for it, and liable for all its consequences."⁴⁶ *Sumner v. Beeler*⁴⁷ is also to be included in this group of cases, for the court treated it as if it presented a case of arrest without a warrant, although it is impossible to tell from the report of the case whether this was the fact or not. In *Williams v. Morris*⁴⁸ one of the inferior courts of Ohio said in dictum that the officer should not be held liable. The reason advanced by the court for this view was that the presumption that a statute is valid should serve to protect the officer making an arrest under it.

A literal false imprisonment was involved in *Gross v. Rice*.⁴⁹ Gross was committed to prison following conviction for crime.

"Some of these cases also involved suits for malicious prosecution. This phase of the problem will be considered in the next section, dealing with acts concerning judicial proceedings. These cases, with the exception of *Gross v. Rice*, *infra* note 49, involve ordinances, but if *Sumner v. Beeler*, *infra* note 47, be viewed as an arrest without a warrant case it should be classified as involving a statute. Cf. RESTATEMENT ON TORTS (Am. L. Inst., No. 3, 1927) § 148, special note.

⁴⁴ 121 Mich. 475, 80 N. W. 248 (1899).

⁴⁵ *Ibid.* 477, 80 N. W. at 248. *Barling v. West*, 29 Wis. 307 (1871), involved an arrest without a warrant by the president and marshal of a village for the alleged violation of an ordinance which was contrary to a state statute, and perhaps (although not entirely clear) unconstitutional. *Held*, a verdict for \$50 was affirmed. Cf. *Hofschulte v. Doe*, 78 Fed. 436 (C. C. Cal. 1897), on the first count of the complaint.

⁴⁶ 50 Ind. 341 (1875). In *Chapman v. Selover*, 172 App. Div. 858, 159 N. Y. Supp. 632 (1916), it was held that an ordinance of a city, which was *ultra vires* under the statutes of the state, did not afford justification to a police officer who made an arrest under it without a warrant.

⁴⁷ 14 Ohio Cir. Ct. (N. S.) 353, 358 (1911).

⁴⁸ 71 Me. 241 (1880).

A statute provided that the number of days spent in solitary confinement should be excluded in computing the term. In accordance with this statute the defendant (warden) kept Gross in prison sixty-eight days longer than the commitment called for, leaving out of view the days spent in solitary confinement. Upon his release Gross sued the warden for trespass to the person and false imprisonment. The statute under which the warden had acted in computing the period for which Gross should have been confined was held to be unconstitutional. The Maine court allowed recovery against the warden. In answer to the contention that the warden should be protected until the statute had been declared invalid, the court made this reply:

"We do not comprehend the logic of a statute having effect as if constitutional, when not so; to be a law for one purpose and not another; a law for one man and not another. It must be either valid or invalid from the beginning, or from the date of the constitutional provision affecting it."⁵⁰

Yet, as illustrated by numerous cases,⁵¹ many courts are doing, in other branches of the law, exactly what the Maine court here thought impossible; holding a statute constitutional for one purpose, though not for another. The court in the *Gross* case was looking at the situation through the spectacles of doctrine as to the effect of an unconstitutional statute, instead of looking at the doctrine through the facts of the case.

With respect to the question of damages, the court thought that punitive damages should not be allowed, but that actual damages only should be recovered. In accord with the *Norwood* case⁵² is the statement of the court that "the warden is only liable to the perils that more or less follow official stations. He had no warrant of court that could protect him."⁵³ The legislature of Maine subsequently made an appropriation to indem-

⁵⁰ *Ibid.* 252.

⁵¹ For some illustrations of this, see Field, *The Status of a Municipal Corporation Organized Under an Unconstitutional Statute*, to be published in (1929) 27 MICH. L. REV.

⁵² *Supra* note 12.

⁵³ *Supra* note 49, at 252.

nify Rice for the amount of the judgment and the expenses of suit.⁵⁴

There seems to be a greater tendency, in the cases dealing with direct and positive acts of officers under an unconstitutional law, for the courts to permit the statute to be used as a justification by the officer in situations involving the violation of a property right, than is true of those involving the violation of personal liberty. The courts are apparently more severe on the officer if the case is one of false arrest or false imprisonment than if it turns on a trespass to land or other property.

III. ACTION CONNECTED WITH JUDICIAL PROCEEDINGS

A defendant who conceives himself aggrieved because action has been brought against him in a court, with resulting arrest, seizure of goods, or trespass to land, may choose one or all of several parties against whom to bring his suit. The cases to be taken up in the several sections of this division illustrate the rules with respect to the various persons who may be made parties defendant, and the extent of their liability, if any, for participating in the proceeding at one of its several stages.

A. Liability for Making Complaint or Filing Affidavit

The first step in an action for violating an ordinance or statute is often that of making a complaint or filing an affidavit. Is an officer liable to an action for damages for filing an affidavit which results in the arrest and punishment of the plaintiff? The rule is well established that he is not. In *Goodwin v. Guild*⁵⁵ the mayor procured another officer to make an affidavit that the plaintiff had violated a city ordinance which was contrary to a statute of the state. In an action against the mayor and the officer neither of them was held liable. The mayor was entrusted by statute with the duty of enforcing city ordinances; there had been

⁵⁴ Me. Resolves (1881) c. 22. "Resolved, that the sum of two hundred and sixty-three dollars, be and the same is hereby appropriated out of the state treasury, to be paid to Warren W. Rice, the same being for moneys paid by him as damages, costs, and expenses, by reason of a suit brought against him by Darrius Gross, an ex-convict, for false imprisonment."

⁵⁵ 94 Tenn. 486, 29 S. W. 721 (1895).

considerable dispute between the various officers of the city concerning the validity of the ordinance; and no ill will had been shown on the part of the defendants, so that, according to the court, there was no ground for imposing liability upon them. In *Trammell v. Town of Russellville*⁵⁶ a similar result was reached where the ordinance was unconstitutional. Another case to the same effect contains this statement:

"A party in good faith making a complaint for the violation of any law or ordinance is not required to take the risk of being mulcted in damages if courts afterwards hold it unconstitutional." ⁵⁷

The same court also asked why the officer making the complaint should be liable when he would not be liable for serving the warrant.⁵⁸ This assumes that the officer serving the warrant is not liable, which as will be pointed out later, is not entirely settled.

An officer who institutes proceedings against a person for the violation of a statute does not act without probable cause merely because the statute turns out to be unconstitutional.⁵⁹ Probable cause is not dependent on the validity of the statute under which the prosecution was instituted. The rule is the same whether complaint is made leading to the issuance of a warrant of arrest or one for search and seizure.⁶⁰ One case contains a dictum that

⁵⁶ 34 Ark. 105 (1879).

⁵⁷ *Tillman v. Beard*, *supra* note 45, at 477, 80 N. W. at 248. See *Hallock v. Dominy*, 69 N. Y. 238 (1877), where the court said, at 241: "Process regularly issued upon this judgment, as was the execution upon which the plaintiff was imprisoned, was a protection to the officer executing it, and to the parties at whose instance it was issued and served."

⁵⁸ *Tillman v. Beard*, *supra* note 45, at 477, 80 N. W. at 248: "If the officer is protected in the service of the warrant, in which act he is performing a duty imposed upon him by law, why should he not be equally exempt where he is in the performance of his duty in making complaint for the violation of an ordinance of his municipality?"

⁵⁹ *Birdsall v. Smith*, 158 Mich. 390, 122 N. W. 626 (1909). The complaint in this case was filed on the order of a superior officer. Suit was, however, also brought against the local inspector who procured the bottle of milk for purposes of chemical analysis. The court held neither of the officers liable. The court said in dictum that if the officers had known the statute to be unconstitutional the result would have been different. The case would then have been similar to that referred to in dicta in some of the cases; that liability would attach if bad motive were shown. *Infra* note 64.

⁶⁰ *Anheuser Busch Brewing Co. v. Hammond*, 93 Iowa 520, 61 N. W. 1052 (1895) (statute contrary to federal statutes on interstate commerce).

if the functions of complainant and magistrate are both entrusted to the same officer the issuance of a warrant under such a statute, if it be invalid, will subject the magistrate to liability.⁶¹ The magistrate in such a case acts as a complainant, however, and in so doing should not be held liable, even though the statute be unconstitutional. There is no reason why the rule should be different as to the complainant in this last case from those involving complaints by other officers under invalid statutes. In fact, there is the more reason for exempting the magistrate in such a case, because not only does the rule as to complainants tend to exempt him, but the tendency of the cases is also to exempt him as magistrate, for issuing the warrant, on the ground that he exercises a judicial function in so doing. If liability would not attach when these two functions were entrusted to two persons, there is no reason for imposing it when the two functions are combined in the same person.

The same doctrine is applied to private individuals who make complaints or file affidavits that an ordinance or statute is being violated.⁶² But if the statute authorizing the issuance of an at-

⁶¹ See *Clark v. Hampton*, 163 Ky. 698, 701, 174 S. W. 490, 491 (1915).

⁶² *Bohri v. Barnett*, 144 Fed. 389 (C. C. A. 7th, 1906). The court said, at 392: "Any other rule would be harsh in the extreme—imposing on one who had witnessed a violation of a local ordinance the responsibility of knowing whether, as a matter of law, the ordinance itself was valid, or of remaining silent." And in *Barker v. Stetson*, 7 Gray 53, 54 (Mass. 1856), the court said: "The authorities are conclusive that, when a person does no more than to prefer a complaint to a magistrate, he is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction." In commenting on a charge to a jury, given in the court below, it was said in *Wheeler v. Gavin*, 5 Ohio Cir. Ct. 246, 253 (1890): "But the charge of the court was in effect saying to the jury that whenever a magistrate issues a warrant, or a person files an affidavit for an arrest, they must not only be sure that there is a statute or ordinance warranting such proceedings, but they must be certain of its constitutionality and validity. In so charging the jury the court below erred, and for that error the judgment will be reversed." Cf. *Vanderberg v. Connolly*, *supra* note 38; *Fenelon v. Butts*, 49 Wis. 342, 5 N. W. 784 (1880) (commissioner before whom supplemental proceedings were had was appointed for two counties, contrary to the constitutional requirement of one for each county); *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774 (1905) (ordinance never went into effect, because not published). It has been held that where there is room for an honest difference in belief as to the constitutionality of a statute malicious prosecution will fail. *Cobbey v. State Journal Co.*, 77 Neb. 626, 113 N. W. 224 (1907) (rival printer got injunction against plaintiff, the statute on which defendant relied being invalid). In *Scott v. Flowers*, 60 Neb. 675, 84 N. W. 81 (1900), an action for malicious prosecution was brought for causing plaintiff to be taken into custody and put

tachment is unconstitutional the individuals procuring it will be liable, and for this purpose a city is in the same position as a private litigant.⁶³

The main reason for denying liability in the case of officers as well as of private individuals is that any other rule would impede the administration of justice. The possibility of an action for damages should not be hung above the officer's head as a deterrent in such cases. In many instances considerable reliance is placed on the initiative of private individuals to aid in the enforcement of laws. For this reason they too should be free from such a deterrent. Although no case has been found which involved the question of action by an officer in making a complaint under an unconstitutional statute, the complaint being malicious, there are many intimations and dicta to the effect that if meddlesome interference, bad motive in making the complaint, or active direction in making the arrest by the officer were present, liability would attach.⁶⁴ Such a case would turn, however, not on the effect of an unconstitutional statute, but on the presence of some other factor which causes the court to impose liability.

into a state girls' school, the statute under which commitment was procured being defective in that the age fixed in it as the maximum was higher than permitted by the state constitution. Plaintiff recovered damages for malicious prosecution. On rehearing, 61 Neb. 620, 85 N. W. 857 (1901), the statute was held constitutional, the court deciding to give effect to it within the limits of the age provided for by the constitution. This caused a reversal of the case, but it is to be noted that the court did not, on rehearing, abandon its position that liability would attach for malicious prosecution. The court seemed influenced by a showing of ill will. If the case is to be taken as authority on malicious prosecution it is contrary to the other cases cited or considered thus far. In accord with the general rule is *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 904 (1892), where Mitchell, J., said, at 405, 52 N. W. at 905: "Under any other doctrine a person would never feel safe in making complaint of the commission of a public offense until the validity of the statute creating the offense had been passed upon by the court of last resort."

⁶³ *Zimmerman v. Lamb*, 7 Minn. 421 (1862); *Merritt v. St. Paul*, 11 Minn. 223 (1865), where the court said, at 231: "It follows that the appellants who instructed the sheriff to make the particular levy complained of, under the warrant in question, acted without authority or jurisdiction, and were, therefore, trespassers." Cf. *Hayes v. Hutchinson*, 81 Wash. 394, 142 Pac. 865 (1914).

⁶⁴ *Supra* note 59. In *Barker v. Stetson*, *supra* note 62, at 54, this statement was made: "If the complaint is malicious and without probable cause, the complainant may be answerable in another form of action." See the following from *Goodwin v. Guild*, *supra* note 55, at 490, 29 S. W. at 722: "If he took advantage of his official position to oppress the plaintiff, either from ill will towards him, or because of any other improper motive, he would be liable."

B. Liability of Magistrate for Issuance of Warrant, Trying, or Sentencing a Person Under an Invalid Statute

The early cases on the liability of a justice of the peace or other inferior magistrate who issued a warrant or tried a person accused of petty crime under an unconstitutional statute held the magistrate liable.⁶⁵ The later cases have relaxed this rule so that now, although the rule is presumably the same in the states in which the earlier cases were decided, several states have adopted a contrary rule.⁶⁶ If a numerical count of either the states or decisions be made the great weight of authority will be found to be in favor of exempting the inferior magistrate for action by him in accordance with a statute or ordinance which is unconstitutional, and the same rule is followed if the ordinance is contrary to the statutes of the state.

Two early Massachusetts cases, *Barker v. Stetson*⁶⁷ and *Kelly v. Bemis*,⁶⁸ adopt the rule imposing liability on the magistrate. In the first case a magistrate issued process authorizing an officer to seize plaintiff's liquor, the process being issued in accordance with a section of a statute which was later held unconstitutional. An action was brought against the magistrate as well as the officer, and both of them were held liable. The court said that inasmuch as the statute conferring jurisdiction to issue the process was invalid the magistrate had no jurisdiction, and for that reason was liable in trespass. The second case decided that a magistrate was liable in trespass for issuing a warrant on which the plaintiff was arrested, the statute authorizing the issuance of the warrant being invalid. The reason given for this result was as follows: that our government was one of limited powers; none

⁶⁵ *Kelly v. Bemis*, 4 Gray 83 (Mass. 1855); *Barker v. Stetson*, *supra* note 62; *Ely v. Thompson*, 3 A. K. Marsh. 70 (Ky. 1820); *cf. Heller v. Clarke*, 121 Wis. 71, 98 N. W. 952 (1904). A justice of the peace was held liable for false imprisonment for putting the plaintiff in jail until trial, when he had no jurisdiction over the case, as a statute had given jurisdiction over this class of cases to a city court.

⁶⁶ *Cottam v. Oregon City*, 98 Fed. 570 (C. C. Ore. 1899); *Hofschulte v. Doe*, 78 Fed. 436 (C. C. Cal. 1897); *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633 (1891); *McDaniel v. Harrell*, 81 Fla. 66, 87 So. 631 (1921); *Trammell v. Town of Russellville*, 34 Ark. 105 (1879). See *infra* note 73.

⁶⁷ *Supra* note 62.

⁶⁸ *Supra* note 65.

of the departments of the government could exceed the power given to them by the constitution; therefore the legislature having attempted by an excess of its power to grant power to the judicial branch, such an attempted grant was ineffectual. There being no statutory grant of jurisdiction it followed that the court had none. It therefore followed that the justice who attempted to exercise jurisdiction when he had none was liable in trespass.

*Ely v. Thompson*⁶⁹ was decided in 1820 by the Kentucky court, and was an action of trespass, assault, and battery, as well as false imprisonment against the justice of the peace and constable who had respectively sentenced the plaintiff to thirty lashes, and had administered them. They were held liable, the court observing that the constitution was above the law:

"It is an instrument that every officer of government is bound to know and preserve, at his peril, whether his office be judicial or ministerial; and he cannot justify an act against its provisions, even with the authority of the legislature to aid him, however much that may mitigate his case."⁷⁰

This case is affected somewhat by the fact that the action taken here was in direct violation of a constitutional provision, and did not involve a typical case of permissible action, so far as the constitution is concerned, being taken under a statute which in some phase of form or substance is not in accordance with the constitution. A recent dictum by the Kentucky court tends to support the view of the two Massachusetts cases adverted to, but in the same case in which the dictum was uttered, it was held that the magistrate was not liable for denying bail, because that was done in the exercise of a judicial function.⁷¹

These are the only cases holding the magistrate liable for acting in accordance with an unconstitutional statute. The federal courts have taken the opposite view, and refuse to impose liability.⁷² They have stressed the fact that inferior judges are within the reason of the rule exempting superior judges from liability for

⁶⁹ *Supra* note 65.

⁷⁰ *Supra* note 65, at 76.

⁷¹ See *Clark v. Hampton*, 163 Ky. 698, 701, 174 S. W. 490, 491 (1915).

⁷² *Cottam v. Oregon City*, *Hofschulte v. Doe*, both *supra* note 66.

mistakes in judgment as to the constitutionality of a statute, or for that matter, for mistakes of law in general. That the justices had general jurisdiction over the type of subject matter involved in the particular case has also been looked upon as a factor supporting the rule of exemption. There being jurisdiction, the case becomes one of excess of jurisdiction only, rather than one involving an exercise of jurisdiction where none existed at all.

The state courts stress similar reasons and factors to support the rule as to exemption, giving them more elaborate statement in many cases. The existence of jurisdiction in general; the presence of good faith; the absence of bad faith; that he had jurisdiction over the person; that the mayor or recorder had in addition to his judicial functions the general oversight of the administration of law in the village; that it was his duty to issue the warrant; that in issuing the process or in sentencing the accused he performed a judicial act, in which the constitutionality of the statute or ordinance was passed upon; that exempting inferior judges from liability is necessary to an impartial and effective administration of justice, have all been stressed in greater or lesser degree by the courts adopting a rule contrary to that of the early Massachusetts cases.

The rule exempting magistrates is applied where the ordinance is invalid because contrary to a statute,⁷³ or where county regulations are in excess of the power of the supervisors,⁷⁴ and in a case where an ordinance is in excess of the statutory powers granted to a city by the state.⁷⁵ The rule has been carried so far that a magistrate escaped liability even though the ordinance under which action was taken had never gone into effect.⁷⁶

⁷³ *Goodwin v. Guild*, *supra* note 55; *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86 (1898); *Wheeler v. Gavin*, *supra* note 62.

⁷⁴ *Hallock v. Dominy*, 69 N. Y. 238 (1877).

⁷⁵ *Henke v. McCord*, 55 Iowa 378, 7 N. W. 623 (1880).

⁷⁶ *Rush v. Buckley*, *supra* note 62, in which notice of the ordinance was not published as required by statute. The court stressed the fact that the justice had general jurisdiction in the city and over this type of subject, and that the mistake in thinking the ordinance was in effect was an error in judgment and for such errors the judge, though inferior, could not be held. A dissenting judge said, at 336, 61 Atl. at 780: "I think the majority opinion holds doctrines impairing the right of personal liberty and subversive of long established rules of law in this state." In *Clark v. Spicer*, 6 Kan. 440 (1870), a justice was held not liable for trying a man with a six-man jury.

In view of the definite trend away from the early Massachusetts rule it is perhaps accurate to say that the rule is becoming well settled now that petty judicial officers are being accorded the same standing as judges of courts of general trial jurisdiction, so far as their liability for acts done in reliance, not only on an unconstitutional statute or ordinance, but also on an invalid ordinance, are concerned. This rule is essential to effective work by inferior judicial officers, and should become firmly embedded in judicial doctrine with the revived interest now being taken in the improvement of these petty courts.

C. Liability of Officer Serving Process

The authorities on this subject are about evenly divided, but many of the cases holding that the officer serving a process under an unconstitutional statute is liable were decided before or about the time of the Civil War. Several of the cases adopting the contrary rule have been decided within the last half century. For this reason, while it is accurate, on the basis of a numerical count, to say that the cases are about evenly divided, it is perhaps more accurate to say that the trend of the recent cases is away from such liability. This is, as previously indicated, in keeping with the trend of the courts with respect to the liability of magistrates, although in the latter cases it is more pronounced than in the cases of ministerial officers.

Early cases in Massachusetts,⁷⁷ Kentucky,⁷⁸ Minnesota;⁷⁹ and later decisions in Wisconsin,⁸⁰ Maine,⁸¹ and Texas⁸² hold the

⁷⁷ *Fisher v. McGirr*, 1 Gray 1 (Mass. 1854); *Barker v. Stetson*, *supra* note 62.

⁷⁸ *Ely v. Thompson*, *supra* note 65.

⁷⁹ *Guerin v. Hunt*, 8 Minn. 477 (1863); *Zimmerman v. Lamb*, *supra* note 63. Both of these cases involved attachments. In the first of them, *Guerin v. Hunt*, *supra*, the court said, at 487: "This would make the Defendants trespassers as to the taking of the property from the Plaintiff's possession, even although it should be found that the assignment . . . was fraudulent, as against the creditors of the assignors." The goods had been taken from the possession of the assignee in this case.

⁸⁰ *Campbell v. Sherman*, 35 Wis. 103 (1874); see (1898) 12 HARV. L. REV. 352.

⁸¹ *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49 (1888).

⁸² *Beavers v. Goodwin*, 90 S. W. 930 (Tex. Civ. App. 1905).

officer liable. This unsatisfactory statement is found in the early case of *Fisher v. McGirr*:

"The law relied on for a justification, being void, gave the magistrate no jurisdiction and no authority to issue the search warrant, the officer cannot justify the seizure under it, and therefore an action lies against him for the taking."⁸³

Few of the cases holding the officer liable add very much to this statement in support of the rule. In *Campbell v. Sherman*,⁸⁴ however, this was added: that a process is not fair on its face when it shows that it was issued on a maritime lien, because that would indicate that a state court would not have jurisdiction to issue the process.

The *Campbell* case also stated the doctrine that ignorance of the law does not excuse, justifying the statement by asserting that if it were an excuse everybody would plead it as an excuse, and, as a result, the administration of justice would be hampered. The most substantial of the reasons advanced in favor of imposing liability is that the officer may protect himself by the simple device of taking a bond before he acts. The court said, relative to this:

"If the act which the writ commanded him to do was a trespass, he was not required to perform it. Nor would he be liable in that case to the plaintiff for refusing to execute a process void for want of jurisdiction."⁸⁵

If this prediction were a correct statement of the rules of law the officer would not be in such a serious plight, for he could then protect himself, either by taking bond, or by refusing to act if the act would be a trespass, and would also be protected in refusing to act, because to act would be a trespass. The cases hitherto considered on the question of damages for refusal to act leave this matter in some doubt, however, and it is not at all certain that

⁸³ *Supra* note 77, at 46.

⁸⁴ *Supra* note 80. In this case a sheriff who seized a ship on process issued out of a state court in the enforcement of a maritime lien was held liable for damages for the burning of the ship while it was in his possession. The sheriff's deputy had actually executed the process. A case on almost all fours, except that the sheriff seems to have acted directly, rather than through a deputy, was that of *Warren v. Kelley*, *supra* note 81. The result was identical, liability being imposed.

⁸⁵ *Campbell v. Sherman*, *supra* note 80, at 110.

the result indicated by the Wisconsin court would be reached by all courts. The taking of bond is quite common in practice, but in small cases it might cause more delay, inconvenience and trouble than is justified. In the larger cases a bond of indemnity could be taken by the officer. That only means, however, that the officer protects himself. The citizen will then have to bear the loss, a result not very much more desirable, though somewhat less objectionable, than to have it fall on the officer.

The liability of officers, or of private individuals who assist an officer in the execution of a search warrant or other process, or in the asportation or destruction of property, is not well settled, but there is some authority for believing that they will be held liable in some states, if they act under an invalid statute,⁸⁶ although there is authority to the contrary also.⁸⁷

The many recent congressional investigations, with attendant commands from the houses of that body that various individuals appear to testify before them or their committees, make the case of *Kilbourn v. Thompson*⁸⁸ of increased interest at the present time. The facts of that case are so well known that they do not require rehearsing at this point. The phase of this famous case to which attention is called in this connection is that concerning the suit for damages brought against the Sergeant-at-Arms of the House of Representatives for having arrested and falsely imprisoned the plaintiff by virtue of a warrant issued by the Speaker of the House, the warrant being issued in excess of his constitutional power. The first trial resulted in a verdict of \$60,000. A new trial was had and the verdict then returned amounted to \$37,500. A remittitur of \$17,500 was filed and the award then stood at \$20,000. This amount was paid by Congress, in addition to an appropriation to compensate Thompson for his expenses and attorney's fees in connection with the case.⁸⁹ Here, as in the

⁸⁶ *Beavers v. Goodwin*, *supra* note 82; *cf.* *Cartwright v. Canode*, 106 Tex. 502, 171 S. W. 696 (1914).

⁸⁷ See *Henke v. McCord*, *supra* note 75 (one officer aiding another).

⁸⁸ 103 U. S. 168 (1880). The case involving suit for false imprisonment and false arrest is by the same name, in *MacArthur & M.* 401 (D. C. 1883).

⁸⁹ 23 STAT. 446, 467 (1885). The appropriations were: to Kilbourn, \$20,000 plus \$143.17 interest and costs; to Thompson, \$5000 for expenses, labor and attention with respect to the case; to Thompson's attorneys, \$3000 for professional services.

Gross case,⁹⁰ in Maine, the legislature came to the rescue of an officer who had acted to his injury in reliance on action by a legislative body, in the form of a statute in the one case; in the form of a warrant of arrest in the other.

The cases refusing to hold the officer liable⁹¹ argue that the process is fair on its face; taking issue on this point with the cases in which liability is imposed. They insist that unconstitutionality is not shown on the face of a warrant, for example, and that it is a fiction to speak of a line between clear and palpable unconstitutionality and any other kind. They point out too, that the administration of justice will be hampered by the introduction of a rule of liability in such cases, because the officers will be slow to act, and it might be added also, that even though bonds of indemnity be taken where property is involved, such a practice tends also to slow up the already dilatory processes of the law. To ask the ministerial officer to be a judge as well as an "executioner" seems to some of the courts to be too high a requirement to impose upon constables, sheriffs, and other police and process-executing officers. The process appears to be regular in these cases; the justice or clerk issuing it does so in accordance with statutory provisions which have all of the appearance of law, and may have been on the statute books of the state unchallenged for many years; and the existence of a presumption in favor of the validity of legislative enactments, all combine to cause the courts of a number of states, in the later cases, to refuse to hold the officer liable. No distinction is made, in the cases pro or con on this subject, between those involving unconstitutional statutes, unconstitutional ordinances, or ordinances which are contrary to general state statutes. The policies causing a court to go one way

⁹⁰ *Supra* note 49.

⁹¹ *Cottam v. Oregon City*, *supra* note 66 (ordinance); *Hofschulte v. Doe*, *ibid.* (ordinance); *Trammell v. Town of Russellville*, *ibid.* (ordinance); *Bohri v. Barnett*, *supra* note 62 (ordinance); *Tillman v. Beard*, *supra* note 45 (ordinance contrary to statute); *Henke v. McCord*, *supra* note 75 (ordinance in excess of city's statutory powers); *Rush v. Buckley*, *supra* note 62 (ordinance had not gone into effect); *Anheuser Busch Brewing Co. v. Hammond*, *supra* note 60; *cf. Sandford v. Nichols*, 13 Mass. 285 (1816); *cf. also* RESTATEMENT ON TORTS (Am. L. Inst., No. 3, 1927) § 149-3 (7), (8). It seems that the RESTATEMENT does not provide for cases wherein the statute other than the one conferring jurisdiction is unconstitutional, so far as arrest with a warrant is concerned.

or another on this point apply with equal or nearly equal force to all three.

Irrespective of the liability of an officer for serving a warrant or other process under an unconstitutional statute, that fact does not justify the person upon whom it is served in forcibly resisting the execution.⁹²

D. Liability of the City or Governmental Unit for Whom the Officer Acts

In *Trescott v. City of Waterloo*⁹³ suit was brought against the city to recover damages for the enforcement of an unconstitutional ordinance. The lower federal court before whom the case was tried denied recovery. In support of this decision the court observed that the police regulations of the city were not made for the city alone, and that they were made in a public capacity, instead of in a corporate capacity; phrased in more customary language, that they were exercises of the governmental power of the city as distinguished from exercises of private or proprietary powers. Some stress was also laid on the fact that the fine was very small; for that reason it should have been paid under protest, or, if the plaintiff had wished to appeal, he could have resisted the payment of the fine in that way. But, as it happened in this case, the plaintiff preferred to go to jail. While this is not conclusive, it nevertheless seemed to influence the court in its attitude towards the case.

The state cases follow the same rule. Thus in *Trammell v. Town of Russellville*⁹⁴ the court denied recovery in a suit against the city, saying:

"Then, for neither the act of the council in passing the ordinance, the acts of the mayor in issuing the warrants, nor those of the marshal and his deputy in making the arrests, was the town liable to the plaintiff."⁹⁵

⁹² *State v. McNally*, 34 Me. 210 (1852); cf. *State v. Skinner*, 148 La. 143, 86 So. 716 (1920).

⁹³ 26 Fed. 592 (C. C. Iowa 1885); *Cottam v. Oregon City*, *supra* note 66.

⁹⁴ *Supra* note 66.

⁹⁵ *Supra* note 66, at 109. See also *City of Albany v. Cunliff*, 2 N. Y. 165 (1849); *Easterly v. Town of Irwin*, 99 Iowa 694, 68 N. W. 919 (1896); *City*

IV. PROTECTION OF OFFICERS ACTING OR REFUSING TO ACT UNDER AN UNCONSTITUTIONAL STATUTE

A brief summary of the rules concerning officers' liability may serve to emphasize the need for some program of protection.

1. Officers are liable for refusal to act if the statute authorizing them to act turns out to be constitutional and if some private individual has been injured thereby.

2. Officers are liable for taxes collected under invalid statutes if they were paid under protest and their payment was involuntary. The fact that the officer has paid the money into the state treasury will not be a defense to such an action.

3. There is a conflict of authority as to whether an officer is liable for the destruction or invasion of property under an unconstitutional statute.

4. Officers are liable for interference with personal liberty if such interference is justified solely on the ground of an invalid statute.

5. Officers are not liable for making complaints under invalid statutes.

6. The weight of authority is that magistrates are not liable for issuance of process or committing a person under an unconstitutional law, but a few cases impose liability.

7. Officers executing process under an unconstitutional law are held liable in some states but not in others, although the tendency seems to be to exempt them and to treat them as executing "fair" process.

This is the distribution by the courts of the risk of error in the operation of government, due to the effect upon an officer

of *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949 (1896); *McFadin v. City of San Antonio*, 22 Tex. Civ. App. 140, 54 S. W. 48 (1899); *Taylor v. City of Owensboro*, 98 Ky. 271, 32 S. W. 948 (1895); cf. *McGraw v. Town of Marion*, 98 Ky. 673, 34 S. W. 18 (1896); 6 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) §2811; WILLIAMS, THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT (1901) 37-39. In *Goodwin v. Guild*, *supra* note 55, suit was brought against the city, the city council, mayor, and board, which had let the contract under which the work was being done. The city, mayor, councilmen, and board were all held not liable. In *Kilbourn v. Thompson*, MacArthur & M. 401 (D. C. 1883), the members of the House who had participated in the proceedings resulting in the issuance of the warrant, were held not liable.

of an unconstitutional statute. The rule obtaining in all of the states that the government cannot be sued without its own consent prevented the courts from including it among those to share the burden. Consent to suit in ordinary tort cases has not been given by the states, and in the case of the national government a beginning only has been made. The courts have, therefore, attempted to place the burden either upon the officer or upon the citizen. The result has been, as indicated in the summary, that the officer has been forced to carry most of the burden.

Viewing the problem as one of judicial distribution of risk, can anything be done by judicial decision to make the rules more equitable? The rule which could probably be improved by this method is that concerning refusal of officers to act. Here the courts might well have held that if the private individual knows that the officer is refusing to act he should be compelled to resort to mandamus, rather than be permitted to bring an action for damages. In a mandamus proceeding many courts would permit a determination of the constitutionality of the statute under which the officer was asked to act, and all courts should permit this in cases where the officer would be liable to an action for damages if he acted pursuant to the writ.⁹⁰ If this be done the matter can be settled in many cases without any greater inconvenience than the delay incident to the hearing in mandamus. This would be a distinct step in advance, and could be accomplished by the application of well-settled legal principles.

There are some cases which cannot be disposed of by the use of mandamus. There may not be sufficient time to wait even for this summary procedure. It may be that the private individual does not know, and could not, under the circumstances, be expected to know, that the officer is refusing to act, and in the meantime the rights of the individual might be adversely affected. For example, if X goes to the register of deeds with a mortgage

⁹⁰ "But the weight of authority sustains the allowance of a defence of this character on the ground that an unconstitutional statute is not a law and binds no one." 38 C. J. 922. For review of the cases, and the arguments in favor of raising the question of constitutionality in mandamus proceedings, see *State v. Candland*, 36 Utah 406, 104 Pac. 285 (1909). *Rapacz, Protection of Officers Who Act Under Unconstitutional Statutes*, *supra* note 2; *Field, Effect of an Unconstitutional Statute* (1926) 1 IND. L. J. 1, (1926) 60 AM. L. REV. 232, (1927) 100 CENT. L. J. 145, n. 41.

and leaves it for recording, and the officer, saying nothing, says to himself, "I will not record this mortgage because the statute authorizing it is unconstitutional," X can hardly be held to know that the officer is refusing to record the mortgage, at least for a period of several days. In such a case it may be only fair to say that an officer should notify the private individual of his intention not to comply with the statute because of the belief that it is unconstitutional, and failing this, he should be liable for the loss occasioned by the failure to perform the duty.⁹⁷ These two suggestions, if embodied in judicial decision, might aid in more equitably distributing the burden of loss in these cases.

In most of the other situations embraced by the rules in the foregoing summary, the citizen, rather than the officer, should bear the burden, as between the two. The normal case should be that the officer acts in compliance with and reliance on statutes as if they were constitutional. The effective functioning of the administrative branch of government requires this. But although it may be somewhat more desirable for the individual citizen to suffer in these cases than to impose the burden of paying for the mistakes of the legislative branch of government upon the officer, to leave the burden with the private citizen is unfair. For this reason the possibilities of solution for the problem by means of judicial administration are very limited. The problem is, in the final analysis, one for legislative consideration.

The first aid which the legislature of a state could give is the enactment of the *Declaratory Judgment Act*. Many of the states now have this act and many more will doubtless adopt it in the near future.⁹⁸

The next step which legislatures should take concerns the

⁹⁷ The writer is indebted to Professor Dudley O. McGovney for this suggestion.

⁹⁸ On the declaratory judgment see the following articles by Professor Edwin M. Borchard: *The Declaratory Judgment—A Needed Procedural Reform* (1918) 28 YALE L. J. 1, 105; *The Uniform Act on Declaratory Judgments* (1921) 34 HARV. L. REV. 697. On government liability and responsibility in tort see Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 129, 229; *Government Responsibility in Tort—A Proposed Statutory Reform* (1925) 11 VA. L. REG. (N. S.) 330, (1925) 11 A. B. A. J. 495; *Government Responsibility in Tort* (1926) 36 YALE L. J. 1; *Theories of Government Responsibility in Tort* (1928) 28 COL. L. REV. 734. See also Borchard, *European Systems of State Indemnity for Errors of Criminal Justice* (1913) 3 J. CR. L. AND CRIM. 684; WATKINS, *THE STATE AS A PARTY LITIGANT* (1927) cs. 2-4, 7, 8, 10.

giving of consent to suit by the state in some regular tribunal, whether it be a special court such as the Federal Court of Claims, adding to its jurisdiction cases in tort, or one of the regular courts in the existing judicial system of the state. If the legislature enacts a statute which it has no power to enact, or does so in a manner forbidden to it, the inferior officers in the judicial and administrative branches of the government should not pay for the mistake. Neither should the citizen pay for it. The loss occasioned by the error should be borne by the people of the state as a group. No one individual should be held liable, on the sole ground that the statute was unconstitutional. Officers should be liable for malicious exercise of power, or other abuse of their authority, in accordance with the established rules of torts. But neither the officer nor the citizen should be made to bear the burden of a legislative error, on the sole ground that the legislature exceeded some constitutional limitation resting upon it, and that the officer or individual acted in accordance therewith.

The matter is not so difficult in the national government. There the risk can be spread over a large number, and the burden on each person becomes very small. When we come to the states the difficulties are more numerous. The states carry on many of their functions through the medium of county, township, and municipal officers. These officers perform some functions for the state and others for the local community. In some instances the ordinances authorizing them to act will be unconstitutional, or perhaps contrary to the general statutes of the state. In other cases state statutes authorizing them to perform some function will be invalid. But state statutes may authorize the performance of a local function, so that the source of authorization cannot be made the dividing line between those cases for which the state as a whole should be liable, and those for which the local unit should be liable. Larger cities and the more populous counties could perhaps bear the burdens of mistakes made in their behalf, but in the case of the small cities and villages the imposition of liability on the unit is not very much more effective than spreading the loss over a few personal sureties, or a surety company, in addition to the officer.

In addition to the problem of dividing responsibility in the states there is the question of the type of tribunal which shall be used to handle these cases. The elimination of the jury is a first requisite, because, in the light of the experience in the case of *Kilbourn v. Thompson*,⁹⁹ the states or other governmental units could not be expected to consent to having cases against them tried before juries in this branch of the law. These cases might be provided for in some more comprehensive scheme of government liability in tort, with special tribunals, such as courts of claims, for the settlement of such disputes.

Should there first be a trial against the officer, and then the officer in turn sue the state or other responsible unit? Or should the entire matter be settled in one claim, with the governmental unit represented by counsel in the suit against the officer? If the latter method were adopted the suit would probably be in one of the regular courts of the established judicial system of the state instead of in a court of claims. These are some of the problems which would have to be solved in any proposal looking to government responsibility for acts of officers under unconstitutional statutes. Perhaps the most important step to be taken is that involved in the establishment of some regular systematic administration of these and other tort cases, wherein the government is for one reason or another the party defendant. With that step taken, experimentation with limited jurisdiction as to the size of claims to be entertained, the retention of legislative control over the cases involving larger amounts than those entrusted to the tribunal, and the single trial of a case to establish liability, may not be so costly but that the advantages to be gained thereby will far outweigh remote possibilities of raids on the public treasury.

The practice of foreign countries in dealing with government responsibility is suggestive, but it is only analogous because action under an unconstitutional statute does not occur in many countries other than the United States. Such action differs from the ordinary case of tort on the part of the officer, because he acts in accordance with a statute or ordinance, and in reliance thereon. The practice which obtains in some foreign countries of compen-

⁹⁹ *Supra* note 88.

sating for injury due to the operation of government regardless of whether such injury constitutes a tort or not is more nearly analogous to the responsibility here proposed for action under invalid statutes than is the practice with respect to responsibility in tort. There is likely to be some injury and loss occasioned by the normal routine operation of any enterprise conducted on such a large scale as government, in its governmental as well as in its private activities. For these the citizen should not be compelled to pay directly, if the loss should in a given case fall upon him, but should only be compelled to pay indirectly, through contribution to the common fund, which should be provided for by legislation. Unconstitutional statutes will continue to be enacted. Injury will continue to be done under them. The group instead of the individual should take up the loss, and that irrespective of whether the injury would constitute a technical tort or not.