Study J-1200 December 1, 1995

First Supplement to Memorandum 95-77

Trial Court Unification: Delegation of Legislative Authority (Effect of Invalidity)

Memorandum 95-77 discusses whether SB 162 is a valid delegation of legislative authority to the Governor to determine the number of superior court and municipal court judges. See Cal. Const. Art. VI, §§ 4, 5 (Legislature "shall prescribe" number of judges). The memorandum concludes that the delegation of authority is probably valid but that, because of the uncertainty and risk involved, saving or curative legislation might be helpful.

This supplemental memorandum reviews the general law governing the consequences of a determination that a judicial officer does not properly hold office. Are the acts of the officer valid, voidable, or void? Is payment of the officer's salary proper? This memorandum concludes that specific legislation of the type proposed in Memorandum 95-77 is necessary to ensure that acts of a person pointed to a converted judgeship are validated and that the person's salary is properly paid, in the event conversion of the judgeship is found to be invalid.

EFFECT OF INVALID APPOINTMENT ON JUDGMENTS

Suppose the Governor converts a municipal court judgeship to a superior court judgeship under authority of SB 162 and appoints a judge to fill the position. The judge issues judgments and orders as a superior court judge, but some time later the conversion of the judgeship is held invalid as an improper delegation of legislative authority to the Governor. Are the acts of the "superior court judge" valid, or are they subject to direct or collateral attack?

Similar circumstances have arisen before. Among the situations where acts of judges have been challenged are:

(1) The judge has acted beyond the jurisdiction of the court or the department of the court in which the judge sits.

(2) The judge has acted when not qualified.

(3) The judge has acted after the judge's term has expired or the judge's office is otherwise vacant by operation of law.

(4) The judge has acted when the judge has no right to the office.

(5) The judge has acted at a time when the office does not exist.

The courts have applied a variety of rules in these situations, and the law is in fact confused. The cases are not consistent in their analysis and application of principals. Decisions involving acts beyond the subject matter jurisdiction of the court, for example, can be found holding the acts void, but other decisions can be found holding them voidable. See 2 B. Witkin, California Procedure, *Jurisdiction* §§ 266-272 (3d ed. 1985).

Properly analyzed, cases where the judge of a particular department of the court acts beyond the jurisdiction of that department are cases involving a voidable act of the judge and not a void act beyond the jurisdiction of the court, since departments are created for administrative convenience and do not limit the underlying subject matter jurisdiction of the court. However, the cases are inconsistent on this issue as well. See 2 B. Witkin, California Procedure, *Courts* §§ 184-187 (3d ed. 1985).

Where the judge is disqualified, cases have stated that acts of the judge are "void", but in fact this doctrine is ordinarily limited to direct attack on the acts before they become final. There have been cases where collateral attack has been allowed, however. See discussion in 2 B. Witkin, California Procedure, *Courts* §§ 74-76 (3d ed. 1985).

Perhaps the most closely analogous situation to the present issue has arisen with respect to acts of a judge who has no right to the office. In People v. Sassovich, 29 Cal. 480 (1866), the defendant in a criminal case was tried in the 15th Judicial District, created by legislation at a time when Article VI, Section 5 of the Constitution provided that "The State shall be divided by the Legislature of 1863 into fourteen judicial districts, subject to such alteration from time to time, by a two-thirds vote of all the members elected to both Houses, as the public good may require." The defendant's objection that the 15th judicial district was not validly created and the judge therefore not validly appointed was rejected by the court. The court went on to state in dictum that:

> The person who filled the office of Judge at the time this case was tried was appointed and commissioned by the Governor under and in pursuance of the provisions of the Act in question. He entered therefore under color of right and title to the office, and

> became Judge *de facto* if not *de jure*, and his title to the office cannot be questioned in this collateral mode. [Citations] His title can only be questioned in an action brought directly for that purpose [in quo warranto proceedings]. The acts of *de facto* officers must be held valid as respects the public and the rights of third persons. A contrary doctrine, for obvious reasons, would lead to most pernicious results.
> 29 Cal. at 485.

The case thus states in dictum that acts of a de facto judge are subject to *neither* collateral nor direct attack. This goes far beyond cases holding that, where a judge has acted after the judge's term has expired or the judge's office is vacant by operation of law, the doctrine of "de facto judge" applies to insulate acts of the judge from collateral attack. See, e.g., Ensher, Alexander & Barsoom, Inc. v. Ensher, 238 Cal. App. 2d 250, 47 Cal. Rptr. 688 (1965) (suit in equity to set aside a judgment by judge alleged to have resigned office by operation of law on taking another public office). However, here again there are also cases holding that the powers of such a judge cease and the judge's orders are void. 2 B. Witkin, California Procedure, *Courts* § 44 (3d ed. 1985).

Without mentioning the *Sassovich* dictum, the court held the opposite in People v. Toal, 85 Cal. 333, 24 Pac. 603 (1890) — acts done by the judge in an improperly constituted judgeship are subject to direct (and in dictum, collateral) attack; the de facto judge doctrine applies only to incumbents of an existing office, not to judges of a court that has no legal existence. In the *Toal* case the criminal defendant appealed the conviction on the ground that the Police Court in which he was tried was improperly constituted by the Los Angeles city charter at a time when Article VI, Section 1 of the Constitution limited the judicial authority of the state to prescribed courts "and such inferior courts as the legislature may establish". The court held that the Police Court was improperly constituted and reversed the conviction, stating:

> But it is urged upon us, by one of the gentlemen who claims to be a police judge under this charter, that dire consequences will result from a decision by us that this court was not legally established; the city of Los Angeles will be deprived of its police court, criminals will escape justice, and the gentlemen claiming to be judges of said court will be responsible for acts done by them as such judges without legal authority. We are too firmly convinced of the correctness of the conclusion we have reached to be affected or influenced by the fear of consequences. Beside, in our judgment, the consequences likely to result form this decision cannot be so serious

> as to allow that courts of justice, however inferior, may be established in the informal and loose way contended for by the respondent. They city of Los Angeles is amply provided with inferior courts, without its police court, and to be relieved of the unnecessary expense of maintaining it should not be seriously complained of; the criminals that will escape justice by the conclusion we have reached must be few in number, and the emoluments of the office to which they were not entitled will probably compensate the judges for all liabilities incurred by them by reason of having acted without authority of law.
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> 2. But conceding that the police court of Los Angeles was not legally established, it is further contended that the fact cannot avail the appellant in this case; that whether it was or not, the pretended judge thereof was a *de facto* judge, and his right to the office, or his power and jurisdiction, cannot be questioned in this collateral way, but must be raised by a direct action for that purpose. We think this point would be well taken if this were an attempt to test the right of some one to hold an existing office. [Citations.] But the question presented here is not as to the right of a particular person to hold an existing office. There cannot be a *de facto* judge of a court that has no existence. We are very clear, therefore, that the appellant has the right to present the question on this appeal, and that it is our duty to determine it; and if such results are likely to follow as the respondent claims, it is better that it should be determined speedily.
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> 85 Cal. at 337-339.

This holding was followed in other cases, including Ex Parte Sparks, 120 Cal. 395 (1898), granting a writ of habeas corpus to a person convicted in another invalidly constituted police court, and Miner v. Justice's Court, 121 Cal. 264 (1989), refusing to enforce a judgment rendered by a judge of an invalidly constituted justice court.

It is unclear which of the possible applicable doctrines would be applied if the Governor's action in converting a municipal court judgeship to a superior court judgeship pursuant to SB 162 were held invalid. Is this the case of a person acting under color of authority of an existing office, invoking the de facto judge doctrine, or is this the case of a person purporting to act under authority of a nonexistent office, giving rise to the nullity doctrine of *Toal*, or is some other principle applicable? The staff thinks there is enough uncertainty about the result that it is worth adding a saving or curative clause of the type suggested in Memorandum 95-77.

EFFECT OF INVALID APPOINTMENT ON SALARIES

The doctrine of de facto judge has been held not to enable payment of the salary of a judge not properly authorized to act. In Legerton v. Chambers, 32 Cal. App. 601, 163 Pac. 678 (1917), the elected judge began acting as judge before proper certification of the election results. "It has been repeatedly held that as the collection of salary or compensation annexed to an office is an incident to the title to the office, *de facto* officers, whose acts for the sake of public interest may be held legal, cannot recover compensation for their services." 32 Cal. App. at 604.

The same principle has been applied to deny payment for services of a court reporter appointed and acting before the statute authorizing appointment by the court took effect. "The law is settled in this state that one who occupies a place merely in a de facto capacity is not, in the absence of a statutory provision to the contrary, entitled to a writ of mandate to collect the salary provided for the office or position." Kennelly v. Lowery, 64 Cal. App. 2d 903, 905 (1944).

For these reasons, the staff concludes that the draft in Memorandum 95-77 validating salary payments in case of invalidity of a judgeship conversion is proper.

Respectfully submitted,

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