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The Law of De Facto Officers

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> In November the voters elected a new town council, and to celebrate, the victors invited their local congressman to administer the oath of office. Several months later some pedant pointed out that North Carolina law doesn't permit a member of Congress to administer oaths of office, and so the new board had not legally qualified for office. What's the status of each of the actions the board has taken since the organizational meeting?
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> A new member of the county commissioners has proved to be controversial, causing some of her opponents to research her background. After several months of looking, they discover that several years ago she was convicted of a felony in another state and does not appear to have regained her rights of citizenship. When her ineligibility is pointed out, she resigns immediately. She was the deciding vote in several matters, though, while she was serving on the board. What's the status of those votes?
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> A newly incorporated town decided to appoint its own tax collector rather than rely on the county collector; to save money, the town board appointed a recently retired citizen, who agreed to do the work on a volunteer basis. This collector has undertaken the work with enthusiasm and has levied on personal property, attached bank accounts, and garnished wages. The town board, though, a bit hazy on the details of the appointment, neglected to require the collector to provide a fidelity bond separate from the town's blanket bond. Once the town and the collector discovered the error, a bond was purchased, but now the question is, what's the status of the collector's actions in the interim?

In each of these cases, the officer or officers in question are de facto officers, and as such their actions are as valid as if they had been de jure (or entirely legal) officers. This *Local Government Law Bulletin* summarizes the law of de facto officers in North Carolina. It distinguishes between de jure officers and de facto officers, it sets out the variety of circumstances in which the courts have recognized a person as a de facto officer, and it discusses the circumstances in which the courts have found persons to be "intruders" or "usurpers," that is, persons whose actions are not valid.

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The Basic Rule

The basic rule, which we'll call the de facto officer doctrine, is that, as a practical matter, the acts of a de facto officer are as valid as the acts of a de jure officer.[1] The difference between the two is that if the status of the officer is directly challenged in an appropriate proceeding—an action in the nature of quo warranto, under Chapter 1, Article 41, of the North Carolina General Statutes (hereinafter G.S.)—the de jure officer will survive the challenge while the de facto officer will not.[2] Both de jure and de facto officers are distinguished from mere "intruders" or "usurpers," whose acts while purporting to be in office are *not* valid as against the public or individuals.

The North Carolina Supreme Court has identified two primary rationales in support of the de facto officer doctrine, a procedural one that furthers legal efficiency and protects the interests of public officers and a substantive one that recognizes the need of the public for security when dealing with apparent public officials.

The procedural element of the doctrine holds that a court will not allow a collateral attack on the status of an apparent officeholder but will hear such a challenge only in a direct action in the nature of quo warranto. That is, if a person is upset with an action taken by an apparent officeholder, the person cannot seek to invalidate the action by attacking the status of the officerholder but must instead find some other reason to challenge the action. Otherwise, an officeholder's right to the office being held could be litigated and decided in a proceeding in which the officer was not a party. When this bar to collateral attack was first enunciated in 1844, in *Burke v. Elliott*,[3] the first explicit statement of the de facto officer doctrine in North Carolina, officeholders held a property right in their offices, a status that remained the law in North Carolina until the 1903 decision in *Mial v. Ellington*.[4] Despite this later change in status, the ban on collateral attack remains in place.[5]

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1. From the earliest cases, *e.g., Burke v. Elliott*, 26 N.C. 355 (1844), the courts have stated that the acts of de facto officers are as valid as those of de jure officers as to *third parties and the public*. The italicized phraseology implies that a de facto officer's actions might not be effective as to first or second parties, but none of the North Carolina cases make such a point directly, nor do they explicitly identify who might be first or second parties. The de facto officer himself or herself is probably the first party, and there is some case law in other states that forbids such an officer from using the de facto officer doctrine in a suit to which the officer is a party. 63C Am. Jur. 2d *Public Officers and Employees* § 236. A person, though, who applies to a de facto officer for specific action or who is the subject of action by a de facto officer is clearly not a second party. In *Ellis v. N.C. Institution for the Deaf & Dumb & the Blind*, 68 N.C. 423 (1873), the plaintiff was an institutional employee discharged by a board whose members were de facto rather than de jure officers, yet the doctrine was applied in his suit for damages. And in *State v. Davis*, 107 N.C. 780, 14 S.E. 55 (1891), the de facto officer doctrine was applied against a defendant in a bigamy action who claimed the justice of the peace who officiated at his illegal wedding was not a de jure officer.

It may be that the second party is the State itself. In *In re Wingler*, 231 N.C. 560, 58 S.E.2d 372 (1950), the court wrote that "[f]or all practical purposes, a judge de facto is a judge de jure as to all parties other than the State itself." *Id*. at 563, 58 S.E.2d at 374.

2. An action in the nature of quo warranto may be brought by the attorney general or by a private party who has been given permission to do so by the attorney general. (In practice, the attorney general's office has, over the years, freely granted that permission and seems rarely to have brought such an action itself.) The attorney general may bring such an action at any time during the challenged person's tenure in office; a private citizen, however, may bring the action only within the first ninety days after the person assumed or claimed the office. If the court finds that the person is unlawfully in the office, it will enter a judgment removing the person from the office.

3. 26 N.C. 355 (1844).

4. 134 N.C. 131, 46 S.E. 961 (1903).

5. *E.g.,* Smith v. Town of Carolina Beach, 206 N.C. 834, 175 S.E. 313 (1934), and *In re Wingler*, 231 N.C. 560, 58 S.E.2d 372 (1950). In *Freeman v. Board of Commissioners of Madison County*, 217 N.C. 209,

The substantive rationale also was first articulated in *Burke*, in which the court stated the validity of acts of de facto officers and asserted that "[t]he business of life could not go on, if it were not so."[6] *Burke* was an action in ejectment that turned on the validity of an earlier execution sale of the property, and the defendant argued that the sale was invalid because the constable who gave notice of the sale was not legally in office. The constable had been appointed in November for a term of one year, but the statute called for the appointment to be made in January or February. The events under attack took place the succeeding April, within a year of the appointment but after the statutory termination of the term. The court held the constable to be a de facto officer, noting that he had in fact actively and openly exercised the duties of the office from his appointment through the April events, and made the following point about the policy that supports the de facto officer doctrine:

> When one is found actually in office and openly and notoriously exercising its functions in a limited district, so that it must be known to those, whose official duty it is to see that the office is legally filled and also that it is not illegally usurped; and when this goes on for a good length of time, or for a period which covers much of the time for which the office may be lawfully conferred; it would be entrapping the citizen and betraying his interests, if, when he had applied to the officer *de facto* to do his business, and got it done, as he supposed, by the only person, who could do it, he could yet be told, that all that was done was void, because the public had not duly appointed that person to the office, which the public allowed him to exercise.[7]

Many years later the court articulated the same point in a somewhat fuller way. *In re Wingler*[8] involved a habeas corpus petition from a misdemeanant who had been convicted in a mayor's court and sought to challenge the status of the mayor who held the court. In refusing to allow such a challenge against a de facto officer, the court wrote that:

> The de facto doctrine is indispensable to the prompt and proper dispatch of governmental affairs. Endless confusion and expense would ensue if the members of society were required to determine at their peril the rightful authority of each person occupying a public office before they invoked or yielded to his official action. An intolerable burden would be placed upon the incumbent of a public office if he were compelled to prove his title to his office to all those having occasion to deal with him in his official capacity. The administration of justice would be an impossible task if every litigant were privileged to question the lawful authority of a judge engaged in the full exercise of the functions of his judicial office.[9]

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7 S.E.2d 354 (1940), the court repeated the point that an officer's status may be challenged only in an action in the nature of quo warranto then proceeded to hear a challenge in any event. The plaintiffs in *Freeman* were county taxpayers seeking to enjoin the use of tax money to pay alleged officeholders, and the court held that "[f]or this purpose the plaintiffs have a standing in court as parties with a legal interest in the controversy." *Id.* at 212, 7 S.E.2d at 357. It is a rare case, though, in which taxpayers seek to enjoin payment of the salary of a de facto officer, and so the exception remains minor.

6. *Burke*, 26 N.C. at 360.

7. *Id.* at 362.

8. 231 N.C. 560, 58 S.E.2d 372 (1950).

9. *Id.* at 565–66, 58 S.E.2d at 337.

The courts have been consistent in recognizing the validity of the actions of de facto officers regardless of the nature of those actions. Some contested actions have been essentially ministerial or even clerical in nature: recording land instruments, witnessing oaths, issuing summons. Others, however, have involved the full discretion associated with public office: adopting and enforcing ordinances, holding court, appointing or removing public officers or employees, performing marriages, licensing professionals. One early case illustrates the possibilities of the doctrine.

In *People ex rel. Norfleet v. Staton*,[10] the governor had, in 1871, appointed William A. Moore to a vacant superior court judgeship; the term of the person causing the vacancy ran until 1878. The General Assembly, assuming that Moore's term ran only to the next election, enacted a law calling for an election for the post to be held in 1874, at which time Lewis Hilliard was elected. The person elected clerk of court in 1874 was unable to make his bond, and so, pursuant to statute, Hilliard appointed H. L. Staton to the position. Moore protested that the General Assembly's assumption was wrong and that he was still the judge, and he appointed Robert Norfleet to the position. Apparently the local consensus was that Hilliard was in fact the judge and his appointment the legal one, and so Staton was generally accepted as clerk.

Eventually the supreme court sided with Moore, holding that he was still judge, and so Norfleet brought an action in quo warranto to oust Staton from the position of clerk of superior court. Norfleet's argument was that a de facto officer, which he admitted Hilliard to be, who is later dislodged, cannot appoint someone to another office and have that other person become a de jure officer. The trial court agreed, but the supreme court did not. It was unwilling to modify the rule upholding the actions of de facto officers to make it inapplicable to appointments to office, and so a de facto officer has the capability of appointing officers who are de jure.

The Kinds of De Facto Officers

Many of the North Carolina cases, particularly those from the late nineteenth and early twentieth centuries, endorse the categorization of de facto officers set out in an 1871 Connecticut case, *State v. Carroll*.[11] The Connecticut court, in an opinion by its chief justice, articulated four broad categories in which a person will be found to be a de facto officer. It will be useful to set out the four categories, in *Carroll*'s words, and give examples of North Carolina cases that fit within each category.

First, [where the duties of the office are exercised] *without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.*

This category basically covers a person who has been acting as a public officer for some period of time but for whom there is no clear evidence of a proper appointment or election to the office.

10. 73 N.C. 546 (1875).

11. 38 Conn. 449 (1871). Illustrative cases that either quote from or cite *Carroll* include *State v. Lewis*, 107 N.C. 967, 12 S.E. 457 (1890), and *State v. Harden,* 177 N.C. 580, 98 S.E. 782 (1919). In *Berry v. Payne*, 219 N.C. 171, 13 S.E.2d 217 (1941), the court quotes a "comprehensive definition" of a de facto officer from 22 R.C.L. § 306, which in fact is drawn from the *Carroll* case; the encyclopedia characterizes the definition as having been "widely accepted."

A classic example of this category of case is *State v. Davis*,[12] which was a prosecution for bigamy. The defendant sought instructions that it was up to the prosecution to show that the justice of the peace who conducted the offending marriage ceremony was validly in office. The trial court refused, and the supreme court affirmed. The court admitted that the justice's name did not appear among those appointed justice by the General Assembly in the appropriate year but noted that he had been acting as justice before the marriage and continued to do so afterward and that there were other ways a person could become a justice besides appointment by the legislature. Similarly, in *Alexander v. Lowrance*[13] there was a dispute between the town of Forest City and the local school board over control of school bond proceeds. The town had attempted to argue that the school board members were not legally in office, but it also had admitted that the board had in fact been operating the schools. The court held that the town's admission meant that the school board members were at the least de facto officers and therefore that it was fatal to the argument; the school board's status could only be challenged in an action in the nature of quo warranto.

A number of early cases involved persons who had originally been lawfully appointed to office but who continued in office without any evidence of subsequent reappointment. *Burke*, described above, is an example of such a case, as was the nearly contemporaneous case of *Gilliam v. Reddick*.[14] In *Gilliam* the validity of a deed of trust was attacked on the ground that the register of deeds was not validly in office. The register had lawfully been appointed to and qualified for the office in 1829, for a four-year term; although the evidence was murky about subsequent reappointments, the man clearly continued in office for another decade or more. This was enough for the court to characterize him as a de facto officer. In contrast, in *Hughes v. Long*[15] a deed of trust was attacked on the ground that the notary who took the probate was not validly in office. The man had been appointed to a two-year term in 1887 and had not been reappointed, yet the probate was taken in 1891, almost two full years after he ceased being a de jure officer. The court emphasized that there was no evidence, nor any other attempt to prove, that the man had continued to act as a notary after his term expired. Rather, as far as the case was concerned, this was an isolated act. As such it was the act of an intruder and did not warrant protection under the de facto officer doctrine. The court refused to enforce the deed of trust.[16]

Second, [where the duties of the office are exercised] *under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.*

The North Carolina cases in this category fit the definition exactly—the officer in question had been properly appointed or elected but neglected to post bond or to take the oath of office. In *Hinson v. Britt*,[17] two ABC law enforcement officers were held to be at least de facto officers, even though they were alleged never to have posted bond; therefore, the court refused to

12. 107 N.C. 780, 14 S.E. 55 (1891).

13. 182 N.C. 642, 109 S.E. 639 (1921).

14. 26 N.C. 368 (1844).

15. 119 N.C. 52, 25 S.E. 743 (1896).

16. For a time the court seemed to think that officers who held over after their terms expired, because their successors had not yet qualified, were de facto officers. *See, e.g.,* Threadgill v. Carolina Cent. Ry. Co., 73 N.C. 178 (1875). In later cases, however, the court recognized that such a person was in fact a de jure officer. *E.g.,* Markham v. Simpson, 175 N.C. 135, 95 S.E. 106 (1918).

17. 232 N.C. 379, 61 S.E.2d 185 (1950).

squelch evidence secured during a search by the officers. Similarly, in *State v. Porter*[18] a justice of the peace was held to be a de facto officer from the time of his appointment, even though he served more than two months before posting bond; therefore, the court upheld the validity of an arrest warrant issued by him before he posted bond. Finally, in *Crabtree v. Board of Education of Durham County*[19] citizens sought to block construction of a new school at a site they disliked, by arguing that the board members were intruders. The statute at that time required school board members to take the oath of office on the first Monday in April and provided that the office was vacant should a board member fail to do so. In the case the five board members were all a day late taking the oath, but the court held they were still de facto officers and the plaintiff's argument could not succeed.

Third, [where the duties of the office are exercised] *under color of a known election or appointment, void because the officer was not eligible, or because there was want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.*

This category includes some of the most interesting fact situations in any of the de facto officer cases. There is an apparently valid election or appointment, but for some reason—a problem with the person, the appointer or electorate, or the process itself—the election or appointment is suspect. This case law category has also been reinforced by being the basis of a statute, G.S. 128-6, which reads as follows:

> **Persons admitted to office deemed to hold lawfully**.
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> Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void.

Interestingly, although the courts sometimes acknowledge this statute, they usually continue to decide the cases by reference to the case law.

The Person Is Ineligible for the Office

In *Armstrong v. McInnis*[20] one argument made by a citizen challenging a rezoning by the city of High Point was that one of the council members in the majority had been convicted of a felony many years earlier and, at the time of the vote, had not had his rights of citizenship fully restored. (They were fully restored not long after the events that led to the case.) Under the North Carolina Constitution, a convicted felon who had not had his or her rights of citizenship restored was not (and is not) eligible to hold public office. Nevertheless the court held that the council member was a de facto officer and that his vote must be counted.[21]

In two other cases, the officerholder's age was the problem. In *People ex rel. Duncan v. Beach*,[22] a successful district court candidate turned out to have been older than the statute allowed at the

18. 272 N.C. 463, 158 S.E.2d 626 (1968).

19. 199 N.C. 645, 155 S.E. 550 (1930).

20. 264 N.C. 616, 142 S.E.2d 670 (1965).

21. In this case the court did rely on G.S. 128-6 rather than the body of case law. G.S. 13-1, which provides for automatic restoration of citizenship for felons who meet certain conditions, was not enacted until 1971.

22. 294 N.C. 713, 242 S.E.2d 796 (1978).

time he was elected. When his ineligibility was finally discovered, he resigned and the governor filled the vacancy. The opponent in the election then brought a quo warranto action, claiming that he should have been declared the winner of the election, inasmuch as his opponent was ineligible to serve. The supreme court held against him, holding that the successful candidate, and judge, had been a de facto officer, and when he resigned that created an actual vacancy that should be filled in the manner provided by law. *In re Russell*,[23] a much earlier case, involved a dispute between North Carolina's Civil War governor and a general in the Confederate army. The governor had appointed Russell to a seat on a board of county commissioners, but the general claimed that Russell was subject to army service under the Confederate draft law. In holding that state law should prevail, the court had to confront the argument that Russell, at the time of the governor's appointment, was not yet twenty-one and thus not eligible for the office. Although the court did not refer to the de facto officer doctrine, it did enforce the doctrine, holding that Russell's eligibility for the office could not be collaterally raised in this habeas corpus proceeding but only in an action in quo warranto.

Lack of Authority in the Appointing Person or Entity

The cases involving a want of authority in the appointing person or entity are quite old. In *Ellis v. N.C. Institution for the Deaf & Dumb & the Blind*,[24] Ellis had been fired by a new board of directors and he sought damages, arguing they had no authority to discharge him. The new board had been appointed by the General Assembly, which the contemporaneous case of *Nichols v. McKee*[25] held was beyond the legislature's power, but the court held that the board members were de facto officers and therefore empowered to hire and fire employees at the institution.

Two other cases involved defendants in criminal trials who both sought to overturn their convictions on the ground that the special commissions issued by the governor to the trial judges were unconstitutional.[26] The supreme court rejected the argument in each case, noting that the judges were de facto officers and therefore that the trials were valid. "Were it otherwise," the court noted in the second case, "the public would be subjected to the hazard of having all of the adjudications of a court presided over by an incumbent judge acting by virtue of a commission declared invalid in all cases where, after a course of litigation, the lawful right to his office is declared to be in a contestant."[27]

Irregularly Called Election

A case involving an interesting story is *Commissioners of Trenton v. McDaniel*.[28] The town had first been established in the late eighteenth century and had been the subject of several subsequent acts of the General Assembly. The latest, enacted in 1825, called for annual election of town officers, and the townspeople did in fact hold such elections for almost twenty years. After 1843 or 1844, however, the elections stopped, as did effective town government. In 1857, though, someone posted notice of town elections, and all but two adult males in the town participated. Three commissioners were elected, and among their subsequent actions was adoption

23. 60 N.C. 388 (1864).
24. 68 N.C. 423 (1873).
25. 68 N.C. 429 (1873).
26. State v. Lewis, 107 N.C. 967, 12 S.E. 457 (1890); State v. Turner, 119 N.C. 841, 25 S.E. 810 (1896).
27. *Turner*, 119 N.C. at 846, 25 S.E. at 811.
28. 52 N.C. 107 (1859).

of an ordinance prohibiting hogs from running at large in the town. The defendant violated the ordinance, his hog was impounded, and he reclaimed it by force from the town sergeant. As a result, the commissioners brought an action in trespass against him, and of course his defense was that the commissioners were not validly in office. The court admitted that their right to office might be susceptible to a successful challenge in an action in quo warranto, but until such an action was brought they were de facto officers and the ordinance was therefore valid. (Although the court does not dwell on this point, it was probably important that there had been such widespread participation in the 1857 election; if only a few citizens had participated, one wonders if the outcome would have been the same.)

An even more unusual set of facts was at issue in *Berry v. Payne*,[29] which involved the temporary resurrection of the town of Englehard. The Hyde County town had been incorporated in 1913, and the incorporation act named the initial mayor and four commissioners. There was to be an election for successors in 1915, but it was never held, and the town ceased active operations. In 1939, however, interest in the town reawakened, apparently because of the possibility of a federal grant that would permit construction of a municipal, or community, building. As a result, a large number of town citizens petitioned the 1913 mayor and the two remaining living 1913 commissioners to once again assume office and reactivate the town. The three did so, appointing two others to fill out the town commission, and the reconstituted board went about seeking the money necessary to construct the desired municipal building. It turned out there was money available, but not enough, and so the town commission levied a small property tax to make up the difference. The plaintiffs, who had been willing to support reactivating the town as long as it was without cost, were not willing to pay taxes for the building and brought an action to restrain their collection. The opinion in the case is unusual. The court devotes two long paragraphs to the issue of whether the mayor and commissioners were de facto officers and seems clearly to believe that they were, but it never explicitly says so. Rather, it holds that because the plaintiffs participated in the effort to reactivate the town they were estopped from arguing that the effort was invalid. As will be noted later in this bulletin, there were some facts in the case that would have been inconsistent with a holding that these were de facto officers, and perhaps that caused the court to ultimately sidestep the issue.[30]

Fourth, [where the duties of the office are exercised] *under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.*

There may be overlap between this category and the third, inasmuch as the want of power to make an appointment, in the third category, might be constitutionally based. For that reason, the case of *Ellis v. N.C. Institution for the Deaf & Dumb & the Blind* might as appropriately be placed in this category as in the third.

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29. 219 N.C. 171, 13 S.E.2d 217 (1941).

30. *See* note 51. Another case within this category is *People ex rel. Norfleet v. Staton*, 73 N.C. 546 (1875), which is described in the text accompanying note 10. *See also* St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908). That case involved the creation of the Cape Fear Board of Navigation by the General Assembly in 1907, to become effective April 15 of that year. The governor, however, made his appointments before the fifteenth, even though the offices did not yet exist, and the defendant in this case claimed that invalidated the appointments. The court noted that the board members did not qualify for the office until April 15, nor did they take any official acts until that day, and therefore it held that they were at the least de facto officers.

Two cases that clearly belong in this category, though, are *Smith v. Town of Carolina Beach*[31] and *Wrenn v. Town of Kure Beach*.[32] Each case grew out of efforts to allow nonresident property owners to vote in town elections. In Carolina Beach the strategy was to limit the electorate to owners of real property, whether resident or not; the town operated under this system for several years in the late 1920s and early 1930s. In Kure Beach the strategy was to provide that the governor was to appoint the town officers but in doing so was bound by the recommendations emerging from an election held for that purpose, one in which nonresident property owners (as well as all residents) were allowed to participate. The town operated under this system from its incorporation in 1947 until the decision in *Kure Beach*. In each of the two cases citizens challenged the issuance of town bonds, on the ground that the town boards had been unconstitutionally elected. (In *Carolina Beach* the bonds did not require voter approval; in *Kure Beach* they did, but the electorate for the bond referendum was limited to residents. Therefore, only the town board elections were being challenged.) In each case the supreme court agreed that the electorates were unconstitutionally structured, but it also held that the boards elected by those electorates were nevertheless de facto officers. As a result, their actions in proposing and approving the bond issues were valid, and the plaintiffs were ultimately unsuccessful in stopping issuance of the bonds.

De Jure Actions versus De Facto Actions

There is one category of de facto officers whose actions are not given the benefit of the de facto officer doctrine. These are officers whose actions are countered by equivalent actions of de jure officers. In the typical case there are two persons, or two sets of persons, each claiming to hold a public office or set of offices, and each takes action on a particular subject. Until a court can sort out which claimant or claimants should be recognized, both are, as a practical matter, de facto officers. Once a court has decided that one of the claimants is de jure, though, that person's or group's actions are given validity and the other's are not, even though they would qualify as de facto officers.

The earliest example of such a case is *Baker v. Hobgood*,[33] a quo warranto case between two persons each claiming to be superintendent of the Granville County schools. There were two competing school boards in the county—one elected by the voters in 1897 for a three-year term and another appointed by the General Assembly in 1899. When each appointed a superintendent, the quo warranto action resulted. The supreme court noted that it had recently decided that the elected board was rightfully in office and therefore was the de jure board. As such, its choice must be respected, even though the other board did have de facto status when it made its own choice. Two other cases of this sort are *Kennedy v. Town of Wilkesboro*,[34] which involved two competing town boards and the question of which board's tax levy was the legal one, and *Sams v. Board of Commissioners of Madison County*,[35] which involved two competing county boards of health, each of which had appointed a county physician.

31. 206 N.C. 834, 175 S.E. 313 (1934).
32. 235 N.C. 292, 69 S.E.2d 492 (1952).
33. 126 N.C. 149, 35 S.E. 253 (1900).
34. 214 N.C. 271, 199 S.E. 35 (1938).
35. 217 N.C. 284, 7 S.E.2d 540 (1940).

None of these cases explain the apparently opposite outcome in the case of *People ex rel. Norfleet v. Staton*[36] (summarized above in the text accompanying note 10). Recall that there were two claimants to the office of superior court judge, each of whom purported to fill a vacancy in the office of clerk of superior court. In the case, a quo warranto action between the two claimants to the office of clerk, the court upheld the appointment of the de facto judge as against that of the judge ultimately held to be de jure. So, why didn't the court prefer the appointment by the de jure judge? The difference between *Norfleet* and the later cases possibly arises from the general acceptance by other officials and by the public of the de facto judge as the person properly in office. That is, although the de jure judge did attempt to appoint someone to fill the vacancy, he otherwise did not act as a judge—court was being held only by the de facto judge. In the more recent cases, by contrast, it appears that both claimants to the office were attempting to carry out their official responsibilities and that there was considerable local confusion about which officer or board should be regarded as legally in office.

What Is an Intruder or Usurper?

So far the discussion has been about circumstances that lead to a finding that persons are de facto officers. The remainder of this bulletin discusses the various circumstances in which the court has found that one or more persons were mere intruders or usurpers, without the status of de facto officers, whose actions therefore were not protected by the de facto officer doctrine. The actions were invalid. Although the rules that result from the various cases are in most cases clear, they do not always seem defensible, given the policies behind the de facto officer doctrine and some of the cases that implement it. Indeed, in one or perhaps two situations, continued characterization of certain persons as intruders might well lead to just the sort of public uncertainty and inconvenience that is the foundational policy for the doctrine.

Taking Office by Stealth or Force

A person who secures apparent public office by trickery or by force is the classic intruder, and *Van Amringe v. Taylor*[37] is the North Carolina example of the genre. Two candidates for New Hanover county clerk of superior court were litigating which of them had been elected, and all sides agreed that the outcome depended on whether the votes from a particular precinct should be counted. The trial court had determined that the precinct registrar was an intruder and had therefore refused to count the votes, and the supreme court affirmed. The version of the facts accepted by the court showed that a man named Cowan was the legally appointed registrar and that he had appointed a man named Thomas to be his clerk. Thomas borrowed the registration books under a promise to return them but on election day refused to do so. Cowan in fact appeared at the precinct on the morning of the election and, in the presence of voters, demanded the return of the books so that he and his appointed judges could conduct the election. Thomas refused and conducted the election himself, with his own judges.

The court differentiated this case from others, in which a possible intruder had been in office for some extended period of time. It also argued that citizens either knew or should have known

36. 73 N.C. 546 (1875). Indeed the court in *Baker* cites *Norfleet* as support for the usual outcome of de facto officer cases.

37. 108 N.C. 196, 12 S.E. 1005 (1891).

of Thomas's intrusion into the office and therefore had no one to blame but themselves when their votes were not counted. All in all the outcome seems fairly drastic, but the case clearly illustrates the effect of an intruder into public office.

Much more difficult to understand on its own terms is *Keeler v. City of Newbern*.[38] The plaintiff alleged that he had contracted with the city council to serve as a police officer for a number of months in 1865 at the rate of $75 per month. The current council refused to pay him for his work, and he brought suit under the contract. The council defended on the ground that the earlier board had been mere usurpers. It pointed out that the city charter required the council to be elected and that it was admitted that the members of this council had never been elected to city office. They "took possession" of the offices in July 1865 and continued to act as the council until March 1866. The supreme court agreed with the defendants, holding that the admission that the older council had not been elected, when election was required by the charter, was fatal to the contract. The council members were mere intruders.

But hold on. Just how did this council come to insert themselves into town government? It turns out—though one would not know this from the opinion—that they had been appointed council members by the governor, after the Union military (which had occupied Newbern from early in the Civil War) returned city government to the civil authorities.[39] It is hard to understand how a town council, appointed by the state's governor and in office for nine months, does not fit into either the first or the third category of de facto officers set out above. To whom else were Newbern citizens to turn when they needed city government? The answer probably lies in the bitter politics of the Reconstruction Era, and the case is probably best understood as a product of that politics rather than as a useful precedent for the de facto officer doctrine.

Acting When Your Term Is Over and Your Replacement Is in Office

If an officeholder's term expires, and his or her replacement has not qualified, G.S. 128-7 provides that the outgoing officer continues in office until the replacement does qualify. A person holding over in that situation is a de jure officer.[40] The situation changes, though, when the term has expired and the replacement officer has taken office. In *In re Pittman*,[41] the issue was the validity of a district court judgment that a child was neglected. The district court judge had announced her ruling in court before she was defeated for reelection, but she did not sign the judgment until her term had ended and her victorious electoral opponent was installed as judge. In those circumstances, the court of appeals held that the former judge was an intruder and that therefore the signed judgment was void.

38. 61 N.C. 505 (1868).

39. Alan D. Watson, A History of New Bern and Craven County 438 (1987).

40. *E.g.,* Markham v. Simpson, 175 N.C. 135, 95 S.E. 106 (1918). *See* Baxter v. Danny Nicholson, Inc., 363 N.C. 829, 690 S.E.2d 265 (2010) (Industrial Commission decision, in which one of two majority commissioners was holding over, held valid); the supreme court's opinion in this case does not mention *Estes v. North Carolina State University*, 117 N.C. App. 126, 449 S.E.2d 762 (1994) (Industrial Commission decision, in which one of two majority commissioners was holding over, held invalid), but the result is directly opposite, and the court of appeals decision should be disregarded.

41. 151 N.C. App. 112, 564 S.E.2d 899 (2002).

Acting after You Have Resigned and Your Resignation Has Become Effective

Similarly, if an officeholder has resigned his or her office and the resignation has been accepted, any attempt to continue exercising the powers of the office is void; such a person is an intruder.[42] In *Whitehead v. Pittman*,[43] a town commissioner accepted another office and consequently resigned from the board of commissioners; even though his resignation was accepted by the board, he for some reason continued to act as a commissioner. This commissioner's vote was essential to the election of a cotton weigher for the town, and the case challenged that election. The supreme court held that by resigning, the commissioner had vacated town office, and that thereafter he was "a mere usurper, whose acts were utterly void."[44]

There Is No Valid Office

A number of cases have held that if there is no legal office, there can be no de facto (or de jure) officer. For example, in *Idol v. Street*[45] the General Assembly by local act created a joint city–county health board for Winston-Salem and Forsyth County. When the board adopted regulations regarding the production and sale of milk, a number of local dairy farmers challenged the regulations on the ground that the act creating the board was unconstitutional. (The state constitution prohibits local acts relating to health, sanitation, and the abatement of nuisances.) The trial court agreed that the act violated the constitutional provision but then held that the board members were nevertheless de facto officers and therefore their regulations were valid. The supreme court reversed. It agreed that the act was unconstitutional but went on to hold that the board members were not de facto officers. Essentially, there cannot be a de facto *office*; in order for a person to be a de facto officer, he or she must hold a de jure office. The court emphasized that this sort of situation did not fit into the fourth category articulated by the Connecticut court in *Carroll*. That category, according to the North Carolina court, refers to the unconstitutionality of the act by which a person is appointed to a legal office; it does not refer to an act that unconstitutionally creates the office itself.[46]

Holding Too Many Public Offices

In 1951 Yancey County voters elected a new school board, with three members. Not long after that election, one of the three was elected mayor of Burnsville and assumed that office; he also, however, continued to act as a school board member. A few weeks later a second member resigned, and the appointing authority filled the vacancy with a person who was also the local postmaster; that person continued to act as both postmaster and school board member. The school board, as so constituted, then voted to consolidate five county high schools into a single facility, and citizens brought an action to enjoin the school system from taking bids for

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42. This situation differs from an officeholder who has not resigned but whose term has expired without his or her replacement having qualified. As just noted, under G.S. 128-7, such a person continues in office and is in fact a de jure officer.

43. 165 N.C. 89, 80 S.E. 976 (1914).

44. *Id*. at 90, 80 S.E. at 976.

45. 233 N.C. 730, 65 S.E.2d 313 (1951).

46. Other cases that fall into this category are *State v. Shuford*, 128 N.C. 588, 38 S.E. 808 (1901) (there must be a judicial district before there can be a judge for the district, and therefore judge holding court for several weeks before district created was not de facto officer; defendant's conviction was vacated), and *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952) (county commissioners without legal authority to create county court, and therefore judge purporting to preside in such a court was not de facto officer; person convicted in the court entitled to habeas corpus).

construction of the new high school. In *Edwards v. Board of Education of Yancey County*,[47] the supreme court held that both the school board member/mayor and the school board member/postmaster were in violation of the constitutional ban on dual office holding[48] and then turned to the issue of whether they were nevertheless de facto officers.[49] Citing precedent, the court held that they were not—that is, a person who exercises the responsibilities of a public office in violation of the constitutional ban on dual office holding is a usurper, one whose "acts are utterly void, both as to the public and as to individuals."[50]

The court was correct in relying upon precedent; *Edwards* is one in a series of cases that have treated persons in violation of the constitutional prohibition as usurpers rather than as de facto officers.[51] But the line of cases is troubling. It seems to run afoul of the basic policy behind the de facto officer doctrine, that the public is entitled to rely upon the bona fides of officers who appear to have been legally placed in office or who have been exercising without challenge the duties of an office for some extended period of time. In addition, it seems to run afoul of the categorization of de facto offices articulated in *Carroll* and repeatedly cited and followed by the North Carolina courts. The two persons in *Edwards* came into their offices through regular means—by election in one case and by the statutory method of appointment in the other—but they were ineligible to either continue to hold or to qualify for the office. Thus they would seem to fit within the third category of de facto officer articulated in *Carroll*. Why the different rule for persons holding too many offices?[52]

The court has given two substantive justifications for denying de facto status to persons who hold too many offices. First, in *Whitehead v. Pittman*, the court noted that the legal effect of accepting and qualifying for a second office, when one already held a first, was to instantly vacate the first office. Accepting the second office is akin to resigning from the first, and, as noted above, a person who resigns from an office cannot be accorded de facto status. The

47. 235 N.C. 345, 70 S.E.2d 170 (1952).

48. An extended discussion of the law of multiple office holding is found in A. Fleming Bell, II, Ethics, Conflicts, and Offices—A Guide for Local Officials 91–121 (Institute of Government, 1997). A second edition is in production.

49. *Edwards*, 235 N.C. 345, 70 S.E.2d 170.

50. *Id*. at 352, 70 S.E.2d at 175.

51. Other cases include *Whitehead v. Pittman*, 165 N.C. 89, 80 S.E. 976 (1914), and *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 72 S.E.2d 838 (1952). In a number of cases the supreme court refused to recognize the validity of the acts of a person in violation of the dual office holding ban but without invoking the de facto officer doctrine: *E.g.,* McIntosh v. Long, 186 N.C. 516, 120 S.E. 87 (1923), and Hill v. Ponder, 221 N.C. 58, 19 S.E.2d 5 (1942).

This line of cases may account for the court's strange treatment of the de facto officer doctrine in *Berry v. Payne*, 219 N.C. 171, 13 S.E.2d 217 (1941), discussed briefly above in the text accompanying notes 29 and 30. Recall that in that case the citizens of Englehard had petitioned a former mayor and two former commissioners to reassume their offices and act as the town council. The court flirted with characterizing them as de facto officers but ultimately held that the plaintiffs were estopped from challenging the status of these officers. In the years between 1915, when the town became inactive, and 1939, when the citizens petitioned for a resumption, the mayor had served a term in the General Assembly and one of the two council members had been elected to the county school board. Thus, under the rules applicable to dual office holding, each had vacated his office in the town of Englehard and could only be a usurper.

52. The court acknowledged in *Edwards* that North Carolina was in the minority in its treatment of multiple office holding violators under the de facto officer doctrine, citing "Effect of election to or acceptance of one office by incumbent of another where both cannot be held by same person," 100 A.L.R. 1162, 1187–89 (1936).

analogy is appealing, but it is not absolute. A person who resigns from an office does so voluntarily and knows that he or she has vacated the office. A person who vacates an office because he or she already holds another does so by action of law and may well not realize the legal effect of having qualified for the second office. Obviously, the school board member who became mayor did not understand that he could not legally continue as a school board member, nor did his colleagues. Therefore, a violation of the constitutional ban might easily continue for an extended period of time, raising precisely the policy concerns that underlie the de facto officer doctrine.

In addition, the analogy to a resignation does not hold for someone who is elected or appointed to a state office while holding a federal office. Qualifying for the state office does not vacate the federal office; rather, the person (as the postmaster in *Edwards*) is considered never to have in fact qualified for or assumed the state office.

Second, in *Edwards* the court noted that the North Carolina ban was constitutional in nature and that therefore the line of cases denying de facto status to those in violation was "calculated to prevent the nullification of the constitutional ban."[53] But there has been at least one other situation in which a person has been constitutionally ineligible for an office yet has been held to be a de facto officer. As was noted above, *Armstrong v. McInnis*[54] involved a challenge to a zoning amendment adopted by the High Point city council. One of the votes necessary for the amendment's passage was cast by a council member who had, many years earlier, committed a felony and who had not had his rights of citizenship restored. At the time the case was decided, Article VI, Section 8, of the state constitution disqualified for office

> All persons, who shall have been convicted or confessed their guilt on indictment pending, and whether sentenced or not, or under judgment suspended, of any treason or felony, or of any other crime for which the punishment may be imprisonment in the penitentiary, since become citizens of the United States, or of corruption or malpractice in office, unless such person shall be restored to the rights of citizenship in a manner prescribed by law.[55]

The courts have given no reason why a person in violation of one constitutional requirement for public office can still be a de facto officer while a person in violation of another cannot.

There is one additional reason for concern about a rule that refuses to accord de facto status to a person who holds one too many public offices. When *Edwards* and the other cases that refused to apply the de facto officer doctrine in this situation were decided, the state constitution prohibited a person from holding *two* public offices, and the rules were clear about which office was lost when a person was in violation of the constitutional limitation. Since 1971, however, the constitution has permitted a person in a number of situations to hold two offices and prohibits him or her from holding a *third*.[56] Whereas we earlier had a prohibition on *dual* office holding, we now have one on *multiple* office holding. One consequence of this constitutional change is that we no longer can be sure of the effect when a person assumes one

53. *Edwards*, 235 N.C. at 352, 70 S.E.2d at 175.

54. 264 N.C. 616, 142 S.E.2d 670 (1965).

55. The constitutional disqualification continues today in Article VI, Section 8, but under slightly different language.

56. Article VI, Section 9, now prohibits a federal office holder from holding a state elected office and a person from concurrently holding two state elected offices. But it also permits the General Assembly to enact laws permitting a person in certain circumstances to concurrently hold two offices, and the General Assembly has responded to the constitutional invitation by enacting G.S. 128-1.1, which permits one person to concurrently hold two appointive offices or one elected and one appointive office.

office too many; there have been no cases that have reached the appellate level and therefore no opportunity for the courts to fashion an appropriate rule. If a person who legitimately holds two offices then qualifies for a third, does he or she vacate the first office assumed or the second; or, perhaps, does such a person simply never legally qualify for the third? We simply don't know, and this uncertainty creates the real possibility of disruption of settled legal expectations that the de facto officer doctrine is intended to avoid. When and if an appropriate case reaches the supreme court, the change in constitutional provision affords the court an opportunity to revisit whether the de facto officer doctrine should apply to a person who holds too many public offices.

A City Council Member Moves Out of the City or Out of His or Her District

G.S. 160A-59 provides that when "any elected city officer ceases to meet all of the qualifications for holding office pursuant to the Constitution, or when a council member ceases to reside in an electoral district that he was elected to represent, the office is ipso facto vacant."[57] Most commonly this provision is triggered when a council member moves from the city or from the electoral district he or she represents. When that happens, the office is "ipso facto" vacant—that is, the office is vacated by action of law, at the moment the move occurs. Thus the situation is similar to that of a person who was in violation of the dual office holding prohibition of the pre-1971 state constitution. The state constitution requires that a person be eligible to vote for a public office in order to hold that office, and a person who has moved from the relevant election district is no longer eligible to vote for that office. Therefore, we have a constitutionally based rule for eligibility for public office and a statute that states that violation of the rule instantly vacates the office. We might expect, then, that a court would apply to a person who continued in public office in these circumstances the same rule applied to a person in violation of the dual office holding prohibition: that he or she is a mere usurper and will not be accorded the status of a de facto officer.

Such an outcome makes logical sense but in practice would be even more pernicious than the continuation of the characterization of persons holding too many offices as usurpers. It is frequently unclear whether a person has in fact moved his or her domicile from one place to another. A person might move his or her residence for a time, even an extended time, without thereby also moving his or her domicile. Whether a move has taken place is frequently disputed, and it may often require a judicial determination before the dispute is settled. As a result, there is a strong possibility that a person who is ultimately judged to have moved from the city or his or her electoral district will have continued in office for an extended period of time after the move was made but before the ultimate legal determination. This seems precisely the sort of situation for which the de facto officer doctrine was created—to provide security for the affairs of individuals and the public; but until a court decides one way or the other there is a significant risk that a council member in this situation will be held to be a usurper and thereby perhaps bring into question actions of the council on which he or she served.

57. There is no comparable statute for county commissioners.