

would result, if in every proceeding before such officers their title could be called in question." The rule applies equally to criminal and civil cases. *State v. Poulin*, 105 Me. 224; *State v. Carroll*, 38 Conn. 449; L. R. A. 1918 D, *note*, p. 1079, 1081, and cases cited.

If the justice received his appointment after becoming a police officer, he was a *de facto* justice, and what he did in that capacity was as valid as though he held the office *de jure*. If his appointment as a justice preceded the appointment to the police force, the result is the same. Although, as already appears, the acceptance of the appointment to the police force meant a termination of the office of justice, his continued exercise of the office was not usurpation. While wrongful, it was under such purported right as to bind third persons by it. There was no divestment of authority by direct proceedings so as to render its exercise void. While rightful authority was gone, color of authority took its place. "Until judgment of ouster or amotion is finally pronounced, he still remains in office, and his acts are valid." *Petition of Portsmouth*, 19 N. H. 115, 117. See also *Prescott v. Hayes*, *supra*; *Petersilea v. Stone*, 119 Mass. 465; *Oliver v. Jersey City*, 63 N. J. Law 634; *Green v. Wardwell*, 17 Ill. 278.

The other ground of exception is waived.

Exception overruled.

SNOW, J., was absent: the others concurred.

Rockingham, }
June 28, 1928. }

WELLS C. SMITH *v.* C. SHERMAN SMITH, *Ex'r.*

Perley Gardner, Robert W. Upton and Winthrop Wadleigh (Mr. Wadleigh orally), for the plaintiff.

Murchie & Murchie (Mr. Alexander Murchie orally), for the defendant.

PEASLEE, C. J. The law governing this case is stated in *Rogers v. Clough*, 76 N. H. 272, 274. "If it were not for this order, the defendants' recovery would be limited to their taxable costs. On the other hand, procuring the injunction bound the plaintiffs to comply with the conditions on which it was issued. Consequently the order limits both the amount the defendants can recover and the items of expense which are chargeable to the plaintiffs. In other words, the amount the defendants can recover in excess of their taxable costs and the items which compose it both depend on the terms of the order."

It being found that there was no damage caused by the restraint of a sale, and that the services and expenses which were allowed for "were entirely in . . . defending against the illegal claim of the plaintiff," no recovery can be had upon the bond. The condition was plain. It dealt only with loss or expense "by reason of this injunction." It did not concern the defence against the merits of the

plaintiff's claim. If the injunction had not been issued, the expenses would have been incurred. They were not caused by the injunction.

The further statement of the presiding justice that "The court rules as a matter of law and finds so far as it is a matter of fact that they are proper elements for allowance as damages under the injunction bond," does not affect the result. As a ruling of law it is erroneous, and it contains no element of a finding of fact. The facts were already found, and the conclusion thereupon was one of law. *State v. Railroad*, 70 N. H. 421.

None of the cases cited by the defendant sustain his position. In *Rogers v. Clough*, *supra*, the bond provided for recovery of the expenses incurred in the main action. In *Derry Bank v. Heath*, 45 N. H. 524, the injunction stayed a suit at law; and recovery was allowed for expenses in that suit, while so delayed. There is no suggestion of liability for other expenses in that action. *Solomon v. Chesley*, 59 N. H. 24, was a suit on a bond given in an equity proceeding, the sole object of which was to restrain the prosecution of a suit at law. Of course the counsel fees paid in defending that bill concerned the injunction and were properly allowed.

The argument that because the court has found, in effect, that the plaintiff's whole claim was fraudulent, therefore a recovery should be allowed here, loses sight of the element that the liability sought to be enforced depends upon the terms of the order and the bond. Had the defendant desired the protection now claimed, he should have moved for a bond covering the expenses of the suit.

Exception sustained.

SNOW, J., was absent: the others concurred.