appointment of the Governor to the same extent and as effectively as if Section 1 of Chapter 232 had not required him to make such appointments. It is a firmly established rule of law that, where a person is elected or appointed to an office under an unconstitutional statute, before such statute is adjudged unconstitutional, such person is a *de facto* officer and his acts are valid in respect to the public, whom he represents, and a third person with whom he deals, notwithstanding there was a want of power to appoint him in the body or person which professed to make such appointment.

Standard Oil v. Henry, 192 Ind. 171;
Felker v. Caldwell, 188 Ind. 364;
Brossman v. Michigan City, 105 Ind. 259.

For the reasons above stated, it is my opinion that the appointment of the present members of the State Egg Board by Governor Schricker is legal and valid in every respect.

Trusting that this fully answers your inquiry and will relieve the minds of the members of the Board as to any question concerning the legality of their appointment.

AUDITOR OF STATE: Whether Auditor may pay expense of transporting a prisoner to the State Reformatory, who has been found guilty of escaping from State Farm.

March 9, 1943.

Mr. Richard T. James,
Auditor of State,
Indianapolis, Indiana.

Dear Sir:

I have your letter of February 26, 1943, in which you request an opinion on the following subject:

> "The Act relative to such escape states that when a person is found guilty of escaping from the Indiana State Farm they shall be sentenced to the Indiana State Prison (Chapter 122, Acts 1927, B. R. S. 10-1808). Payments for such services are authorized under the provisions of Chapter 124, Acts 1919, amended by Chapter 183, Acts 1921, B. R. S. 49-1318.

"The question arises in this office:

> " 'Under the authority of the above named act, or any other act, can the Auditor of State pay the expenses of transporting a prisoner to the State Reformatory, who has been found guilty of escaping from the Indiana State Farm?' "

The earliest Act upon this subject is Section 2, ch. 124, of the Acts of 1919, as amended by Sec. 1, ch. 183, of the Acts of 1921, which provides in part:

> "Hereafter, the expense of removing persons convicted of the offense of escaping from the Indiana State Farm to the Indiana State Prison and the Indiana Reformatory, after their conviction, shall be paid from the Indiana State Treasury, * * *."

It would seem that the only remaining question is whether a court may sentence anyone to the Indiana Reformatory upon his escape from the Indiana State Farm.

Chapter 122 of the Acts of 1927 provides that escape from the Indiana State Farm is a felony and upon conviction, one escaping shall be sentenced to the State Prison.

Did that act, by implication, repeal that part of the 1919 act, as amended, which directed payment from the state treasury for transportation of escaped State Farm prisoners to the reformatory? The 1919 act, as amended, was an act "* * * providing that hereafter all expenses of removing such persons to the State prison or reformatory shall be paid from the state treasury upon the warrant of the Auditor of State," and did not purport to establish either a criminal offense or punishment therefor. On the other hand, the 1927 act was obviously a part of the state criminal code.

Indiana courts have repeatedly emphasized that repeal by implication should be found only in clear cases of actual repugnancy.

In the recent case of Freyermuth v. State, ex rel. Burns' 210 Ind. 235, 1936, the court quotes Board of Commissioners v. Carty, 161 Ind. 464, as follows:

> " 'It has been repeatedly affirmed by the decisions of this court that implied repeals are only recognized

> and upheld when the later act is so repugnant to the earlier as to render the repugnancy or conflict between them irreconcilable. A court will always, if possible, adopt that construction which, under the particular circumstances in a given case, will permit both laws to stand and be operative.' "

Since the acts are of an entirely different subject matter, and since there is no repugnancy in their provisions, I am of the opinion that the act of 1919, as amended, was not repealed, in whole or in part, by that of 1927.

Then, in 1927, another act was passed (ch. 200) by the same legislature providing for the sentencing of certain persons to the Indiana reformatory. Among other things, the act provides:

> "* * * and all existing laws requiring the courts of this state to sentence such persons to the penitentiaries or prisons of this state, are hereby modified and changed as to make it the duty of such courts to sentence such prisoners to the Indiana reformatory. * * *"

Chapter 200, Acts of 1927, above quoted, was approved one day after Chapter 122 Acts of 1927, and neither of these acts contain an emergency clause.

Applying the familiar principle that where two acts of the same legislature are in conflict, the last one approved prevails, undoubtedly, the court has power to sentence in such cases to the state reformatory.

See discussion in State v. Board of Commissioners, 170 Ind. 595, 1908, Metsker v. Whitsell, 181 Ind. 126, 1913, and Milk Control Board v. Pursifull, 36 N. E. (2d) 850, 1941, in which the court says:

> "There is ample authority * * * that as between two inconsistent acts passed by the same session of the legislature, even if they become effective at the same time, the one subsequently passed prevails. * * *"

Consequently, in my opinion the answer to your question must be that the Auditor of State has the authority to pay such expenses.