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JUDGES — DE FACTO JUDGE — SPECIAL JUDGE HOLDING OVER AFTER TERM OF ASSIGNMENT EXPIRES — A district judge, specially assigned to a court other than his own for a term of one week, continued to hold the position after the period had expired under the belief that his assignment covered a longer period, and tried this case after the expiration of the one week period. All attorneys, assuming that the assignment covered a longer period, acted in the case without objection to the judge. The parties did not specifically agree upon him as a special judge. After verdict for defendant, plaintiff moved to vacate. *Held*, the judge was a de facto judge, and his decision is valid. *Oklahoma Transportation Co. v. Lewis*, 177 Okla. 106, 58 P. (2d) 128 (1936).

Ordinarily, the power of a judge to exercise judicial functions ceases when his term of office expires, and the consent of the parties cannot confer jurisdiction upon him.[1] But the acts of a de facto officer, in so far as they affect the rights of the public and of interested third persons, are universally held valid.[2] A de facto officer is one who is in actual possession of the office, to the exclusion of all others, exercising all the duties thereof, with all the insignia thereto,

[1] Berry Bros. v. Leslie, 131 Mo. App. 236, 110 S. W. 685 (1908); Low v. State, 111 Tenn. 81, 78 S. W. 110 (1903); Coopwood v. Prewett, 30 Miss. 206 (1855); Marcellus v. Wright, 61 Mont. 274, 202 P. 381 (1921).

[2] See exhaustive note in 140 Am. St. Rep. 178 (1911).

in such a manner as to lead the public to believe that he is the actual officer.[3] Although the general rule is that color of title is required,[4] a few cases hold that such a requirement would violate the foundation of the doctrine, which is public necessity and a desire to prevent a hiatus in government.[5] At any rate, it has been held that a holding over after the expiration of a term of office affords such color as is required,[6] and this would seem to be the correct view.[7] Thus, the general rule is that a person holding over after the expiration of his term without legal authority, but continuing to perform the functions and duties of the office, with a color of right to the office, is a de facto officer.[8]

[3] Lord Ellenborough, in Rex v. Bedford Level, 6 East. 356, 102 Eng. Rep. 1323 (1805), generalizing from a previous definition given by Lord Holt in Parker v. Kett, 1 Ld. Raym. 658, 91 Eng. Rep. 1338 (1790), defined a de facto officer as an officer who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. See 22 R. C. L. 588 (1918); R. C. L. (Perm. Supp. 1929), p. 5234; R. C. L. (Continuing Perm. Supp. 1936), p. 1095. "A de facto officer is one who is in possession of an office and discharging its duties under color of authority," State ex rel. v. Oakes, 86 Wis. 634 at 638, 57 N. W. 296, 39 Am. St. Rep. 912 (1893). The court adds, "By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer."

[4] Berryman v. Becker, 173 Mo. App. 346, 158 S. W. 899 (1913); Swarthout v. Curtis, 5 N. Y. 302 (1851); Carleton v. People, 10 Mich. 250 (1862).

[5] "Hence, where a person is called upon to deal with such an officer, he is not bound to inquire whether his title to the office is good, and for a like reason it seems to us that he should not be required to inquire whether such title is colorable. In fact, he is not called upon to inquire into the title of such an officer at all, but may safely assume that he is what he appears to be, and what the public generally regard him to be." Cromer v. Boinest, 27 S. C. 436 at 438-439, 3 S. E. 849 (1886). In Petersilea v. Stone, 119 Mass. 465 at 468 (1876), Justice Devens says, "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far to see that he has color of title to it by virtue of some appointment or election." See the leading case of State v. Carroll, 38 Conn. 449 (1871).

[6] Cocke v. Halsey, 16 Pet. (41 U. S.) 71, 10 L. Ed. 891 (1842); Brown v. Lunt, 37 Me. 423 (1854); Cromer v. Boinest, 27 S. C. 436 at 442, 3 S. E. 849 (1880), in which it was said, "Now while, strictly speaking, an appointment to an office for four years cannot well be considered as conferring even color of title for any longer period, yet it may well be so regarded in the connection and for the purpose for which the words—color of right or title—are used in discussing this subject. As we understand it, those words are used to mark sharply the line between one who intrudes himself into an office without any shadow of right—a mere usurper—and one who enters upon an office or continues in it under an honest, though mistaken, belief of his legal right so to do shared by the public."

[7] See the exhaustive article, Jarrett, "De Facto Public Officers: The Validity of Their Acts and Their Rights to Compensation," 9 So. CAL. L. REV. 189 (1936).

[8] "Where an officer under color of right continues in the exercise of the duties of the office after his term of office has expired, or after his authority to act has ceased, he is an officer de facto, although he has no right to hold the office as against the one rightfully chosen his successor." 22 R. C. L. 598 (1918). To the same effect is 23 CYC. 619 (1918). "As a general rule, one who comes into office legally, and con-

Some courts require good faith on the part of the officer so holding over,[9] although others make no such requirement.[10] The general rule should be especially applicable where the length of the term can be determined only by reference to a particular document and cannot be known by the general public.[11] Since the doctrine is founded on the idea that the public should not be required to make too rigorous an examination into the title of a public officer,[12] it would seem that the ultimate test is whether or not the officer is clothed with such apparent legal authority as to lead the public to reasonably accept him as a de jure officer.[13] If such apparent authority exist, it might well be said that color of title, as used here, is present.[14] In the instant case, the public and all interested parties had every reason to believe that the judge was a de jure officer when the decision was rendered; only an inspection of the records of the chief justice of the supreme court would indicate otherwise. This is much more apparent authority than where the judge holds in violation of the state constitution, although in such a case he was held to be a de facto judge.[15] Also, it has been held that one is a de facto officer who holds over until his successor qualifies,[16] or who holds over contesting the order for his removal,[17] or acts after his resignation,[18] or who cannot hold the office of judge because of his election to the legislature,[19] or who wrongfully holds over after the expira-

tinues to hold possession of the office and exercise the functions and duties thereof after the term for which he was elected or appointed has expired, is an officer *de facto*," 8 AM. & ENG. ENCY. LAW, 2d ed., 796 (1898); Ridout v. State, 161 Tenn. 248, 30 S. W. (2d) 255, 71 A. L. R. 830 (1930).

[9] Cromer v. Boinest, 27 S. C. 436, 3 S. E. 849 (1886); Merced Bank v. Rosenthal, 99 Cal. 39, 31 P. 849, 33 P. 732 (1893); Smith v. Meader, 74 Ga. 416, 58 Am. Rep. 438 (1885).

[10] Fleming v. Mulhall, 9 Mo. App. 71 (1880); State ex rel. v. Perkins, 139 Mo. 106, 40 S. W. 650 (1897).

[11] Oliver v. Jersey City, 63 N. J. L. 634, 44 A. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228 (1899).

[12] See footnote 5, supra.

[13] Jarrett, "De Facto Public Officers: The Validity of Their Acts and Their Rights to Compensation," 9 So. CAL. L. REV. 189 (1936).

[14] Justice Chambliss, in his learned opinion in Ridout v. State, 161 Tenn. 248 at 257, 30 S. W. (2d) 255 (1930), says, "the modern rule treats 'color' as the equivalent of appearance only, without reference to source"; see Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796 (1913). Color of title is that which in appearance is title, but which in reality is no title. Wright v. Mattison, 18 How. (59 U. S.) 50 at 56, 15 L. Ed. 280 (1855).

[15] State ex rel. v. Hart, 56 Mont. 571, 185 P. 769, 7 A. L .R. 1678 (1919). The judge was held to be a de facto officer, although not entitled to compensation. See also 1 VA. L. REV. 239 (1913).

[16] Threadgill v. Carolina Central Ry., 73 N. C. 178 (1875); State v. Lee, 35 S. C. 192, 14 S. E. 395 (1891); Cook v. State, 91 Ala. 53, 8 So. 686 (1890); Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436 (1890).

[17] Terre Haute v. Burns, 69 Ind. App. 7, 116 N. E. 604 (1917).

[18] Cook v. State, 91 Ala. 53, 8 So. 686 (1890). *Contra*, Loughran v. Jersey City, 86 N. J. L. 442, 92 A. 55 (1914).

[19] Woodside v. Wagg, 71 Me. 207 (1880).

tion of his term.[20] The principal case, therefore, can be supported both on reason and on authority.

[20] Morton v. Lee, 28 Kan. 286 (1882).