Michigan Law Review

Volume 46 | Issue 8

1948

JUDGES-DE FACTO JUDGES

J. R. Swenson S.Ed.
University of Michigan Law School

JUDGES—DE FACTO JUDGES—In 1947, the Arkansas legislature created an additional division in the First Chancery Circuit and provided that the office be filled until the next general election by Ruth F. Hale, the then Master of Chancery in that circuit.[1] In Arkansas, divorce is an equitable proceeding,[2] and from the date of her appointment, Chancellor Hale had granted an estimated 1,750 divorces.[3] Defendant appealed a divorce decree granted by Chan-

[1] Ark. Acts (1947) No. 42.

[2] Ark. Stat. (Pope, 1937) § 4380.

[3] N.Y. TIMES, Jan. 13, 1948, p. 27:3. The figure 1,750 does not appear in the opinion.

cellor Hale alleging it to be void. *Held*, decree vacated. Three judges dissented. *Howell v. Howell*, (Ark. 1948) 208 S.W. (2d) 22.

The major issue was whether Chancellor Hale was a de facto judge, since, had she been, this decree would have been immune from attack.[4] The entire court agreed that the legislature had transgressed the executive function of appointment by specifying the individual to fill the newly created office,[5] but the majority went on to find that the legislative purpose of the enactment was to create a job for Chancellor Hale and that consequently the entire act was inseverable and void. And, in the opinion of the majority, the legislative appointment was so devoid of authority that it could not add the color of law which would have given Chancellor Hale's acts de facto recognition. But the grounds on which the entire act was declared void contradicted the express language of the legislature since the act contained (1) a specific severability clause,[6] and (2) a statement that the purpose of the act was to relieve the congestion in the existing chancery court.[7] Had this legislative language been respected, the invalid appointment alone could have been deleted leaving the judicial office created by the statute untouched.[8] This would have meant that Chancellor Hale was acting in a de jure court, a requirement laid down by some courts for de facto judges.[9] The same conclusion could be reached on another ground since the effect of the statute in question was merely to add a second chancellor to an existing court, the de jure status of which was not

[4] A judge de facto is a judge de jure as to all persons except the state and may be challenged only by a quo warranto proceeding brought by the state. See 87 Am. St. Rep. 177 (1902); 140 Am. St. Rep. 201 (1911); 20 Ann. Cas. 460 (1911). Cases collected 30 AM. JUR., Judges, § 102; 48 C.J.S., Judges, §§ 7, 52; 33 C.J., Judges, § 14. His title and authority cannot be challenged in a proceeding to obtain a writ of prohibition, Walcott v. Wells, 21 Nev. 47, 24 P. 367 (1890); nor in an action tried before him, Winn v. Eatherly, 187 Miss. 159, 192 S. 431 (1939); nor on appeal, Sylvia Lake Co. v. Northern Ore Co., 242 N.Y. 144, 151 N.E. 158 (1926). Freeman indicates that such challenge might be made before trial. 1 FREEMAN, JUDGEMENTS 654 (1925).

[5] The argument was made but rejected that since the Constitution gave to the governor only the authority to fill *vacancies* by appointment, no violation of this prerogative had occurred in that the statute creating the office had provided no vacancy. Principal case at 26.

[6] Ark. Acts (1947) No. 42, § 12.

[7] Id., § 13.

[8] This was in effect the position of the minority. The utilization by the court of its own impressions to repudiate the express statements of the legislature presents an extreme example of the lengths to which a court may be carried in its attempt to arrive at a judicially construed legislative intent. For an excellent discussion of some of the problems of statutory construction see Powell, "Construction of Written Instruments," 14 IND. L.J. 309 (1939).

[9] Re Norton, 64 Kan. 842, 68 P. 639 (1902); State v. County Ct., 50 Mo. 317 (1872). However, there are many cases holding that there may likewise be a de facto court and that there may be a de facto judge of that court. Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121 (1886); Hildreth v. M'Intire, 1 Marsh. (24 Ky.) 206 (1829). And in Arkansas it appears that a de facto public officer does not require a de jure office. Eureka Fire Hose Co. v. Furry, 126 Ark. 231, 190 S.W. 427 (1916).

affected by this act.[10] As for Chancellor Hale's de facto status, there is substantial authority that a judge appointed under an unconstitutional statute attempting to increase the number of judges of a legally existing court has de facto authority.[11] Colorability was provided the appointment by the fact that Miss Hale's commission was regularly issued by the secretary of state.[12] And certainly all of the circumstances surrounding her assumption of the office and her performance of its duties gave rise to a reputation likely to induce people to invoke her action without inquiry, on the supposition that she was in truth the officer she purported to be. Absent even a colorable appointment, this is generally sufficient to create a de facto officer.[13] Without doubt, the Arkansas court would have been fully justified in finding that the Chancellor had de facto status. Its refusal to do so means that approximately 1,750 divorce decrees are void on their face, providing an excellent illustration of the desirability of the defacto doctrine.

J. R. Swenson, S. Ed.

[10] This was given implicit recognition by the court since the case was remanded to the Chancery Court for consideration. Principal case at 28.

[11] Butler v. Phillips, 38 Colo. 378, 88 P. 480 (1906); Walcott v. Wells, 21 Nev. 47, 24 P. 367 (1890); Ex parte State ex rel. Atty. Gen., 142 Ala. 87, 38 S. 835 (1905).

[12] Generally a judge who assumes to act in that capacity under commission from the proper executive officer, although issued without authority, is a de facto judge. State v. Lewis, 107 N.C. 967, 12 S.E. 457 (1890); 11 L.R.A. 105 (1891).

[13] See the exhaustive discussion of authorities in State v. Carroll, 38 Conn. 449 (1871), particularly the reference to this problem at page 467.