

COURTS NOT OF RECORD: DISTRICT COURTS.

Official actions of general district court substitute judge are valid *de facto* actions that were taken after expiration of judge's six-year term and before reappointment of judge to subsequent six-year term by order entered *nunc pro tunc* by chief judge of circuit court.

The Honorable James H. Harvell III

Judge, Seventh Judicial District

November 18, 1996

You ask whether the official actions of a substitute judge in the Newport News General District Court are valid because the actions were taken after the expiration of the judge's six-year term and before reappointment to a subsequent six-year term by order entered *nunc pro tunc*¹ by the chief judge of the circuit court.²

You state that the general district court clerk requested a substitute judge to sit during your absence from the bench. The substitute judge acted on cases before the court two days after the judge's six-year appointment had expired. The chief judge of the circuit court reappointed the substitute judge one month later by order entered *nunc pro tunc*.

Under certain circumstances in Virginia, there can exist a *de facto* judge. In the case of *McCraw v. Williams*,³ the Supreme Court of Virginia considered the validity of actions taken by a county court judge before the commencement of his official term, stating that the judge acted

"under color of authority of his appointment by the legislature and commission of the governor. If he was not judge *de jure*^[4] at the time of the trial and conviction, he was certainly a judge *de facto*,^[5] and his judgment is as valid and binding as if he was judge *de jure*."^[6]

Accordingly, I am of the opinion that the substitute judge acted *de facto* in the facts you present. It is my opinion that the official actions of the general district court substitute judge are valid *de facto* actions that were taken after expiration of the judge's six-year term and before reappointment of the judge to a subsequent six-year term by order entered *nunc pro tunc* by the chief judge of the circuit court.

¹"*Nunc pro tunc*" means "[n]ow for then. A phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done." BLACK'S LAW DICTIONARY 1069 (6th ed. 1990).

²"Substitute judges shall be appointed by the chief judge of the circuit court having jurisdiction within the district for a term of six years." VA. CODE ANN. § 16.169.9:1(a).

³74 Va. (33 Gratt.) 510 (1880).

⁴"De jure" "is the contrary of *de facto*" in the sense that it means "[o]f right; legitimate; lawful; by right and just title. BLACK'S LAW DICTIONARY, *supra*, at 425.

⁵The *de facto* phrase "is used to characterize ... a past action ... which must be accepted for all practical purposes, but is illegal or illegitimate. Thus, [such an action] exist[s] under a claim or color of right." *Id.* at 416.

⁶74 Va. at 514. The court reasoned that "[a]n officer *de facto* is one who comes in by the power of an election or appointment, but in consequence of some informality ... or by reason of the expiration of his term of service [emphasis added] ... cannot maintain his position when called upon by the government to show by what title he holds his office. He is one who exercises the duty of an office under claim and color of title, being distinguished on the one hand from a mere usurper, and on the other from an officer *de jure*." *Id.* at 513. The Court further explained that "[t]he rule which declares that the acts of an officer *de facto* are as valid and binding as if he were an officer *de jure*, is founded on the soundest principles of public policy, and is absolutely essential to the protection of the best interests of society. Indeed the affairs of society could not be conducted on any other principle. To deny validity to the acts of such officers, would lead to confusion and insecurity, in public as well as private affairs, and thus oppose the true policy of every well regulated State." *Id.* at 514; see also *Roche v. Jones, Sergeant*, 87 Va. 484, 12 S.E. 965 (1891); *Griffin's ex'or v. Cunningham*, 61 Va. (20 Gratt.) 31 (1870). *But cf. Morriss v. Virginia Insurance Company*, 85 Va. 588, 595, 8 S.E. 383, 387 (1888) (doctrine of *de facto* officers is not applicable where there is incumbent in office).