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The Interborough Receivership

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NOTES AND COMMENT

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THE INTERBOROUGH RECEIVERSHIP.

On August 25, 1932, the Interborough Rapid Transit Company consented to an equity receivership in an action brought against it by the American Brake Shoe Company in the Southern District Court. Attached to the papers consenting to such receivership was an affidavit in proper form by James L. Quackenbush, attorney for the company, stating that in his judgment it would be undesirable to have a trust company appointed receiver in the cause and giving his reasons. The day previous, Judge Martin T. Manton, Senior Circuit Judge, signed an order designating himself a district judge.[1] Under the standing order[2] for distribution of business in the District Court the petition for the receivership would in the regular course of business have been presented to Judge Robert B. Patterson who was then sitting and available. Judge Manton thereupon announced his disagreement with the distribution of business by the senior district judge and invoking Section 23 of the Judicial Code[3] appealed to himself as senior circuit judge to settle the theoretical dispute between the district judges. He, therefore, ordered that applications for the appointment of receivers might be made to him as well as to the district judge regularly assigned for that purpose by the senior district judge.[4]

Thereafter Judge Manton appointed receivers for the company and appointed attorneys for the receivers. The order was subsequently extended to include a subsidiary, the Manhattan Railway Company. A motion was then made returnable before Judge Woolsey, a district judge, by one Johnson, a stockholder of the Manhattan Railway Company, for an order vacating the appointment of the receivers and their attorneys as irregular and praying for the appointment of new receivers. The petitioners contended that pursuant to Rule 11a of the Rules of the Southern District Court of New

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[1] 28 U. S. C. A. §22: "The Chief Justice of the United States, or the circuit justice of any judicial district, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit. * * *"

[2] Rule 1a of the United States District Court, Southern District of New York, General Rules, effective July 1, 1932, provides: "Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the senior district judge."

[3] 28 U. S. C. A. 27: "In districts having more than one district judge, the judges may agree on the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

[4] *Supra* note 2.

York,[5] Judge Patterson was the only judge who had authority to appoint receivers in equity causes.

On his own initiative, Judge Woolsey consolidated [6] the American Brake Shoe Company cause and the Johnson cause and set aside as void and of no juridical effect all orders signed by Judge Manton as a *district* judge.[7] The request for the appointment of new receivers was denied and the operation of the order vacating the orders of Judge Manton was stayed for twenty days so as to allow time for an appeal to the Circuit Court. An appeal was taken to the Circuit Court which reversed the order of Judge Woolsey and upheld the orders of Judge Manton.[8] Certiorari was subsequently granted by the United States Supreme Court.

Judge Manton's orders were attacked specifically on three grounds. The only authority under which a circuit judge can be appointed a district judge is to be found in Section 22, Vol. 28 of the United States Code.[9] It was strongly urged by those seeking to vacate Judge Manton's appointments that it was the intention of Congress that this section should only be invoked where the public interest required, as where there had been an alarming accumulation of business before the Circuit Court or where a particular district judge was disqualified from hearing a particular cause because of his having participated in it as counsel, that no such emergency existed in the present case, and hence there was no basis for the invoking of the statute.

Assuming further that Judge Manton's designating himself a district judge was valid, petitioners contended that he still had no authority to designate *himself* to hear the application for the receivership for to do so would violate Rule 1a of the General Rules of the United States District Court, Southern District.[10] Those desiring to upset the orders of the Senior Circuit Judge further contended that under Section 22 of Vol. 28 of the United States Code,[11] Judge Manton did not become a district judge in the ordinary meaning of the term; that said section merely provides for

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[5] Rule 11a of the General Rules of the Southern District of New York provides: "All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other cause (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules) shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge."

[6] 28 U. S. C. A. 734: "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

[7] Johnson v. Manhattan Ry. Co. *et al.*, 1 Fed. Supp. 809 (S. D. N. Y. 1932).

[8] Johnson v. Manhattan Ry. Co. *et al.*, 61 F. (2d) 934 (C. C. A. 2d, 1932).

[9] *Supra* note 1.

[10] *Supra* note 2.

[11] *Supra* note 1.

the appointment of a circuit judge to do the work of a district judge; that under such appointment the appointee does not become a district judge and hence has no power or authority to claim a disagreement of the division of business under Section 27, Vol. 28 of the United States Code.[12]

"Public Interest" is an extremely elastic term and difficult of definition. The Court of Appeals of this state has held[13] that the courts have no authority to determine whether a "public interest" existed within the meaning of Section 153 of the Judiciary Law[14] which gives to the Chief Executive power to convene the Supreme Court in extraordinary term. The executive is not bound to disclose the reasons for urgency and the judiciary has no authority to require their disclosure. In speaking of the very statute here under consideration, the Circuit Court of Appeals for the Fourth Circuit said:[15]

> "The 'public interest' is involved in the dispatch of all the business of the courts. These sections of the statute were intended to have a liberal and elastic rather than a strict and rigid construction to facilitate the business of the courts."

The purpose of this particular section of the Code was to enable a circuit judge who prior to the abolition of the Circuit Court had partially heard an equity case therein to continue to conduct the cause to a final decree in the District Court.[16] What one tribunal may decide to be in the public interest may be deemed to be to the public detriment by another. The term allows for much latitude and it is difficult to conceive of a case where an appellate court would reverse an order of a court of original jurisdiction the basis for which was conceived in the public interest.

The authority for Rules 1a[17] and 11a[18] of the District Court are to be found in Section 27 of Vol. 28 of the United States Code.[19] Ordinarily every judge has the inherent power to try any case in the same tribunal which any other judge of the same jurisdiction may preside in, regardless of existing rules of practice.[20] The violation of such rules is considered a mere irregularity.[21] Disre-

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[12] *Supra* note 3.

[13] People v. Supreme Court, 220 N. Y. 487, 116 N. E. 384 (1917).

[14] "The governor may, when, in his opinion the public interest so requires, appoint one or more extraordinary special or trial terms of the supreme court."

[15] United States v. Gill, 292 Fed. 136 (C. C. A. 4th, 1923).

[16] Pennsylvania Steel Co. v. New York City Railway Co., 221 Fed. 440 (S. D. N. Y. 1915).

[17] *Supra* note 2.

[18] *Supra* note 5.

[19] *Supra* note 3.

[20] People v. Barbera, 78 Cal. App. 277, 248 Pac. 304 (1926).

[21] Payne v. Garth, 285 Fed. 301 (C. C. A. 8th, 1922); People v. Extraordinary Trial Term, 228 N. Y. 463, 127 N. E. 486 (1920).

gard of the rules apportioning judicial duties by the very same judges who had previously assented thereto does not in itself deny or invalidate the judicial functions of any judge.[22] Such rules are merely directory,[23] and a refusal to abide by them does not constitute reversible error.[24]

The validity of Rules 1a and 11a [25] is to be doubted. In order to be binding they must be consistent with laws of the United States and Rules of Practice prescribed by the United States Supreme Court.[26] Are these rules consistent with the authority vested [27] in the senior circuit judge to designate a circuit judge to hold a district court? Do they give the power of nullification to the senior district judge by reason of his authority to apportion the business before the district court, or has the senior circuit judge not only the power to designate a circuit judge a district judge, but also the authority to designate the matters over which he shall have jurisdiction? The former interpretation is illogical, the latter reasonable. The power of appointment is limited to cases where the public interest requires it,[28] and it is more logical to assume that the legislature intended a public interest in regard to particular and specific causes rather than a public interest based on whim or fancy.

Assuming that a circuit judge appointed under the provisions of Sec. 22 of Vol. 28 [29] of the United States Code does not thereby become a district judge,[30] his acts are nevertheless valid. He surely is a judge *de facto* [31] if not a *de jure* one. He acts and purports to act as a judge of the District Court under color of the direction and authority contained in the designation order, in a duly instituted suit, when a duly constituted court had jurisdiction over the parties and the subject matter. The title of *de facto* public officers and the validity of their acts cannot be questioned in proceedings

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[22] Foley v. Utterbach, 196 Iowa 956, 195 N. W. 721 (1923).

[23] Washington-Southern Navigation Co. v. B. & P. S. Co., 263 U. S. 629, 44 Sup. Ct. 220 (1924); Southern Pacific Co. v. Johnson, 69 Fed. 559 (C. C. A. 9th, 1895); *In re* opinion of the Justices, 124 Maine 453, 126 Atl. 354, 363 (1924).

[24] Southern Pacific Co. v. Johnson, *ibid.*

[25] *Supra* notes 2 and 5.

[26] 28 U. S. C. A. 731: "The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceeding."

[27] *Supra* note 1.

[28] *Ibid.*

[29] *Ibid.*

[30] Craig v. Hecht, 263 U. S. 255, 44 Sup. Ct. 103 (1923): "He was not a District Judge, but a Circuit Judge assigned to hold a session of the District Court."

[31] See State v. Carrol, 38 Conn. 449 (1871).

to which they are not parties.[32] The acts of a *de facto* judge cannot be attacked collaterally, appeal being the remedy provided by law.[33]

Judge Woolsey felt that Judge Manton was a "usurper" because of his violation of Rule 1a of the District Court Rules [34] and that therefore he, a judge of equal jurisdiction, had power and authority to nullify the acts of one who had purported to act as a district judge. Based as it is entirely on the doubtful validity of a court rule, it is impossible to agree with the learned Judge. The conclusion that Judge Manton was at least a *de facto* district judge is an inevitable one.

The conclusion is inescapable that Judge Manton's acts are legally unimpeachable. Although no one will contend that Congress contemplated that the sections of the Judicial Code invoked were to be used in an instance as presented by the *Interborough* case, basis and authority for Judge Manton's acts are to be there found.

The case presents a more practical question. There is no doubt that the direct purpose of the proceedings by Judge Manton was to obviate the possibility of a trust company being appointed receiver by the District Court.[35] This personal desire by the Senior Circuit Judge does not merit unnecessary interference with the business of the District Court. If judges who constitute a court are to function at their best, they must be masters in their own house. Their rules of practice and procedure should not be subject to the whim and caprice of others. Judge Manton's designation of himself instead of another circuit judge to hold the District Court, and then appealing to himself as a senior circuit judge to adjust a dispute he himself had created as a district judge, is not to be commended.[36]

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[32] MECHEM, PUBLIC OFFICERS (1890) §330.

[33] Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121 (1886); *In re* Manning, 139 U. S. 504, 11 Sup. Ct. 624 (1891); Ball v. United States, 140 U. S. 118, 11 Sup. Ct. 761 (1891); McDowell v. United States, 159 U. S. 596, 16 Sup. Ct. 111 (1895); *Ex parte* Henry Ward, 173 U. S. 452, 19 Sup. Ct. 459 (1899); Luhrig Collieries Co. v. Interstate Coal and Dock Co., 287 Fed. 711 (C. C. A. 2d, 1923).

[34] *Supra* note 2.

[35] See Instructions to Receivers, American Brake Shoe and Foundry Co. v. Interborough Rapid Transit Co., 1 Fed. Supp. 820 (S. D. N. Y. 1932).

[36] 28 U. S. C. A. 216: "* * * No judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals."