

6-1-1951

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Recommended Citation

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conveyed a warranty deed to the plaintiff without notification to the mortgagee who held a security deed containing a "dragnet" clause on the same property, and then died insolvent and considerably in debt to the mortgagee as a result of business transactions between them. *Leffler Co. v. Lane* is concerned with an attempt by the plaintiff mortgagee to bring within the scope of the "dragnet" clause the indebtedness to itself of a partnership of which the mortgagor subsequently became a member, the indebtedness having arisen in the course of business between the partnership and the mortgagee. The third case, *McClure v. Smith*, did not involve a "dragnet" clause, but dealt instead with the extension of the security for one loan to cover another loan by an apparent agreement of the parties. Disregarding the *McClure* case, the *Hurst* and *Leffler* cases are readily distinguishable from the instant case by the fact that the indebtedness in question arose out of transactions between the parties, and could therefore be assumed to have been within the contemplation of the parties at the time of the execution of the mortgage containing the controversial clause. The *Hurst* case is further distinguishable by the fact that the mortgagee had no notice of the subsequent conveyance of the warranty deed. In that case, while recognizing that substantial authority was opposed to its views,²⁶ the court nevertheless felt itself bound by the previous Georgia decisions.²⁷ In several other fairly recent Georgia cases²⁸ not cited in the instant case where "dragnet" clauses were broadly construed, the additional indebtedness also arose from transactions between the original parties to the mortgage.

It would seem, therefore, that in the instant case the Georgia Supreme Court has carried the broad construction of "dragnet" clauses rather far in favor of the mortgagee. It is submitted that a court sitting in equity should feel less bound by the strict meaning of contractual verbiage than a court of law and perhaps more influenced by the intention of the parties and the customs of the business community with regard to similar transactions, in order to render truly equitable decisions.

CIVIL PROCEDURE — ABATEMENT FOR FAILURE TO MAKE PROPER SUBSTITUTION

The plaintiff, widow of a naval officer, procured judgment against Rear Admiral Buck, Paymaster General of the Navy, requiring payment of widow's gratuity.¹ After judgment was entered, W. A. Buck was succeeded in office

26. *Hurst v. Flynn-Harris-Bullard Co.*, *supra* note 18 at 483, 166 S.E. at 505, citing annotation to Ann. Cas. 1913C 552, 556 to the effect that advances made after notice of the subsequent liens do not have priority over such liens by the weight of authority.

27. *Ibid.*

28. *Zachry v. Industrial Loan & Investment Co.*, *supra* note 18; *Bank of Cedartown v. Holloway-Smith Co.*, *supra* note 10; *Dudley v. Reconstruction Finance Corp.*, 60 Ga. App. 240, 2 S.E.2d 907 (1939); *Albany Loan & Finance Co. v. Tift*, 43 Ga. App. 789, 160 S.E. 661 (1931).

1. 41 STAT. 812, 824 (1920), as amended 34 U.S.C. § 943 (Supp. 1949).

by Rear Admiral Edwin D. Foster and the government appealed. Neither party sought substitution of the original defendant's successor within the statutory time limit and the Court of Appeals remanded with orders to dismiss the complaint. *Held*, on certiorari, that failure to seek substitution of the defendant's successor in office within the statutory period abated the suit and the plaintiff lost her judgment. *Snyder v. Buck*, 71 Sup. Ct. 93 (1950).

At common law it was consistently held that an action by or against an officer in his official capacity abated if the officer died or for any reason ceased to hold the office.² His successor in office was not permitted to be brought into the action by way of amendment to the proceedings or through an order for substitution.³ An exception, however, was recognized in an action brought by or against officers in their official capacities as members of a continuing body.⁴ The injustice of this rule influenced the Supreme Court, in *Bernardin v. Butterworth*,⁵ to suggest that "Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death and resignation, it should be lawful for the successor in office to be brought into the case on petition, or some other appropriate method."⁶ In 1899, Congress provided for such continuance upon proper showing that a settlement of the questions involved could not otherwise be obtained.⁷ This Act, however, had no application to other than federal officers and the common law rule was still applied by the federal courts in cases involving state or municipal officials.⁸ These officials, however, were also brought under the new rule by the Act of 1925 by which Congress, again at the instance of the Supreme Court,⁹ extended the 1899 Act to make it cover them and also to reduce the period of time during which substitution could be made.¹⁰ This Act was repealed by Congress in 1948 and the matter is now encompassed in Federal Rules of Civil Procedure¹¹ which provide a means of substitution for an officer of any political subdivision. This new rule, however, fails to state which party shall be burdened with the duty to make proper substitution and few courts have

2. *Bernardin v. Butterworth*, 169 U.S. 600 (1898) (death); *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1896) (resignation); *Long v. Lochren*, 164 U.S. 701 (1896); *United States ex rel. Warden v. Chandler*, 122 U.S. 643 (1887); *United States v. Boutwell*, 17 Wall. 604 (U.S. 1873) (retirement); *Secretary v. McGarrahan*, 9 Wall. 298 (U.S. 1869) (resignation).

3. *Ibid.*

4. *Marshall v. Dye*, 231 U.S. 250 (1913); *Murphy v. Utter*, 186 U.S. 95 (1901); *Thompson v. United States*, 103 U.S. 480 (1881); *Comm'rs v. Sellev*, 99 U.S. 624 (1878); see *Irwin v. Wright*, 258 U.S. 219, 224 (1921).

5. 169 U.S. 600 (1898).

6. *Id.* at 605.

7. 30 STAT. 822 (1899).

8. *Irwin v. Wright*, *supra* note 4; *Shaffer v. Howard*, 249 U.S. 200 (1918); *Pullman Co. v. Knott*, 243 U.S. 447 (1916); *Pullman Co. v. Croom*, 231 U.S. 571 (1913); *Richardson v. McChesney*, 218 U.S. 487 (1910); *Chandler v. Dix*, 194 U.S. 590 (1903).

9. *Irwin v. Wright*, *supra* note 4, at 223.

10. 43 STAT. 936-941 (1925), 28 U.S.C. § 780 (1946).

11. FED. R. CIV. P. 25(d).

ruled on this question.¹² Since these statutes abrogate the common law, strict compliance is required, and if proper substitution is not made the action will abate.¹³ This, however, does not mean the cause of action will die.¹⁴ In many recent suits against federal officers, the courts, in an effort to allow the substance of the action to prevail over procedure, have recognized the United States as the real party in interest, the officer in whose name the suit is instigated being a mere nominal party.¹⁵

The instant case was governed by the 1925 Act.¹⁶ The court held that since the complaint alleged no claim against the defendant personally and since proper substitution was not obtained within the statutory period, the suit abated and the plaintiff lost her judgment. One dissent classified this as a representative action¹⁷ claiming the government attorney in bringing the appeal in the defendant's name merely recognized him as an alias for the United States. This dissent reasoned that since the plaintiff could have brought her claim directly against the government,¹⁸ the judgment of the District Court should, in effect, be a money judgment against the United States. It argued, further, that the court could, as a matter of record, note that the Paymaster General of the Navy is now someone else and allow the appeal to proceed on that basis. Another dissent asserted that the court's decision placed upon the appellee the burden of correcting his adversary's error¹⁹ and that the appeal itself should have been dismissed on the court's own motion.

The law on substitution in its present form²⁰ is openly recognized as

12. *Bowles v. Ohlhausen*, 71 F. Supp. 199 (N.D. Ill. 1947) (in suits against a government officer, the plaintiff is required to move to substitute); cf. *Bowles v. Weiner*, 6 F.R.D. 540 (E.D. Mich. 1947) (the rule does not refer to the successor but to the opposite party).

13. *Mathues v. United States*, 282 U.S. 802 (1930); *Clausen v. Curran*, 276 U.S. 590 (1927); *Lecrone v. McAdoo*, 253 U.S. 217 (1920); *McVey v. Magnolia Petroleum Co.*, 114 F.2d 111 (10th Cir. 1940); *Bowles v. Ohlhausen*, *supra* note 12; *Bowles v. Siegel*, 7 F.R.D. 331 (D.D.C. 1947); *Bowles v. Weiner*, *supra* note 12; cf. *ex parte La Prade*, 289 U.S. 444 (1932); *Davis v. Preston*, 280 U.S. 406 (1930).

14. See *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 637 (1948); *Fix v. Philadelphia Barge Co.*, 290 U.S. 530, 533 (1933).

15. *Fleming v. Goodwin*, 165 F.2d 334 (8th Cir.), *cert. denied* 334 U.S. 828 (1948); *Seven Oaks v. Federal Housing Adm'n.*, 171 F.2d 947 (4th Cir. 1948); *Ralph D'Oench Co. v. Woods*, 171 F.2d 112 (8th Cir. 1948); *Northwestern Lumber & Shingle Co. v. United States*, 170 F.2d 692 (10th Cir. 1948); *United States v. Koike*, 164 F.2d 155 (9th Cir. 1947); *United States v. Figur*, 80 F. Supp. 140 (D. Minn. 1948); *Fleming v. Peoples Natural Gas Co.*, 8 F.R.D. 42 (W.D. Pa. 1948); *United States v. Saunders Petroleum Co.*, 7 F.R.D. 608 (W.D. Mo. 1947); *Porter v. Pure Oil Co.*, 7 F.R.D. 577 (E.D. Pa. 1947); cf. *Porter v. Maule*, 160 F.2d 1 (5th Cir. 1947); *Bowles v. Ell-Car Co.*, 71 F. Supp. 482 (S.D.N.Y. 1947).

16. *Supra* note 10 (repealed by 62 STAT. 992 (1948) but any rights or liabilities accrued under the act are reserved).

17. *Snyder v. Buck*, 71 Sup. Ct. 93, (1950) (Dissenting opinion at 100).

18. 12 STAT. 765 (1863), as amended, 28 U.S.C. §§ 456, 792, 794, 2503 (Supp. 1950) (plaintiff could have brought her action in the Court of Claims); 24 STAT. 505 (1887), as amended, 28 U.S.C. §§ 1492, 2509 (Supp. 1950) (plaintiff could have brought her action in the District Court).

19. *Snyder v. Buck*, *supra* note 17, at 102.

20. See note 11 *supra*.

poor law.²¹ It is submitted that in the present case the court's holding merely perpetuated formality of procedural requirements in failing to look behind the nominal defendant to the real party in interest. In such cases, in the absence of amendments to the rules, the court should, as the dissent²² suggests and as many federal courts have done,²³ recognize the United States as the real party in interest and not allow the action to abate for failure of proper substitution. In any event, effort should be made to alleviate a situation in which a party to an action must correct his adversary's error.

CONFLICT OF LAWS—DOMESTIC RELATIONS—COLLATERAL ATTACK ON DIVORCE DECREE BY STRANGER TO ACTION

After the death of W₁, H married W₂, and they established their residence in New York. In August 1941, W₂ obtained a divorce from H in a Florida proceeding,¹ although the undisputed facts show that she did not comply with the jurisdictional 90-day residence requirement.² In 1944, H married W₃, and in 1945 H died, leaving a will in which he gave his entire estate to his daughter by W₁. After probate of the will, W₃ filed notice of her election to take the statutory one-third share of the estate.³ This election was contested by H's legatee, the daughter by W₁, who argued that W₂'s Florida divorce from H was invalid and therefore W₃ could claim no status as H's surviving spouse. The New York Surrogate⁴ ruled in favor of W₃, and that ruling was unanimously upheld by the Appellate Division of the New York Supreme Court. The New York Court of Appeals reversed,⁵ holding that the Florida judgment finding jurisdiction to decree the divorce bound only the parties themselves and, as the court construed the Florida cases to allow the daughter to attack the decree collaterally in Florida, it decided she should be equally free to do so in New York. On certiorari, *held*, Florida divorce against husband rendered after his general appearance and contest on merits is not subject to collateral attack on jurisdictional grounds by his daughter in Florida, and is not subject to collateral

21. 4 MOORE'S FEDERAL PRACTICE 510 (The author says the rule for substitution is needless formality and substitution should be put on a flexible basis. The rule is a substantial restatement of a statute that was only partially sound in its approach to the problem.).

22. See note 17 *supra*.

23. See note 15 *supra*.

1. In this proceeding, H had appeared by attorney and interposed an answer denying the wrongful acts but not questioning the allegations as to residence in Florida.

2. FLA. STAT. § 65.02 (1949). (This has been construed to require residence for the 90 days immediately preceding the filing date.); *Curley v. Curley*, 144 Fla. 728, 198 So. 584 (1940). In the instant case W₂ arrived in Florida from New York in June, and filed a bill of complaint on July 29.

3. Pursuant to N.Y. DECEDENT ESTATE LAW § 18.

4. Who heard the cause under the provisions of N.Y. SURROGATE'S COURT ACT § 145-a.

5. *In re Johnson's Estate*, 301 N.Y. 13, 92 N.E.2d 44 (1950).