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CIVIL PROCEDURE—ABATEMENT—STATUS OF SUIT NOMINALLY AGAINST GOVERNMENT OFFICIAL WHEN OFFICIAL LEAVES OFFICE—
Often an action brought against an official of the sovereign is actually against the sovereign itself, nominally represented by the official. The status of such a suit when the official leaves office is even today not

satisfactorily settled. The so-called representative suit,¹ while at one time serving a purpose, has always been somewhat anomalous and today is antiquated and useless.

I. *Common Law Background*

Every civilized political state has, as a part of its judicial system, a principle that the sovereign cannot be sued without its consent.² Whether or not this stemmed from the divine right of kings, it is based, at least in part, upon the theory that the ability of governmental authority to operate efficiently depends upon there being no recourse against it. Consequently, both federal and state courts uniformly have held that the United States cannot be sued without its consent.³ The representative suit was developed as a fiction to circumvent the operation of the principle of sovereign immunity.⁴ Instead of making the sovereign a party defendant, suit is brought against an official of the sovereign, not with the intent of making him personally liable,⁵ but to force him to perform an official duty, which anyone holding the office could perform, to satisfy a claim in substance against the sovereign.

The representative suit was further identified with the official, the nominal defendant, by the form of action in which the suit was usually brought, namely, a mandamus proceeding.⁶ The federal courts have held that mandamus goes to the official, not to the office,⁷ so that if the official leaves office while the suit is pending, the action abates⁸ as completely as did a tort claim at common law when either party died.⁹ The suit could not continue against the official because he could no longer perform the duty requested by the claimant. The official's suc-

¹ In this context, a representative suit, as defined by Justice Frankfurter, is an action against a governmental officer, but in effect against the United States—not a class action in the usual sense of that term. See *Snyder v. Buck*, 340 U.S. 15 at 28, 71 S.Ct. 93 (1950).

² 54 AM. JUR., United States §127 (1945).

³ The same is true as to the several states. See 49 AM. JUR., States, Territories, and Dependencies §91 (1943).

⁴ *Snyder v. Buck*, 340 U.S. 15 at 28 and 29, 71 S.Ct. 93 (1950).

⁵ An exception is the so-called Collector-suit, in which the Collector of Internal Revenue is held to have committed a personal wrong in collecting the tax. For the additional problems raised see 4 MOORE, FEDERAL PRACTICE 531 to 534 (1950).

⁶ 102 A.L.R. 943 (1936).

⁷ 102 A.L.R. 943 at 945 (1936); 43 AM. JUR., Public Officers §508 (1942); 1 AM. JUR., Abatement and Revival §48 (1936); *Secretary of Interior v. McGarrahan*, 9 Wall. (76 U.S.) 298 (1869); *United States v. Boutwell*, 17 Wall. (84 U.S.) 604 (1873).

⁸ When an action abated at common law, it was utterly dead and could not be revived except by commencing a new action. *First Nat. Bank of Woodbine v. Board of Supervisors of Harrison County*, 221 Iowa 348, 264 N.W. 281 (1935). See also 1 WORDS AND PHRASES 65 (1940).

⁹ PROSSER, TORTS 950 (1941).

cessor could not be substituted as defendant, because mandamus went to the official, not to the office. If this result was once thought indispensable in order to avoid identification of the official with the sovereign, it became totally unnecessary in many instances after 1855, when the federal government came to realize that it could allow recourse for claims against it and still function as a government, and so created the Court of Claims.¹⁰

II. *Statutory Development*

The United States Supreme Court became aware of the gross inconvenience caused by the abatement of a representative suit when the official left office. Not only was abatement wasteful both of time and expense, but there was also a likelihood that the plaintiff would be barred forever by the running of a statute of limitations. In an 1895 decision, the Court appealed to Congress to take action.¹¹ The result was the Act of February 8, 1899,¹² which provided, seemingly unqualifiedly, that an action against a federal government officer should not abate if he left office while the suit was pending. Upon a showing that survival of the action was necessary, the successor could be substituted within twelve months after the original defendant left office. The act, however, was ambiguous as to the result if substitution was not made within the time provided. The Supreme Court in the case of *LeCrone v. McAdoo*¹³ held that the action did not abate at all; but, if seasonal substitution was not made, it came to an end. Prior to a judgment the result in the two instances would surely be the same. If, however, the official left office after a judgment in the district court had been obtained, that judgment stood. Actually only the appellate part of the action abated. The effect of a judgment *against* the official after he has

¹⁰ In 1855 the Court of Claims was established with jurisdiction over "All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. . . ." 10 Stat. L. 612 (1855). 24 Stat. 505 (1887) increased the jurisdiction of the Court of Claims to include claims founded upon the Constitution of the United States and gave the district courts concurrent jurisdiction.

¹¹ *Bernardin v. Butterworth*, 169 U.S. 600 at 605, 18 S.Ct. 441 (1898).

¹² 30 Stat. L. 822 (1899). ". . . no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term or office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs."

¹³ *LeCrone v. McAdoo*, 253 U.S. 217, 40 S.Ct. 510 (1920).

left office was not made clear. At least one later United States Supreme Court decision¹⁴ and several court of appeals decisions have misinterpreted the *LeCrone* case to mean that the action would abate completely if after twelve months no substitution had been made.¹⁵ The Supreme Court, however, recently has reaffirmed by dictum the statutory interpretation in the *LeCrone* case.¹⁶

In a 1922 decision, the United States Supreme Court suggested that the Act of 1899 be amended to include substitution of successors to state officers who leave office while suits to which they are parties are pending.¹⁷ The resulting 1925 amendment embodied this proposal, and also shortened the period of substitution to six months after the officer's tenure terminates.¹⁸

In 1938, the 1925 amendment was incorporated by reference into Federal Rule 25(d), the only difference being in the prescribed period of substitution: six months after the successor takes office rather than six months after the original official leaves office. In 1948, Rule 25(d) was amended to embody completely the 1925 provision, but without reference to it.¹⁹

While the statutory development has somewhat eased the harshness of the common law rule of abatement, it has not been completely

¹⁴ *Fix v. Philadelphia Barge Co.*, 290 U.S. 530 at 533, 54 S.Ct. 270 (1934).

¹⁵ *Black Clawson Co. v. Robertson*, (D.C. Cir. 1934) 71 F. (2d) 536; *Oklahoma ex rel. McVey v. Magnolia Petroleum Co.*, (10th Cir. 1940) 114 F. (2d) 111 at 114; *Becker Steel Co. of America v. Hicks*, (2d Cir. 1933) 66 F. (2d) 497 at 499.

¹⁶ *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631 at 637 to 638, 69 S.Ct. 762 (1949).

¹⁷ *Irwin v. Wright*, 258 U.S. 219 at 223 to 224, 42 S.Ct. 293 (1922).

¹⁸ 43 Stat. L. 936 at 941, §11(a) (1925). ". . . where, during the pendency of an action . . . brought by or against an officer of the United States . . . and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

¹⁹ Rule 25(d), Rules of Civil Procedure, 28 U.S.C. (1948) §2072. "When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

sound in its approach to the problem, as it has not recognized that in many suits against federal officers the United States is the real party in interest, and that, therefore, substitution of one nominal party to replace another is at best a mere formality.²⁰

III. *Snyder v. Buck*

The United States Supreme Court in a five to four decision²¹ recently affirmed the dictum of the *Defense Supplies Corporation Case*,²² namely, that the effect of section 11 of the Act of 1925, which governed,²³ was to abate a suit brought against a government official who leaves office while the action is pending, if substitution is not made within the statutory period.

The plaintiff, a naval officer's widow, sued the Paymaster General of the Navy to recover a statutory death gratuity allowance. The suit could have been brought directly in the district court or the Court of Claims. The original action was for mandamus; but, since the duty the performance of which the plaintiff sought to compel was not strictly ministerial,²⁴ the district court granted a mandatory injunction instead. The Government appealed in the name of the original Paymaster, Buck, who, before appeal but after the judgment of the district court, had been retired. After the statutory substitution period had elapsed, the Government called to the attention of the court of appeals the fact of Buck's retirement. The court of appeals vacated the judgment of the district court and remanded with directions to dismiss the action as abated.

The plaintiff then appealed to the Supreme Court, which affirmed the action of the court of appeals. Justice Douglas, the author of the majority opinion, tracing the history of the problem of abatement in the representative suit, interpreted the Act of 1899 to mean that the action did not abate, but was at an end, if substitution was not made during the twelve-month period, thus reaffirming *LeCrone v. McAdoo*. According to Justice Douglas, section 11 of the Act of 1925, by leaving out the phrase, "no . . . action . . . shall abate,"²⁵ changed the effect

²⁰ 4 MOORE, FEDERAL PRACTICE 511 (1950).

²¹ *Snyder v. Buck*, 340 U.S. 15, 71 S.Ct. 93 (1950).

²² *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631 at 637 to 638, 69 S.Ct. 762 (1949).

²³ "For the Court of Appeals during the period material to our problem had in force its Rule 28(b) which provided that abatement and substitution were governed by §11 of the 1925 Act." *Snyder v. Buck*, 340 U.S. 15 at 17, note 2, 71 S.Ct. 93 (1950).

²⁴ 34 AM. JUR., Mandamus §66 (1941); *Secretary of Interior v. McGarrahan*, 9 Wall. (76 U.S.) 298 (1869).

²⁵ Act of February 8, 1899, 30 Stat. L. 822. See note 12 supra.

of the earlier statute, so that under the new statute the action abated if seasonal substitution was not made. Plaintiff argued that section 11 was intended to apply only to "actions brought against officials for remedies which could not be got in a direct suit against the United States."²⁶ Justice Douglas held, however, that the act, by its very wording, covered any action brought by or against any officer of the United States relating to present or future discharge of his official duties, and that this necessarily covers many actions which are in substance suits against the United States. The suit, therefore, abated, and the plaintiff had to start anew. If a statute of limitations had run in the meantime, the remedy would have been lost completely.

The fact that there are two dissenting opinions²⁷ in the *Snyder* case illustrates how unsettled the problem is. Justice Frankfurter, joined by Justice Jackson, made a thorough analysis of the question and presented a common sense solution, though one probably unwarranted by the language of section 11.²⁸ He reasoned that since this was in substance a suit against the United States and could have been brought directly against it, the appeal should be allowed, and the court should merely "note as a matter of record that the name of the Paymaster General of the Navy is now Fox [Buck's successor]. . . ."²⁹ If it could be said that the statute does not apply to such a suit, the United States should be substituted rather than the official's successor. It must be admitted, however, that this would present difficulties where the action is mandamus. Surely it would be desirable if Justice Frankfurter's suggestion could be effectuated. The statute, however, purports to cover any suit to which a government officer in his official capacity is a party, though only nominally, and sets a definite time in which substitution must be made in the event the official leaves office. In the face of these express provisions, it is difficult to find that the suit merely continues as though proper substitution under the statute was made.

Justice Frankfurter believed that the Act of 1899 and section 11 (the 1925 amendment) were intended by Congress to have the same effect, and that the purpose of the later statute was merely to enlarge the scope of the earlier one so as to include state, local, and territorial officers. Under his interpretation, an action under either statute would

²⁶ *Snyder v. Buck*, 340 U.S. 15 at 20, 71 S.Ct. 93 (1950).

²⁷ *Id.* at 22 and 32.

²⁸ See note 18 *supra*.

²⁹ *Snyder v. Buck*, 340 U.S. 15 at 31, 71 S.Ct. 93 (1950).

abate unless proper substitution is made. This seems to controvert the holding of *LeCrone v. McAdoo*.³⁰

Justice Clark dissented³¹ on the ground that the court of appeals should have dismissed the appeal, since Buck, the party appealing, no longer had standing before the court. This probably meant that the judgment of the district court would be left standing. Query as to the effect of a judgment against an official having left office. Although Justice Clark reached this result apparently without relying upon section 11, that statute surely applies. His conclusion logically would necessitate a finding that section 11 had the same effect which Justice Douglas attributed to the Act of 1899, namely, that according to the statute the action was at an end. Under present legislation, this may well be the best result of the three opinions, since it is likely that the two statutes were meant to have the same effect, as Justice Frankfurter claimed,³² but at the same time the wording of the Act of 1899 seems to indicate categorically that the action would not abate.

IV. Possible Solutions

Seeking a solution to the question, one discovers four possibilities.³³ The two which will be considered first could be accomplished under Federal Rule 25(d) as it now stands. The remaining two go more to the philosophy of the representative suit and would require legislative changes.

One possible way to resolve the problem under present legislation would be to by-pass Federal Rule 25(d) by saying, as Justice Frankfurter said of section 11 in the *Snyder* case, that it does not pertain to actions in substance against the United States. A number of O.P.A. cases have so held,³⁴ on the ground that to hold otherwise "would, in our opinion, be to glorify form over substance and reality."³⁵ Justice Douglas' broad language in the majority opinion of the *Snyder* case seems, correctly, to foreclose this as a possibility without legislative changes. Surely section 11 and Federal Rule 25(d) were intended to cover any action to which an official is either an actual or a nominal

³⁰ *LeCrone v. McAdoo*, 253 U.S. 217, 40 S.Ct. 510 (1920).

³¹ Justice Black concurred.

³² *Snyder v. Buck*, 340 U.S. 15 at 23, 71 S.Ct. 93 (1950).

³³ 4 MOORE, FEDERAL PRACTICE 534 to 538 (1950).

³⁴ *Northwestern Lumber & Shingle Co. v. United States*, (10th Cir. 1948) 170 F. (2d) 692; *Ralph D'Oench Co. v. Woods*, (8th Cir. 1948) 171 F. (2d) 112; *Fleming v. Goodwin*, (8th Cir. 1948) 165 F. (2d) 334.

³⁵ *Fleming v. Goodwin*, (8th Cir. 1948) 165 F. (2d) 334 at 338.

party. It is unlikely that the majority of the Supreme Court will change its position as to the meaning of the present legislation.

A second suggested solution would be to satisfy the technical requirements of the present legislative scheme by allowing an *ex parte* blanket substitution of the successor in office. Some of the district courts have done so in O.P.A. cases.³⁶ The workability of this solution to the problem depends, however, upon the voluntary cooperation of the successor and is, therefore, not likely to prove effective where the official is generally defending actions rather than bringing suit.

Third, Congress could recognize, as it has with respect to suits before the Tax Court,³⁷ that the United States is the actual party in interest and dispense altogether with the necessity of substitution, which is in truth but a formality in "a suit to secure a money claim due from the United States, enforced against the officer who was the effective conduit for its payment."³⁸ This could easily be accomplished by means of a proviso limiting Federal Rule 25(d) to actions on claims which cannot be brought directly by or against the United States. To paraphrase Justice Frankfurter, since the representative suit arose as a subterfuge to circumvent sovereign immunity, there is no merit in continuing the fiction in cases as to which the sovereign has consented to direct suit.³⁹

In view of the fact that the suit against the governmental representative is so much a part of our system of jurisprudence, probably the most practical solution is a compromise under which suit could be brought against the office instead of the official.⁴⁰ If, therefore, the official leaves office while the action is pending, the suit merely continues against the successor. No substitution of names would be necessary if the original official was not sued by name. The courts have long held that an action brought against a board or agency with continuity of existence does not abate upon a change in personnel, and no substitution is needed.⁴¹ There is no reason why this practice can not be extended to allow suit against an office with continuity of existence, though held by successive individuals. Many state courts very early recognized this general approach in holding that a mandamus proceeding goes to the office, not to

³⁶ 4 MOORE, FEDERAL PRACTICE 536 (1950); *Bowles v. Goldman*, (D.C. Pa. 1947) 7 F.R.D. 12; *Bowles v. Weiner*, (D.C. Mich. 1947) 6 F.R.D. 540.

³⁷ 53 Stat. L. 165 (1939), 26 U.S.C. (1946) §1143; 4 MOORE, FEDERAL PRACTICE 534 and 536 (1950).

³⁸ *Snyder v. Buck*, 340 U.S. 15 at 28, 71 S.Ct. 93 (1950).

³⁹ *Id.* at 28 and 29.

⁴⁰ 4 MOORE, FEDERAL PRACTICE 536 (1950).

⁴¹ 102 A.L.R. 943 at 956 (1936); *Murphy v. Utter*, 186 U.S. 95, 22 S.Ct. 776 (1902); *Leavenworth County v. Sellew*, 9 Otto (99 U.S.) 624 (1878); *Marshall v. Dye*, 231 U.S. 250, 34 S.Ct. 92 (1913); *Irwin v. Wright*, 258 U.S. 219, 42 S.Ct. 293 (1922).

the official, so that a mandamus action against an official will not abate upon his leaving office.⁴²

That the problem of the representative suit should today be so unsettled an issue seems strange, especially in view of the fact that adequate legislation has succeeded in laying to rest many another common law ghost. The representative suit is so solidly implanted in our judicial system, however, that it may be with us indefinitely. One can hope, nevertheless, that eventually our legislators will adopt a more realistic philosophy. Perhaps the Supreme Court through the decision of the *Snyder* case will, as it has done in the past,⁴³ provide the needed impetus.

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⁴² 102 A.L.R. 943 at 948-952 (1936).

⁴³ The case of *Bernardin v. Butterworth*, 169 U.S. 600, 18 S.Ct. 441 (1898) was largely responsible for the Act of 1899, and the Supreme Court in the case of *Irwin v. Wright*, 258 U.S. 219, 42 S.Ct. 293 (1922) urged such changes as were later adopted in §11 of the 1925 Judicial Code.