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ABATEMENT AND REVIVAL-FEDERAL COURTS-ABATEMENT OF ACTION BY FEDERAL OFFICIAL UNLESS SUCCESSOR SUBSTITUTED AS PARTY PLAINTIFF WITHIN SIX MONTHS

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RECENT DECISIONS

ABATEMENT AND REVIVAL—FEDERAL COURTS—ABATEMENT OF ACTION BY FEDERAL OFFICIAL UNLESS SUCCESSOR SUBSTITUTED AS PARTY PLAINTIFF WITHIN SIX MONTHS—The administrator of the Office of Price Administration began an action on behalf of the United States against the defendant to enforce certain penalties for the violation of the Emergency Price Control Act. While the action was pending the administrator was succeeded in office. Counsel for the government, however, failed to move to substitute his successor as a party plaintiff until more than six months thereafter. The defendant then moved to dismiss the action on the grounds that unless such substitution was made within the six months specified by section 780 of the Judicial Code and Rule 25(d), Federal Rules of Civil Procedure, the action abated. *Held*, motion granted. *Bowles v. Ohlhausen*, (D.C. Ill. 1947) 71 F. Supp. 199.

Absent a saving statute an action against an officer of the United States as party defendant abates on his separation from office.[1] The action is considered to be against the officer individually rather than against the office or the United States.[2] This approach avoids the immunity from suit which the officer might otherwise claim as an agent of the sovereign.[3] Whether at common law an action by an officer of the United States as party plaintiff likewise abates is not clearly settled.[4] Congress, however, to avoid the inconvenience of abatement provided that actions "by or against" federal officials might be continued by substituting the successor in office within six months.[5] This removed the difficulty in suits against federal officers as parties defendant.[6] But ". . . there is a difference in the case of parties plaintiff, since in the first case the wrongful act laid is not that of the substituted defendant, while the right sued upon generally in fact devolves upon the successor, virtute officii." [7] Despite this the Supreme Court, in interpreting the statute, assumed without discussion that but for the

[1] United States ex rel. Bernardin v. Butterworth, 169 U.S. 600, 18 S.Ct. 441 (1898).

[2] The succeeding official cannot be substituted as defendant since he is not privy to the wrong laid as the basis of the suit, the wrong being the individual act of the first official alone. Gorham Mfg. Co. v. Wendell, 261 U.S. 1, 43 S.Ct. 313 (1923).

[3] If the suit were considered to be against the officer in his representative capacity it could not proceed for it would then be a suit against the United States and the United States cannot be sued without its consent. 43 YALE L. J. 500 (1934).

[4] In Tyler v. Hand, 48 U.S. 573 (1849), President Tyler was allowed to sue on bonds running to his predecessor President Van Buren. "The title was not in Mr. Van Buren individually, but in him as President;" to the title (or right of action) President Tyler succeeded as President of the United States. Id. at 583. Some state courts allowed the substitution of successors in office without the benefit of a statute, Burras v. Looker, 2 Edws. Ch. (N.Y.) 499 (1835); Felts v. Mayor of Memphis, 39 Tenn. 650 (1859); People ex rel. Reeder v. County of Wexford, 37 Mich. 351 (1877).

[5] 2 MOORE, FEDERAL PRACTICE, § 25.06 (1938), 28 U.S.C. (1940) § 780.

[6] Caledonian Coal Co. v. Baker, 196 U.S. 432, 25 S.Ct. 375 (1904).

[7] Judge Learned Hand in Bowers v. American Surety Co., (C.C.A. 2d, 1929) 30 F. (2d) 244 at 246.

statutory provision allowing substitution, an action by an officer as party plaintiff would abate on his separation from office.[8] It is true that some inconvenience is occasioned when the succeeding official must be substituted as plaintiff in but one case.[9] But the problem becomes acute on the separation from office of an official whose functions necessitate extensive litigation on behalf of the United States, and substitution must be sought in thousands of cases pendente lite throughout the nation.[10] Some courts have devised more ingenious and practical solutions,[11] but a literal interpretation of the statutory provisions impedes judicial administration,[12] and postpones decision on the merits to controversy over technicalities.[13] In the instant case the court felt that "the act of Congress went beyond

[8] The case involved several successive changes in an Internal Revenue Office, the district court seemingly holding that the first successor might sue by virtue of his office, but that the cause of action abated when the second succeeding official was not substituted within six months. McLaughlin v. Philadelphia Barge Co., (D.C.Pa.1932) 60 F. (2d) 333. The Supreme Court was of the opinion that the original suit abated, but that the cause of action remained and might be enforced by the successor, *virtute officii*. Fix v. Philadelphia Barge Co., 290 U.S. 530, 54 S. Ct. 270 (1934).

[9] "Of the convenience in recognizing an office as a legal person in cases like that at bar there can be no question. . . ." Judge L. Hand in Bowers v. American Surety Co., (C.C.A.2d, 1929) 30 F. (2d) 244 at 246; 43 YALE L. J. 500 at 502 (1934); State of Oklahoma ex rel. Phillips v. American Book Co., (C.C.A. 10th, 1944) 144 F. (2d) 585.

[10] The various successions in the Office of Price Administration jammed the dockets with motions to substitute parties plaintiff, Bowles v. Kent County Motor Co., (D.C. Del. 1947) 6 FEDERAL RULES DECISIONS 515; Bowles v. Weiner, (D.C. Mich. 1947) 6 FEDERAL RULES DECISIONS 540; Porter v. Hirahara, (D.C. Hawaii 1947) 69 F. Supp. 441; Porter v. Ryan, (D.C. Ore. 1947) 69 F. Supp. 446; Fleming v. Taylor, (D.C. Tex. 1947) 70 F. Supp. 222.

[11] Judicial notice was taken of the succession in office, Bowles v. Babar, (D.C. Mich. 1944) 54 F. Supp. 453; Motion for substitution nunc pro tunc was granted to toll the six months period, Bowles v. Kent County Motor Co., (D.C. Del. 1947) 6 FEDERAL RULES DECISIONS 515; Blanket decree directing substitution in all pending actions was held sufficient without individual motion in the hundreds of pending cases, Bowles v. Weiner, (D.C. Mich. 1947) 6 FEDERAL RULES DECISIONS 540. Considerable discretion rests in the federal district courts in dealing with the substitution of succeeding officers, Land v. Dollar, 329 U.S. 700, 67 S.Ct. 1009 (1947).

[12] Bowles v. Goldman, (D.C. Pa. 1947) 7 FEDERAL RULES DECISIONS 12. At a period when some dockets were still crowded with motions to substitute Porter for Bowles, Bowles v. Kent County Motor Co., (D.C. Del. 1947) 6 FEDERAL RULES DECISIONS 515; other courts were passing on motions to substitute Fleming for Porter, Porter v. Ryan, (D.C. Ore. 1947) 69 F. Supp. 446.

[13] Considerable litigation developed over the technical questions whether a substantial need for substitution had been shown, Porter v. Goodwin (D.C. Mo. 1946) 68 F. Supp. 949; and whether the administrator of the Office of Temporary Controls was a proper party to be substituted for the administrator of the Office of Price Administration, Porter v. Ryan, (D.C. Ore. 1947) 69 F. Supp. 446; Porter v. Hirahara, (D.C. Hawaii 1947) 69 F. Supp. 441. This latter question necessitated resort to the Supreme Court, Fleming v. Mohawk Lumber Co., 331 U.S. 111, 67 S.Ct. 1129 (1947).

the need which it was passed to meet and has therefore led to a most unfortunate result." [15] A revision of this statute, like those previously prompted by judicial suggestion, would seem to be in order.[16]

John M. Veale, S.Ed.

[15] Judge Campbell in Bowles v. Ohlhausen, (D.C. Ill. 1947) 71 F. Supp. 199 at 200. The need for such a statutory provision allowing substitution is limited to actions against federal officers as party defendants which are said to be against the officer individually solely to avoid problems of governmental immunity. The theory that the official is acting individually should never have been carried over to the suit on behalf of the government by the officer as a party plaintiff, since "in reality the Administrator, as an individual, could not be construed to be the plaintiff in the action by the farthest stretch of imagination . . . since the United States government . . . is the only party who can be prejudiced or benefit in the disposition of the proceedings . . . ." Bowles v. Goldman, (D.C. Pa. 1947) 7 FEDERAL RULES DECISIONS 12 at 16.

[16] The original statute was passed on the suggestion of the Supreme Court and amended on the advice of the same court, 2 MOORE, FEDERAL PRACTICE, §25.06 (1938). When the litigation is between persons other than federal officials and there is a transfer of interest there is no time specified for substitution, the action continues "by or against" the original party "unless the court upon motion directs the person to whom the interest is transferred to be substituted." Rule 25(c), Federal Rules of Civil Procedure.