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Federal Civil Procedure - Parties - Effect of Failure to Make Timely Application for Substitution for Deceased Party Defendant

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the same transaction.[10] The North Dakota Rules provide that an indictment or information can charge only one offense.[11]

The dissenting justices argued that the prosecution had in effect tried the accused for four murders three successive times. They further stated that this harassment of the defendant is a violation of the Fourteenth Amendment. It might be noted that there are several aspects to this argument that merit careful investigation. When the problem is viewed in the light of "fairness" to the parties, the state's unlimited finances place a tremendous burden on the defendant. Funds are usually available to locate key witnesses no matter where they are, and the prosecutor may expect greater cooperation from the police in his jurisdiction.[12] When this is combined with the power of the prosecutor to use these unlimited finances to harass the defendant through repeated litigation it becomes a dangerous weapon in the hands of a zealous prosecutor. It might also be noted that it is an unwarranted expenditure of money and valuable court time to relitigate matters that could just as well be settled in one trial. It further stands to reason, as proven in the principal case, that as the number of trials is increased, the chances of the desired verdict are likewise increased.

Since the principle of due process is generally identified with the concept of fairness in the procedural aspect,[13] it might be well to note of what this fairness consists. In deciding this problem, two questions must be resolved: "Is that kind of double jeopardy . . . a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principals of liberty and justice which lie at the base of all our civil and political institutions?"[14]

KEITHE E. NELSON.

FEDERAL CIVIL PROCEDURE — PARTIES — EFFECT OF FAILURE TO MAKE TIMELY APPLICATION FOR SUBSTITUTION FOR DECEASED PARTY DEFENDANT. Plaintiff brought an action against Sims and Navarra. Navarra then died. After two years had elapsed, a motion was made to dismiss the action as to Navarra on the basis of Fed.R.Civ.P. 25(a)(1), which provides that: "If a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party." The District Court, in denying the motion, *held* that Fed.R.Civ.P. 25(a)(1) was invalid insofar as it attempted to abridge plaintiff's substantive right to bring her action to trial by placing a fixed time limit upon her right to apply for a substitution for the deceased party defendant.[1] *Henebry v. Sims*, 22 F.R.D. 10 (E.D.N.Y. 1958).

The case presents a striking issue of procedural law. In *Anderson v. Yungkau*,[2]

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11. N.D. Rev. Code § 29-1404 1B (1943); *but see* N.D. Rev. Code § 29-1149 (1943).
12. See Ludwig, *The Role of the Prosecutor in a Fair Trial*, 41 Minn. L. Rev. 602, 608, 609 (1956).
13. See Powell v. Alabama, 287 U.S. 45 (1932).
14. Palko v. Connecticut, 302 U.S. 319, 328 (1937).

1. 28 U.S.C. § 2072 (1952); United States v. Sherwood, 312 U.S. 584, 590 (1941).
2. 329 U.S. 482 (1947); Hofheimer v. McIntee, 179 F.2d 789 (7th Cir. 1950); Winkleman v. General Motors Corp., 30 F. Supp. 112 (S.D.N.Y. 1939); Anderson v. Brady, 1 F.R.D. 589 (E.D. Ky. 1941).

the Supreme Court of the United States held that Rule 25 acts as a statute of limitations upon the right of revivor and is mandatory in character, *requiring* a trial court to dismiss any action not revived within the two year period. It was further held that Fed.R.Civ.P. 6(b), which permits extensions of time in cases where failure to comply with a time limit imposed by the Rules has been due to excusable neglect, cannot be applied to extend the time limit established by Rule 25. The holding of the principal case seems squarely in conflict with this precedent.

The District Court based its ruling in the principal case on the authority of *Perry v. Allen*.[3] In that case, the Fifth Circuit Court of Appeals held that if Rule 25 is applied inflexibly it abridges the substantive rights enjoyed by a plaintiff, distinguishing *Anderson v. Yungkau* on the ground that it was decided in reality on a point of substantive law. The contention was that at the time that the *Anderson* case was decided there was in force 28 U.S.C. § 778 – a two-year federal statute of limitations which was merely implemented procedurally by Rule 25; that the subsequent repeal of this statute[4] in turn automatically left various state statutes of limitations on the right of revivor in force.[5] The Circuit Court stated in the *Allen* case that Rule 25(a) couldn't possibly operate as a statute of limitations upon the revivor. A "statute", they said, must be the act of a "legislative body". The placing of an absolute time limit upon the assertion of a right goes to the substance of the right even though such an act is catalogued as relating to the remedy alone.[6] The Court stated further that such a limitation may be imposed only by legislative authority, and it is beyond the competence of a court to exercise its power to formulate rules of procedure.

But *Perry v. Allen* – and thus the instant case – appears to be questionable. Examination of the legislative history involved in the repeal of the two-year statute of limitations indicates that the repeal was not intended to act as a legislative reversal of the policy embodied in *Anderson v. Yungkau*. Such a repeal of § 778 gave Rule 25 the force and effect of a statute.[7] It occurred in the course of a revision of Title 28 of the United States Code which had for its essential purpose "the substitution of plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections, and consolidation of related provisions."[8] Indeed, the explanation of the House Judiciary Committee for the repeal of 28 U.S.C. § 778 was that it was superseded by Rules 25 and 81. To suggest that by the incidental repeal of the statute Congress overturned the rule of *Anderson v. Yungkau* is to say that the revision was self-defeating and that Congress achieved a result precisely opposite to what it intended.[9] All Federal Rules carry a presumption of validity, and must not be interpreted to be invalid in the absence of most

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3. 239 F.2d 107 (5th Cir. 1956).
4. 62 Stat. 869 (1948).
5. Holmberg v. Armbrecht, 327 U.S. 392 (1946).
6. 239 F.2d 107, citing Holmberg v. Armbrecht, 327 U.S. 392, 394 (1946); Barthel v. Stamm, 145 F.2d 487, 491 (5th Cir. 1944).
7. Foltz v. Moore-McCormack Lines, Inc., 19 F.R.D. 301 (S.D.N.Y. 1956); *cf.* 28 U.S.C. § 2072 (1952).
8. Foltz v. Moore-McCormack Lines, Inc., *supra*, note 7, citing Reprint from Committee on Judiciary, House of Representatives, to accompany H.R. 3214, H.R. 308 (80th Congress, 1st session) p. 2.
9. Foltz v. Moore-McCormack Lines, Inc., *supra*, note 7.

convincing arguments to the contrary,[10] or where a contrary and valid interpretation exists.[11]

North Dakota is not faced with the problem of the principal case. In drafting N.D.R.Civ.P. 25, the two-year time limit was omitted and it was provided merely that if substitution is not made within a "reasonable time", the action "may" be dismissed as to the deceased party. The problems arising from this version of the rule are, of course, *sui generis.*

BENJAMIN OSTFIELD.

HIGHWAYS — RIGHT OF ABUTTING OWNERS — RIGHT OF ACCESS. — The owner of a parking garage on a corner lot with vehicular access to a street on one side of lot was denied access to the other street. The basis of the denial was a city ordinance providing that no permit shall be isued for the construction of any curb cut or driveway leading onto portions of designated streets. He sought a writ of mandamus against the city of San Antonio to compel the issuance of a permit. The Supreme Court of Texas *held,* two justices dissenting, that the ordinance was a valid exercise of the city's police power. *San Antonio v. Pigeonhole Parking,* 311 S.W.2d 218 (Tex. 1958).

The weight of authority is that the right of access is an easement appurtenant[1] to the abutting land[2] and a valuable property right[3] which cannot be taken except by the exercise of the power of eminent domain upon payment of just compensation.[4] Although complete prohibition of the right of access is a taking of property without due process[5] this right may be

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10. Gertler v. United States, 18 F.R.D. 307 (S.D.N.Y. 1955).

11. Bowles v. Tankar Gas, 5 F.R.D. 230 (D.C. Minn. 1946). It should be noted that dismissal in accordance with Rule 25 is not an adjudication on the merits. United States v. Saunders Petroleum Co., 7 F.R.D. 608 (W.D. Mo. 1947) and consequently does not bar the commencement of another action on the same claim through any application of the principles of res judicata. *In re* Hoover Co., 30 C.C.P.A. (Patents) 927, 134 F.2d 624, 628 (1943). Although in many instances further litigation would undoubtedly be barred by the statute of limitations regulating the life of the claim, this result is not directly attributable to Rule 25 itself.

1. Rose v. State, 19 Cal.2d 713, 123 P.2d 505 (1942); Minnequa Lumber Co. v. Denver, 67 Colo. 472, 186 Pac. 539 (1920); Howell v. Board of Comm'rs, 169 Ga. 74, 149 S.E. 779 (1929); Continental Oil Co. v. Twin Falls, 49 Idaho 89, 286 Pac. 353 (1930); O'Brien v. Central Iron and Steel Co., 158 Ind. 218, 63 N.E. 302 (1902); Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953); State v. Department of Highways, 200 La. 409, 8 So.2d 71 (1942); Wenton v. Commonwealth, 335 Mass. 78, 138 N.E.2d 609 (1956); Hillerege v. Scottsbluff, 164 Neb. 560, 83 N.W.2d 76 (1957); Shawnee v. Robbins Bros. Tire Co., 134 Okla. 142, 272 Pac. 457 (1928); State, By and Through State Highway Comm'n v. Burk, 200 Ore. 211, 265 P.2d 783 (1954); Newman v. Mayor of Newport, 73 R.I. 385, 57 A.2d 173 (1948); Gulf Refining Co. v. Dallas, 10 S.W.2d 151 (Tex. 1928); Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A.2d 527 (1943); Royal Transit, Inc. v. West Milwaukee, 266 Wis. 271, 63 N.W.2d 62 (1954).

2. "When no land intervenes between the land of the abutter and the street, his property is said to abut." 10 McQuillin, Municipal Corporations, § 30.55, (3rd ed. 1950).

3. Pure Oil Co. v. Northlake, 10 Ill.2d 241, 140 N.E.2d 289 (1957); Anzalone v. Metropolitan Dist. Comm'n, 257 Mass. 32, 153 N.E. 325 (1926); Cummings v. Minot, 67 N.D. 214, 271 N.W. 421 (1937).

4. Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Breining v. County of Allegheny, 332 Pa. 474, 2 A.2d 842 (1938); Newman v. Mayor of Newport, 73 R.I. 385, 57 A.2d 173 (1948). *Contra,* Alexander Co. v. Owatonna, 222 Minn. 312, 24 N.W.2d 244 (1946).

5. Brownlow v. O'Donoghue Bros., Inc., 276 Fed. 636 (D.C. Cir. 1921); Pure Oil Co. v. Northlake, 10 Ill.2d 241, 140 N.E.2d 289 (1957); Cummings v. Minot, 67 N.D. 214, 271 N.W. 421 (1937). *But see* Alexander Co. v. Owatonna, *supra* note 4.