

CASE AND COMMENT
PRACTICE

ADDING PARTIES AFTER JUDGMENT—DEATH OF JUDGMENT CREDITOR

Wilson v. MacKellar

and

Wilson v. U. S. Fidelity Assurance Co. (assignee)

The question of what to do after a judgement creditor has died in order to carry on proceedings in an ancillary to the action is one which arose recently in the case of Wilson v. MacKellar (unreported).

In this case the defendant recovered judgement for costs and assigned the judgement debt. He subsequently died and the judgement assignee was placed in the position of being unable to take further proceedings under the judgement by the use of the defendant's name, which right was acquired when the judgement debt was assigned.

By Order 17 rule 4 of the Rules of the Supreme Court, when by virtue of the death or other event, occurring after the action is commenced, causing a change of interest, it becomes necessary or desirable that a person should be made a party to an action, an order that proceedings shall be carried on between the continuing parties may be obtained on an *ex parte* application. However does this mean that parties can be changed after judgement has been signed?

The power of the Court over an action was stated by Jessel M.R. in his judgement in *Salt v. Cooper* (1880) 16 Ch D 544 at p 551 as follows: "A cause is still pending even though there has been final judgement given, and the court has very large powers in dealing with a judgement until it is fully satisfied." This statement indicates that the Court can change parties after judgement. The New Brunswick Court of Appeal clearly indicated that this proposition was correct in the case of *McPhail v. Winslow* 8 M.P.R. 552. In that case the Court ruled that proceedings for the examination of a judgement debtor cannot be taken out by a successor in interest of a deceased judgement creditor without such party being first added as a party to the action by an appropriate application under Order 17.

Several English decisions are of the same effect. In *Norburn v. Norburn* (1894) 1 Q.B. 448 the judgement creditor died before realizing on his judgement. His executors made application for a receivership against the defendant but the Court held that the executor must first be added as a party before further proceedings could be taken under the judgement. Accordingly, application being made, an order was granted adding the assignee of the Judgement creditor to be added as a party on the record of the original action.

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