

THE JUDGE OF THE DEBT COURT, et al.,  
Appellants, v. ORA M. HORTON, Appellee.

APPEAL FROM RULING OF JUSTICE.

Argued November 24, 1975. Decided December 31, 1975.

1. In case of the death of a party in a pending action, the action may be continued by or against a legal representative of deceased, whose appointment may be sought by either side.
2. Generally, debts owed by a decedent are collectible from his estate through the fiduciary of the estate.
3. When a judgment will be of no effect if substituted parties are named, the action abates and cannot be revived.

The appellee was sued personally by creditors of her husband's estate. She was the petitioner, who successfully sought a writ of prohibition from the Justice presiding in chambers to stop the judge of the Debt Court from issuing a writ of execution against her personal property to satisfy the claims of the creditors. The respondents appealed from the ruling, and in the course of proceedings appellee died.

The Court pointed out that the appellee was the wrong party in the action, that claims against an estate must be sought from the estate through its fiduciary. The ruling was *affirmed*.

*Stephen B. Dunbar* for appellants. *J. Dossen Richards* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

This case emanates from the chambers of Mr. Justice Robert G. W. Azango, who granted the petition for a writ of prohibition requested by petitioner, Ora M. Horton, widow of the late Dr. D. R. Horton, to prohibit

the judge of the Debt Court from issuing an execution against her personal property to satisfy the claims against the estate owned by her late husband. The respondents appealed from the ruling of the Justice.

At the call of the case, counsel for petitioner inserted in the record of this Court that the case was now moot, because the party, Ora M. Horton, against whom the action was instituted is now dead, and that since she, and not the Horton estate, was personally sued there could be no recovery from her.

The opposing counsel contended that the question of substitution of party should have been raised in the lower court; that when Mrs. Horton was sued in her capacity as widow of the late Dr. Horton, she personally paid \$3,000.00 against the debt and was, therefore, liable for payment of the balance; and that when the action was instituted Mrs. Horton never filed an answer and, therefore, issues not raised in the lower court could not be raised for the first time before this Court. He, however, requested the Court to use its discretion in the disposition of this matter.

A dead person cannot be a party to an action, therefore, our Civil Procedure Law requires that in case of death of a party while an action is pending before a court, the action may be continued but only by or against the executors, administrators or other legal representatives of the deceased. Rev. Code 1:5.31(1). A motion to substitute may be made by any party to an action or by the successors to or representatives of, a party; and a court may, *sua sponte*, order substitution of a party. The application for substitution may be made to the appellate court. Rev. Code 1:5.36 (1), (3), (4). If substitution is not made within a year after the death of the party, the court may, upon motion of an opposing party, (a) dismiss the action as to the plaintiff for whom substitution should have been made, or (b) direct the entry of judgment by default against the defendant for whom substitu-

tion has not been made and/or against his representatives and successors in interest, as shall be appropriate. Rev. Code 1:5.37.

Since the time of Mrs. Horton's death, which occurred more than a year ago, no one has moved for substitution. The time for substitution having elapsed, the applicable section of our Civil Procedure Law, § 5.37, should be operative, but, again, the opposing party has not made such a motion, and the Court itself in this instance cannot take the initiative because it would be unfair and legally improper to exclude the deceased husband's estate from settlement of his debts and issue execution against the personal property of his late widow.

Generally, debts owed by a decedent are settled from his estate; as can be seen from the following authoritative excerpts from 21 AM. JUR., *Executors and Administrators* (1939):

"The general rule that administration of a decedent's estate is necessary is especially applicable to compel administration and, through administration, to subject the debtor's estate, real and personal, to the payment of the debts against the estates." § 16.

"The principal duties of an executor or administrator are to collect debts due the estate, to prosecute suits in favor of, and defend suits against, his estate, and otherwise to preserve and protect it from loss. It is likewise his duty to pay the debts of the decedent, whether secured or unsecured, to the extent that there are assets; such payments, in the absence of a contrary direction in the will or by statute, to be made first from the personal estate and then from the real estate." § 219.

"It may be stated generally that all claims, demands, and causes of action subsisting against the decedent at the time of his death, except those which are terminated by death, may be enforced against his estate in the hands of his personal representative, sub-

ject, of course, to all proper grounds of defense.”  
§ 325.

“Except where services are rendered gratuitously, a claim may be presented therefor against the estate of a person who received the benefit thereof and failed to make payment during his lifetime.” § 325.

“Generally, all contractual obligations which survive the death of the obligor are binding on his executors and administrators in their representative capacity, and may be enforced against his estate to the extent of the assets thereof. . . . No personal liability attaches to the executors and administrators in regard to such contracts. However their liability being only in a representative character except where they voluntarily incur indebtedness in completing them.” § 336.

We also note that an action for or against an estate “must be by or against the executor or administrator in his representative capacity.” 31 AM. JUR., 2d, *Executors and Administrators*, § 371 (1967).

Finally, our Decedents Estates Law entrusts the responsibility for payment of decedent’s debts to his fiduciary, executor, or administrator; and these payments are to be made from the assets of the estate. Rev. Code 9:116.11. See also *Richards v. Coleman*, 6 LLR 285 (1938).

Since Mrs. Horton was sued in her capacity as a widow, and not as an executrix or administratrix of her husband’s estate, for payment of her late husband’s debts, it is our opinion that she was not the proper party against whom the suit should have been brought. Furthermore, her death terminated the action, for where a judgment will be of no effect if substituted parties are named, the action abates and cannot be revived. 1 AM. JUR., 2d, *Abatement, Survival, and Revival*, § 47 (1962). It is not the practice of courts to decide cases after their decisions have become useless. This does not destroy the cause of action for payment of debts owed by Dr. Horton,

but the creditor must seek recovery from the proper party. Therefore, the ruling of the Justice prohibiting the Debt Court from issuing an execution against appellee's personal property is hereby affirmed, with costs against the respondents. And it is so ordered.

*Affirmed.*