ROYAL EXCHANGE ASSURANCE, Appellant, *v.* DR. AND MRS. H. HARRIERO, Appellees.

MOTION FOR SUBSTITUTION OF A PARTY.

Argued October 28, 1975. Decided January 2, 1976.

1. It is essential that the party sought to be substituted bear some relation to the original party, or possess a sufficient interest in the case to enable him to maintain the proceedings.
2. The term "due process of law" means, in brief, that there must be a tribunal competent to pass on the subject matter; notice, actual or constructive; an opportunity to appear and produce evidence, to be heard by counsel or in person, or both; and having been duly served with process or having otherwise submitted to the jurisdiction of the court.
3. Once diplomatic immunity has been conferred by accreditation to the host country, the courts no longer have jurisdiction over the person enjoying such immunity, although the courts continue to have jurisdiction over the subject matter of a suit commenced prior to acquisition of diplomatic immunity.

The appellees moved to substitute another in their place in the case pending before the Supreme Court, due to the fact that during the pendency of the appeal, Dr. Harriero had been accredited to the Republic of Liberia as Ambassador from Argentina and he and his wife, successful plaintiffs in the action from which the appeal was taken, could not pursue the appeal further because of the diplomatic immunity of the appellees.

The Supreme Court found that the case did not present one of the instances when substitution might be had under the Civil Procedure Law. In addition, because of the immunity conferred upon the appellees, they had no standing before the Court to enable them to move for the relief sought. The Court, therefore, *denied* the motion and ordered the case to remain dormant on the court's docket until such time as appellees resumed the civilian status they had at the inception of the suit.

Joseph P. H. Findley and *H. Reed Cooper* for appellant. *Joseph J. F. Chesson* and *Richard A. Diggs* for appellees.

MR. CHIEF JUSTICE PIERRE delivered the opinion of the Court.

In this case the appellees, Doctor and Mrs. H. Harriero, nationals of the Republic of Argentina, brought suit for damages against Royal Exchange Assurance, an insurance company doing business in Monrovia, Liberia. At the time of the filing of suit in 1970, the Doctor carried on a medical practice in Monrovia and its environs. He sued to recover, and was awarded damages, in the sum of $129,920.50, resulting from losses he sustained due to a fire that destroyed his residence, which was also his office where he carried on his practice. The Doctor got judgment in the Civil Law Court in Monrovia, and the insurance company appealed from the judgment to the Supreme Court.

While this case was pending on appeal, and before this Court could hear the case, Doctor Harriero was accredited to the President of Liberia by the Government of Argentina, in the character of Ambassador Extraordinary and Plenipotentiary. The case was called for a hearing at the present term of the Supreme Court, when a motion was filed by the appellees, asking that Anthony Barclay be allowed to be substituted for them in the action, since as Ambassador the Doctor and his wife could not continue as parties before the Court.

In the resistance which the appellant filed, the following pertinent points were asserted: (1) that appellees were without legal capacity to make the motion, due to their enjoyment of diplomatic immunities; therefore, they could not confer on Anthony Barclay what they did not have themselves; (2) that as diplomats enjoying immu-

nity from the processes of the courts of Liberia, they can plead immunity as a bar to any judgment this Court might enter against them; and in case of remand of the case for a new trial, the Ambassador's immunities would prevent him from appearing as party or witness, and should costs be assessed against him, no ministerial officer could collect by due process; (3) that in Liberia substitution of parties is permitted only in the following cases: (a) in case of death of a party; (b) in case of incompetency; (c) in case of assignment of benefits of creditors; (d) in case of transfer of interest, and (e) substitution of public officers, appellant contends that none of these grounds has been shown by the motion; (4) that the motion which seeks to have Anthony Barclay substituted for the appellees does not show that the said Anthony Barclay is either a legal representative, guardian *ad litem,* receiver, trustee, curator of their estate or successor otherwise to the interest of the appellees, and there is no showing that the said Anthony Barclay bears any legal relationship to the appellees, nor is it shown that he has any interest in the controversy. These are the pertinent issues before us, and we shall review them in reverse order.

Our Civil Procedure Law regulates substitution of parties.

> "Substitution in case of death. *In general.* Except as otherwise specifically provided by law, if any party to an action dies while such action is pending before any court in this Republic, the action may be continued by or against the executors, administrators, or other legal representatives of the deceased party or parties in accordance with the provisions of this subchapter and the statutes relating to survival of actions." Rev. Code 1:5.31(1).
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> "Substitution in case of Incompetency. If a party becomes incompetent, the court shall direct the action

to be continued by or against the legal representative or a guardian *ad litem* of the incompetent. The court shall protect the interests of the incompetent in accordance with the provisions of section 5.13(2)-(4) above." *Id.*, § 5.32.

"Substitution in case of assignment for benefit of creditors. When a party to an action assigns his property for the benefit of creditors, the action shall be continued by or against the receiver, trustee, curator of estate, or other successor in interest of such party; provided, however, that the party shall be entitled to maintain and shall continue to be liable in actions for personal injuries." *Id.*, § 5.33.

"Substitution upon transfer of interest. In case of any transfer of interest other than one for which special provisions are set out in this subchapter, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted in the action or to be joined with the original party." *Id.*, § 5.34.

Section 5.35 refers to substitution of public officers, and we have not quoted it because we do not feel it necessary.

Before relating the provisions quoted to the circumstances in this case, we would like to refer to a point raised during the hearing before us. Was Anthony Barclay apprised of the appellees' motion to have him substituted, and did he give his consent? Nowhere in the motion, or in any document before us, has it been shown that the party sought to be substituted for the appellees had by any act of his assented to being so substituted. It is our opinion that because of the great responsibility, and sometimes heavy liabilities substituted parties are called upon to assume by virtue of their alleged consent, they should in fairness indicate their willingness to serve in such capacity. In every such case, such willingness

should be indicated either in the minutes of the trial court, or should be annexed to a motion to form a part thereof.

In *Bryant* v. *Harmon,* 12 LLR 330 (1956), the appellee died during pendency of the case, and his son Emmett Harmon asked to be substituted for his deceased father. His request was granted. In a more recent case, *Bassa Brotherhood Society* v. *Horton,* Doctor Horton was one of the parties to the suit and died before the Supreme Court could decide the case. His son Romeo Horton requested and was granted permission to be substituted for his deceased father. This latter case was decided by this Court in the October 1971 Term. We do not think it would be fair to any party sought to be substituted, to impose upon him such responsibility, without first obtaining his consent, his consent to be attained in a manner as to form part of the record in the case.

In observing the requirements of the sections on substitution of parties quoted above, the movents should have shown in their motion the interest Anthony Barclay has in the case, or in what way he is related to the cause of action or the parties.

> "All courts recognize that there may properly be a substitution of parties where the substituted party bears some relation of interest to the original party and to the suit and there is no change in the cause of action." 79 AM. JUR., *Parties,* § 99 (1942).
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> "It is essential that the party substituted bear some relation to the original party, or possess an interest in the controversy sufficient to enable him to maintain the proceedings." *Id.,* note 7, page 968.

The person sought to be substituted for the appellees in this case, does not seem to come under any one of the provisions for substitution of parties which would justify our granting the motion.

Appellees' counsel argued that they had based their motion on incompetency, as a ground for our considera-

tion. The section quoted above with respect to incompetency as a ground for substitution of parties, is very clear that in every such case "the action shall be continued by or against the legal representative or a guardian *ad litem* of the incompetent." Nowhere has it been shown that Anthony Barclay was ever a legal representative, or guardian *ad litem* of the appellees in this case.

Moreover, the statute for protection of persons under disability, as found in the Decedents Estates Law passed and approved May, 1972, provides that guardians *ad litem* shall be appointed by the court for a person under a legal disability, who has not appeared by a guardian, which guardian must have failed to file an affidavit showing the following: (a) that he is qualified to protect the rights of the incompetent; (b) that he is related to or connected in business with the party to the proceeding or is attorney for any party; (c) whether he is entitled to share in the estate in which the incompetent is interested, or is in any way interested therein; (d) whether he has any interest adverse to or in conflict with that of the incompetent; and (e) such additional facts as may be required by the court. Rev. Code 9:104.2, 104.3. It cannot be denied that Anthony Barclay has never been so qualified by any court to represent the appellees as guardian, attorney, or guardian *ad litem*.

Appellees' counsel raised the issue that under Art. I, Sec. 6th, of the Constitution every person injured shall have remedy therefor by due course of law. They contended that their clients are entitled to protection under this constitutional provision. In countering this contention, counsel for appellant conceded that appellees are entitled to protection from injury, but only insofar as this can be afforded "by due course of law."

BOUVIER'S LAW DICTIONARY has defined the phrase to mean law in its regular course of administration through courts of justice; and the definition also states that the phrase is synonymous with "due process of law," or "the

law of the land." Consequently, the controversy on this issue simply boils down to both parties agreeing that appellees should be protected against any injury they claim and can establish they suffered at the hands of appellant. However, appellant insists that in affording this constitutional protection it should be done "by due course of law," or by "due process," or in keeping with "the laws of the land."

With this as a basis let us look into the origin of the phrase "due process of law," which is the only point on which the parties differ in respect to appellees' right to protection and redress for any injury they have sustained. This phrase, without doubt, is one of the firmest pillars upon which the liberties of the citizen in a free society rest. As far as is known it was born in Chapter 29 of Magna Carta, when King John promised:

> "No man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land."

More than a hundred years after Magna Carta, in 1335 and in the reign of Edward III, the phrase again appeared in English law.

> "No man of what state or condition he be shall be put out of his lands or tenements, nor taken, nor disinherited, nor put to death without he being brought to answer by due process of law."

In the landmark opinion of *Wolo* v. *Wolo*, 5 LLR 423, 428 (1937), the Supreme Court went to great length in explaining "due process of law" and "the law of the land." Mr. Chief Justice Grimes, who spoke for a unanimous bench, quoted extensively from an American legal authority on the subject.

> "The term 'due process of law,' when applied to judicial proceedings, means that there must be a competent tribunal to pass on the subject matter,

notice actual or constructive, an opportunity to appear and produce evidence, to be heard in person or by counsel; and if the subject-matter involves the determination of the personal liability of defendant he must be brought within the jurisdiction by service of process within the state, or by his voluntary appearance. And there must be a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights."

Later in this opinion we shall see whether this rule can be applied to redress any grievance the appellees claim to have suffered. For instance: (1) Do we have a judicial tribunal competent to now have jurisdiction over the subject matter and the appellees? (2) Can process constructive or actual be served upon the appellees, to notify them of the hearing of their case? (3) According to the present status of the appellees, can they give evidence before any judicial forum in Liberia? (4) Can the appellees now and in their present status be brought under the jurisdiction of our courts? Can we apply judicial rules and principles established for the normal protection of the rights of ordinary parties in this case? As we have said before, we shall see later in this opinion if this is at all possible.

There have been cases where a diplomatic officer was appointed after courts of the receiving state had acquired jurisdiction over him previous to his accreditation and the hearing of such cases were stayed. O'CONNELLS' INTERNATIONAL LAW, Vol. II, 2nd ed. 912 (1970). In the case *Arcaya* v. *Paez,* 244 F. 2d 958 (1957), the plaintiff appealed from an order staying his action for damages for libel, so long as the defendant retained his status as a diplomatic representative of Venezuela to the United Nations, and the Federal Court of Appeals of Washington, D.C. affirmed.

But the appellees in this case had full knowledge of

the pendency of their case before they were accredited and received in Monrovia as Ambassador of Argentina; therefore, it seems to us that they should have taken some step to protect themselves from the immunity which they knew would prevent them from personally continuing their case in court. The moment they were received by the President, they were automatically placed beyond the jurisdiction of the courts of Liberia, except in cases where they might have to appear originally before the Supreme Court. *Constitution Article* IV, Section 2nd.

The jurisdiction which the Civil Law Court acquired over the subject matter when the case was filed in 1970, as well as the jurisdiction which the Supreme Court acquired as a result of the completion of the appeal, is still retained and was not disturbed by the accreditation of the plaintiff as a diplomat. However, we no longer have jurisdiction over the Ambassador of Argentina and his wife, who in their private capacity had been plaintiffs in the court below, due to the diplomatic immunities conferred upon their accreditation.

As Ambassador of their Country they had no standing to file the motion, nor could their lawyers properly do so for them, since their filing of the motion did not clothe them with capacity to move the Court; nor did it divest them of the diplomatic immunities which they had assumed, which placed them beyond the Court's jurisdiction in this case.

As counsel their lawyers represented their clients, and prepared the document which gave utterance to their clients' request to be substituted for; but the point is that they could not make such a request of the Court unless the Court, having already acquired jurisdiction over them, could retain that jurisdiction in order to hear, grant, or deny their request. To ask the Court to substitute someone in their stead is to say that the Court has jurisdiction over them, and that they only now seek to have the Court allow another to take their place. But

this is not the case, because the Court lost jurisdiction over them when they were received as diplomatic representatives of their Country.

The immunities of an Ambassador insulate him from all Court action in the receiving state to which he has been accredited.

In *People of Puerto Rico* v. *Ramos,* 232 US 627 (1914), it is shown that in a case between a British citizen and a Puerto Rican, the State of Puerto Rico intervened, and by amended complaint of the plaintiff, was later made sole defendant in the case. Puerto Rico then moved the court to dismiss the case on the ground of sovereign immunity, and lack of jurisdiction. In denying the jurisdictional motion, the Court said:

> "There is an assignment of error based on the proposition that by the amendment of the complaint the plaintiff and Puerto Rico became the sole parties to the action, and they being citizens of Puerto Rico, the court lost jurisdiction of it. The proposition is not urged by plaintiff in its brief, and if the proposition did not raise the question of jurisdiction, we might pass it without comment. It is however, enough to say of it that the original defendant, Wood, was properly sued, he then being a subject of Great Britain, and in possession of the land. Puerto Rico subsequently becoming a party, did not oust the jurisdiction. *Phelps* v. *Oaks,* 117 U.S. 236, 714 L.Ed. 888 (1886)."

In the *Phelps* case relied upon by the Court, the question was whether jurisdiction previously obtained over the original parties, was ousted by the amendment which made a sovereign State sole defendant. In addressing itself to this issue the Court said: "Much less can the plaintiff's right to prosecute his action in the courts of the United States, once vested, be defeated by imposing upon him an adversary against whom he cannot maintain the jurisdiction of these tribunals."

Likewise, we hold that the jurisdiction over the subject matter acquired by the Civil Law Court, and which by appeal from its judgment now lodges in the Supreme Court, was not ousted by the diplomatic status which the appellees acquired when Doctor Harriero was accredited and received as Ambassador Extraordinary and Plenipotentiary of Argentina. But jurisdiction over him as a party to the action is a different story; the courts of Liberia ceased to have any jurisdiction over him once he took diplomatic status.

He cannot be sued in the receiving State, because this would naturally bring him under the jurisdiction of the courts of that State; for the same reason he cannot sue, since this would also bring him under the jurisdiction of the courts. How would a court enforce an adverse civil judgment against an Ambassador, were he sued and lost the case? And how could he collect his debt or damages if he sued and won, when no ministerial officer can deal with him in any manner? Let us come home to the present case; suppose it became necessary for a new trial to be granted; how would the Ambassador appear in court in face of his extraterritoriality?

Extraterritoriality is a diplomatic right enjoyed by the envoys of all sovereign states, and it is never infringed upon by any host country, except upon the most unavoidably necessary occasions. But the enjoyment of extraterritoriality does not give to the envoy any right to expect to be exempted from the operations of the ordinary laws of the receiving State, and at the same time prosecute suits against parties in the same courts of the host Country. To allow this would be not only unfair, but impossible; since extraterritoriality implies living beyond the territory of the country to which he is accredited. OPPENHEIN'S INTERNATIONAL LAW defines the term.

> "The extraterritoriality which must be granted to diplomatic envoys by the Municipal laws of all members of the international community is not, as in the

case of sovereign Heads of States, based on the principle *par in paren non habet imperium,* but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, control, and the like, of the receiving State. Extraterritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving State. The term is nevertheless valuable because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States. The so-called extraterritoriality of envoys takes practical form in a body of privileges which must be severally discussed." OPPENHEIN, INTERNATIONAL LAW, Vol. 1, pp. 792, 793.

Among the privileges referred to above are immunity of domicile, diplomatic asylum, exemption from civil jurisdiction, and others.

In this context, the appellees certainly could not have been outside Liberian territory and have filed their motion in the office of the Clerk of the Supreme Court. Moreover, how could they, in fairness, ask for hearing of a case in which they are parties during their exemption from the operations of the ordinary laws of Liberia, and the functions of the Liberian courts? In the circumstances, we are of the considered opinion that Ambassador Harriero's case should be allowed to remain dormant on the docket, until such time as he can return to the status of a nondiplomatic national of this Country, and to the capacity in which he sued in the trial court. When that time comes, he may then decide whether or not he should continue his motion. Costs to abide final determination of the case. It is so ordered.

Motion denied.