Chicago-Kent Law Review

Volume 29 | Issue 3 Article 5

June 1951

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COSTS—TAXATION—WHETHER COSTS INCURRED IN ORDER TO OVERCOME DEFENSES NOT MADE IN GOOD FAITH MAY BE TAXED AT AN EX-PARTE HEARING—Little use appears to have been made of Section 41 of the Illinois Civil Practice Act,[1] if absence of appellate records may be considered to be any indication of infrequent trial court practice, although a judge once offered the opinion that the imposition of penalties under the statute would soon cause untrue defenses to disappear.[2] The decision in *Adams* v. *Silfen*[3] indicates that it would be improper to assess costs for an untruthful defense, if one should be offered, except at the time of the trial and then only after proper notice of an intention to make application for an award. The plaintiff there, on petition filed long after the hearing and at an *ex parte* hearing before another judge than the one who presided at the trial, secured an order taxing the defendant with certain costs and attorney's fees allegedly incurred in overcoming certain allegations and denials made by the defendant supposedly without reasonable cause, not in good faith, and found to be untrue.[4] The Appellate Court for the First District reversed such order on the ground that the statute was penal in character and no recovery could be permitted under it except upon full compliance with its terms. Although the section calls for a "summary" taxation of costs, it was said not to warrant *ex parte* action but rather to require that an opportunity be provided to be heard on the question of whether costs should be taxed or not. It was also said that the power to tax costs was vested in the trial judge alone since only he would possess the knowledge necessary to permit of summary disposition of the matter. The utility of the provision would seem to be a matter of some doubt unless it could be said to possess some prophylactic value from its mere presence on the statute book.

[1] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 165.

[2] Fisher, "The Persistence of Chitty," 6 U. of Chi. L. Rev. 359 (1939), particularly p. 372.

[3] 342 Ill. App. 415, 96 N. E. (2d) 628 (1951).

[4] Other cases interpreting the statute may be found in Hausman Steel Co. v. N. P. Severin Co., 316 Ill. App. 585, 45 N. E. (2d) 552 (1942), and Palmer v. Gillarde, 312 Ill. App. 230, 38 N. E. (2d) 352 (1942), but to date there has been no recorded case in which a penalty under the statute has been successfully imposed. It should be noted that the permissible recovery is described as the "reasonable expenses" of the opposite party. Ill. Civ. Prac. Act Anno., 1933, pp. 87-8, suggests this phrase may include attorneys' fees. There has been no expression to date interpreting this aspect of the statute.

DECLARATORY JUDGMENT—PROCEEDINGS—WHETHER OR NOT TIME FOR APPEAL IN A DECLARATORY JUDGMENT PROCEEDING IS TO BE MEASURED BY APPLICABLE LEGAL OR EQUITABLE RULE—The Illinois Supreme Court granted leave to appeal in *Freeport Motor Casualty Company* v. *Tharp*[1] solely to settle a question as to the timeliness of an appeal from a declaratory judgment order entered pursuant to the recently enacted declaratory judgment statute.[2] The proceeding had been one to secure a declaration as to an insurance company's obligations under a public liability policy. The trial judge, being absent from the county, mailed a written judgment order, under date of June 15th, to the clerk of the court with direction to make the usual docket entry "the next day there is court in Louisville," that place being the county seat. The order was received by the clerk of June 16th but was not spread of record until June 24th, the next court day. Notice of appeal was filed on September 22nd, well within the ninety-day period[3] measured from June 24th but more than the statutory time allowed if the order could be said to have been entered on June 16th. The Appellate Court had rejected a motion to dismiss the appeal and had disposed of the case on the merits. The Supreme Court agreed that such action had been proper.

It is clear that the commencement of the period for appeal varies depending on the nature of the action brought, for a law judgment becomes final the moment it is pronounced even though not recorded until later,[4] whereas an equity decree attains the force of a binding decree for this purpose only after it has been signed and enrolled.[5] Inasmuch as a declaratory judgment proceeding is *sui juris*,[6] it became necessary for the court to determine the exact point when the period for appeal would begin to run in such a case. In that regard, and for this purpose, the court concluded that the declaratory judgment proceeding should take the same character as would a suit based on the same facts but seeking positive relief instead of a mere declaration of rights. As the instant case appeared to be, in essence, a law action based on a contract, the court

[1] 406 Ill. 295, 94 N. E. (2d) 139 (1950), affirming 338 Ill. App. 593, 88 N. E. (2d) 499 (1949). Fulton, J., dissented.

[2] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 181.1.

[3] Ibid., Ch. 110, § 200, requires that no appeal, as a matter of right, shall be taken "after the expiration of ninety days" from the "entry" of the order, decree or judgment. It does not elaborate on the acts which constitute "entry."

[4] People v. Jarecki, 352 Ill. 207, 185 N. E. 570 (1933).

[5] Snook v. Shaw, 315 Ill. App. 594, 43 N. E. (2d) 417 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 98. See also Hughes v. Washington, 65 Ill. 245 (1872), and Jones v. City of Carterville, 340 Ill. App. 330, 91 N. E. (2d) 604 (1950).

[6] Progressive Party v. Flynn, 400 Ill. 102, 79 N. E. (2d) 516 (1948); Great Northern Life Ins. Co. v. Vince, 118 F. (2d) 232 (1941), cert. den. 314 U. S. 637, 62 S. Ct. 71, 86 L. Ed. 511 (1941).

applied legal rather than equitable concepts to fix the time for appeal.[7] The holding may be indicative of a line of thought to be applied with regard to other procedural problems which may arise in declaratory judgment matters.[8]

The court did, however, note that the statute fixes a period which commences with the "entry" of the judgment rather than with its rendition. If a law judge pronounces judgment while present in open court in the county in which the case is pending and at a time when the court is in full and proper session, the appeal period, following the law rule, would immediately begin to run as the ministerial act of "entering" the judgment would be presumed to have occurred contemporaneously with the rendition of the judgment. If, on the other hand, as in the instant case, the judge is elsewhere at the time he formulates his decision and sends the same in by mail, there is no judgment until he, or an appropriate substitute, returns and reconvenes the court into proper session at the proper place. On that basis, the court held the final judgment in the instant case had not been "entered" until June 24th, for which reason the motion to dismiss the appeal had, properly, been denied.

DIVORCE—ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY—WHETHER OR NOT RETROACTIVE EFFECT SHOULD BE GIVEN TO THE STATUTORY AMENDMENT DESIGNED TO PRESERVE LUMP-SUM SETTLEMENTS FROM THE CONSEQUENCE OF REMARRIAGE—In the recent case of *Walters* v. *Walters*,[1] the plaintiff, in 1946, had been awarded a divorce under a decree which contained a provision for the payment of a specified sum of money in installments. Later that year, the defendant filed a petition for modification of the decree in the form of cancellation of the obligation to make the payments because of the plaintiff's remarriage. The trial court granted the requested relief but the Appellate Court for the First District reversed on the ground that the provision was in the nature of a lump-

[7] The case had seemingly turned on a question as to the construction to be given to the language contained in the policy. That aspect of the case is discussed in a note to the decision of the Appellate Court to be found in 29 CHICAGO-KENT LAW REVIEW 18-9. Presumably, if the declaratory judgment proceeding had sought a determination as to the company's freedom from liability because of fraud or mistake, the action would have possessed the character of a suit in equity for rescission or reformation.

[8] The statute, Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 181.1, recognizes the possibility for differentiation among types of declaratory judgment proceedings for it calls for trial by jury of disputed issues of fact where such method of determination is customary. Pleading and other procedural questions may turn on the distinction made in the instant case.

[1] 341 Ill. App. 561, 94 N. E. (2d) 726 (1949). Niemeyer, P. J., wrote a concurring opinion. Feinberg, J., dissented.

sum settlement,[2] even though payable in installments, rather than one for alimony. The plaintiff was, therefore, held entitled to the continued receipt of the sums even though her marital status had been altered. The decision is in conformity with the spirit of the 1949 amendment to Section 18 of the Divorce Act,[3] which provision now requires the continuation of payment, despite remarriage of the recipient, of any lump-sum settlement, including those payable in installments. That amendment was, in all probability, enacted to prevent the recurrence of decisions, such as had been reached by certain of the Appellate Courts, to the effect that such settlements, if payable in installments, were converted into and were to be treated as alimony.[4] The majority of the court mentioned, but declined to apply, the amended section on the basis that it was unnecessary to do so. Taking this position, it found it unnecessary to consider whether the amendment possessed retroactive effect. Judge Niemeyer, in his concurring opinion, felt the court should have stressed the statute to bolster its decision.[5]

The significance of the position taken in the concurring opinion could the more readily be grasped if one would consider that it could conceivably affect innumerable divorce decrees entered before the passage of the 1949 amendment. Just such a situation existed in another recent case, that of *Coleman* v. *Coleman*.[6] The facts therein parallelled those of the Walters case in that the decree and the petition for modification came before the passage of the 1949 amendment, and the decree provided for a settlement similar to the one described in that case. The Appellate Court for the Fourth District, however, interpreted the decretal provision as being one for alimony rather than a lump-sum settlement and ordered a termination of payments on evidence of the wife's remarriage. In arriving at that decision, the court refused to give retroactive effect to the 1949 amendment. If it had done so, the result reached might well have been different since it would then have been confronted with an express legislative mandate designed to fit the situation presented to the court.

[2] This conclusion was apparently based on two factors present in the decree, to-wit: (1) the settlement was for a specific total sum; (2) any unpaid balance, in event of the premature death of the ex-husband, was to be a charge against his estate.

[3] Ill. Rev. Stat. 1949, Vol. 1, Ch. 40, § 19.

[4] See, for example, Hotzfield v. Hotzfield, 336 Ill. App. 238, 83 N. E. (2d) 605 (1948); Banck v. Banck, 332 Ill. App. 369, 54 N. E. (2d) 577 (1944); Adler v. Adler, 373 Ill. 361, 26 N. E. (2d) 504 (1940).

[5] Since no legislative intent allowing retroactive application was shown, the conclusion is difficult to justify. For the necessity of such a showing, see Hathaway v. Merchants' Loan & T. Co., 218 Ill. 580, 75 N. E. 1060 (1905); Gage v. Stewart, 127 Ill. 207, 19 N. E. 702 (1889).

[6] 341 Ill. App. 462, 94 N. E. (2d) 507 (1949).

MUNICIPAL CORPORATIONS—CREATION, ALTERATION, EXISTENCE AND DISSOLUTION—WHETHER THE FAILURE TO INCLUDE THE TERMS OF ANNEXATION IN THE INITIATING ORDINANCE VOIDS THE ARRANGEMENT EVEN THOUGH THE VOTERS APPROVE THE ACTION—The councils of both the plaintiff city and the defendant city, in the recent case of *City of Nameoki* v. *Granite City*,[1] passed ordinances authorizing special elections to determine whether the former should be annexed to the latter. A majority of those casting votes at each election approved the proposed action. The plaintiff city thereafter commenced suit requesting an injunction to restrain the defendant and its officers from assuming control over the former's government, property and affairs. The complaint alleged that neither ordinance specified the terms of the annexation, as is required by statute,[2] for which reason the whole arrangement was void. The "terms" referred to were those dealing with the disposition to be made of the annexed municipality's property, debts, public facilities and the like. The trial court dismissed the suit on motion and, upon direct appeal to the Supreme Court because a franchise was involved, that decision was affirmed.[3]

The higher court took the position that the mere failure to recite the terms of annexation in the ordinances did not void the action taken since other sections of the statute could be looked to in order to provide the missing information. It is true that the legislature, after outlining two methods for annexation, had included a statement of the manner in which the existing debts and facilities of the annexed municipality were to be handled.[4] Due to the physical arrangement of this particular portion of the statute,[5] however, it might appear that these provisions are applicable only where annexation occurs by the second method, the one not utilized in the instant case. There is further basis for differentiation in the fact that the second manner of procedure does not allow the municipalities any opportunity to agree as to the terms for the election thereunder is to be ordered by the county court upon petition by the requisite number of voters. It was held, however, that the sections referred to are

[1] 408 Ill. 33, 95 N. E. (2d) 920 (1951).

[2] Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 7—12.

[3] The trial court decision may have rested on the proposition that plaintiff chose the wrong remedy, having used a proceeding in equity rather than quo warranto, permitted by Ill. Rev. Stat. 1949, Vol. 2, Ch. 112, § 9(a). The Supreme Court, while noting that equity does not take jurisdiction merely to inquire into the legality of an election deemed the remedy appropriate as property rights were involved: Village of Morgan Park v. City of Chicago, 255 Ill. 190, 99 N. E. 388 (1912).

[4] Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 7—15 to § 7—20 inclusive and §§ 7—35, 7—38, 7—39.

[5] These provisions follow immediately upon the sections outlining the second method of annexation.

not restricted in their application to situations where the annexation occurs through the intervention of the county court, but are equally applicable to either method of annexation.[6]

NAMES—ASSUMED NAMES—WHETHER OR NOT CONTRACT MADE BY ONE WHO HAS FAILED TO COMPLY WITH STATUTE REGULATING USE OF AN ASSUMED NAME IS VALID AND ENFORCIBLE—The plaintiff in *Grody* v. *Scalone*,[1] conducting his business under the designation of "Modern Furnace Company," sought to recover a balaance allegedly due for the installation of a furnace in the defendant's residence. The answer admitted the existence of the contract, denied the other items in the complaint, and set up as an affirmative defense the fact that the plaintiff had failed to comply with the registration requirements of the Illinois Assumed Name Act.[2] It was contended that since the plaintiff had violated the statute he was not lawfully in business and therefore any agreement he had entered into was unenforcible as being contrary to public policy. The trial court sustained this argument and the case was taken directly to the Supreme Court on a claim that the statute was unconstitutional. The higher court circumvented the constitutional issue by holding that noncompliance with the statutory provisions regulating the use of assumed names did not affect the enforcibility of contracts or obligations entered into by persons otherwise subject to the regulation of the statute. An identical result was reached, on similar facts, in the later Supreme Court case of *Cohen* v. *Lerhman*.[3] The court, in reaching its decision in these two cases, found that no other result would be consistent with legislative intent. It reasoned that, since the only penalty set out in the statute is one designed to punish the violator by a fine or imprisonment,[4] the legislature did not intend any other consequence to attach to a failure to comply with the law. A contrary result which had been attained in two prior Appellate Court decisions has thus been repudiated.[5]

[6] It is to be noted that Section 7—15, having to do with the debts of the annexed municipality, restricts its applicability to annexation on petition. As the other sections are not so specifically restricted, the court reasonably concluded that they were not subject to restraint but could, and did, apply to both types of proceeding.

[1] 408 Ill. 61, 96 N. E. (2d) 97 (1950), noted in 39 Ill. B. J. 308.

[2] Ill. Rev. Stat. 1949, Vol. 2, Ch. 96, § 4 et seq.

[3] 408 Ill. 155, 96 N. E. (2d) 528 (1951).

[4] Ill. Rev. Stat. 1949, Vol. 2, Ch. 96, § 8.

[5] Mickelson v. Kolb, 337 Ill. App. 493, 86 N. E. (2d) 152 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 327. See also Franks v. Coront, 341 Ill. App. 137, 93 N. E. (2d) 157 (1950).

TAXATION—LEGACY, INHERITANCE, AND TRANSFER TAXES—WHETHER IT IS PROPER TO DEDUCT A PRO-RATA SHARE OF ALL DEBTS AND EXPENSES FROM THE VALUE OF LOCAL PROPERTY IN COMPUTING THE INHERITANCE TAX PAYABLE BY A NON-RESIDENT DECEDENT'S ESTATE—The case of *In Re Geatty's Estate*[1] presented a problem which arose out of an ancillary administration proceeding commenced in Illinois. The decedent, a resident of Maryland, died, leaving assets in both jurisdictions. The local administrator filed an inheritance tax return,[2] listing the property subject to the Illinois tax, and deducted from the gross value 42.55% of all the debts payable out of the estate together with the expense of administering it both in Illinois and Maryland. He proceeded on the theory that the Illinois assets were 42.55% of all the property left and therefore should bear that percentage of debts and expenses as far as the tax calculation was concerned. The Attorney General objected to this method of computation and subsequently the estate filed an amended return wherein only the Illinois debts and administration expenses were subtracted. However, in the latter was included the entire amount of the Federal Estate Tax,[3] and once more the Attorney General took exception. The county judge assessed the tax on the basis of the original return, and upon appeal by the state to the county court[4] the order was affirmed. A further appeal was perfected, this time directly to the Supreme Court as a question of revenue was involved, and again the percentage deductions were sustained.

In computing the inheritance tax in instances where the decedent is a non-resident, one of two methods is typically utilized in ascertaining the amount of the debts and expenses which are deductible. The first allows only the subtraction of local debts and administrative expenditures, while the second, the one adopted in the principal case, permits a pro-rata deduction of all such items without regard to their situs.[5] In choosing the latter as the appropriate rule to be followed, the Supreme Court took into consideration the fact that the adoption of the former would allow the estate to reduce the tax basis by the full amount of the federal Estate Tax. This, it was reasoned, might result in duplicate deductions, the estate taking advantage of the federal tax twice: once in the

1 408 Ill. 383, 97 N. E. (2d) 307 (1951), noted in 39 Ill. B. J. 518.

2 This was in compliance with the state inheritance tax act, Ill. Rev. Stat. 1949, Vol. 2, Ch. 120, § 375 et seq. The tax is calculated on the amount of property which has a tax situs in the state minus debts and administration expenditures.

3 The Illinois Supreme Court has held that the full amount of the federal Estate Tax is deductible even though the decedent had been possessed of property in sister states: People v. McCormick, 327 Ill. 547, 158 N. E. 861 (1927).

4 The Act provides for such procedure: Ill. Rev. Stat. 1949, Vol. 2, Ch. 120, § 385.

5 61 C. J., Taxation, § 2604.

main administrative proceeding in Maryland, and once in the ancillary proceeding in Illinois. The court felt that it was under a duty to attempt to prevent this possibility.[6]

The Supreme Court did, however, foresee one difficulty which might arise if the pro-rata method was used indiscriminately and without regard to the facts and circumstances of each case. Thus, if the local debts and expenses were larger than the allowable pro-rata deductions, the result would be what the court termed "indirect taxation." In effect, the state would be receiving more than its share since the entire amount of the debts and expenses which were proper incidents of this jurisdiction would not be subtracted from the value of the property located within its boundaries.[7] As the record in this particular case did not indicate that indirect taxation would occur, it was decided that there was no necessity to design a solution for such a problem at this time.

WORKMEN'S COMPENSATION—EFFECT OF ACT ON OTHER STATUTORY OR COMMON LAW RIGHTS OF ACTION AND DEFENSES—WHETHER STATE RELINQUISHES RIGHT OF SUBROGATION BY OFFSETTING WORKMEN'S COMPENSATION PAYMENTS AGAINST STATE RETIREMENT SYSTEM BENEFITS—In the recent case of *Weaver* v. *Hodge*,[1] it appeared that after the death of her husband, a former employee of the State of Illinois who had been negligently killed in the course of his employment, the widow sought to collect her claim under the Workmen's Compensation Act[2] and also under the Illinois Retirement System Act.[3] Following determination of her claim under each of these respective statutes, she received payment in full of the workmen's compensation claim and payment of her entitlement under the retirement system, but payment of the latter was reduced by a set-off

[6] The extent to which this objective was attained depends upon the Maryland method of computation. Thus, if that state did not apply pro-rata apportionment, a degree of duplication in the deduction of the Federal Estate Tax would still occur. The possibility of duplicate deductions did not deter the court from allowing the subtraction of the entire federal tax in People v. McCormick, 327 Ill. 547, 158 N. E. 861 (1927). It is to be noted that the decedent in that case, unlike the one in the present, was a resident of Illinois and the main administration of the estate occurred here. Thus it is readily apparent that the entire tax expense had a direct point of incidence in this jurisdiction whereas the same is not true in situations involving non-resident decedents where only ancillary proceedings occur in this state. It would, therefore, appear reasonable to suggest that the instant decision will have no effect upon the established rule that the federal Estate Tax can be deducted in its entirety where a resident decedent's estate is involved. See 39 Ill. B. J. 518 at 519.

[7] For a situation of this type involving a resident decedent, see Connell v. Crosby, 210 Ill. 380, 71 N. E. 350 (1904).

[1] 406 Ill. 537, 94 N. E. (2d) 297 (1950).

[2] Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 138 et seq.

[3] Ibid., Vol. 2, Ch. 127, § 215 et seq.

of the amount paid under the workmen's compensation award.[4] Thereafter, the administrator of the deceased employee secured a judgment in an action against the tort-feasors responsible for the death and the proceeds of that judgment were paid to the Clerk of the court. Upon petition to distribute these proceeds, the State of Illinois sought leave to intervene and to enforce a lien to reimburse it for the unsatisfied remainder of the award it had been forced to pay under the Workmen's Compensation Act.[5] The lower court denied such request and the state appealed directly to the Supreme Court.[6] That court decided that a proper interpretation of the two statutes involved would necessarily lead to the result that the governmental employer had made an election to utilize the payments it had made under the Workmen's Compensation Act in order to reduce the obligation created by the Retirement System Act. To permit the state to then enforce a lien upon the wrongful death judgment would, in effect, provide it with duplicate reimbursement. While the case dealt only with an issue involving a public employer, it poses a nice question as to whether or not the same result would follow if a private employer, operating a pension or benefit fund, should become involved in a similar situation.[7]

[4] Ibid., Vol. 2, Ch. 127, § 225, directs that any amounts provided for the benefit of a dependent of a system member, whether under the provisions of the state Workmen's Compensation Act or the state Occupational Disease Act, shall be applied as an off-set against the amount due for any accidental death benefit, the off-set to be made in such manner as the retirement board may direct.

[5] Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166, provides for a lien in favor of an employer who has paid a workmen's compensation award.

[6] Ibid., Vol. 2, Ch. 110, § 199, authorizes a direct appeal where the state is a party.

[7] See Campbell, "Subrogation Under Workmen's Compensation—Too Much or Too Little," 18 CHICAGO-KENT LAW REVIEW 225-47 (1940).