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Attorney's Fees -- Should They Be Taxed As Costs?

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COMMENTS

ATTORNEY'S FEES—SHOULD THEY BE TAXED AS COSTS?

A recent Florida statute enables a petition for the dissolution of a solvent corporation where two equal opposing ownership interests are dead-locked.[1] The statute has not however, provided for the payment of attorney's fees[2] and the problem of whether or not the corporation assets should be charged with the successful petitioner's attorney's fees is bound to arise.

Mindful of the dicta of the United States Supreme Court when speaking in regard to allowance by a court of equity of counsel fees not included in the ordinary taxable costs recognized by statute, that ". . . such allowances are appropriate only in exceptional cases and for dominating reasons of justice . . . ,"[3] we intend to clearly show that the situation necessary for the invocation of this statute presents just such an exceptional case; further, that it is closely analogous to several classes of cases wherein equity has invoked its inherent power to allow attorney's fees.

Allowance of Attorney's Fees In General

The present policy of our judicial system against awarding attorney's fees to the successful litigant has been under heavy criticism by legal writers for the past quarter-century.[4] There has, however, been very little in the way of legislative and judicial response to this criticism.

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1. Fla. Stat. § 608.28 (1953):

> When the number of directors of any corporation is even and they are equally divided respecting the management of the corporation and the total stock voting power is equally divided into two independent ownerships or interests with one part favoring the course advocated by one half of the directors and one part favoring the course of the other half, or the holders of the two halves of stock voting power are unable to agree on the election of a board of directors, consisting of an uneven number, the circuit court, sitting in chancery, may entertain a petition for involuntary dissolution of the corporation . . . .

2. The only provision for the payment of fees and costs in Fla. Stat. § 608.28 (1953) is "The fees and costs provided by § 608.27 shall be paid by the receiver or trustee from corporate funds." The provision in § 608.27 as to fees and costs provides, "Upon the . . . payment by the corporation of the cost of publication and the fee required by § 608.05(4) the corporation shall be dissolved. § 608.05(4) provides only for the payment of fees to the Secretary of State.

3. Spraque v. Ticonic Nat. Bank, 307 U.S. 777, 780 (1939).

4. See Goodhart, *Costs*, 38 Yale L. J. 849 (1929); McCormick, *Counsel Fees and Other Expenses of Litigation As An Element of Damages*, 15 Minn. L. Rev. 619 (1931); Comment, 44 Ill. L. Rev. 507 (1950).
Costs. 44 Ill. L. Rev. 507 (1950).

The dicta of some of the cases[5] in which this issue has arisen, and some of the writers on this topic,[6] appear to hold the view that our jurisprudence has *never* countenanced the inclusion of attorney's fees in taxable costs. The history of the matter discloses quite a contrary notion.

It is quite true that during the earliest years of the growth of our legal system lawyers were held in great disrepute by courts and laymen alike.[7] In some of the colonies, lawyers were even forbidden to receive fees from their own clients.[8] It is highly improbable that in the existence of such an atmosphere the issue of including attorney's fees in costs would *even* arise.

However, the earliest statutes concerning court procedure clearly evince an intent to charge the unsuccessful litigant with the counsel fees necessary for his successful adversary's prosecution (or defense) of the litigation.[9] In point of fact, the establishment and growth of the present policy against awarding attorney's fees appears to be quite accidental in nature; perhaps, indeed, a mistake in its very inception.

These statutes provided for an award to the successful litigant of certain specified amounts for the various procedural steps necessary in the prosecution of the action.[10] The amounts stipulated, were, at the time of their enactment, very close in amount to the actual fees which attorneys were receiving.

The contention that the early policy was directly opposed to the present one is further bulwarked by the fact that most of our early jurisprudence was imported, or engrafted, from the English system. English law has from very early times awarded attorney's fees as costs taxable against the losing party.[11]

In any event, the inflexible method utilized by the statutes (a fixed sum per stipulated service), combined with the rapid early economic growth of our nation, quickly relegated what were formerly awards of reasonable fees to the role of mere formalities. It does not appear why the respective legislatures did not enact further statutes to perpetuate the system. The cases, however, clearly show that the judiciary has long considered the area one proper only for legislative activity,[12] and have held that *in*

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5. See Manko v. Buffalo, 65 N.Y.S.2d 128, 143 (1946).
6. See Satterthwaite, *Increasing Costs to be Paid by Losing Party*, 46 N.J.L.J. 133 (1923).
7. WARREN, A HISTORY OF THE AMERICAN BAR 4 (1913).
8. *Ibid.*
9. N.Y. REV. STAT. c. 10, § 4 (1829). VIRGINIA LAWS c. 6, § 14 (1745).
10. *Ibid.*
11. Sandback v. Thomas, 1 Stark. 306, 171 Eng. Rep. 481 (1816). See 2 DANIELL, CHANCERY PLEADING AND PRACTICE § 1376-1440 (6 Am. ed. 1894).
12. Marks v. Leo Teist, Inc., 8 F.2d 460 (2d Cir. 1925); Ritter v. Ritter, 381 Ill. 549, 46 N.E.2d 41 (1943); Patterson v. Northern Trust Co., 286 Ill. 564, 122 N.E. 55 (1919).

cases at law, the taxable "costs" provided for by statute mark the limits for recovery of the expenses of litigation.[13]

Thus, today, except in various limited areas of exception, the rule that attorney's fees are not recoverable is well established.

Various reasons for and against the present policy have been espoused,[14] but the basic problem resolves into the conflict of two diametrically opposed philosophies of the nature of costs. There is, on the one hand, the view that costs are a penalty imposed upon the unsuccessful ("unfortunate") litigant,[15] and, on the other, that costs are an expense incidental to the litigation presumably necessitated by the legal wrong of the failing litigant, and therefore rightly chargeable to him.[16]

Those who hold to the former view reason that the imposition of heavier costs by the inclusion of attorney's fees would deter the prosecution of meritorious claims due to the prospect of having to pay an onerous amount if for some unforeseen reason the suit is unsuccessful.[17] Those who advocate a change in the present policy reason that the prospect of having to pay the "actual costs" of litigation will deter the initiation of spurious actions and the interposition of non-meritorious defenses.[18]

At present, no trend is readily discernible concerning the future of the rule. Without delving too deeply into the controversy, it suffices at this point to conclude that a strict adherence to the rule, indiscriminate of the equities of particular cases, or classes thereof, to which the arguments and reasoning above are peculiarly inapplicable, works grave injustices.

Evidencing an awareness of this, the various legislatures have built up several areas of exception to the general rule. Under the police power, statutes in most states now provide for the allowance of attorney's fees to successful plaintiffs in proceedings against certain classes of defendants such as railroads and insurance companies.[19] A much more important area of exception is found in legislation authorizing such allowances in actions which, by their nature, present situations where an application of the general policy against the award of attorney's fees would clearly work inequities. Florida, for example, has by statute provided for the allowance of attorney's fees in actions to partition realty,[20] partition

13. Macri v. City of Bremerton, 111 P.2d 612 (Wash. 1941); Parker v. Mecklenburg Realty and Ins. Co., 195 N.C. 644, 143 S.E. 254 (1928); Patterson v. Northern Trust Co., 286 Ill. 564, 122 N.E. 55 (1919).

14. See Note, 15 U. OF CIN. L. REV. 313, 314, for a rather thorough discussion of the various arguments which have been expounded.

15. See note 6 *supra*.

16. See note 4 *supra*.

17. See note 6 *supra*.

18. See note 4 *supra*.

19. *E.g.*, FLA. STAT. § 356.04 (1953) (railroads); FLA. STAT. § 625.08 (1953) (insurance companies). Generally, as to this type of legislation concerning insurance companies, see VANCE, INSURANCE 761 (1930).

20. FLA. STAT. § 66.08 (1953).

personalty,[21] enforce decrees of alimony[22] and in garnishment proceedings.[23] Similar provisions can be found in most other states.[24]

The general rule that attorney's fees will not be taxed as costs in the absence of statute, contract, or agreement is subject, except in New Jersey,[25] to only one significant area of exception. This area consists of proceedings in which a common fund has been increased or protected by the services of the attorney. The chancery courts have held that it is within their inherent powers to make an award of attorney's fees out of the fund in such cases.[26]

Specific Problem

The probem of the power to dissolve a corporation in the event of deadlock has been met by legislation in every state[27] except Iowa.[28] In all except two of those states,[29] there apparently is no statutory provision for awarding attorney's fees to the successful petitioner.

Very few cases have been presented for judicial review in which this problem has been scrutinized. The only litigation that appears to be on point has arisen in New York[30] and California.[31]

The leading New York case, In re *Stoll-Meyer Wood Crafter's Inc.*,[32] in a proceeding brought under the prototype of the Florida statute,[33] held that the court had no power to make allowance for attorney's fees. It reasoned that this type of application for dissolution was a "special

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21. Fla. Stat. § 66.09 (1953).
22. Fla. Stat. § 65.16 (1953).
23. Fla. Stat. § 77.28 (1953).
24. *E.g.*, New York Civ. Prac. Act § 1512 provides for additional allowances to plaintiff in actions to foreclose a mortgage, partition real property, adjudicate a will or other instrument in writing, and writs of attachment.
25. New Jersey has, by statute [N.J. Stat. Ann. Tit. 2, c. 29, § 131 (1941)] invested its courts of equity with discretionary power to award counsel fees as costs in all matters before them. See Comment, 44 Ill. L. Rev. 507, 517 to the effect that the New Jersey Chancery Courts have not applied this as a general rule.
26. 105 U.S. 527 (1881); 132 Fla. 602, 182 So. 216 (1938) (suit for partnership accounting); 94 Fla. 817, 114 So. 548 (1927) (suit by a representative of the beneficiaries for distribution of a trust); 113 Ala. 531, 21 So. 315 (1896) (stockholders derivative action).
27. Hornstein, *Voluntary Dissolution—A New Development in Intra Corporate Abuse*, 51 Yale L.J. 64 (1941); *e.g.*, Fla. Stat. § 608.28 (1953); N.Y. Gen. Corp. Law §§ 101, 103 (1943); Wis. Stat. § 180.771 (1951).
28. Iowa Code § 8402 (1939) authorizes the court to dissolve a corporation "on good cause shown." This may be construed to cover the situation under discussion here.
29. New Jersey, under its general discretionary power; see note 25 *supra*. There is a possibility that the Louisiana Statutes may be so construed. See in this connection La. Rev. Stat. Ann. § 12:752.3, and 12:55.4 (1948).
30. Wis. Stat. § 180.773 (3) (1951); Application of Cantelino, 278 App. Div. 800, 104 N.Y.S.2d 282 (1st Dep't. 1951); *In re* Stoll-Meyer Woodcrafters, Inc., 84 N.Y.S.2d 757 (1948); *In re* Newman (Nu Form Dress Corp.) (Oct. 23, 1945) (No opinion for publication); Matter of Tarrytown W.P.M. Ry., 133 App. Div. 297, 117 N.Y. Supp. 695 (2d Dep't. 1909).
31. *In re* St. Clair Estate, 66 Cal. App.2d 964, 153 P.2d 453 (1944).
32. 84 N.Y.S.2d 757 (1948).
33. N.Y. Gen. Corp. Law §§ 101, 103.

proceeding" within the contemplation of the Civil Practice Act and since there was no specific provision contained therein authorizing the allowance, the court was without power to do so.[34] As authority for their holding, the court cited *Matter of Tarrytown*,[35] which case apparently stands for the proposition that where an action is statutory, the court cannot utilize its general equity powers to afford relief not authorized within the confines of said statute.[36] The court in the aforementioned California case[37] did not allow the taxing of attorney's fees but did say that such awards rest within the sound discretion of the trial court.

As mentioned previously courts of equity have recognized that when a party institutes litigation which creates, increases, or protects a fund for the benefit of a class of which he is a member, the fund or property should be charged with necessary expenses incurred in the litigation; which includes the reasonable compensation of the plaintiff's lawyer.[38] The successful litigant's counsel is thus not being paid by the unsuccessful party, but rather by the class of which the petitioner is a member.[39] This doctrine was first enunciated in creditors' suits.[40] It was felt that if the one creditor had to pay he might suffer a pecuniary loss while other creditors sat back and benefited. On the contrary he should be permitted and invited to play the part of champion of those in common interest with him.[41] This principle has been further expanded to apply to stockholders' actions; almost one half of the states have at least one reported case in a suit by a stockholder, and all uniformly hold counsel fees should be allowed.[42]

The words of Justice Terrell of the Florida Supreme Court can best epitomize the position of the court in awarding counsel fees in a class action: "To hold that those likewise affected . . . cannot be required to bear their portion of the burden is to admit that equity practice is effete and has not kept pace with the factual situations that precipitate litigation."[43]

Of course, these decisions are predicated upon the fact that a benefit has accrued to the fund, and thus, indirectly, to those who should bear the burden of the expense. This predicate of necessity exists in the type of action under study here. For, although the careless language

34. *In re* Stoll-Meyer Woodcrafters, Inc., at 758.
35. *In re* Tarrytown W.P.M.Ry., 133 App. Div. 297, 117 N.Y.Supp. 695 (2d Dep't 1909).
36. *Id.* at 696, where the court says:
The power which the court possesses in such proceedings is purely statutory, and does not depend upon its general equity powers.
37. See note 31 *supra*.
38. Hornstein, *Counsel Fees in Stockholders Derivative Suits*, 39 COL. L. REV. 784.
39. Burroughs v. Toxaway Co., 185 Fed. 435, 441 (4th Cir. 1911); Lamar v. Hall & Wimberly, 129 Fed. 79, 82 (5th Cir. 1904).
40. See note 38 *supra*.
41. Trustees v. Greenough, 105 U.S. 527 (1881).
42. See note 38 *supra*.
43. Tenney v. Miami Beach, 11 So.2d 188, 190 (Fla. 1942).

of some of the statutes would seem to make a dissolution mandatory in the event of deadlock, the courts have required evidence that the dissolution would redound to the benefit of the stockholders.[44] Thus, a decree of dissolution is beneficial by virtue of its *protection* of the fund.

The court may proceed on other theories to support an allowance of counsel fees to successful petitioners under the dissolution statute. Application of the rule set forth in many Florida cases[45] which allows attorney's fees when litigation involves a partnership accounting is a distinct possibility. This, however, would necessitate a piercing of the corporate veil. A corporation consisting of two stockholders is susceptible to this line of reasoning, especially if the dictum in a New York case[46] were to be followed: "In point of fact that most close corporations are little more than . . . chartered partnerships and should be treated as such." It is the authors' opinion, however, that the Florida court would not subscribe to such reasoning.[47]

A second theory submitted as a possible rationale is that of a partition suit. Inasmuch as the Florida statutes provide for an award of attorney's fees in partition suits of real[48] and personal property,[49] might not the court adopt this as a governing and applicable rule?[50]

Conclusion

We feel that the denial of attorney's fees to successful petitioners under Florida Statutes Section 608.28 would definitely be inequitable. It would allow one of the two factions of a deadlocked corporation to benefit materially at the expense of the other. Further, that such an allowance does not require an unprecedented break in the current policy of the law regarding attorney fees, but is merely an extension of the use of the inherent power of equity to allow such fees in situations the equities of which necessitate it.

Of course, the most feasible way to handle this problem would be for the legislature to enact an amendment to the present statute correcting this situation.

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44. E.g. Matter of Cantelmo, 275 App. Div. 231, 88 N.Y.S.2d 604 (1st Dep't (1949).
45. E.g. Wade v. Clower, 94 Fla. 817, 114 So. 548 (1927).
46. Ripen v. U.S. Woven Label Co., 205 N.Y. 442, 447, 98 N.E. 855, 856 (1912).
47. Freedman v. Fox, 67 So.2d 692 (Fla. 1953) (This was a suit for dissolution prior to the enactment of Fla. Stat. § 608.28. The court would not dissolve the corporation upon the submitted contention that it was in fact a partnership).
48. Fla. Stat. § 66.08 (1953).
49. Fla. Stat. § 66.09 (1953).
50. The theory of allowing attorney's fees in partition suits is that all parties receive a common benefit from the labors of the attorneys effectuating the partition, and they should not be permitted to escape the common burden and throw on the plaintiff the whole of it. Arthaud v. McFerrin, 156 S.W.2d 641 (Mo. 1941); *See* Brickell v. Di Pietro, 152 Fla. 429, 12 So.2d 782 (1943).