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Insurance -- Subrogation -- Requirement to Defend -- Attorney's Fees in Declaratory Judgments

The instant case refutes the distinction between the *Bingham* and *Cobb* cases, stating that the former had correctly stated the law when it held that expenses must be proximately related to the *conservation* of property. It holds that if a lien upon any of petitioner's income-producing property would result from a tax assessment, attorney's fees paid out in defending such a claim are proximately related to the *conservation* of income-producing property and, consequently, are deductible under § 23(a)(2) of the Internal Revenue Code.

To logically follow this reasoning would be to conclude that the expense of defending any type of litigation, for example, a tort action, would be deductible because a judgment rendered against taxpayer would become a lien on his income-producing property.[10] However, the law is still clear that where the transaction which gave rise to the tax assessment was not proximately related to the production or collection of income, any expense arising from such litigation would not be deductible.[11] The *Lykes* case does not change this rule. It merely broadens the scope of expenses considered proximately related to include attorney's fees paid for defending a tax assessment where the assessment might result in a lien on any of petitioner's income-producing property, even though such property was not the subject of the transaction which gave rise to the original tax assessment.

INSURANCE—SUBROGATION—REQUIREMENT TO DEFEND—ATTORNEY'S FEES IN DECLARATORY JUDGMENTS

Plaintiff, insurance company, brought suit for a declaratory judgment against its insured under a public liability policy to determine whether it was required to defend an action against the insured by a third party. Judgment was rendered for the insured and attorney's fees were adjudged against insurer under a Florida statute [1] which provides that attorney's fees be assessed against insurer where insured successfully prosecutes suit against the company. On appeal, *held*, that attorney's fees were properly awarded insured since the statute is applicable to situations where suit is brought by insurer as well as insured, *Phoenix Indemnity Co. v. Anderson's Groves, Inc.*, 176 F.2d 246 (5th Cir. 1949).

Where attorney's fees are permitted by statute, cases arising thereunder

10. *See* John W. Willmot, 2 T.C. 321, 326 (1943).
11. Kohnstamm v. Pedrick, 66 F. Supp. 410 (S.D.N.Y. 1946); Joseph v. Commissioner, 8 T.C. 583 (1947).

1. FLA. STAT. § 625.08 (1941). "Upon the rendition of a judgment or decree by any of the courts of this state against any insurer in favor of the beneficiary under any policy or contract of insurance executed by such insurer, there shall be adjudged or decreed against such insurer and in favor of the beneficiary named in said policy or contract of insurance, a reasonable sum as fees or compensation for his attorneys or solicitors prosecuting the suit in which recovery is had."

must be strictly construed within its provisions inasmuch as the imposition of such fees are in the nature of a penalty.[2] The delinquencies and dilatory tactics practiced by insurance companies in their payment of claims have resulted in the application of such a penalty to compel the companies to pay their claims promptly.[3] The question as to whether attorney's fees should be granted an insured where the *insurer* brings an action for a declaratory judgment to determine its liability, and is unsuccessful, has not heretofore been decided in Florida. However, the award of attorneys fees under the statute where the *insured* brought an action for a declaratory judgment to determine the liability of the insurance company [4] was held proper.

Since statutes awarding attorney's fees are penal in nature and are strictly construed, it might appear that an *insurer* who has not refused to pay claims, but is merely seeking a declaratory judgment in a situation involving legal uncertainty as to whether he is required to defend the *insured,* would not be within the provisions of such a statute. To impose a penalty against the insurer in such a case would discourage the beneficial use of the declaratory judgment procedure.[5] However, resort to the courts by an insurer on the pretext of uncertainty of obligation may be used as a dilatory tactic which the statute was designed to overcome. Since attorney's fees are not adjudged against the *insurer* unless he is unsuccessful, such a penalty would not be imposed against an *insurer* whose defense under the policy is sound. In the instant case if the insurer had not brought the declaratory judgment action, but had waited for the insured to defend an action by the injured party, attorney's fees would have been assessed against insurer when the *insured* brought suit against the company to compel it to comply with the terms of the policy.[6] The fact that the insurer brought the insured into court prior to the time when the insured might have brought suit against the company, should not work to the disadvantage of insured by requiring him to bear the cost of a suit brought by the company.

An insured should be able to rely on the insurance company defending him. To subject him to the possibility of two suits—by the insurer to determine his non-liability and by the injured party for negligence—might work an injustice upon him.[7] But, however effective the result of the majority of the

2. Union Indemnity Co. v. Vetter, 40 F.2d 606 (5th Cir. 1930); United States Fire Insurance Co. v. Dickerson, 82 Fla. 442, 90 So. 613 (1921).

3. Pendas v. Equitable Life Assur. Soc'y of United States, 129 Fla. 253, 176 So. 104 (1937); Orlando Candy Co. v. New Hampshire Fire Insurance Co. of Manchester, 51 F.2d 392 (S.D. Fla. 1931).

4. Continental Casualty Co. v. Giller Concrete Co., 116 F.2d 431 (5th Cir. 1940), *cert. denied,* 313 U.S. 567 (1940). In a suit for a declaratory judgment, the court in allowing attorney's fees stated that under the statute a "recovery is had" and insurance company is liable for attorney's fees whenever it unsuccessfullly *defends* an action against it on a policy or contract of insurance. The statute is not limited to suits for the recovery of money, but is applicable to suits for declaratory judgments.

5. Hutcheson dissenting in the principal case.

6. Brief for Appellees, p. 38.

7. BORCHARD, DECLARATORY JUDGMENTS 653 (2d ed. 1941).

court in the principal case may be in discouraging insurance companies from unnecessarily bringing the insured into court by awarding attorney's fees to the insured, the statute is clear and unambiguous in stating that its provisions apply to situations where the *insured* prosecutes. When a statute, as here, is clear upon its face, and when standing alone is fairly susceptible of but one construction, that construction should be accepted.[8] Strict interpretation of the provisions warrant the conclusion that the court went beyond the express provisions of the statute to reach a desired result, even though to give the statute this construction would in effect result in defeating the intention of the legislators.

LABOR LAW—RIGHTS OF EMPLOYEES TO STRIKE AGAINST A MUNICIPALITY

Plaintiff, Department of Water of the City of Los Angeles, sought to enjoin defendant labor unions, whose members were employed by independent contractors under contract with the city, from striking, picketing and engaging in other concerted action for the purpose of coercing the Department to comply with certain demands of defendants regarding working conditions. A preliminary injunction issued granting the relief sought and denying the defendants' contention that the strike was not against the government, as the city was acting in a proprietary rather than a governmental capacity. *Held,* on appeal, that since the city charter did not require that the Department grant the unions' demands, the strike was illegal in its purpose, regardless of the peaceful means employed, and the order of the injunction was affirmed. *Los Angeles v. Los Angeles Building & Construction Trades Council,* 210 P.2d 305 (D.C. App. Cal. 1949).

Courts have long refused to recognize that city officials have a duty to enter into agreements with labor unions governing the terms of employment.[1] Today, most courts go even further in holding that a municipality

8. Caminetti v. United States, 242 U.S. 470 (1917); Hamilton v. Rathbone, 175 U.S. 414 (1899).

1. The rights of employees of municipalities to belong to labor unions has not been uniformly allowed. Perez v. Board of Police Comm'rs, 78 Cal. App.2d 638, 178 P.2d 537 (D.C. App. Cal. 1946) (the court upheld an order of the Board forbidding police officers to become, or to continue to be, members of any labor union); *accord,* C.I.O. v. Dallas, 198 S.W. 2d 143 (Tex. Civ. App. 1946), McNutt v. Lawther, 223 S.W. 503 (Tex. Civ. App. 1920). *But see* Mugford v. Baltimore, 185 Md. 266, 44 A.2d 745 (1945); Local Union No. 876 v. Mich. Labor Mediation Board, 294 Mich. 629, 293 N.W. 809 (1940). City ordinances prescribing union labor on public contracts have usually been held invalid. Adams v. Brenan, 177 Ill. 194, 52 N.E. 314 (1898). *Contra:* Amalithone Realty Co. v. New York; 162 Misc. 715, 295 N.Y. Supp. 423 (Sup. Ct. 1937).