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Developments in Chancery Proceedings - 1950-1960

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EQUITY

To no one will we sell, to no one will we delay, to no one will we deny right or justice.—THE MAGNA CHARTA.

DEVELOPMENTS IN CHANCERY PROCEEDINGS—1950–1960

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THE LAW MOVES ponderously in its growth and evolution. One decade is a very small period of legal history. But, the past span of ten short years have seen changes in chancery proceedings which deserve notice and comment as follows:

Prior to January 1, 1956, where a master in chancery died before completion of testimony, there was no authority for subsequent use of the record of the proceedings previously conducted by him. Even if the term of office of the master expired before completion of the testimony, his successor could not complete the case on the basis of the testimony previously taken and such additional evidence as the parties might offer.[1] The theory was that the second master did not have the benefit and assistance of actually seeing and hearing all of the witnesses.[2] Oddly enough, all legal formalities were deemed satisfied if the case was heard partly before the master and partly in open court.[3] It seems clear that the safest procedure to be followed in event of the death or disability of the master pending completion of the reference was a re-reference to a new master for hearing *de novo*.[4] These principles were affirmed and reannounced by the Supreme Court in recent cases. The court held "that the parties were entitled to a complete hearing by a chancellor or master who could hear and then pass upon the weight

[1] Coel v. Glos, 232 Ill. 142, 83 N.E. 529 (1908).

[2] Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N.E. 933 (1904).

[3] Kenealy v. Glos, 241 Ill. 15, 89 N.E. 289 (1909).

[4] People v. Lewe, 383 Ill. 549, 50 N.E.2d 577 (1943).

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and credibility of conflicting testimony."[5] "The full hearing required by due process of law contemplates that all of the evidence should be submitted before a single judge, master or other tribunal which may see the witnesses, weigh their testimony and determine their credibility."[6]

THE STATUTORY SOLUTION TO THE PRIOR TESTIMONY PROBLEM

The Legislature has attempted to ameliorate this situation by action effective January 1, 1956. Section 5a of the statute governing "Masters in Chancery" provides that if the master's term ends for any reason before the reference has been finished, the court may appoint him as a special master to complete the reference.[7] Accompanying section 5b contains additional provisions.[8] Testimony taken before the master and certified by him may be filed as evidence. The completed testimony of any witness taken before a master who has ceased to act for any reason before certification may be proved and then ordered filed as evidence. The court is then empowered in its discretion to proceed in any of three alternative methods:

1. The court may hear the matter on the filed evidence together with such additional evidence as may be offered.

2. The court may refer the case to another master to take and certify additional evidence. The court would then decide the cause on the evidence previously filed together with the evidence subsequently certified and filed by the new master.

3. The court may refer the case to another master to take and certify the additional evidence and then to report his findings of fact and conclusions of law upon the evidence previously filed and the additional evidence taken before him.

Up to this time, these remedial statutes have not been considered by the courts. The Appellate Court has merely mentioned the "statutory benefit" resulting from having testimony previously taken considered by another master.[9] Section 5a would seem to create no special legal difficulty. But section 5b may present problems if considered in the light of previous pronouncements by the Supreme Court that one tri-

[5] People v. Lupe, 405 Ill. 66, 71, 89 N.E.2d 824, 826 (1950).

[6] Mills v. Ehler, 407 Ill. 602, 611, 95 N.E.2d 848, 853 (1951).

[7] ILL. REV. STAT. ch. 90, § 5a (1959).

[8] ILL. REV. STAT. ch. 90, § 5b (1959).

[9] Reiter v. Illinois Nat'l Casualty Co., 12 Ill. App.2d 273, 139 N.E.2d 614 (1956).

bunal must hear all of the witnesses to satisfy requirements of due process. This issue is a problem created during the past ten years which may be determined during the next ten.

CHANCERY PROCEEDINGS IN COOK COUNTY

A number of other questions regarding procedure before masters in chancery deserve comment. The RULES OF THE SUPREME COURT OF ILLINOIS provide that "a reference to a master shall be the exception and not the rule."[10] This language is identical to that used in the FEDERAL RULES OF CIVIL PROCEDURE.[11] However, despite this rule, growing congestion of court calendars has increased the number of references to masters in Cook County. In connection with proceedings before masters, the new rules of the Circuit and Superior Courts of Cook County, effective March 1, 1959, provide as to master's fees that the master will not "request or accept" a stipulation as to amount of his fees from any party or attorney before objections to his report have been disposed of. Also, that before his fees have been taxed he will not request or receive deposit or payment for his services except upon court approval or for fees already accrued for taking testimony at the statutory rate.[12] This represents a liberalization of former rules which prohibited deposit of fees with the master before completion of the reference and taxation of the fees as costs.[13] It should also be noted that the court may in its discretion, at any time after the reference, order the parties to deposit funds with the clerk of the court to secure payment of the costs of the reference.[14] This procedure is distinguished from a deposit with the master himself as contemplated in the rules of court. The most recent decision in this area has shown a tendency to attempt elimination of the deposit of costs as a condition precedent to the right of a litigant to present his case. Thus, in a situation where the court required plaintiff to post a cost bond with corporate surety as a condition to proceeding before the master, and dismissed the suit on failure of plaintiff to comply, the Appellate Court held that the court should have heard the issues without the need of a reference.[15] The opinion cited the right of a liti-

[10] ILL. SUP. CT. R. 14-1.

[11] FED. R. CIV. P. 53 (b).

[12] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, R. 9.3.

[13] UNIFORM RULES FOR CIR. CT., & SUPER. CT., COOK COUNTY, Comment on R. 9.3 (a).

[14] ILL. REV. STAT. ch. 53 § 38 (1959).

[15] Strongs v. Chicago Title & Trust Co., 14 Ill. App.2d 92, 142 N.E.2d 797 (1957).

gant to an extensive trial in a suit at law upon payment only of a nominal fee and held that failure to post a bond should not deprive any person of a hearing.[16]

Ruling by the master on objections made before him still remains a doubtful subject despite revision of applicable rules. Present rules for the Circuit and Superior Courts of Cook County, effective March 1, 1959, provide that "the master may rule upon all objections concerning the admissibility of evidence or the propriety of questions put by the attorneys at the time the objections are made."[17] This would appear to be a permissive and not a mandatory statement of the function of the master. But, the official comment presented with the rules states: "This section provides that the master shall rule upon all questions of the admissibility of evidence when presented."[18] The comment would appear to interpret the rule as mandatory, requiring the master to overrule or to sustain each objection and to proceed accordingly. The Supreme Court has not precisely approved this method. The court has held that the master is usually governed by the ordinary rules of evidence as a court would be, and that "he should hear and exclude evidence as if the hearing were before the court."[19] But, in the very next sentence, the court stated: "It is equally true, however, that unless the evidence is clearly inadmissible, the better practice is for the master to receive it subject to objections, so that it may be considered without re-reference of the cause in the event the court should deem it admissible."[20] Perhaps the court has in mind that the best practice is a combination of both points of view. That is, in all cases, the master should state a definite ruling on the evidence for the record; but he should make the record on the reference complete by actually receiving the evidence either subject to the objection or with the statement that it should be stricken from the record. This would eliminate the need for re-reference in the event that the trial court or a reviewing court disagrees with the master's rulings.

The newly adopted rules of the Circuit and Superior Courts of Cook County contain other provisions which should facilitate proceedings before the master. Where the master has excluded evidence,

16 *Ibid.*

17 UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, R. 9.4 (a).

18 UNIFORM RULES FOR CIR. CT., COOK COUNTY, Comment on R. 9.4 (a).

19 Peck v. Peck, 16 Ill.2d 268, 278, 157 N.E.2d 249, 256 (1959).

20 *Ibid.*

review may be had by the court after closing of proofs but before the master files his report.[21] Where the master has received evidence over objection, this ruling may be reviewed by the court after the closing of proofs but not later than the hearing of exceptions to the report by the court.[22] The rules also provide for review by the court of the master's rulings on evidence at any time before closing of proofs, "upon motion made in good faith, and a showing that good cause for immediate review exists."[23] These new rules also provide that "the master shall rule upon a motion to dismiss made at the close of the plaintiff's case,"[24] The official comment accompanying the rules states: "This section is intended to dispel doubts concerning the master's power to rule on a motion to dismiss at the close of the plaintiff's case."[25]

The new rules of the Circuit and Superior Courts of Cook County also seek to change the procedure with reference to the filing of the master's report. The new rules now provide that the master shall first "prepare and serve upon all parties a draft of his proposed report including findings of fact and conclusions of law."[26] The parties may file their objections with the master within ten days after service of the draft of the proposed report.[27] There is no provision in the rules for filing of the master's draft report or of the objections thereto. Within thirty days thereafter, the master is to prepare a final report which is to be filed with the clerk.[28] Presumably, objections to this final report may be filed and heard as exceptions before the court.

The official comment on these sections of the rules states that the provisions are in accordance with federal practice.[29] However, it is submitted that the federal practice differs from that set forth in the new rules. Under the FEDERAL RULES OF CIVIL PROCEDURE, the master "may submit" a draft of his report "to counsel for all parties for the purpose of receiving their suggestions."[30] The master's report is to be

[21] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, R. 9.4 (b).

[22] UNIFORM RULES FOR CIR CT. & SUPER. CT., COOK COUNTY, R. 9.4 (c).

[23] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, R. 9.4 (d).

[24] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, R. 9.4 (e).

[25] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, Comment on R. 9.4 (e).

[26] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, R. 9.2 (a).

[27] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, R. 9.2 (b).

[28] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, R. 9.2 (c).

[29] UNIFORM RULES FOR CIR. CT. & SUPER. CT., COOK COUNTY, Comment on R. 9.2 (a).

[30] FED. R. CIV. P. 53 (e) (5).

filed with the clerk of the court.[31] The parties then file objections to the report with the clerk and the court hears the report on the objections thus filed.[32] The federal rules are thus more flexible in that the provision for submission of a draft or preliminary report is permissive. The Cook County rules seem to require the submission of a draft report in each and every case. The local rules also speak of "objections" to the draft report while federal rules use the word "suggestions."

Experience would seem to indicate that it is certainly not necessary in every case to place upon the master the burden of preparing a draft report and also a final report. In addition, a question arises as to whether it is wise to change the system traditionally used in Cook County of having objections passed upon in the first instance by the master with subsequent review by the court. Perhaps these questions also will be answered in the next decade.

DEVELOPMENTS IN THE LAW OF REDEMPTIONS

Sweeping changes in the Illinois statutes pertaining to redemptions were made in 1957. Generally speaking, the effect of the new provisions was to permit waiver of redemption rights in property held in a land trust;[33] to provide for limitation of redemption rights to three months from sale in event of waiver of deficiency in certain situations;[34] to provide in certain circumstances for acquisition of title by the mortgagee in return for extinguishment of the debt with resulting limitation of the period of redemption to three months;[35] to shorten the period of redemption by shifting the time of creditors' redemption to the last three months of the first year after sale instead of the first three months of the next year thereafter;[36] and to provide for subsequent redemptions after initial redemption by a judgment creditor.[37]

The bulk of these changes have not as yet been the subject of court decision. However, the Supreme Court has decided that the amendment which acts to shorten the period of redemption has retroactive effect and applies to all foreclosure sales which occurred after the effective date of the statute, May 24, 1957.[38] Thus, at present, in all foreclosure sales of real estate in Cook County held after May 24, 1957,

[31] FED. R. CIV. P. 53 (e) (1).

[32] FED. R. CIV. P. 53 (e) (2).

[33] ILL. REV. STAT. ch. 77, § 18 b (1959).

[34] ILL. REV. STAT. ch. 77, § 18 c (1959).

[35] ILL. REV. STAT. ch. 77, § 18 d (1959).

[36] ILL. REV. STAT. ch. 77, § 20 (1959).

[37] ILL. REV. STAT. ch. 77, § 24 (1959).

[38] Mt. Morris Sav. & Loan Ass'n v. Barber, 17 Ill.2d 523, 162 N.E.2d 347 (1959).

regardless of the date of execution of the trust deed or mortgage, the owner may redeem for the full year after sale but the time within which judgment creditors may redeem is only during the last three months of the year immediately following the sale. In other words, "the rights of judgment creditors and defendants to redeem will run concurrently during the last 3 months of the 12-month period."[39] Thus, in all foreclosure sales held in Illinois after May 23, 1957, where there is no redemption, the certificate holder is entitled to a master's deed at the expiration of the twelve month period after sale regardless of any recital to the contrary in the recorded certificate of sale. The Supreme Court reached the result of giving retroactive effect to the statutory amendment by reasoning that the amendment did not reduce the period of redemption for defendants or for creditors but "merely moved the 3-month period from 12 months after the sale to 9 months after the sale"[40] so that it was a time limitation and therefore procedural in character.

Other problems relating to redemption have been considered by the courts and deserve comment here. It has been held that a person who could prove that he had supplied the capital for organization of a corporation and who actually operated the corporation through nominees or agents was entitled, after dissolution of the corporation, to redeem corporate property from a tax sale.[41] This decision was reached on the theory that the person seeking to redeem was the equitable owner of the stock of the dissolved corporation.[42] In this same case, the dissolved corporation had been through bankruptcy proceedings but did not schedule the real estate among its assets. The court held that this fact would not void redemption from the tax foreclosure sale but that failure to schedule the property was a matter which affected only the rights of the creditors of the bankrupt or of the trustee in bankruptcy, neither of whom was before the court.[43]

The Appellate Court for the First District recently passed upon the question as to whether the filing of a notice of appeal from a decree approving a mortgage foreclosure sale and giving of bond so as to obtain supersedeas operated to extend an owner's right to redeem during the period of the appeal. The court held that the pendency of the appeal and the supersedeas order did not affect or stay the running of

[39] *Id.* at 526, 162 N.E.2d at 349.

[40] *Ibid.*

[41] People v. Hess, 7 Ill.2d 192, 130 N.E.2d 280 (1955).

[42] *Ibid.*

[43] *Ibid.*

the statutory period of redemption during the pendency of the appeal from the decree confirming the master's sale.[44] In reaching this result, the court rejected the argument of liberal construction for redemption statutes and instead reasoned closer to the analogy that pendency of an appeal does not postpone running of the statute of limitations.[45]

The last ten years have seen great increases in real estate values. Master's sales have been generally well attended and bidding has often been brisk. Therefore, it is not surprising that the question has arisen regarding application of a surplus arising after redemption sale held by a sheriff. Certain property was the subject of a mortgage foreclosure sale. Plaintiff was successful bidder but a deficiency remained. A judgment creditor redeemed and redemption sale was held. The plaintiff bid sufficient to pay the judgment and costs with a surplus held by the sheriff. Plaintiff garnisheed the sheriff to apply this surplus in payment of the deficiency. The owners of the equity of redemption sought recovery of the surplus. The Appellate Court affirmed a decree awarding the fund to plaintiff on the deficiency decree.[46]

OTHER NOTEWORTHY OPINIONS

Another recent decision to note is that involving the right to partition of a ninety-nine-year leasehold. The Appellate Court for the First District held that a ninety-nine-year leasehold was a proper subject for partition of the interests of the lessees.[47] The court compared partition of the leasehold to dissolution of a partnership and noted the increasing use of longterm leases in industrial, commercial and even residential enterprises.[48] This decision was affirmed by the Supreme Court.[49]

The statutory provision that "no special findings of fact or certificate of evidence are necessary in any case in equity to support the decree"[50] has been reaffirmed and strengthened by the Appellate

[44] Fairfield Sav. & Loan Ass'n v. Central Nat'l Bank, 19 Ill. App.2d 465, 154 N.E.2d 333 (1958).

[45] *Ibid.*

[46] Eliott v. Valpanet, 19 Ill. App.2d 346, 153 N.E.2d 588 (1958).

[47] Pierce v. Pierce, 351 Ill. App. 336, 115 N.E.2d 107 (1953).

[48] *Ibid.*

[49] Pierce v. Pierce, 4 Ill.2d 497, 123 N.E.2d 511 (1955).

[50] ILL. REV. STAT. ch. 110, § 64 (4) (1959).

Court.[51] In the decided case, the decree recited that the court had heard the testimony and other evidence "in open court, as per the transcript of proceedings which is to be filed herein in due course."[52] No transcript was filed. The Appellate Court affirmed the order upholding this decree. The court held that, regardless of the recital in the decree, the burden rested upon appellant to supply the missing evidence if it was necessary to support his attack on the decree. In other words, the statutory elimination of the need for a transcript of testimony to support the decree would be adhered to even though the decree itself contained a recital that the transcript was to be filed in the cause.

[51] Shemaitis v. Shemaitis, 26 Ill. App.2d 467, 168 N.E.2d 787 (1960).

[52] *Id.* at 470, 168 N.E.2d at 789.