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Taxation--Application for Refund

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Delaware statutes, no cause of action was alleged. (The bill alleged desertion, whereas the statutory ground was "wilful" desertion.)

The only apparent justification for the court's holding is that henceforth it shall require a greater degree of particularity—a closer adherence to the rules of pleading—in bills of complaint for divorce. So restricted, the court's pronouncement would not appear so startling. Indeed, the opinion states that due to the interest of the state in the protection and preservation of the marriage relationship, accurate pleading should be demanded before the marriage is dissolved. Undoubtedly, it is a wise policy which enjoins the courts with the duty of watching over divorce proceedings with the closest surveillance. A policy which interposes to prevent abuses of the delicate and reasonable power confided in the courts to dissolve the marriage contract is certainly desirable. But, aside from the statutory protection of the state's interest under W. VA. CODE c. 48, art. 2, § 24 (Michie, 1949) which provides for appointment of a commissioner to investigate and "defend the interests of the State," other interests are here involved. Holding, as the court does, that divorce decrees which do not have a sufficient averment of grounds to support them are forever open to attack, what of the security of land titles passed pursuant to divorce decrees? Or the poor abstractor struggling with the record of a divorce granted, to be certain (or never be certain?) that the title he certifies is secure? Or think for a minute of the fate of Mr. Williams and his second wife, *Williams v. North Carolina,* 317 U.S. 287 (1942), 325 U.S. 226 (1945), and of such a possibility under this decision.

W. O. S.

TAXATION—APPLICATION FOR REFUND.—Petition for writ of mandamus requiring *D* to issue a warrant on the State Treasurer to refund a tax payment as recommended by the Court of Claims and approved by the legislature which requested that the amount in controversy be paid as a moral obligation against the State under W. VA. CODE c. 11, art. 13, § 3 (Michie, 1949). *Held,* that inasmuch as the remedy under W. VA. CODE c. 11, art. 1, § 2a was not complete, writ awarded. *Raleigh County Bank v. Sims,* 73 S.E.2d 526 (W. Va. 1952).

The pertinent part of W. VA. CODE c. 11, art. 1, § 2a (Michie

Supp. 1951), reads as follows: "Any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this state, may, *within three years* from the date of such payment, *and not after,* file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required unlawfully; and if, on such petition, and the proofs filed in support thereof, the official collecting the same shall be of the opinion that the payment of tax collected, or any part thereof was improperly required, he shall refund the same to the taxpayer." (Italics supplied.)

The court says that this statute does no more than vest in the tax official the right to determine administratively the right of the taxpayer to receive a refund and to direct payment thereof. The court holds that it does not afford the taxpayer a complete remedy.

The above interpretation of the statute seems to give it little effect. If the taxpayer may go to another governmental body beyond the time prescribed by statute (here three years) to file for a refund, then it is reasonable to assume that he may avail himself of another remedy other than that prescribed by statute, within the period allowed, or if he does not, he may wait until the time has run and then apply to another governmental agency for relief.

In statutory construction the purpose is to ascertain the intent of the legislature. *State* ex rel. *McLaughlin v. Morris,* 128 W. Va. 456, 37 S.E.2d 85 (1946). By passing laws the legislature has some intention in mind. Here the apparent intention is not only to give the official discretionary power to pass on such claim, but to give the taxpayer an exclusive remedy in allowing him to file with the official or department, within three years, and not after.

In *State v. Penn Oak Oil & Gas, Inc.,* 128 W. Va. 212, 36 S.E.2d 595 (1945), the court, in construing W. VA. CODE c. 11, art. 14, § 19 (Michie, 1949), said that where a statute provides the taxpayer with a specific remedy against injustices, the remedy is exclusive. The only material difference between the statute being construed in the *Penn Oak* case and the one in the principal case is that the former has a proviso that "the tax commissioner shall cause refund to be made under authority of this section only when application for refund as herein provided is filed" within a specified time. Comparing the construction of this statute with the construction given

to the statute in the instant case, it would seem that the mere fact that the former contained a proviso, which is a wordier but no more definite specification of a period past which no application may be filed than is to be found in the statute at hand, is deemed by our court sufficient to allow a differentiation. Such a construction may be plausible, but by so construing the principal statute as not giving an exclusive remedy because there is no proviso seems to be against the apparent intent of the legislature.

By the prevailing view, statutes of limitations are statutes of repose, the object of which is to compel the exercise of a right within a reasonable time. They are designated to suppress stale claims from being asserted so that the parties may not be surprised when the evidence may have been lost, or facts may have become obscure, or witnesses can no longer be obtained. *Street v. Consumers Mining Corp.,* 185 Va. 561, 39 S.E.2d 271 (1946).

There is a difference between remedial statutes and substantive ones. The former bars only the remedy; the latter is a statute of creation, *i.e.,* a statute which itself creates a new liability which did not exist at common law and fixes a time within which the action may be commenced. A statute of creation is an integral part of the right. When such a statute is relied upon, the limitation of time is a condition precedent to the maintenance of the suit. *Town of Leesburg v. Loudon National Bank,* 141 Va. 244, 126 S.E. 196 (1925). The statute here under construction is one of creation; thus, the taxpayer should be barred relief as he has not complied with the requirements of the statute which is the essence of his claim.

Admitting that the Court of Claims may have the right to consider this case, it is inconsistent with a previous holding when it stated that it was without jurisdiction to extend the time fixed by statute to make application for refund of excess income tax collected under authority of W. Va. Acts 1939, c. 128; W. VA. CODE c. 11, art. 13b, § 54 (Michie Supp. 1939). *Long v. State Tax Comm'r,* 3 Ct. of Claims 25 (1945).

Courts in other jurisdictions have held that if a right is granted to an aggrieved taxpayer to recover taxes paid, and a remedy is prescribed, the right must be exercised in a manner prescribed by statute. *Thirst Quenchers of Ohio v. Glander,* Ohio B.T.A., 47 Ags. 175, 68 N.E.2d 671 (1946); *State* ex rel. *Straus v. Wisconsin Tax Comm'n,* 201 Wis. 470, 229 N.W. 546 (1930).

Statutes prescribing remedies should be construed liberally to

promote justice, but such statutes should not be so construed as to make them useless and contrary to the apparent intent of the legislature. Petitioner's overpayment was caused by his own failure to claim a statutory exemption which demonstrates that there was no injustice on the part of the state. A taxpayer is given an adequate remedy by this statute and if he does not avail himself of it he should be denied relief.

J. M. H.

WORKMEN'S COMPENSATION—SILICOSIS—APPLICATION FOR BENEFITS.—Under an application for compensation filed July 17, 1951, because of silicosis, it was established that claimant had been employed in West Virginia for ten years prior to the time of the filing of his application. It was further established that claimant had worked for at least two years continuously during this period; that the two years had been spent in contact with the hazard of silicon dioxide dust; and that although claimant had been *employed* by the United States Steel Company from August, 1949 to March 18, 1950, he had *worked* only fifty-five days during that period. After the State Compensation Commissioner awarded compensation, the employer appealed to the Workmen's Compensation Appeal Board, which reversed the commissioners order. Claimant appealed. *Held,* that the order of the commissioner should be reinstated inasmuch as the claim had been filed within two years of the last exposure to the hazard, although the claimant had not worked sixty days during the two-year period. It was further *held* that the word "continuous" and the phrase "continuous period" as used in the Compensation Act mean with "reasonable continuity". *Richardson v. State Compensation Comm'r,* 74 S.E.2d 258 (W. Va. 1953).

This case is of prime importance in that it decides two points of "first impression" in West Virginia. First, when must a claimant file an application for compensation on the ground that he is suffering from silicosis; and second, what constitutes an exposure for "a continuous period of sixty days"?

Three statutory provisions were construed in answering the questions stated. They appear in W. VA. CODE c. 23, art. 4 (Michie, 1949). The following are pertinent excerpts therefrom:

§ 1. ". . . the commissioner shall disburse the compensation