

CPLR 4213(c): Section Deemed Precatory

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Since neither case presented an "identity of issues," the question of the effect of *Cummings* on the *Glaser* rule would seem to remain unresolved.

ARTICLE 42 — TRIAL BY THE COURT

CPLR 4213(c): Section deemed precatory.

In *Allied Scrap & Salvage Corp. v. State*,¹⁰³ the defendant moved to vacate an award on the ground that the decision was not rendered within sixty days after the cause was finally submitted, as provided for in CPLR 4213(c). The court, however, noted that the provision of CPA § 442,¹⁰⁴ providing for a new trial if the decision were not rendered within sixty days, was deleted from CPLR 4213(c) "because under the old rule courts customarily denied the new trial on condition that the decision be rendered within an additional specified time."¹⁰⁵ This deletion, the court surmised, made CPLR 4213(c) precatory.

Two arguments are advanced for the proposition that 4213 *must* be precatory: (1) there is no method of enforcement; and (2) assuming a means of enforcement, a judge forced to render a decision will be prone to decide against the moving party. Both arguments may be answered.

With respect to enforcement, the duty of a judge to render an opinion is unquestionably a ministerial one. It would seem, therefore, that a writ of mandamus could issue against a judge who failed to render a decision within the sixty days provided for in 4213.¹⁰⁶ The court in *Allied* did not discount such a course of action. As to the second argument, a decision which smacks of abuse of discretion can always be appealed.

Thus, it would seem that there is still logical justification for an interpretation of CPLR 4213 which would find that provision more than a pious wish.

¹⁰³ 26 App. Div. 2d 880, 274 N.Y.S.2d 317 (3d Dep't 1966).

¹⁰⁴ Under CPA § 442, a court trying a case without a jury had to render its decision "within sixty days after the final adjournment of the term where the issue was tried." Upon failure of the court to do so, either party could move for a new trial and the court would be obliged to order a new trial absolutely or order a new trial conditionally upon a decision not being rendered within a specified time. In practice the section was merely precatory, since the motion for new trial was rarely granted and, instead, the time for the court's decision was generally extended. 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4213.11 (1966).

¹⁰⁵ *Allied Scrap & Salvage Corp. v. State*, 26 App. Div. 2d 880, 274 N.Y.S.2d 317, 319 (3d Dep't 1966).

¹⁰⁶ "[Mandamus] is a proper remedy to compel the performance of a specific act where the act is ministerial in its character. . . ." 2 BOUVIER, LAW DICTIONARY 2075 (9th ed. 1914). Seemingly, under CPLR 4213 the duty would not be subject to mandamus until the sixty days had passed.