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Declaratory Judgment -- Trustees' Request for Instructions

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would have required the federal court to grant relief on the substantive issue not determined in the state court.

Now let us do as Justice Frankfurter did and combine *res judicata* and the *Erie* doctrine. What is the result? By the use of *res judicata* the constitutionality of the state statute as between the parties is settled. It cannot be attacked in the federal court. By the use of the *Erie* doctrine the state policy of denying relief is to be followed if the state statute establishing such policy is constitutional. But the constitutionality question having been determined by the application of *res judicata* there is now no problem. The state policy enunciated by a "constitutional" statute is now applied in the federal court.

Hence, we see that the desired end of not allowing Bullington a recovery in a federal court when he was denied the same in a state court is attained only by utilizing *both* the doctrines of the *Erie* case and *res judicata.*

CLAUDE F. SEILA.

Declaratory Judgment—Trustees' Request for Instructions

The Elders of the First Presbyterian Church of Salisbury as the trustees under a will probated in 1849, devising a certain plot of land in Salisbury together with the sum of twenty thousand dollars ($20,000) in trust for the church, came into the Superior Court of Rowan County under the declaratory judgment act,[1] asking for a declaration that they had the power "to sell, mortgage, and/or lease" the property in view of changed conditions. The trust instrument specifically withheld the power of sale, and provided that if the trustees should fail or neglect to execute the trust, then the property should go to Davidson College. The trustees were to keep the property so improved that the rent would provide a revenue for the church. Plaintiffs alleged the property was on the edge of the business district in Salisbury and very much in demand by commercial interests, but that they were financially unable to develop and maintain it adequately. Trial court granted the relief requested. *Held:* Reversed and case dismissed. Declaratory judgment inappropriate: (1) plaintiff should have brought trustees' bill in equity for instructions, (2) apparently the court felt that the request for the power of sale would have invoked a forfeiture of the estate.[2]

It is surprising to find the court refusing a declaratory judgment on the first ground, for the declaratory action is an outgrowth and extension of the trustees' bill in equity for instructions.[3] Thus the court indicates

[1] N. C. GEN. STAT. (1943) §§1-253 *et seq.*

[2] Brandis *et al.* v. Trustees of Davidson College *et al.*, *227* N. C. *329*, 41 S. E. 2d 833 (1947).

[3] Little v. Thorne, 93 N. C. 69 (1885) (under the equity jurisdiction of the court, by a trustee's request for instructions, an executor or trustee may apply to

its unwillingness to entertain the declaratory action merely because an alternative remedy is available.[4] There has been a considerable amount of controversy among the various American jurisdictions as to whether or not the declaratory action should be entertained in such a situation.[5] The erroneous conception that it should not be[6] has arisen in part from confusion with the policy that a declaratory suit would not be permitted where a special statutory proceeding has been provided.[7] This misconception has been cleared up in North Carolina.[8]

The declaratory judgment was meant to be an alternative remedy,[9] to be used, in the court's discretion, either where no remedy existed,[10] or where adequate but less appropriate remedies already existed either at law or in equity.[11] The point of the action is to provide anticipatory relief without necessity of prior breach of duty.[12] Here the court de-

the court for advice in the management of the trust, but in such case the advice of the court is given only upon an existing state of facts which calls for some present action, and not in regard to future conduct upon a certain contingency); BORCHARD, DECLARATORY JUDGMENTS 144 (2d ed. 1941).

[4] *Contra:* Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930) (a specific remedy to enable legatees to obtain legacies without bond was viewed as not so exclusive as to deprive the legatee of the power to seek a declaration to like effect).

[5] Tuscaloosa County v. Shamblin, 233 Ala. 6, 169 So. 234 (1936) (declaratory judgment allowed); Lisbon Village District v. Lisbon, 85 N. H. 173, 155 Atl. 252 (1931) (declaratory judgment refused); Woollard v. Schaffer Stores Co., 272 N. Y. 304, 5 N. E. 2d 829 (1936) (declaratory judgment allowed); Loesch v. Manhattan Life Ins. Co. of N. Y., 128 Misc. 232, 218 N. Y. Supp. 412 (1926) (declaratory judgment refused); People's Park & Amusement Ass'n, Inc. v. Anrooney, 100 Wash. Dec. 43, 93 P. 2d 362 (1939) (declaratory judgment refused).

[6] *See* Miller v. Currie, 208 Wis. 199, 205, 242 N. W. 570, 572 (1932); Schmidt v. La Salle Fire Ins. Co., 209 Wis. 576, 580, 245 N. W. 702, 703 (1932) ("The Declaratory Judgments Act is an effort to provide a tribunal in which controversies may be determined which could not otherwise be presented for determination." [quoted in both cases]).

[7] *Compare* Poore v. Poore, 201 N. C. 791, 161 S. E. 532 (1931) (declaratory judgment on validity of will not allowed before admission of will to probate), *with* Rountree v. Rountree, 213 N. C. 252, 195 S. E. 784 (1938) (allowed declaratory judgment on will after its admission to probate); Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. 2d 619 (1940).

[8] *See* Wachovia Bank & Trust Co. v. Lambeth, 213 N. C. 576, 580, 197 S. E. 179, 181 (1938) ("In Mountain Park Institute v. Lovill, 198 N. C. 642, 645, 153 S. E. 114, 116, citing authorities, it is said: 'It is well settled that an executor upon whom the will casts the performance of a duty may, when he needs instruction, bring a suit in equity to obtain a construction of the will.' *In re* Estate of Mizzelle, 213 N. C. 367, 368, 196 S. E. 364. Plaintiff *further* has the right to maintain this action under chapter 102, sec. 3, Public Laws of 1931, known as the 'Uniform Declaratory Judgment Act.' Rountree v. Rountree, 213 N. C. 252, 195 S. E. 784"); *see* Allison v. Sharp, 209 N. C. 477, 481, 184 S. E. 27, 30 (1936) ("*While there was another remedy at law available to them,* they have challenged the constitutionality of the statute under which they contend that the registrar refused them registration. Under such circumstances and conditions, the Uniform Declaratory Judgment Act affords a ready means of testing its validity, ...") [italics supplied].

[9] N. C. GEN. STAT. (1943) §1-253.

[10] N. C. GEN. STAT. (1943) §§1-253, 1-254.

[11] N. C. GEN. STAT. (1943) §1-253.

[12] Borchard, *Declaratory Judgments,* 1939, 9 BROOKLYN L. REV. 1 (1939) (an address delivered before a meeting of the New York State Bar Association at Saranac Inn on June 30, 1939, in which Prof. Borchard said: "It has already been noted

mands the use of the trustees' bill for instructions, which would involve almost identically the same proceedings, the same issues, and the same relief. This is not in accord with the authorities[13] and is a reversion to the holding of the court in the early days of applying the declaratory judgment act; namely, that such an action would not lie merely because other remedies, legal or equitable, already existed.[14]

The court in refusing the declaratory judgment as being in excess of the statutory authorization therefor cited one case in support, *Tryon v. Duke Power Co.*[15] The court in that instance gave as its reason for dismissal the lack of a case or controversy. In the instant case, the court may have felt that this was in reality an *ex parte* proceeding and thus not cognizable under the declaratory judgment act.[16] It is submitted that the possibility of forfeiture upon sale, mortgage or lease without judicial sanction, caused the interests of the parties to be sufficiently adverse to constitute a case or controversy.[17] The trust instrument expressly prohibits sale and provides for possible forfeiture to the college so that the interests of the church and the college are necessarily in conflict. The fact of friendship between the parties (the college did not appeal and was not represented by counsel in the Supreme Court), cannot be said to vary their legal relations.[18] And the trustees want to sell in the immediate future, raising the controversy with the college now. In *Tryon v. Duke Power Co.*, the court in refusing a declaratory judgment said, "The statute does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." There the petitioners wanted the decision not for immediate application but rather to know what they might do if they desired to invoke the judgment in the future.[19]

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that against a responsible defendant a declaration of his duty serves the same purpose as a command to perform it. Just what motive persuades a plaintiff to seek the milder relief of declaration rather than the more drastic relief of coercion is not always apparent. But the simplicity, the friendlier atmosphere, the escape from technicalities, the narrowing of the issues, the inexpensiveness and the speed would in most cases account for the election. In California, Michigan and Kentucky, declaratory actions go to the head of the calendar and the new Federal Rules provide that 'the court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.' [Rule 57]").

[13] Borchard, *The Next Step Beyond Equity, the Declaratory Action*, 13 U. OF CHI. L. REV. 158 (1946) (it appears that the rule that the declaratory action will not be allowed where an alternative remedy, legal or equitable, is available today exists only in Indiana).

[14] Green v. Inter-Ocean Casualty Co., 203 N. C. 767, 167 S. E. 38 (1932).

[15] 222 N. C. 200, 22 S. E. 2d 450 (1942).

[16] *Ibid.*; *In re* Eubanks, 202 N. C. 357, 162 S. E. 769 (1932).

[17] BORCHARD, DECLARATORY JUDGMENTS 927 (2d ed. 1941).

[18] *Accord*, Z. Smith Reynolds Foundation, Inc. v. Trustees of Wake Forest et al., 227 N. C. 500, 42 S. E. 2d 910 (1947) (the court had no difficulty in recognizing the existence of a case or controversy between friendly litigants seeking the same judgment; namely, approval of contract between two groups of charitable trustees).

[19] See note 15 *supra*. (At the time of bringing the declaratory action, the plain-

As to the second ground for refusing a declaratory judgment, namely, the court's feeling that the trustees' request amounts to an admission of failure to execute the trust and the invocation of forfeiture, see *Middleton v. Rigsbee*.[20] There, the court authorized the trustees to sell part of the corpus in spite of specific provisions in the will to the contrary on the ground that if the testator had foreseen the practical situation, he would have permitted the sale in order to preserve the trust and effectuate its purpose. This has frequently been done in situations where the court finds such a sale necessary to the preservation of the trust res.[21] Although courts hesitate longer in giving the power to mortgage, that would seem to have no bearing on the decision in this case, for the court did not consider this aspect of the case, but based its decision solely on the request for power of sale. True, there is a distinction between the present case and the *Middleton* case in the forfeiture provision. There, the parties involved were the life tenant and remaindermen, all of whose interests could best be served by permitting sale and thus preserving the res. Here, the provision for forfeiture to the college if the trustees should fail or neglect to execute the trust or to keep the property productive permits the contention that the interests of the college would not best be served by granting a power of sale to the trustees of the church. But this is the very determination for which the trustees are seeking.

Though the petitioners may admit that they can no longer administer the trust properly without sale, mortgage or lease, the request itself cannot constitute a failure of administration. If the court feels that the terms of the instrument are still binding, it can so decide. The situation is one for which the declaratory action was specifically designed and has been used before[22] and since[23] in this jurisdiction. The decision should be confined to its facts and not extended to other situations.

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tiffs did not contemplate acting in accordance with the decision but only desired to determine whether they could apply a condemnation feature of a contract against the defendants if they wanted to do this at any time in the future, but there was no present intention of such application, and so no case or controversy).

[20] 179 N. C. 437, 102 S. E. 780 (1920); *accord*, Cutter v. American Trust Co., 213 N. C. 686, 197 S. E. 542 (1938); *cf.* in the Petition of the Equitable Trust Co., 17 Del. Ch. 21, 147 Atl. 231 (1929) (trust instrument allowing sale of real estate, ". . . except the farm called Beauclerc Manor. . . ." Sale of part of manor allowed under statute empowering the court to permit sale of property held in trust unless expressly prohibited by the creator of the trust [commented upon favorably in Note, 30 COL. L. REV. 136 (1930)]).

[21] In the Petition of the Equitable Trust Co., *supra* note 20.

[22] N. C. GEN. STAT. (1943) §1-255; Wachovia Bank & Trust Co. v. Lambeth, 213 N. C. 576, 197 S. E. 179 (1938).

[23] See note 18, *supra*.