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Declaratory Judgments-Avoidance of Peril-Refusal to Adjudicate Rights of Will Beneficiary Under No-Contest Clause-Testator

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DECLARATORY JUDGMENTS—AVOIDANCE OF PERIL—REFUSAL TO ADJUDICATE RIGHTS OF WILL BENEFICIARY UNDER NO-CONTEST CLAUSE—Testator, plaintiff's father, acquired property in the joint names of himself and his wife by using money belonging to his wife. At her death testator claimed sole ownership of the property as the survivor. Plaintiff agreed not to probate his mother's will if testator would bequeath the property to his children. Also, testator agreed that if he should remarry he would, by a prenuptial agreement, make it possible to carry out the plan. The agreement was not reduced to writing. Testator remarried and shortly thereafter executed a will in which he disregarded the verbal agreement and left a substantial part of his estate to his second wife. The will also contained a clause providing that any beneficiary under the will who contested any part of its contents should forfeit all rights thereunder.[1] Plaintiff brought suit under the declaratory judgment act,[2] asking whether a

1 Such so-called "terror" clauses in wills are generally judicially upheld. See ATKINSON, WILLS 408-09 (2d ed. 1953).

2 MICH. COMP. LAWS §§ 691.501, 691.507 (1948): "No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may, in cases of actual controversy, make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance or other governmental regulation,

suit for specific performance of the oral contract would be a contest within the meaning of the clause. Defendant's motion to dismiss the bill as not stating a proper ground for declaratory relief was granted by the district court. On appeal, *held*, affirmed. The declaratory judgment device is not available for the protection of interests which will be placed in jeopardy only if the plaintiff brings a suit for specific performance and loses. *McLeod v. McLeod*, 365 Mich. 25, 112 N.W.2d 227 (1961).

The declaratory judgment device is generally utilized in two types of situations: first, where the rights under consideration are capable of being settled by a coercive decree but where the plaintiff desires only a declaration; and second, where no other relief is possible but where an actual controversy arises because a claimed legal right or interest of the plaintiff has been placed in danger by a conflicting claim of the defendant.[3] As to the first category, many courts have held, without persuasive reasoning, that the availability of another form of relief is sufficient to defeat a declaratory judgment action.[4] Unless another type of action is required by a relevant statute[5] such decisions are manifestly wrong,[6] since the declaratory judgment statutes almost invariably contain provisions that such relief may be obtained "whether or not further relief is or could be claimed."[7] Such statutes recognize that in many instances the use of a

or any deed, will or other instrument in writing, and a declaration of the rights of the parties interested, but the foregoing does not exclude other cases of actual controversy. . . . This act is declared to be remedial, and is to be liberally construed and liberally administered with a view to making the courts more serviceable to the people."

3 BORCHARD, DECLARATORY JUDGMENTS 26 (2d ed. 1941).

4 See, *e.g.*, Pinkard v. Mendel, 216 Ga. 487, 490, 117 S.E.2d 336, 339 (1960); Bryarly v. State, 232 Ind. 47, 111 N.E.2d 277 (1953); Brown v. Brodsky, 348 Mich. 16, 81 N.W.2d 363 (1957).

5 See, *e.g.*, PA. STAT. ANN. tit. 53, § 25057 (1957) (setting forth the procedure for obtaining a variance to zoning regulations) and Castle Shannon Coal Corp. v. Upper St. Clair Township, 370 Pa. 211, 88 A.2d 56 (1952) (holding that because of the statute, a declaratory judgment as to the right to a variance could not be sought).

6 See, *e.g.*, Columbia Pictures Corp. v. DeToth, 26 Cal. 2d 753, 761, 161 P.2d 217, 221 (1945); Cohen v. Reisman, 203 Ga. 684, 48 S.E.2d 113 (1948); Maas v. Maas, 305 Ky. 490, 204 S.W.2d 798 (1947); Kartzevitz v. Shertz, 213 N.Y.S.2d 204 (Sup. Ct. 1961); Moore v. Moore, 344 Pa. 324, 25 A.2d 130 (1942).

7 Federal Declaratory Judgments Act, 28 U.S.C. § 2201 (1958); Uniform Declaratory Judgments Act, 9A UNIFORM LAWS ANN. § 1 (1922) [as of December 1961 this act has been adopted in 36 states—including Georgia (in a modified form), and Indiana (but compare cases cited note 4 *supra*)—and Puerto Rico]; ALASKA COMP. LAWS ANN. § 52A-1-17(1)(b) (Supp. 1959); CAL. CIV. PROC. CODE § 1060; CONN. GEN. STAT. REV. § 52-29 (1958); DEL. CODE ANN. tit. 10, § 6501 (1953); HAWAII REV. LAWS § 228-1 (1955); KAN. GEN. STAT. ANN. § 60-3127 (1949); KY. REV. STAT. § 418.040 (1962); MICH. COMP. LAWS § 691.501 (1948); N.M. STAT. ANN. § 22-6-1 (1953); N.Y. CIV. PRAC. ACT § 473; OKLA. STAT. tit. 22, § 1651 (1961); VA. CODE ANN. § 8-578 (1950). *But see* N.H. REV. STAT. ANN. § 491:22 (1955), the only statute which does not contain the phrase "whether or not other relief is or could be sought" or similar language. See also Lisbon Village Dist. v. Lisbon, 85 N.H. 173, 155 Atl. 252 (1931) (refusing relief where plaintiff could obtain coercive relief). Mississippi is the only state which has no declaratory judgment statute.

declaratory judgment will be more advantageous than a coercive decree as it presents a particular issue of law which the court can decide quickly,[8] thus settling contentions between the parties prior to serious injury and before the relationship is disrupted. It accomplishes this more efficaciously than the demurrer because it does not have to be decided upon an agreed statement of facts.[9] And finally, it is suggested that although it is an adversary action, some of the belligerence found in a suit for damages or an injunction is removed.[10]

However, the declaratory judgment proceeding probably finds its greatest utility in actions of the second type—those where no other relief is possible. The advantages here may be seen through a comparison of declaratory and coercive suits. When bringing a suit for a coercive decree, the plaintiff must state a "cause of action" by showing he has received an injury for which the law gives a remedy. But the declaratory judgment statutes make it possible to move back a step, giving the courts jurisdiction to hear cases before injury has occurred. This procedure contemplates two adverse parties, each willing to obey the law if he knows what it is. That this can be accomplished by the statutes should no longer be open to question.[11] However, a problem remains as to the proper timing of the

8 Many states provide that a declaratory judgment suit may be advanced on the court's calendar; see, *e.g.*, CAL. CIV. PROC. CODE § 1062(a); KY. REV. STAT. § 418.050 (1960); MICH. COMP. LAWS § 691.502 (1948); FED. R. CIV. P. 57.

9 The right to decide disputed facts is given by statute in some states; see, *e.g.*, MICH. COMP. LAWS § 691.504 (1948); Uniform Declaratory Judgments Act, 9A UNIFORM LAWS ANN. § 9 (1922). Other states have allowed this by judicial decision; *e.g.*, Howard v. Howard, 131 Cal. App. 2d 308, 313, 280 P.2d 802, 805 (Dist. Ct. App. 1955); Employer's Liab. Assur. Corp. v. Tibbetts, 96 N.H. 296, 298, 75 A.2d 714, 716-17 (1950). The federal system has allowed this by court rule, FED. R. CIV. P. 57.

10 See Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69, 75-76 (1917).

11 See, *e.g.*, Woodward v. Fox W. Coast Theaters, 36 Ariz. 251, 284 Pac. 350 (1930) (plaintiff sought assurance that lease was valid before erecting improvements); Rothschild v. Wolf, 20 Cal. 2d 17, 123 P.2d 483 (1942) (whether building subject to stairway easement might be demolished); Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931) (whether owner might improve his property as he desired despite restrictive covenants); Whiteside v. Merchants Nat'l Bank, 284 Mass. 165, 187 N.E. 706 (1933) (plaintiffs uncertain whether defendant's interest in his grandfather's estate came within the terms of an assignment to them by defendant; plaintiffs wanted to sell the interest if theirs); Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N.W. 618 (1930) (whether plaintiff could replace existing building without forfeiting lease); Carolina Power & Light Co. v. Iseley, 203 N.C. 811, 167 S.E. 56 (1932) (whether plaintiff might substitute bus service for streetcar service under its contract with the city); Evangelical Lutheran Church v. Sahlem, 254 N.Y. 161, 172 N.E. 455 (1930) (whether plaintiff could build a church on land restricted by covenants); Glauberman v. University Place Apts., Inc., 188 Misc. 277, 66 N.Y.S.2d 335 (Sup. Ct. 1946) (whether lessee could sublet); Multnomah County Fair Ass'n v. Langley, 140 Ore. 172, 13 P.2d 354 (1932) (whether plaintiff's plan for conducting horse racing was illegal); Girard Trust Co. v. Tremblay Motor Co., 291 Pa. 507, 140 Atl. 506 (1928) (whether lessor must rebuild building destroyed by fire). Anticipatory relief in equity is plainly insufficient, because of the historical development of equity jurisprudence and the often rigorous threshold "adequacy" test of equity

suit. The "actual controversy" requirement has been construed by the courts to mean that the facts must be such as to allow the rendition of a final judgment: the issue presented may not be moot nor the opinion requested advisory.[12] Thus where the value of the judgment rests upon the mere possibility of the happening of certain events, or where intervening facts have made a decision unnecessary, the case is considered not "ripe" for determination.[13] But even where the "controversy" requirement is met, the statute's wording that "the court *may* in cases of actual controversy . . ."[14] does not require an adjudication necessarily to be made.[15] The court in the principal case seemingly holds that there is no justiciable controversy because the need for the decision is contingent upon plaintiff's bringing and losing a suit for enforcement of his contract, neither of which is foreseeably certain,[16] and not that they are refusing to hear the case in the exercise of judicial discretion. By such an application of the "controversy" requirement there is effectively no difference between a declaratory suit and an ordinary "cause of action," as the parties will be required to upset the status quo and cause injury before they may settle their differences. The point at which the declaratory judgment should be given is arguably where adverse parties have done all that they can without harming either themselves or others, and where one desires to act further if he may do so without penalty.

It would seem that this point had been reached by the litigants in the principal case. Any further action on the part of the plaintiff might have meant irreparable injury for him, while failure to take further action would have meant giving up a claim to valuable property. An adjudication by the court on the point in contention would have removed any uncertainty as to whether and how the plaintiff should proceed.[17] In other cases where

jurisdiction, to encompass the variety of situations covered by declaratory judgment statutory provisions.

12 A moot issue is one in which intervening circumstances have removed the controversy between the parties, *e.g.*, Connecticut Gen. Life Ins. Co. v. Pierce, 110 F.2d 27 (3d Cir. 1940) (while on appeal, a decision in another suit between the parties settled the contended issues). In an advisory opinion there may also be no justiciable controversy either because the facts are hypothetical or contingent, or because the parties do not have a sufficient interest in the outcome; *e.g.*, Merkley v. Merkley, 12 Cal. 2d 543, 86 P.2d 89 (1939) (plaintiff asked for adjudication of rights under certain contracts if sometime in the future her husband should default on his alimony payments); Heller v. Shapiro, 208 Wis. 310, 242 N.W. 174 (1932) (plaintiff asked for an adjudication of subrogation rights if and when he pays off a mortgage).

13 Kariher's Petition (No. 1), 284 Pa. 455, 471, 131 Atl. 265, 271 (1925): "jurisdiction will never be assumed unless the tribunal appealed to is satisfied that an actual controversy, or the ripening seeds of one, exists between [the] parties. . . ."

14 MICH. COMP. LAWS § 691.501 (1948).

15 See Kariher's Petition (No. 1), 284 Pa. 455, 471, 131 Atl. 265, 271 (1925). (Emphasis added.)

16 Principal case at 34, 112 N.W.2d at 231.

17 If a judgment had been given for the defendant no litigation would have followed;

a court has refused to give an adjudication of the issues presented, the moving party was usually not definite in asserting his proposed action. Thus, where a court was asked if a certain result would follow if and when a mortgage was paid,[18] or where the complaint was made that a zoning ordinance might interfere with uses the plaintiff might desire to make of his property,[19] adjudication by declaration was refused. But such was not the kind of situation presented in the principal case, where the plaintiff averred that in order to preserve his rights "it has now become necessary" to institute an action for specific performance.[20] The step between this statement and the conclusion that the plaintiff will attempt to enforce his claims if he can do so without fear of forfeiture is not an arduous one. Seemingly, if the court is correct in its refusal to issue a declaration, no party seeking to avoid a perilous situation may do so by a declaratory judgment, as the parties will never have done all they might do until the controversy has produced an otherwise justiciable "wrong." Further doubt is cast upon the correctness of this decision by the results reached in similar cases in other jurisdictions. In *Dravo v. Liberty Nat. Bank & Trust Co.*,[21] the plaintiff also requested a declaration as to whether his proposed action conflicted with the no-contest provision of a will; the court was faced with the same double contingency argument, but held that under the expanding concept of the use of declaratory judgments such a defense had no validity.[22]

if it had been given for the plaintiff there might have been a settlement. In either event there is a good possibility that the court could have settled the contention and avoided all future litigation by a relatively simple declaration.

18 Heller v. Shapiro, 208 Wis. 310, 242 N.W. 174 (1932).

19 Weigand v. City of Wichita, 118 Kan. 265, 234 Pac. 978 (1925).

20 Principal case at 29, 112 N.W.2d at 228-29.

21 267 S.W.2d 95 (Ky. 1959). The Michigan and Kentucky statutes are substantially the same. *Compare* MICH. COMP. LAWS § 691.501 (1948) (quoted *supra* note 2), *with* KY. REV. STAT. §§ 418.040-.045 (1960). "In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked. . . . Any person interested under a deed, will or other instrument of writing, or in a contract, written or parol; or whose rights are affected by statute, municipal ordinance, or other government regulation; or who is concerned with any title to property, office, status or relation; or who as fiduciary, or beneficiary is interested in any estate, provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his right or duties, even though no consequential or other relief be asked. The enumeration herein contained does not exclude other instances wherein a declaratory judgment may be prayed and granted under KRS 418.040 of this act, whether such other instance be of similar or different character to those so enumerated."

22 *Accord*, Cohen v. Reisman, 203 Ga. 684, 48 S.E.2d 113 (1948) (declaration granted that plaintiff could bring an action against the executor without forfeiting her rights under a no-contest clause); Estate of Badenhop, 61 N.J. Super. 526, 161 A.2d 318 (1960) (trustee obtained a declaration of whether a no-contest clause would be violated by defending in an appeal from the probate proceeding); Lanyon v. Lanyon, [1927] 2 Ch.

Other cases where courts have been faced with this same problem are those dealing with the interpretation of leases, contracts, deeds and statutes.[23] In each of these cases one of the parties desired to know if proposed action could be taken without penalty. In each case the court had no guarantee, other than an averment in the petition, that if it declared in favor of the party's right to proceed he would do so. Yet each time the court felt that the dilemma in which the plaintiff found himself was sufficiently developed and perilous to necessitate the rendering of a decision. The only basis upon which a court faced with this type of situation could refuse to hear the case is in the exercise of its discretion, and not because there is no justiciable controversy. But even this mode of refusal would be inappropriate. That it is desirable to know whether proposed action may be taken without fear of penalty or forfeiture hardly needs to be stated. To facilitate this, courts responsible for the orderliness of society should lend their aid to any rational scheme which will prevent parties from doing harm to themselves and others, and should not invoke rules which require that damage be done first and rights be decided later.[24] The Michigan court has invoked just such a rule in the principal case, and in so doing has defeated both the letter and the spirit of the declaratory judgments act.

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264 (gift in will conditioned on beneficiary not marrying a blood relative declared to be against public policy); Page v. Public Trustee, [1926] Ch. 842 (gift conditioned on living in a certain place; declaration given as to effect of moving away at behest of husband).

23 See, *e.g.*, cases cited note 11 *supra*.

24 "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under declaratory judgment law you turn on the light and then take a step." 69 CONG. REC. 2108 (1928) (speech by Representative Gilbert, Kentucky), BORCHARD, *op. cit. supra* note 3, at 931.