St. John's Law Review

Volume 11
Number 2 *Volume 11, April 1937, Number 2*

Article 14

Declaratory Judgment--Pleading and Practice--Contract (Kalman v. Shubert, 270 N.Y. 375 (1936))

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the rule laid down in MacNaghten's Case [6]—now he is one with a "defect in reason",[7] which does not have to be pathological in nature. The legislature takes cognizance of present-day medical research and realizes that the mental states excusing persons from criminal responsibility may be brought about not only by delusions, but by the pressure of sociological and economic hardship.[8] In addition, it is not necessary that the defendant should be unable to know *both* the nature and the quality of the act, and that it is wrongful, as failure to understand either of these is sufficient. This is so both under the statute [9] and under the common-law rule.[10]

Finally, when the jury cannot come to a decision and the judge charges that they may recommend mercy, following which they bring in a verdict of murder in the first degree with a recommendation of mercy, the law is well settled in this and other jurisdictions [11] that such instruction is tantamount to holding out an inducement to the jury to agree upon a verdict, and is reversible error.[12]

J. K.

DECLARATORY JUDGMENT — PLEADING AND PRACTICE — CONTRACT.—It is alleged that the plaintiff, author, composer and owner of five operettas, offered the defendant, in a writing subscribed by plaintiff, the right to perform these operettas in the United States and Canada, upon the payment of specified royalties. Defendant failed to notify plaintiff of acceptance of the offer and has failed to pay the royalties, but claims that this instrument constitutes a binding agreement and that thereby he possesses the exclusive right to perform or

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[6] 10 Clark & F. 200 (H. L. 1843).

[7] N. Y. PENAL LAW § 1120.

[8] In the instant case at p. 430, Crouch, J., says, "The claim here rests upon evidence which, on the one hand, neither discloses nor even suggests any rational motive for the tragic act; and on the other hand, does build up *a personality which might well crack and crumble under the hard blows which fate, within a brief period dealt it.*" (Italics supplied.) Also, in reference to the delusion that in death alone could the infant son be saved from suffering and misery, the judge said, *"The time has gone by when such a claim could seem fantastic, either to judge or juror."* (Italics supplied.)

[9] N. Y. PENAL LAW § 1120.

[10] 10 Clark & F. 200 (H. L. 1843).

[11] State v. Kernan, 154 Iowa 672, 135 N. W. 362 (1912); State v. Kiefer, 16 S. D. 180, 91 N. W. 1117 (1902); Hackett v. People, 8 Colo. 390, 8 Pac. 574 (1885); *cf.* also, People v. Santini, 221 App. Div. 139, 222 N. Y. Supp. 683 (1st Dept. 1927), *aff'd*, 246 N. Y. 612, 159 N. E. 672 (1927).

[12] N. Y. PENAL LAW § 1045 has been amended so that the jury may, in convicting a person of felony murder, recommend, as a part of its verdict, that the defendant be imprisoned for life, and "the court may sentence the defendant to imprisonment for the term of his natural life" upon such recommendation. Amended by N. Y. Laws 1937, c. 67, N. Y. PENAL LAW § 1045-a, in effect March 17th, 1937.

permit performance of the operettas in the United States and Canada. The plaintiff asks the court to declare that the defendant has no rights in said operettas by reason of this instrument. From an affirmance of dismissal of complaint by Appellate Division, *held,* reversed. The complaint sufficiently states a cause of action calling for a declaratory judgment because the writing in the hands of the defendant creates a cloud upon the title of plaintiff and he can obtain adequate relief by no other existing form of action. *Kalman* v. *Shubert,* 270 N. Y. 375, 1 N. E. (2d) 470 (1936).

Declaratory judgment statutes, now in force in the majority of American jurisdictions,[1] are substantially the same in content, all being based on the English Order of 1883.[2] New York is one of these jurisdictions, and its statute is set forth in the Civil Practice Act, Section 473,[3] which grants to the Supreme Court power to declare rights and other legal relations on request. The general purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.[4] The granting or withholding of this relief is a matter of discretion,[5] but such discretion is not an arbitrary one.[6] Where plaintiff has a reasonably adequate remedy already provided by another well known form of action, a declaratory judgment should be withheld.[7]

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[1] Borchard, *The Declaratory Judgment in the Unted States* (1931) 37 W. VA. L. Q. 127.

[2] 7 STATUTORY RULES AND ORDERS 54 (1883).

[3] N. Y. CIV. PRAC. ACT § 473: "The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment".

[4] James v. Alderton Dock Yards, 256 N. Y. 298, 176 N. E. 401 (1931); Somberg v. Somberg, 263 N. Y. 1, 188 N. E. 137 (1933); Post v. Metropolitan Ins. Co. of N. Y., 227 App. Div. 156, 237 N. Y. Supp. 64 (4th Dept. 1929), *aff'd,* 254 N. Y. 541, 173 N. E. 857 (1930); Borchard, *The Uniform Declaratory Judgment Act* (1934) 18 MINN. L. REV. 239.

[5] N. Y. RULES OF CIV. PRAC., Rule 212: "If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it *may* decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised". (Italics supplied.)

[6] Bareham v. City of Rochester, 246 N. Y. 140, 158 N. E. 51 (1927); Newberger v. Tubell, 257 N. Y. 383, 178 N. E. 669 (1931); Union Trust Co. of Rochester v. Main & South Streets Holding Corp., 245 App. Div. 369, 282 N. Y. Supp. 428 (4th Dept. 1935).

[7] James v. Alderton Dock Yards, 256 N. Y. 298, 176 N. E. 401 (1930); Newberger v. Tubell, 257 N. Y. 383, 178 N. E. 669 (1931); Loesch v. Manhattan Life Ins. Co. of N. Y., 128 Misc. 232, 218 N. Y. Supp. 412 (1926), *aff'd,* 220 App. Div. 828, 222 N. Y. Supp. 845 (1st Dept. 1927); City of N. Y. v. Maltbie, 248 App. Div. 39, 289 N. Y. Supp. 562 (3d Dept. 1936). *Contra:* Borchard, *The Uniform Declaratory Judgment Act* (1934) 18 MINN. L. REV. 239 (stating that where a declaratory judgment will not be rendered because another remedy was available is an error of law and a flat contradiction of the express words of the statute, *"whether or not further relief is or could be claimed"*) (italics supplied).

In the present case the writing in the hands of the defendant creates a cloud on the title of the operettas, of which the plaintiff alleges he is the owner, and effectively prevents the plaintiff from selling or negotiating a sale of his rights in the operettas since a prospective vendee does not desire to purchase a law suit.[8] Since plaintiff claims that the defendant has failed to accept his offer, no contract ever came into existence.[9] Therefore, he has no cause of action at law nor in equity, except equitable relief by way of injunction.[10] However, this remedy is of no avail since the defendant may never attempt to exercise the rights which he now asserts and may merely want to prevent competition from the operettas owned by the plaintiff, with others in which he may be interested. A suit in the federal courts for plagiarism may not be had unless there has been an infringement,[11] and none has as yet occurred. Thus we have a case where the plaintiff must have affirmative relief in the nature of a declaratory judgment, as no other form of action is reasonably adequate.

H. K.

DECLARATORY JUDGMENTS—SECTION 473 OF THE N. Y. CIVIL PRACTICE ACT—DETERMINATION OF THE LEGALITY OF AN ENTERPRISE WHEN USED AS A SUBTERFUGE TO EVADE THE PENAL LAW.—Plaintiff has devised a scheme wherein and whereby he sells options on dogs which are pitted against each other in "Dog Races". The options become effective depending on the outcome of the races and if not exercised by the buyers, are bought back by him at his election and at prices determined by him. Plaintiff was prosecuted for a violation of the Penal Law [1] against gambling, pool-selling, registering bets, *etc.* This prosecution was unsuccessful, for even though the options were bought with intent to gamble, the intent of the buyer alone was not sufficient to make the transaction illegal.[2] The district

[8] See record on appeal, *Brief for Plaintiff-Appellant* (1936) Vol. 44, No. 209, p. 7.

[9] WILLISTON, CONTRACTS (Revised ed. 1936) 64.

[10] See record on appeal, *Brief for Plaintiff-Appellant* (1936) Vol. 44, No. 209, p. 8.

[11] Vernon v. Shubert, 220 Fed. 694 (S. D. N. Y. 1915).

[1] N. Y. PENAL LAW § 986: "Any person who engages in pool-selling, or book-making with or without writing at any time or place; * * * upon the result of any trial or contest of skill, speed or power of endurance, of man or beast, * * * is guilty of a misdemeanor * * *."

[2] Instant case, 159 Misc. 853, 289 N. Y. Supp. 798 (1936) (Special term reviewing the case at Police Court); Bigelow v. Benedict, 70 N. Y. 202 (1877); Zeller v. Leiter, 189 N. Y. 361, 82 N. E. 158 (1907); Springs v. James, 137 App. Div. 110, 121 N. Y. Supp. 1054 (1st Dept. 1910), *aff'd*, 202 N. Y. 603, 96 N. E. 1131 (1911).