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Article 15

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 (Reed v. Littleton, 249 App. Div. 250 (2d Dept. 1936))

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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).

attorney threatened further prosecution. Plaintiff then petitioned the Supreme Court for a declaratory judgment determining whether his business is legitimate or whether it violates the Penal Law. From a judgment in favor of plaintiff, *held,* reversed and complaint dismissed. The Civil Practice Act,[3] providing for a declaratory judgment, and the Civil Practice Rule,[4] providing that the jurisdiction is discretionary, do not contemplate that the courts having civil jurisdiction shall determine whether certain acts do or do not constitute a crime when the whole scheme is deliberately contrived to avoid the Penal Law. *Reed* v. *Littleton,* 249 App. Div. 250, 292 N. Y. Supp. 363 (2d Dept. 1936).

The declaratory judgment has its historical source in equity procedure [5] and the declaratory judgment statute is, in effect, merely a direction to use a long existing and often exercised power.[6] In this state the declaratory judgment statute is set forth in the Civil Practice Act,[7] which gives to the Supreme Court the jurisdiction to render this type of judgment, and the Rules of Civil Procedure,[8] make this jurisdiction discretionary. Where there is no justiciable issue presented, the court does not render this form of relief,[9] but in cases where a declaratory judgment is granted, it will have the force of a final judgment.[10]

In the instant case it was held that there was no real dispute between the parties as to their legal or equitable rights.[11] The court overlooked the fact that the plaintiff has a fully matured legal interest to be determined, inasmuch as the refusal to grant the relief prayed for may result in sending the plaintiff to prison and ruin his business.[12] However, the decision was largely based on the reasoning

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[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 requests 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] Rule 212, Rules of Civ. Prac.: "If, in the opinion of the court, the parties should be left to relief by existing forms of action, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised".

[5] Borchard, *The Uniform Declaratory Judgment Act* (1934) 18 Minn. L. Rev. 246.

[6] *Ibid.*

[7] *Supra* note 3.

[8] Rule 212, Rules of Civ. Prac.: "If, in the opinion of the court, * * * *it may decline* to pronounce a declaratory judgment * * *". (Italics supplied.) But the discretion must be exercised judicially and with care, Bareham v. City of Rochester, 246 N. Y. 140, 158 N. E. 51 (1927); Newberger v. Lubell, 257 N. Y. 383, 178 N. E. 669 (1931).

[9] 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).

[10] N. Y. Civ. Prac. Act § 473: "* * * *and such declaration shall have the force of a final judgment*". (Italics ours.)

[11] Instant case at p. 251.

[12] See 97 N. Y. L. J. 30, Feb. 5, 1937, p. 4, col. 3 (Professor Borchard discusses Reed v. Littleton).

that the provisions making possible a declaratory judgment do not contemplate that courts shall determine the precise rights existing between public officers and questionable violators of the law, by declaring in advance, whether certain shady transactions do or do not constitute a crime.[13] The opposite conclusion has been reached in Oregon[14] and Utah,[15] in somewhat similar cases. Both of those jurisdictions have adopted the Uniform Declaratory Judgments Act, whereas New York has not. However, the New York Act does not apparently differ from the Uniform Declaratory Judgments Act in any respect which would suggest a principle upon which the Oregon and Utah cases could be distinguished from the instant case.[16]

The discretionary power of the court is best exemplified in situations of this type, when, in the exercise of such discretion, the dignity of the court can be protected from declaring whether options on dogs at this time, or options on horses at a later date, or other cleverly devised gambling schemes constitute a crime. The equitable maxim of "Clean Hands" relegates petitioners of this type of action to the established tribunals of criminal jurisdiction.[17]

H. K.

DOMESTIC RELATIONS—CRIMINAL JURISDICTION OF DOMESTIC RELATIONS COURT.—The defendants contributed to a minor's delinquency and this proceeding is brought by virtue of the Domestic Re-

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[13] Instant case at p. 252. *Contra:* 97 N. Y. L. J. 30, Feb. 5, 1937, p. 4, col. 3.

[14] Multnomah County Fair Ass'n v. Langley, 140 Ore. 172, 13 P. (2d) 354 (1932) (determination at the instance of a county fair whether a proposed game of chance would amount to a lottery and thus violate a statute).

[15] Utah State Fair Ass'n v. Green, 68 Utah 251, 249 Pac. 1016 (1926) (privileged to conduct horse racing without danger of prosecution). Also see: Faulkner v. City of Keene, 85 N. H. 147, 155 Atl. 195 (1931); Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N. W. 838 (1929).

[16] Editorial, N. Y. L. J., p. 620, col. 1, Feb. 5, 1937.

[17] A distinguished authority on the subject of Declaratory Judgments, Edwin M. Borchard, Hotchkiss Professor of Law at Yale University, comments as follows on the instant case: "It would seem to me that the court has been misled. The plaintiff seeks not an advisory opinion, but a binding and final judgment on a question of law. The court might send the case back for trial to determine the full facts, if these were doubtful, but I do not think that it is authorized to dismiss the case on the ground that it seeks an advisory opinion, or that it is a substitution of a civil for a criminal action, or that there is no authority for this kind of action. The public officials are not indeed claiming any right of property in the dogs. They are merely threatening to send the plaintiff to prison and ruin his business. That gives him a fully matured legal interest to have the court determine as a matter of law that the threat is unfounded and unjustified, and that he is legally privileged to run his business as he is now operating it. Unless there is a doubt on the facts, the court is in a position to decide that question of law, and by doing so serves a valuable social function." (Correspondence, N. Y. L. J., p. 620, col. 3, Feb. 5, 1937.)