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TWENTY-SIX YEARS UNDER THE COLORADO DECLARATORY JUDGMENTS ACT

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With the purpose in mind ". . . to settle and afford relief from uncertainty and insecurity with respect to rights, status, or other legal relations,"[1] the 1923 General Assembly of Colorado enacted the Uniform Declaratory Judgments Act. It is believed that the value of this Act, both past and future, is sufficient to warrant a review of the seventy cases reported since that time in an effort to determine the applicability of the Act to future litigation.

The purpose of the Act was clearly remedial.[2] The primary distinction between a case instituted under this Act and any other litigation is that in the former no objection can be made on the ground that further relief is not or could not be claimed.[3] Furthermore, although an actual, justiciable controversy must exist before the courts can take jurisdiction of an action for declaratory relief, it is not necessary that one of the parties litigant has sustained an actual injury.[4] Hence, the parties to a contract, engaged in a dispute over its legal effect, may have a judicial determination of their rights prior to an actual breach;[5] an insurer may have his rights declared prior to an actual claim for payments by the beneficiary;[6] a taxpayer who is threatened with assessment may bring an action to have his rights and duties declared under an applicable tax statute prior to paying under protest.[7] These are only a few examples of the value and practicability of the declaratory judgment. To construe the Act as requiring a breach of duty as a condition precedent to bringing the action would clearly defeat the purpose of the Act.[8] Herein, however, lies the primary difficulty in applying the Declaratory Judgments Act to any given set of facts. For unless there are adverse parties and unless there exists either an actual controversy or the ripening seeds of one, the courts will consider the question hypothetical, moot, or in the nature of an advisory opinion, and they will hold that any determination of such a question will constitute an extra-judicial or non-judicial function.[9]

These requisites were firmly established in Colorado by a very

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* Written while a student at the University of Denver College of Law.

[1] COLO. STAT. ANN., c. 93, § 89 (1935).

[2] It is asserted, however, by some writers that granting declaratory relief is within the inherent powers of the courts without statute, ANDERSON, DECLARATORY JUDGMENTS (1941).

[3] COLO. STAT. ANN., c. 93, § 78 (1935).

[4] BORCHARD, DECLARATORY JUDGMENTS (1934).

[5] COLO. STAT. ANN., c. 93, § 80 (1935); Highland Sales v. Roberts, 104 Colo. 222, 90 P. 2d 2 (1939).

[6] Aetna Life Ins. v. Haworth, 300 U.S. 227 (1937).

[7] Armstrong v. Carmen Distributing, 108 Colo. 223, 115 P. 2d 386 (1941).

[8] COLO. STAT. ANN., c. 93. § 91 (1935); BORCHARD, DECLARATORY JUDGMENTS (1934).

[9] Muskrat v. United States, 219 U.S. 346 (1911).

well-reasoned opinion by Justice Burke in *Gabriel* v. *Board of Regents*.[10] This action was brought under the following provision: "Any person interested under a . . . writing constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . ." [11] Plaintiff's assignor had entered into a contract with the Board of Regents of the University of Colorado whereby the Board was to lease him certain land. The suit was instituted three days after execution of the contract for the purpose of seeking a declaration as to whether or not the Board of Regents had the power to make this lease. The complaint failed to allege that the validity of said contract had been questioned, and the Supreme Court concluded that there was no justiciable controversy over which the court could assume jurisdiction. The court continued by saying:

> This Act (Uniform Declaratory Judgments Act) was not intended to repeal the statute prohibiting judges from giving legal advice, nor to impose duties of the profession on courts, nor to provide advance judgments as the basis for commercial enterprise, nor to settle mere academic questions.

With this decision in mind, it is important for attorneys who contemplate using this Act to determine as nearly as possible what constitutes an actual controversy, or the ripening seeds of one, for the objection of lack of justiciability is always present as a defense to a declaratory action. Therefore, it is necessary to review the reported Colorado decisions in order to ascertain what does, in fact, constitute justiciability.

EFFECTIVELY USED TO DETERMINE CONTRACTUAL RIGHTS

The action has been used very effectively in Colorado in order to ascertain rights under a written contract prior to an actual breach,[12] or even after breach when an action for damages or specific performance could have been sustained.[13] It should also be noted that, although the statute [14] specifically authorizes actions under "writings" constituting a contract, one case in Colorado has sustained an action for interpretation of an oral contract,[15] indicating a liberal application of the Act. On the basis of these decisions, the court apparently feels that a controversy is justiciable under this section if the parties to the instrument actually challenge its validity,[16] or disagree as to their rights and duties under the instrument [17] or as to the legal effect of the contract.[18] Of course,

[10] 83 Colo. 582, 267 P. 407 (1928).
[11] COLO. STAT. ANN., c. 93, § 79 (1935).
[12] COLO. STAT. ANN., c. 93, § 80 (1935); Equitable Life v. Hemenover, 100 Colo. 231, 67 P. 2d 80 (1937).
[13] Tellman v. Smith, 112 Colo. 217, 148 P. 2d 581 (1944); Bennett's, Inc. v. Krogh, 115 Colo. 18, 168 P. 2d 554 (1946).
[14] COLO. STAT. ANN., c. 93, § 80 (1935).
[15] Highland Sales v. Roberts, 104 Colo. 222, 90 P. 2d 2 (1939).
[16] Highland Sales v. Roberts, *supra*, note 15.
[17] Bennett's, Inc. v. Krogh, *supra*, note 13.
[18] Todd v. Elkins, 101 Colo. 269, 72 P. 2d 696 (1938).

if there has been an actual breach, there can be no denial of justiciability.[19]

USE IN CONNECTION WITH WILLS AND TRUSTS

In an action for construction of a will, the Supreme Court indicated that a court of general jurisdiction had this power even prior to passage of the Act.[20] The court further stated, however, that it would not entertain questions which had not yet arisen in the administration of the trust and would refuse to answer speculative inquiries.

USED TO TEST CONSTITUTIONALITY OF A LAW

In several cases, the constitutionality of statutes and ordinances has been attacked.[21] Petitioner, however, must be an adverse party and have sufficient interest to attack the statute.[22] Moreover, as in every other action for a declaratory decree, there must be a justiciable controversy.[23] The fact that both parties to a declaratory action may concede the appropriateness of the procedure would not seem to preclude the court from requiring this element; however, the court apparently refused to recognize this requirement in *McNichols* v. *Denver*.[24] An ordinance was passed by the city of Denver providing, in effect, that when a vacancy was created in a Justice of Peace Court, the mayor could transfer jurisdiction to municipal judges. Shortly after passage of the ordinance, the city auditor brought an action against the city to test its validity. The district court entertained the action and declared the ordinance valid, the result being reversed by the Supreme Court without questioning justiciability. Justice Burke, however, in a highly practical and well-reasoned concurring opinion, pointed out that no legal right, status, or other legal relation was uncertain, that no vacancy had occurred, nor had any question of applying this ordinance been raised. Justice Burke took the position that the court should not "sit to adjudicate every street squabble about what the law *might* [25] be if the impossible happened, simply because the disputants might so stipulate."[26] He clearly considered this case hypothetical. His conclusion seems correct.[27]

DECLARATORY JUDGMENTS USEFUL IN TAX FIELD

One of the most effective uses of the declaratory judgment is in the field of taxation. A taxpayer is able to have his rights litigated under applicable tax statutes prior to an actual payment of

[19] Tellman v. Smith, *supra*, note 13.
[20] Mulcahy v. Johnston, 80 Colo. 499, 252 P. 816 (1927).
[21] McNichols v. Denver, 109 Colo. 269, 124 P. 2d 601 (1942).
[22] Rinn v. Bedford. 102 Colo. 475, 84 P. 2d 827 (1938).
[23] Gabriel v. Board of Regents, *supra*, note 10.
[24] 109 Colo. 269, 124 P. 2d 601 (1942).
[25] Italics added.
[26] McNichols v. Denver, *supra*, at 276 *et seq.*
[27] In some jurisdictions, however, if the question was of great public interest, the rule of justiciability has been relaxed. *See*, ANDERSON, DECLARATORY JUDGMENTS, p. 43 (1941).

the tax.[28] Declaratory judgment actions in this field have been instituted primarily to determine the status of the taxpayer [29] or the classification of articles under a statute.[30] The actions were justiciable under the theory that the state treasurer had either made a demand on the taxpayer or had issued a directive including the uncertain articles. An action will not lie, however, if the ordinance in question has not yet been passed.[31]

MISCELLANEOUS APPLICATION OF ACT

While the foregoing uses of the Act in Colorado have perhaps occurred more frequently, actions have been brought under the Act for various other purposes. Such other actions in the Colorado courts for declaratory decrees include those involving (1) declaration of status and rights under applicable statutes and ordinances,[32] (2) construction of statutes and ordinances,[33] (3) questions of titles and marketability,[34] (4) power of governmental bodies,[35] (5) rights of insurers and beneficiaries under policies and statutes,[36] (6) rights of holders of government and municipal bonds,[37] and (7) construction of oil and gas leases.[38]

The use of declaratory judgments action in Colorado has not been extensive, but under the Federal act of the same nature, many varying causes of action have been instituted. The intent of the Act as passed in Colorado is that it be interpreted in the light of Federal decisions.[39]

LIBERAL INTERPRETATION GIVEN BY SUPREME COURT

What then constitutes justiciability? When are the seeds of the controversy sufficiently "ripe" to sustain an action for a declaratory decree? Although judicial precedents may guide us in our inquiry in a given factual situation, no all-inclusive answer may be given to these questions. Although we may say facts "indicative of threatened litigation in the immediate future which seems unavoidable"[40] constitute the "ripening seeds" of a controversy, the final determination of a given set of facts can be determined only by the courts. One consideration to keep in mind, however, is that

[28] *See,* San Luis Power v. Trujillo, 93 Colo. 385, 26 P. 2d 537 (1933), in which the court held the Declaratory Judgments Act constitutional, saying, "Preventive relief is a matter of judicial function and is *res judicata* as to the issues presented." Bennett's Inc. v. Carpenter, 111 Colo. 63, 137 P. 2d 780 (1943).

[29] *See,* San Luis Power v. Trujillo, *supra,* note 28.

[30] Bedford v. Johnston, 102 Colo. 203, 78 P. 2d 373 (1938).

[31] Denver v. Denver Land Co., 85 Colo. 198, 274 P. 743 (1928), citing Gabriel v. Board of Regents, *supra,* note 10.

[32] Washington Co. High School District v. Board of Commissions, 85 Colo.. 72, 273 P. 879 (1928); Smith Printing v. Young, 103 Colo. 199, 85 P. 2d 39 (1939). The latter case contains an excellent dissent by Burke on the issue of justiciability.

[33] Colorado and Utah Coal v. Walter, 75 Colo. 489, 226 P. 864 (1923).

[34] Union Colony v. Gallie, 104 Colo. 46, 88 P. 2d 120 (1939).

[35] Montgomery v. Denver, 102 Colo. 427, 80 P. 2d 434 (1938).

[36] Continental Ins. v. Cochran, 89 Colo. 462, 4 P. 2d 308 (1931).

[37] Employers' Mutual v. Board of County Commissioners, 102 Colo. 177, 78 P. 2d 380 (1938).

[38] Hill v. Stanolind Oil, 119 Colo. 477, 205 P. 2d 643 (1949).

[39] COLO. STAT. ANN., c. 93, § 91 (1935); for a comprehensive review of federal cases *see,* ANDERSON, DECLARATORY JUDGMENTS (1941).

[40] In re Cryan's Estate, 301 Pa. 386, 152 A. 675 (1930).

in the past the Colorado Supreme Court has rejected less than 10 per cent of the approximately seventy actions for declaratory relief. This would seem to indicate a tendency on the part of the court to interpret the statute quite liberally and, in some instances, even to disregard the question of justiciability unless it is raised in the briefs.[41]

Some relatively concrete observations can be made, however, as follows: an action brought under the Declaratory Judgments Act is tried in the same manner as any other action brought under the rules of civil procedure;[42] it is res judicata as to the issues presented;[43] and any decree rendered can be presented for further relief when it is necessary.[44] Furthermore, although the cases are in hopeless conflict, the more liberal rule seems to be that an action for a declaratory decree should be entertained even though another remedy exists.[45]

Although some critics have asserted that the declaratory judgment is academic and is of little practical value, it is believed that its uses as pointed out in this paper have in some way indicated the practicability of this action.[46] This practicability was foreseen by Congressman Gilbert in debate on the first Federal declaratory judgments bill when he said, "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 the declaratory judgment law you turn on the light and then take the step."[47]

Personals

Chief Justice Benjamin C. Hilliard made the principal address at the seventeenth annual convention of the State Bar of Arizona at Chandler, Ariz., on Saturday, April 15th. The Chief Justice's address came as the climax to a three-day bar session which featured such other well-known speakers as Harold J. Gallagher, president of the American Bar Association; Jerry Giesler, famous Los Angeles attorney; and the Hon. Harry C. Westover, judge of the U. S. District Court for the district of Southern California.

Raymond R. Brady, a former member of the Denver and Colorado bar associations, is now engaged in general practice at 301 Utah Savings and Trust Bldg., Salt Lake City. Col. Brady, who spent his youth in Alamosa and Salida, was Staff Judge Advocate at Lowry Field for two years during the war. He retired from the armed forces in November, 1946.

[41] McNichols v. Denver, *supra,* note 24.
[42] Rule 57.
[43] San Luis Power v. Trujillo, *supra,* note 28.
[44] COLO. STAT. ANN., c. 93, § 85 (1935).
[45] This seems to be the rule in Colorado. *See,* Employer's Mutual v. Board of County Commissioners, 102 Colo. 177, 78 P. 2d 380 (1938); Tellman v. Smith, *supra,* note 13; *Cf,* Lueras v. Lafayette, 100 Colo. 124, 65 P. 2d 1431 (1937).
[46] Today 60 per cent of all equity actions in England are adjudicated in this manner, ANDERSON, DECLARATORY JUDGMENTS, § 1 *et seq.*
[47] 69 Congressional Record 2108 (1928).