Volume 57 | Issue 2 Article 12

May 1955

Declaratory Judgments--Adjudication of Custody

M. J. S.
West Virginia University College of Law

When *D* answered "no", could he not have as easily inferred that the supposition was false as that it was true, and would not such construction go to the establishment of his innocence rather than his guilt? Upon a full reading of the immunity statute, it is easy to interpret it as requiring the testimony to be criminating before immunity is granted for the offense to which the testimony relates; yet, an opposite interpretation (that the testimony given need not be self-incriminating in order to obtain immunity) may be fairly arrived at, and it is this one which seemingly must be given in order that the statute may have the breadth of W. VA. CONST. Art. 3, § 5 ("nor shall any person, in any criminal case, be compelled to be a witness against himself."). The privilege of the constitution is to refuse to answer at all if the question may be answered with an incriminating response. The two possible interpretations of the statute were not discussed by the court, but the latter one was assumed though there are dicta in *State v. Sterne,* 96 W. Va. 360, 363, 123 S.E. 235, 237 (1924), to the effect that *D* must give testimony which tends in some way to incriminate himself in order to be entitled to immunity.

Lastly, assume that *D* impliedly testified that the supposition (engaging in illegal activities) was true, then is he not immune from prosecution for any illegal activity carried on in his business establishment? It would seem so, for the "offense in regard to which he is so compelled to testify" is not one but all for which he might seek protection through bribery. Thus, need any particular type of criminal conduct be mentioned in the supposition, as the dissent contends, before there can be immunity as to the assumption about which there has been testimony?

This case may illustrate the proposition that a difficult case makes bad law. The law of the case, whether good or bad, is difficult to ascertain. This may have resulted from an inadequate analysis of the questions propounded to *D*.

C. R. M.

DECLARATORY JUDGMENTS—ADJUDICATION OF CUSTODY.—*P*, ex-husband, instituted a proceeding under the Uniform Declaratory Judgment Act, W. VA. CODE c. 55, art. 13, § 1, *et seq.* (Michie, 1949), to adjudicate rights as to the custody of his minor children then residing in Minnesota with *D*, his ex-wife, upon whom service of process was had by delivery of a copy thereof to her in Minnesota.

Held, that this is a proceeding in personam, and that service of process outside the state on nonresident *D* is insufficient to give the court jurisdiction over the person of *D*. *Smith v. Smith,* 83 S.E.2d 923 (W. Va. 1954).

Although the use of a declaratory judgment proceeding to adjudicate custody would afford a new and heretofore untried remedy in West Virginia to determine custody, no question was raised by the defendant, nor any comment made by the court, as to the propriety of such a proceeding.

The proposition that the question of proper custory of children may be determined in a declaratory action as well as a habeas corpus proceeding or other traditional action at law or suit in equity [1 ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS 413 2d ed. 1951] has been presented in three other cases. In *Carter v. Nance,* 304 Ky. 256, 200 S.W.2d 457 (1947), it was held that a declaratory judgment action would lie to determine whether the surviving father or maternal grandparents were entitled to the custody of the father's minor child. This is apparently the only case in the United States directly holding that the action would lie. In *Johnson v. Cook,* 274 Ky. 841, 120 S.W.2d 675 (1938), the surviving mother brought an "action in the nature of a declaratory judgment proceeding" against the paternal grandmother to determine the right to the custody of her infant son, and here as in the instant case, the propriety of the declaratory action was not put in issue. In *Hope v. Hope,* 4 De G.M. & G. 328, 43 Eng. Rep. 534 (1854), the wife had a divorce suit pending in England. While sojourning in France, the French court gave her temporary custody of the children pending final disposition of the divorce case by the English court. Subsequently in a declaratory proceeding in England by the husband, the court made a declaration to the effect that under English law the husband was entitled to custody of the children until the matter was determined by the ecclesiastical court in the divorce proceedings.

W. VA. CODE c. 55, art. 13, § 1 (Michie, 1949), provides that the courts "shall have power to declare rights, status and other legal relations. . . .; and such declarations shall have the force and effect of a final judgment or decree." Although the act does not in express terms require the existence of a justiciable controversy, nevertheless, such controversy must exist and be susceptible of judicial determination. *Town of South Charleston v. Board of Education,* 132 W. Va. 77, 50 S.E.2d 880 (1948); *Dolan v. Hardman,* 126 W. Va. 480, 29 S.E.2d 8 (1944); *Joseph v. National Bank of*

W. Va., 124 W. Va. 500, 21 S.E.2d 141 (1942). On the basis of the statutory authority and these cases, it would appear as a general proposition that a declaratory judgment action would lie to adjudicate custody.

However, the case under comment brings into consideration a relevant factor which was not present in *Carter v. Nance, supra, Johnson v. Cook, supra,* and *Hope v. Hope, supra,* that is, there were prior final adjudications of custody. See *Smith v. Smith,* 76 S.E.2d 253 (W. Va. 1953), in which case the court denied *P* a divorce, but awarded him custody of the minor children. Pending final judgment in that action, the wife secured a divorce in Minnesota, and in that proceeding she was awarded the custody of the same minor children. See the instant case at 925.

In the principal case the purpose of the declaratory proceedings was to have "the rights of the parties as to custody of the children determined," and no question as to the validity of the Minnesota divorce decree was involved. Thus, the action on its face was not to test the validity of the Minnesota decree, but to determine an issue which had previously been adjudicated. At first blush it would appear that an actual controversy did exist, since distinct judicial proceedings resulted in each adverse party being awarded custody; but it has been held that questions previously adjudicated are not the subject of an "actual controversy" within the Declaratory Judgment Act. *Shearer v. Backer,* 207 Ky. 455, 269 S.W. 543 (1925). The purpose of the act is to have a declaration of rights not theretofore determined, and not to determine whether rights, theretofore adjudicated, had been properly adjudicated. Further, an action will not lie under the Declaratory Judgment Act to determine the propriety of a judgment in a prior action between the same parties. *Burgess v. Burgess,* 210 Ga. 380, 80 S.E.2d 280 (1954); *Ferree v. Ferree,* 273 Ky. 238, 115 S.W.2d 1055 (1938). See *Glassford v. Glassford,* 76 Ariz. 228, 262 P.2d 386 (1953), holding that the Declaratory Judgment statute does not contemplate a declaration on one's status or rights under a decree of a court of competent jurisdiction.

A further limitation is placed on the use of a declaratory action by W. VA. CODE c. 55, art. 13, § 6 (Michie, 1949), wherein it is provided that the "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings." See *Tharp v. Tharp,* 131 W. Va. 529, 48 S.E.2d 793 (1948). The ensuing result of this provision is

that the court will refuse to render or enter a declaratory judgment or decree when such judgment, if rendered, would not terminate the controversy, remove the uncertainty giving rise to the proceeding, or serve any useful purpose. *Sheldon v. Powell,* 99 Fla. 782, 128 So. 258 (1930); *Cook v. Sikes,* 210 Ga. 722, 82 S.E.2d 641 (1954); Jackson, *A Note on Declaratory Judgment Pleading and Practice,* 48 W. VA. L.Q. 135 (1942). In *Pantelides v. Pantelides,* 54 N.Y.S.2d 841 (1945), it was held that the use of a declaratory judgment, although discretionary, is dependent on circumstances rendering it useful and necessary, and in absence of necessity for resort thereto, it should not be employed; nor should it be used where a full and adequate remedy is already provided by another well known form of action. *Brindley v. Meara,* 209 Ind. 144, 198 N.E. 301 (1935); *James v. Alderton Dock Yards,* 256 N.Y. 298, 176 N.E. 401 (1931). See *Somberg v. Somberg,* 263 N.Y. 1, 188 N.E. 137 (1933).

Therefore, the general proposition that a "declaratory judgment action will lie to adjudicate custody" is qualified when such proceeding is based on a factual situation equivalent to that found in the principal case, due to the absence of an "actual controversy" within the meaning of the Declaratory Judgment Act, and the action would serve no useful purpose inasmuch as a declaratory judgment decree would not be entitled to any higher degree of full faith and credit in the Minnesota courts than the original custory award in *Smith v. Smith,* 76 S.E.2d 253 (W. Va. 1953).

M. J. S.

DEEDS—ESTOPPEL BY DEED—EFFECT OF REFERENCE.—Father of *P* was seised of a one-half undivided interest in tracts of land No. 1 and 2, and mother of *P* was seised of the other one-half undivided interest in tracts No. 1 and 2, and of the whole of tract No. 3. By deed the father and mother conveyed to *P* the father's "undivided interest" in the three tracts (the father's only apparent interest in tract No. 3 being his inchoate dower right). By a later deed *P* conveyed to *D* with covenants of general warranty, "all those certain tracts [1, 2, and 3] . . . of surface land situate on Peter Cave and Bartram Fork Creek of Little Lynn Creek . . . and being the same land conveyed by Sarah B. Wellman [mother] and B. F. Wellman [father], her husband . . . and bounded and described as follows . . . ." There followed metes and bounds descriptions