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James Schoonmaker

DECLARATORY JUDGMENT

By James Schoonmaker*

IT may be assumed that the members of the bar understand the meaning of the words "declaratory" and "judgment," but as the "declaratory judgment," so called, is not a part of our common law, it is probable that few understand just what is meant by that term.

The purpose hereof is to briefly explain what is meant by the term "declaratory judgment," and call attention to a few of its advantages, both to the public and the profession. Those who wish to go into the subject more fully are referred to the able brief by Edwin M. Borchard, Professor of Law, Yale University, submitted to the Committee on the Judiciary, United States Senate, in 1919, in support of the bill (S. 5304) to authorize federal courts to render declaratory judgments. A copy may be obtained by writing Senator Knute Nelson. I am indebted largely to Professor Borchard for the matter herein contained.

We have in Minnesota two classes of judgments, namely: First, executory or coercive; and, second, constitutive or investitive.

Judgments of the first class are based on some past violation of right or an immediately threatened violation thereof which will result in irreparably injury, that is, injury not compensated by money damages, and they are followed by coercion. For instance, damages are awarded against a party, or he is commanded to do or refrain from doing something. If he disobeys the mandate of the judgment he may be coerced by execution, contempt proceedings, etc.

The second class of judgments effect same change of status and constitute a source of new jural relations, but in their simplest form they order nothing to be done—are not coercive. Among such judgments are order and decrees admitting wills, determining descent of property, appointing guardians and receivers, dissolving and annulling marriages, and adjudications in bankruptcy. These judgments, like executory judgments, are

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based upon some past act or condition, and involve rights and duties but neither class are strictly declaratory.

Declaratory judgments, on the other hand, do not presuppose a legal wrong, nor are they followed by coercive relief as they simply declare a right, duty, relation, immunity, disability, etc. In the language of Prof. Borchard:

"Their distinctice characteristic lies in the fact that they constitute merely an authentic confirmation of already existing relations."

It is well settled that "equity will not interfere for the purpose of declaring rights to prevent a possible controversy which has not yet arisen."[1]

It is equally well settled that our present system of jurisprudence furnishes no means whereby a party to a contract may obtain an authoritative construction of the contract for his guidance except by breaching it and submitting himself to damages, and this is especially true if it involves any question of fact.

The absurdity and gross injustice of this rule is aptly illustrated by the recent case of *Dreiser v. John Lane Co.*,[2] decided in 1918. The parties had entered into a contract providing for the publication of plaintiff's book on a royality basis. A certain society for the prevention of vice claimed that the book was obscene, and threatened criminal prosecution. The parties submitted to the court upon an agreed state of fact the question as to whether the book was obscene, but the court held that it was not a proper matter for judicial determination on voluntary submission.

That both legislatures and courts are drifting away from these absurd and unjust judge made rules is evidenced by the recent enactments and decisions hereinafter mentioned.

Space will not permit tracing the history of the declaratory judgment. Suffice it to say that its origin is in the Roman Law, and from this source it later found its way into other parts of Europe. In various forms it has been in use in different countries about as follows: In Scotland, for 400 years; in France, for several centuries; in England, since 1852; in Germany, since 1877; in India, since 1859; and from various dates since 1853, in Australia, New Zealand, Queensland, Ontario, British Columbia, Manitoba and other Canadian Provinces. It was in use in

[1] 16 Cyc. 102.
[2] 171 N. Y. S. 605.

Italy during the middle ages, and in modern times in Spain and Spanish America.

The English courts were vested with power to render declaratory judgments by enactments in terms or by statutes authorizing court rules, and in short form. The act of 1852 is as follows:

"No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."

The court rule in 1883 is as follows:

"No action or proceeding shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

The amended rule of 1893 is as follows:

"In any division of the high court, any person claiming to be interested under a deed, will or other instrument, may apply by original summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested."

The bill introduced in Congress in 1919 (S. 5304), after the enacting clause is as follows:

"The district courts, the circuit courts of appeals, and the Supreme Court of the United States shall have power in any action or in an independent or interlocutory proceeding, to declare rights and other legal relations on written 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."

Wisconsin[3] and Michigan[4] enacted in 1919 statutes authorizing declaratory relief.

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[3]Wis. Laws 1919 c. 242 reads as follows:

"Equitable action to obtain declaratory relief may be brought and maintained in the circuit court and in matters of which the supreme court has original jurisdiction in the supreme court, and it shall be no objection to the maintenance of such action that no consequential relief is sought or can be granted if it appears that substantial doubt or controversy exists as to the right or duties of parties, and that either public or private interests be materially promoted by a declaration of the right or duty in advance of any actual or threatened invasion of right or default in duty. The judgment rendered in such an action shall bind all the parties thereto and be conclusive and final as to the rights and duties involved."

[4]Mich. Pub. Acts 1919 No. 150 reads as follows:

"An act to authorize courts of record to make binding declarations of rights.

"Sec. 1. 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 make binding declarations of rights whether any consequential relief is or could be

The cumbersome form of the equitable action to remove a cloud from the title of real property and the artificial restrictions with which it is incumbered have led to the enactment of statutes authorizing any person claiming an interest in land (in some cases the claimant must be in possession or the land must be vacant) to bring an action to determine adverse claims. The complaint simply alleges the ultimate facts as to the plaintiff's interest, that is, his ownership or possession, or both, or that the land is vacant; and that the defendant claims adversely. The judgment simply declares the plaintiff's right and that the defendant has no claim. These judgments are simply judicial declarations of rights without any consequential relief, and hence are pure declaratory judgments, though not in name.

At least Connecticut has gone further and eliminated the questions of possession and occupancy and included personal property by the enactment of a statute authorizing any person claiming an interest in real or personal property to bring an action against

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claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

"Sec. 2. Declarations of rights and determination of questions of construction, as herein provided for, may be obtained by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or the equity side of the court as the nature of the case may require, and where a declaration of rights is the only relief asked, the case may be noticed for early hearing as in case of a motion.

"Sec. 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith upon such reasonable notice as shall be prescribed by the Court in said Order.

"Sec. 4. When a declaration of rights, or the granting of further relief thereon, shall involve the determination of issues of fact by a jury, such issues may be submitted to a jury in form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case.

"Sec. 5. Unless the parties shall agree by stipulation as to the allowance thereof, costs in proceedings authorized by this act shall be allowed in accordance with such special rules as the supreme court may make, and in the absence of such rules the practice followed in ordinary cases at law or in equity shall be followed wherever applicable, and when not applicable, the costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party.

"Sec. 6. This act is declared to be remedial, and is to be liberally construed and liberally administered with a view of making the courts more serviceable to the people."

any person claiming adversely to determine such adverse claim and clear the title.[5]

Our action to determine adverse claim was at first limited to a plaintiff in possession of real property, but was later extended to unoccupied lands. I have never been able to understand the reason for these limitations, nor why the action should not be also applied to personal property. The Connecticut statute is a great improvement upon our statute, and ours has proven so convenient and effective that no one would think of repealing it.

Our statute authorizing the registration of land under the Torrens system is another illustration of the use of a declaratory judgment. The court determines all interests, claims and liens affecting the land, including mechanics' liens of record, but it grants no consequential relief unless the direction to the registrar may be termed such. Thus a mechanic's lien may be adjudged against the land, but it cannot be foreclosed in the registration proceedings.[6]

In at least three cases our supreme court has sustained declaratory relief though in neither case is the principle of the declaratory judgment discussed as such. I refer to *Fitzpatrick v. Simonson,*[7] *Porten v. Peterson,*[8] and *Slingerland v. Slingerland.*[9] In the *Fitzpatrick case* the court sustained a judgment as final which determines title to real property by descent under law 1897, c. 157, though the judgment was purely declaratory and granted no consequential relief. In the *Slingerland case* the plaintiff was permitted to maintain an action to cancel an antenuptial contract although the defendant had taken no affirmative action, and though the plaintiff's inchoate dower right might never vest. The court says:

"Courts are established, and law and equity administered, for the purpose of justice in the adjustment of differences between man and man. . . . In addition it would seem that now, while the parties to the instrument are alive and capable of testifying fully to the facts, is the appropriate time for the adjustment of the controversy."

[5]Conn. Pub. Acts 1915, ch. 174.
[6]Reed v. Siddall, (1905) 94 Minn. 216, 102 N. W. 453.
[7](1902) 86 Minn. 140, 90 N. W. 378.
[8](1918) 139 Minn. 152, 166 N. W. 183.
[9]Slingerland v. Slingerland, (1910) 109 Minn. 407, 410, 411, 124 N. W. 19.

Certainly the above statement cannot successfully be controverted, and yet we know that this "appropriate time" consideration has not been sufficient to induce courts to grant declartory relief.

The *Porten case* was an action for specific performance of an oral land contract, which was denied by the defendant. The plaintiff was in possession, but not having made all required payments was not in postion to demand specific performance. The question involved was whether under such circumstances he could have his equitable title adjudicated. The court says at page 155: "We find no case directly in point." At page 156 the court quotes the last part of the above quotation from the *Slingerland case,* and among other things says: "There as here the only effect of the decree was to determine the right."

The logical reasoning and the just and salutary results reached in these two cases are not supported by the reported cases. At least, as stated by Justice Dibell in the *Porten case,* I find no case directly in point. Nor do I find any case holding the declaratory relief alone may be granted independent of statute.

There is scarcely any limit to the questions concerning which declarations would be most useful in the administration of justice. Any one desiring more specific enumeration will do well to consult a digest of the many reported English cases. That the declaratory judgment has become most useful in England is proven by the fact that 66 per cent of the reported cases in the second chancery division in 1917 were declarations. Concerning the uses of the declaratory judgment I quote from Prof. Borchard as follows:

"As a measure of preventive justice, the declaratory judgment probably has its greatest efficacy. It is designed to enable parties to ascertain and establish their legal relations so as to conduct themselves accordingly, and thus to avoid the necessity of future litigation.

"It is further designed to enable trustees, executors, receivers, and others who act in a fiduciary capacity and whose proper execution of such trusts is a matter of public as well as private interest, to obtain authoritative advice and guidance in the performance of their duties."

The enactment of a statute vesting our district courts and the supreme court with power to grant declaratory relief would only be an extension of the principle involved in our action to deter-

mine adverse claims and in our registration of land titles, and recognized in the decisions of the *Slingerland* and *Porten* cases above mentioned.

The principle of the declaratory judgment was unanimously indorsed by the State Bar Association at its recent meeting; and that it will be indorsed and appreciated by the people of this state as a convenient and effective means of adjusting controversies between man and man is proven by the experience of England and a large part of the civilized world.

Again I quote from Professor Borchard as follows:

"Its simplicity, its capacity to serve important ends of corrective justice without legal hostilities, its utility in deciding many questions which can not now be brought to judicial cognizance, its efficacy in removing uncertainty from legal relations before they have ripened into a cause of action—that is, its usefulness as an instrument of preventive justice, a field which has hardly begun to be cultivated in this country, commend the declaratory judgment to the earnest attention of the American Bar and of the public which it serves."

One question remains for consideration and that is the form of the enactment. Shall we simply vest our courts with power to grant declaratory relief as was done in England and is proposed by the bill in Congress, or shall we also prescribe more or less of the procedure as was done in Wisconsin and Michigan? If we were all familiar with the declaratory judgment and the pertinent English decisions, then I would say that a brief statute vesting the courts with this power would be sufficient; but the fact is that neither the judges nor the members of the bar are familiar with these judgments and decisions, and it would be no surprise if they were inclined to construe it strictly instead of liberally as a remedial measure, and thus greatly limit its usefulness. For this reason it might be advisable to prescribe more or less of the procedure.

Before the meeting of the next legislature I shall prepare a bill authorizing our courts to grant declaratory relief. In the meantime I shall be pleased to receive suggestions as to its form.[10]

[10]Since the above was written I have learned that the Michigan statute above mentioned has been held unconstitutional in Anway v. Ry. Co., (Mich. 1920) 179 N. W. 350. I will refer to this case in a later article.