

DECLARATORY JUDGMENTS*

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You may think it a little presumptuous, and I guess it is, to have a man come here from the East and undertake to point out any defects in the law of Ohio. My interest in the subject of declaratory judgments is such, however, that I have ventured to incur whatever dangers there may be in that undertaking. I was the more disposed to run those risks because what I hope to discuss today is not anything really new, but is an institution that England has had for over fifty years and which has been adopted in some twenty-three states in the United States. The declaratory judgment procedure has been adopted by nearly every neighbor that Ohio has, including Pennsylvania, Indiana, Kentucky, and Michigan; so that, unless Ohio does come into line, it may soon be called a "backward state". For that reason I ventured to come West to see if I could not, in conference with lawyers at the bar, persuade you of the merits of this procedure, for I think you will agree, before I have gone very far, that there are numerous situations in life requiring judicial settlement that are not covered by the existing procedure.

If I were advocating something which had not been thoroughly tried out, I would feel on very much more uncertain ground, but as I have stated, the declaratory judgment procedure has been tried out in England for fifty years, and in Scotland for four hundred years. And when I tell you that the majority of the equity cases in England come up on bills for declaratory judgment instead of bills of injunction, specific performance or other equit-

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able relief, and that twenty-three states of the United States have adopted this procedure, I think it has passed the experimental stage. But the very words "declaratory judgment" have thrown such a doubt over certain members of the bar that they have had to be doubly convinced of its merit before adopting it.

Perhaps I ought first to say something about what the declaratory judgment is before I discuss its history; and the best way to do that is, I think, to discuss some practical cases.

Our law proceeds mainly on the assumption that the court can act only after a wrong has been done; after you have violated a law you can have a court tell you what it means; after you have broken a contract you can get a judicial determination of what your rights were, hoping that when you acted upon the advice of your counsel you were right. Sometimes you are justified in that hope and sometimes you are not. Now, it ought not to be necessary to break a contract in order to find out your rights under it—always on the assumption that you have a genuine controversy with the other party to the contract.

A broken contract means a cessation of friendly relations and an economic waste often of incalculable amount, because a broken contract rarely is patched up again. Nowadays when people enter into important and complicated contracts for public works (as in New York) it has become extremely valuable to have available in case of serious dispute a suit for the declaration of the rights of the plaintiff and defendant under that contract *before* they break it; and when judicially determined—usually on summary proceedings—to be able to go ahead with the contract despite the controversy.

Let me mention certain cases. And first, the case of *The Shredded Wheat Company v. City of Elgin*,¹ which

¹284 Ill. 249, 120 N. E. 248 (1920).

came up in 1920. In that case The Shredded Wheat Company proposed to sell shredded wheat to the inhabitants of the city of Elgin. The city of Elgin has a municipal ordinance which required anybody who sold at retail in that city to take out a twenty-five dollar license, under penalty of ten dollars per day for every day he sold without a license. The Shredded Wheat Company said: "We are engaged in interstate commerce and therefore we cannot be taxed by you for the privilege of selling our product in your city." So they sought an injunction against the city of Elgin to restrain the enforcement of the ordinance against them. The lower court, affirmed by the supreme court, in effect said: "We are sorry, but we cannot issue an injunction against the enforcement of this ordinance, because it is criminal in nature. Go ahead and sell your product; if you are engaged in interstate commerce, then you are not subject to the tax, and will go free when they prosecute you; but if you are not engaged in interstate commerce, then you should pay the tax and the penalty." Thus, they had to violate the ordinance first or purport to violate it before the validity of the ordinance could be determined. Now, that ought not to be necessary under a civilized system and it is not necessary in those states that have declaratory judgments.

A similar case under the declaratory judgment procedure recently came up in Tennessee—*Erwin Billiard Parlor Co. v. Buckner*.² A statute prohibited, under penalty, the operation of billiard parlors in counties having a population not less than 10,115, nor more than 10,125. The owner of a billiard parlor in Unicoi County, directly affected by this statute and threatened by the sheriff with enforcement, contended that the act was unconstitutional because it was special legislation affecting owners

²300 S. W. 565 (Tenn. 1927).

of billiard parlors in certain counties only. He sued, therefore, for a declaratory judgment that the law was unconstitutional and for an injunction to restrain its enforcement. I shall presently mention the great advantage of being able to combine the prayer for a declaratory judgment and for an injunction in one action. The court said: "This is a criminal statute. We do declare that it is unconstitutional, but we cannot issue an injunction against its enforcement." That served every practical purpose. No officer would think of enforcing a statute declared unconstitutional. All the plaintiff or petitioner wanted to have adjudged was that the act was unconstitutional, so he got his full relief.

Recently a case came up before the Supreme Court of Pennsylvania. This court, like those of New York and other states, has been appreciative of the value of the declaratory judgment procedure as a method of settling controversies. In that case, *Girard Trust Company v. Tremblay Motor Company*,³ the plaintiff, the landlord, sues the tenant, the Motor Company, on the following state of facts. The lease, made in 1922, covered a three-story non-fireproof building used as a garage and service station. In 1923 a Pennsylvania statute provided that thereafter no garages or service stations could be located in non-fireproof buildings higher than two stories. There was a clause in the lease to the effect that if the building should burn down, the landlord was to furnish the tenant (in order to reinstate the obligation to pay rent) with a building equally as good as the one on the premises before the fire. In 1927, the building burned down. The landlord offered to put up a three-story building similar to the old one. The tenant refused that, saying the statute would prevent his occupying it. The landlord then offered to build a fireproof two-story building, which the tenant

³291 Pa. 507, 140 Atl. 506 (1928).

could have for the rent stated in the lease. The tenant answered that he would only take that if his rent were reduced. What is the landlord to do? Under the existing forms of procedure, he can put up a building and then tender it to the tenant and hope that the courts will tell him that he has put up the right kind of building under the lease and the statute, so as to obtain the rent. Under the declaratory judgment procedure, the landlord, without putting up a building, brought this kind of a declaratory suit. He prayed the court to declare that the defendant is under a duty (a) to accept the three-story non-fireproof building which he had offered him, as a compliance with the landlord's obligations under the lease; (b) to accept a two-story fireproof building, paying the same rental as for the old premises; and (c) he demanded a declaration that the defendant, by not accepting either of these two alternatives had broken the lease and that the landlord was privileged to declare the lease terminated and reenter. All plaintiff had to furnish was the plans for the two alternate buildings. The Pennsylvania Supreme Court issued the declaration requested and made the following remarks:

"In a case like the present, by proceeding according to the Declaratory Judgments Act (Pa. St. Supp. 1924, secs. 12805*a*1 to 12805*a*16), the parties avoid the necessity of first actually erecting a building in order to be in a position to obtain a judicial construction of their respective rights and liabilities. The lessor, having averred a willingness to erect the kind of a building which it conceives to be sufficient to entitle it to receive rent from the lessee, and the tender of such a building to defendants—these facts and the good faith of the tender not being denied—can have it judicially declared whether, under the governing rules of law, the structure tendered meets the requirements of the situation, and, if erected, would oblige the lessee or the subtenant to recommence

payment of the rent named in the contract of lease. Lessor can also have a further declaration as to its rights consequent upon a refusal by defendants to accept the kind of a building tendered; and this latter declaration must be, as found by the court below, that the lease is at an end and plaintiff can repossess itself of the demised premises.

“A prime purpose of the Declaratory Judgments Act is to render ‘practical help’ in ending controversies such as the one now before us. Kariher’s petition, No. 1, 284 Pa. 455, 471, 131 A. 265. Had defendants, instead of refusing the offers of plaintiff, simply taken the position that, according to their understanding of the law applicable to the admitted facts, the building tendered would not give them what they were entitled to under the lease, and, on that state of affairs, asked for a declaratory judgment or joined with plaintiff in asking for such a judgment, their respective rights might have been judicially declared. Then, after such a determination of the governing principles of law as we have here made, plaintiff could either have erected the proposed three-story building and insisted on payment of rent for the balance of the term named in the contract of lease, or, in place of actually building, plaintiff could have given defendants notice that its offer to build was still open; if, under these circumstances, defendants had persisted in their refusal, plaintiff could have accepted such refusal as an abandonment of the lease. In other words, had the parties seen fit, they could have had the help of a judicial declaration of their respective rights and liabilities before taking a definite stand amounting to an ultimatum on each side and asking for a declaratory judgment on that state of fact. As the case comes before us, however, we have the lease, the destruction of the building by fire, plaintiff’s offer to erect a new one, and defendants’ refusal submitted to the court below for judgment thereon, that tribunal’s declaration of law that the lease was at an end, plaintiff’s acquiescence in this conclusion, by not appealing, and defendants’ appeal; this is the case as the parties made it, and we must adjudge it accordingly.

While not agreeing with the court below that, upon the destruction of the old building, the act of 1923 had the effect of immediately 'rescinding' the lease 'by operation of law', we concur in its ultimate conclusion that the lease is extinguished; and since that is the dominating declaration in the case, the judgment appealed from will not be disturbed."

Common cases that have come up have been landlord and tenant cases, where there is in the lease a condition to the effect that the tenant may not sub-let without the consent of the landlord, which may not be "unreasonably" withheld. The tenant wants to sub-let and the landlord will not give permission to sub-let—unless he is paid for it, or for some other reason. The tenant thinks the landlord was bound to accept a sub-lease, and that the withholding of consent was "unreasonable". The tenant can, under existing forms of procedure, do one or two things. He can sub-let and he and his sub-lessee can take chances on the court ultimately saying, when the lawsuit comes up for ejectment or for breach of the lease, that the consent was unreasonably withheld; or he can forego the prospective benefits of his proposed sub-lease. Nobody likes to buy a law-suit. With the declaratory judgment procedure available the tenant does not need to risk breaching the lease or foregoing his privileges, but may sue the landlord for a declaration that he is bound to give his consent to the sub-letting before the sub-tenant has gone in, or that the landlord's consent is unreasonably withheld. All the court asks is to be convinced that the subject matter involves a genuine controversy which needs to be determined,—and this before damages have been incurred, and before the tenant or sub-tenant by action on his lawyer's interpretation of his rights in the matter, which may or may not be in line with what the court ultimately would decide, incurs

unnecessary risks, expenses and damages.⁴ This means that before the damage is done or risks incurred, you are enabled, by the use of the declaratory judgment procedure, to obtain from the court an authoritative binding judgment as to the rights of the conflicting parties not possible by any other method. Disputed facts may be submitted to a jury on demand.

In New York we have had fifty-two reported cases since 1922 and the Chief Judge of that state, Judge Cardozo, whose name will undoubtedly be familiar to all of you, has been most laudatory as to the value of this form of procedure, particularly for those who would otherwise act at their peril. There are a great many such cases. Officials are often in that position. For example, they are bound by a statute to do something. They believe the statute to be unconstitutional. They may undertake to do the act and in some particular states if they do it and the statute is proved unconstitutional, they are liable for damages as individuals;⁵ and if they decline they subject themselves to suit for damages for not doing what the statute says they should do.⁶ It ought not to be necessary to place an official in that predicament. Not all courts permit the issue of constitutionality to be raised on mandamus proceedings.⁷ The declaratory judgment procedure enables the official to sue for a declaration against the individual urging him to act or that he is under no duty to act because the statute is unconstitutional or that he is privileged to act under a given statute.⁸ In New York and numerous other states,

⁴*Young v. Ashley Gardens*, 2 Ch. 112 (1903); *Sarner v. Kantor*, 123 Misc. 469, 205 N. Y. Supp. 760 (1925).

⁵*Barker v. Stetson*, 7 Gray (Mass.) 53 (1857); *Ely v. Thompson*, 3 Marsh (Ky.) 70 (1820).

⁶*Clark v. Miller*, 54 N. Y. 528 (1854).

⁷*Cf. State v. Dandaland*, 36 Utah 406, 104 Pac. 285 (1909).

⁸*Cf. State v. Grove*, 109 Kan. 619, 201 Pac. 82 (1921).

the narrowing of the issue and the speed with which matters of this type are determined (often in as summary a manner as motions) has proved that the declaratory judgment procedure is essential to the effective administration of justice.

There has been an interesting case recently in New York in connection with the declaration of status in marriage and divorce.⁹ A woman in New York was married to a man who went off to Mexico and got a divorce there, then went to Connecticut, undertook to marry another lady and continued to live with her back in New York. The wife, whose interests were seriously affected, brought an action for a declaratory judgment that the Mexican divorce was invalid. That was all she needed. To bring an action for the annulment of the second purported marriage would only have complicated the case and would also have depended upon showing that the Mexican divorce was invalid. There was a good deal of doubt among the bar in New York whether you could substitute an action for the annulment of the second marriage by a suit for a declaration that the divorce was void. The court on the merits decreed that the divorce obtained in Mexico was invalid, the New York Appellate Division having on the procedural issue said: "There was no reason why this important question should not be settled by declaratory judgment. On the merits, the prayer for a declaration was combined with a prayer for an injunction against the husband and the second woman holding themselves out as husband and wife."

The advantage of being able to combine a petition for a declaration with one for an injunction will readily be apparent. An injunction cannot always be obtained, though, as I shall show, courts have occasionally permitted

⁹Bauman v. Bauman, 222 App. Div. 460, 226 N. Y. Supp. 576 (1928).

the injunction to be abused for the purpose of issuing what is in effect a declaratory judgment. But most courts still insist that as a condition of an injunction, you must show irreparable imminent injury and inadequacy or the relief at law. If you fail in your demand for the injunction, you are out of court, and do not know your rights. You have to start all over again. The combined demand for a declaration of rights and a demand for injunction avoids that predicament. The request for injunction may fail, but you will nevertheless get your declaratory judgment and that is all you need in order to know where you stand. That has been proved in innumerable cases in England and in this country.¹⁰

To show that the injunction is, as I believe, occasionally abused for the laudable purpose of issuing what in effect is a declaratory judgment, I will mention one notable case. Out in Oregon the Catholic schools were threatened with extinction by a state law which provided that all children would have to go to public schools, although the statute was not to go into effect for three years in order to give these schools ample time to dissolve. Suit was brought to enjoin the enforcement of this statute, which was not going to come into effect for three years and which nobody was threatening to enforce. It was not, I think, proper to use an injunction for that purpose. There being no declaratory judgment procedure in Oregon at the time and it being very necessary to have the constitutionality of the statute determined in order that the economic interests involved might be relieved of their precarious uncertainty, the court issued on that framed-up injunction procedure, what in every essential was a declaratory judgment, simply because they felt it necessary to get the case before them and decide it.¹¹ Author-

¹⁰*Cf.* *Islington Vestry v. Hornsey U. D. C.*, 1 Ch. 695 (1900); n. 2, *supra*.
See cases cited in 28 *YALE L. J.* 105 *et seq.*

¹¹*Pierce v. Society of Sisters*, 268 U. S. 510, 525 (1925).

ized procedure for a declaratory judgment under the Oregon statute would have rendered the circumlocution unnecessary. Not all courts will permit an injunction to be abused in that way. There is no need for such abuse if you have the alternative of a declaratory judgment procedure.

Declaratory judgments come up most frequently in connection with the construction of written instruments. In view of our long familiarity with the procedure for the construction of a will, it is apparent that this is no great innovation. It simply extends the judicial power of construction to other written instruments, contracts, mortgages, deeds, leases, partnership agreements, and agreements of all kinds. Just think how often partnerships and other associations have been disrupted by different interpretations placed on such agreements by the parties. Now it is not necessary under the declaratory judgment procedure to break such agreements to have them judicially interpreted.¹² The issue on the construction of such an agreement is hostile and adversary in every usual sense. A contends that the contract means this and B contends that it means that. In Ohio the agreement probably has to be broken in order to get the court to pass upon it, but it should not be necessary to break an agreement, with all the loss and disturbance involved, in order to find out what it means. As Congressman Gilbert said in debating the federal Declaratory Judgments Bill which passed the House last January and is now pending before the United States Senate: "You have the same court, the same jurisdiction, the same procedure, the same parties and the same questions. Under the present law you take a step in the dark and then turn on the light to see if you have stepped into a

¹²*United Order of Foresters v. Miller*, 178 Wis. 299, 190 N. W. 198 (1922).

hole. Under the declaratory judgment law you turn on the light and then take the step."¹³

I humbly submit that it represents a serious gap in our existing form of procedure not to provide for declaratory judgments. Chief Judge Cardozo of New York and Chief Justice von Moschzisker of Pennsylvania have practically gone on record to this effect in supporting the passage of the federal Declaratory Judgments Bill.

A recent Tennessee decision contains the following lucid statement:

"A declaratory judgment is essentially one of construction. It is apparent from the history of the legislation providing for this procedure as well as from the recital of the Uniform Declaratory Judgments Act, that its primal purpose is the construction of definitely stated rights, status and other legal relations, commonly expressed in written instruments, although not confined thereto."¹⁴

Perhaps I should say a word about the history of the declaratory judgment in this country. In England it was adopted in 1883 by a simple rule of court providing that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequent relief is or could be claimed or not." In a declaratory judgment you merely ask for a declaration of your rights, which you must allege according to your claim in your pleadings. Of course, there must be a genuine controversy, a contested issue to be decided. It enables the parties to settle controversies arising out of contracts, for example, without first breaking them. On proof that the issue is ma-

¹³Cong. Rec., p. 2108, Jan. 25, 1928.

¹⁴Mewsum v. Interstate Realty Co., 152 Tenn. 302, 278 S. W. 56 (1925).

terial, and that it serves a useful purpose to settle it by decision, the court can construe the contract before breach, declare the rights of the parties, and its decision is final and binding. It saves the necessity of violating a law to find out from a court what it means. Courts should not render declaratory judgments in inappropriate cases. They have full discretion to decline to render a declaratory judgment in an improper or inappropriate case, when there is no genuine controversy, no hostile issue, and when the judgment would not finally terminate the controversy or serve a definitely useful purpose.

The movement in the United States began in 1917 and 1918, and though statutes to construe wills had been known before then, general statutes along the English model were not enacted until 1919, when Michigan and Florida passed statutes authorizing their courts to render declaratory judgments. Since then twenty-three states have fallen into line. The movement was greatly stimulated by the recommendation in 1921 by the Commissioners on Uniform State Laws of the Uniform Declaratory Judgments Act. Nearly half of the twenty-three states have enacted the Uniform Act.

In Michigan the statute had an undeservedly unfortunate experience: An action for a declaration was brought there to construe a statute which provided that no person shall be employed by a public service company for more than six days a week. The employee, in apparent agreement with his employing company, asked for a declaration claiming that, under the statute, he is privileged to work seven days a week if he wants to. A labor union intervened. The question in issue did not present a controversy and the court was correct in saying that it was not a case for declaratory judgment. But the Supreme Court of Michigan went further and asserted, the declaratory judgment procedure to be unconstitu-

tional. They thought it required the court to render advisory opinions and decide moot cases. As so often happens on issues of constitutionality, the facts of the first case are of great importance. The facts in that first case of *Anway v. Grand Rapids Ry.*¹⁵ were miserable. Courts have a natural hostility against new words and terms and the majority of the Michigan court developed a prejudice against the declaratory judgment, because they did not apparently understand it. No one should have assumed that the statute required decisions in cases that did not present actual controversies or that were moot. Decisions in later cases have made this clear. The courts of other states have pointed out the Michigan court's error, and it cannot prevail.

No other state has fallen into the mistake of the Michigan court, and the declaratory judgment procedure is now established in twenty-three of the United States. Some 250 decisions have been rendered under it. Wisconsin repealed its 1919 declaratory judgment statute in 1922 on the erroneous ground that it seemed to require decisions in moot cases; but last year Wisconsin re-enacted the Uniform Declaratory Judgments Act, so that they would appear to have repented. As already observed, the issuance of declaration is in the discretion of the court and the court should issue it only when it serves a useful purpose and terminates a genuine controversy.

I believe this short review of the declaratory judgment procedure will have convinced you that it is useful and that the states and countries that have adopted it have not been making mistakes; but, on the contrary, have helped to solve a genuine legal problem, which was universally felt, namely, how to avoid having to act at your peril, how to remove uncertainty and clouds from

¹⁵211 Mich. 592, 179 N. W. 350 (1920).

legal rights when they are placed in jeopardy. It enables us to get a final judgment on our rights before we plunge rather than after.

Perhaps I should add a word on the Supreme Court of the United States. This court has not yet had a real declaratory judgment case before it and has never had such case argued, but under an action brought in the United States District Court in Kentucky under the federal Conformity Act, Judge Sanford took occasion to make some unnecessary statements.¹⁶ A warehouse company undertook to ask a declaration in the state court of Kentucky that a statute which required cooperative marketing of tobacco was unconstitutional. The court rendered a declaratory judgment that the statute was constitutional.¹⁷ Even under the declaratory procedure, the court can thus disappoint a petitioner. A non-resident of Kentucky then went into the federal District Court under the Conformity Act and asked for a declaration similar to that asked by his Kentucky colleagues of their state court. And the federal District Court in Kentucky stated that the federal Conformity Act could not be used for that purpose. On appeal to the United States Supreme Court, the Supreme Court affirmed the decision of the District Court of Kentucky. That was, it is believed, correct, but the court, without any special necessity therefor, went on to say that nobody was threatening to enforce the Kentucky statute; that the plaintiffs did not allege that they were contemplating doing anything forbidden by the Act; and that no relief was prayed. Evidently Judge Sanford did not think the case presented an adversary proceeding. Only under this assumption—which the real facts do not evidently

¹⁶*Liberty Warehouse Co. v. Grannis*, 47 Sup. Ct. 282 (1927).

¹⁷*Jewell Tobacco Warehouse Co. v. Kemper*, 206 Ky. 667, 268 S. W. 324 (1925).

sustain—can Judge Sanford's *dictum* be supported. It must be remembered that there was no declaratory judgment before the court for review. It may be remarked, however, that execution is not necessary to make a judgment final or the action a "case" or "controversy". It is the finality of the judgment, its final binding character which is decisive of the question. The executability of the judgment is not an essential part of the exercise of the judicial function or of a "case" or "controversy".¹⁸ The Supreme Court will not, I believe, make any difficulties on this question. The experience of New York, Pennsylvania, and other important states and the decisions of their highest courts, as well as the decision of some two thousand cases in England bringing up myriads of subjects on actions and proceedings for declaratory judgments cannot, I believe, fail to convince the court that a declaratory judgment is as final and binding and the issue as justifiable as in any other proceeding. The only difference between this and any other proceeding is in the prayer for relief. The procedure, without the name, is familiar to us for centuries, as in actions to remove clouds from title, to construe wills, etc. Only its name and its more extended use are modern. The bill authorizing the federal courts to render declaratory judgments passed the House of Representatives January 25, 1928, and is now pending before the Senate Judiciary Committee. It is to be hoped that this state will soon join practically all its neighbors by enacting the Uniform Declaratory Judgments Act, and will thus enable its courts to render an important service to the people of Ohio.

¹⁸Fidelity National Bank v. Swope, 274 U. S. 123 (1927).