

general, the solution of such problems ought to depend upon whether the enterprise is incidental to the disposition of governmental property or the latter is a mere subterfuge for engaging in the enterprise. Certainly, if there were no other suitable method of marketing a valuable governmental asset, the United States would not be debarred from realizing its value, though in order to do so it should be necessary to change its form or even to utilize it in a commercial enterprise. On the other hand, the constitutional power to dispose of property of the United States would scarcely seem to warrant permitting the Government to engage in competitive commercial enterprises merely because they involve the use and ultimate disposition of property lawfully acquired.

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## AN INDIANA DECLARATORY JUDGMENT

By EDWIN BORCHARD\*

It is an aphorism that the greatest enemies of law reform, and particularly of procedural reform, are the lawyers. A striking exemplification of the axiom may be found in *Brundley v. Meara*, decided by the Supreme Court of Indiana, November 18, 1935, 198 N. E. 301.

That was the second of two appearances before the Supreme Court of the members of the advisory board of North Township, Lake county. They had already successfully brought an action for a declaratory judgment, construing a statute which determined that they and not the defendant, township trustee, had the power to select the persons that shall be employed by the trustee as investigators or assistants in discharging duties concerning the relief of the poor. 194 N. E. 351. Later on, the trustee apparently annoyed the advisory board by publishing certain articles attacking their integrity and impartiality, and threatened to hamper and harass the board in the performance of their duties. They then petitioned the court a second time "as further relief" for an order enjoining the trustee from "interfering [with] harassing and annoying your petitioners."

This relief was denied them in a vehement opinion of the Supreme Court, in which the Court maintains that "nowhere in the [Uniform Declaratory Judgments] Act is there an express provision for an executory or coercive judgment in connection with a declaration of rights," etc., that the provision of Sec. 8 of the Uniform Act that "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper" means further *declaratory* relief, and not coercive or executory relief; that if it meant coercive or executory relief the body of the Act would be broader than the title and it would hence be unconstitutional, that it would moreover be providing "a new addi-

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tionary remedy," a "new procedure by which an executory or coercive judgment may be had;" that "an additional remedy in that class of cases could not be said to be remedial, since it does not supply a deficiency nor abridge a superfluity in the law as it is," namely, that executory relief should be sought in one action in Indiana, a departure from which rule the Court states was not intended since by Sec. 6 the Court may decline a declaration where such [declaratory] judgment "would not terminate the uncertainty or controversy giving rise to the proceeding;" that "a declaration of rights in connection with an executory judgment is to that extent remedial," but that "it is difficult to conceive of a declaratory judgment becoming the basis of relief since its entire function is to declare rights, status, and relations and to interpret statutes, contracts and instruments generally;" that declaratory relief is therefore not an alternative remedy, "designed to furnish an additional remedy where an adequate one exists before," but one proper only when no "established remedy is available;" that "any other interpretation would mean the practical abolition of all established forms of action at law or proceedings in equity," yet that declaratory relief "may be had even though for complete relief other and additional remedies must later be resorted to."

Insofar as these statements are not contradictory, they unfortunately are a plain departure from the words and whole intent of the Declaratory Judgments Act. Indiana heretofore has given a reasonable interpretation to that Act, more in line with what other states and England have done. It is therefore regrettable that an inappropriate case, in which the petitioners misconceived their remedy, should have led the Court into the espousal of doctrines, largely by way of dictum which, if applied, will deprive the people of Indiana of many of the benefits derived from this procedure by other states of the Union.

At the outset, it may be remarked that the second petition of the board of advisers was not in any way ancillary to the original declaratory judgment which determined only the question of jurisdiction as between the board and the trustee. While possibly intended as a petition under Sec. 8, supplemental to the original declaratory judgment, the conditions of Sec. 8 had not been observed. No summons or other notice had apparently been served on the trustee. That alone was sufficient ground for denying the petition. The substance of the petition indicated a grievance having no material relation to the original judgment, but was an independent body of complaints which required a new trial, new testimony, and independent equitable or legal relief. It was therefore not that supplemental relief to carry into effect a declaratory judgment defied or violated, which Sec. 8 has in view. The dismissal of the petition was therefore evidently correct.

But the Court's opinion opens a vista of interpretation unique in the history of the subject and, it is submitted, plainly in error. The very words of Sec. 1 of the Act show that the declaratory judgment is an

alternative remedy, "an additional remedy," and not an extraordinary remedy, to be invoked only when no ordinary remedy is available. The fact that the courts are empowered to render declaratory judgments "whether or not further relief is or could be claimed," obviously says and means that declaratory relief may be granted (1) where further relief is also sought in the same action, (2) even though further relief could be sought, but is *not* sought; or (3) when further relief could not have been sought. Alternative (1) indicates the possibility of a combination of prayers, a common practice, alternative (2) the possibility of asking either for merely declaratory relief, when that satisfies the plaintiff's needs, or for further relief, if it does not; and alternative (3) the possibility of suing for a declaration of rights in cases where no coercive relief is obtainable, as, e. g., in actions for a so-called "negative" declaratory judgment that the plaintiff is free from adversely asserted claims or is released from claimed restrictions.

While somewhat contradictory in its views, the Supreme Court would seem practically to confine the scope of the declaratory judgment to alternative (3) only, which would distort the Act. To support this unjustified view of the scope of the declaratory judgment, the Court cites three cases from the tribunals of other states which have on single occasions also taken that narrow view, considering the declaratory judgment as if it were an extraordinary remedy, not applicable where any ordinary remedy was available. What the Court failed to observe is the fact that even in these states, Michigan, Pennsylvania, and New York, the cases cited were exceptional, an aberration from the general view taken by those very courts, and that in the vast majority of the cases throughout the country the statute has not been thus misconstrued. Why should a legislature be barred from providing aggrieved litigants with a new remedy, alone or as an alternative to other more traditional remedies? Why should not a plaintiff be permitted to choose his relief, if that is effective and will satisfy him? Why must a plaintiff be obliged to come into court through one door only? Why should the rigid formulae of ancient systems of pleading be perpetuated? The only question a Court may with propriety ask is whether the grievance alleged and proved admits of the relief sought—not whether other relief would have been possible. If the relief sought would be ineffective, that presents a different question. In the first *Brindley* case, a declaratory judgment construing the jurisdiction of plaintiff and defendant over the matter of appointing investigators was an appropriate method of relief; in the second case, it was not, nor did plaintiffs seek it. Whether they should have had the relief they sought or any relief was a matter for an independent trial, having no direct relation to the original declaratory adjudication. Under Sec. 6 of the Uniform Act the Court has discretion to refuse a declaration where it will not "terminate the controversy," for a declaratory judgment is expected to be a final adjudication of a disputed issue. Practice has

also developed the rule that where a *special statutory* method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be determined by declaration. But a Court is not empowered to refuse a declaration merely on the ground that another remedy is available. Certainly the Declaratory Judgments Act was not "intended to abolish the well-known causes of action," but it was distinctly "designed to furnish an additional remedy," even "where an adequate one existed before." That is conveyed by the words of section one, and by a nearly unanimous view throughout the English-speaking world.

The conclusion that "further relief" in Sec. 1 and Sec. 8 means "further declaratory relief" and not coercive or executory relief, is not sustainable. The word "further" is the American equivalent of the English word "consequential," which means consequential or coercive as distinguished from "merely declaratory." When therefore Sec. 8 provides that "further relief based on a declaratory judgment decree may be granted whenever necessary or proper," it means merely that if the losing party fails to give effect to the declaratory judgment, a winning party is not helpless but may ask the Court to implement the declaration of rights by the necessary order. Few litigants have been or would be so reckless as to defy a declaratory judgment; but if by chance such a party should be found, a coercive ancillary decree can be almost automatically obtained. That fact doubtless persuades litigants to observe declaratory judgments. The experience of thousands of cases would indicate that supplemental coercion has rarely if ever proved necessary.<sup>1</sup> It seems unfortunate that a simple statutory provision should have been given so devious a construction, the effect of which may be to discourage resort to declaratory relief in Indiana.

Judging from experience, there is no need to fear that declaratory actions will cause two resorts to the Court, one for the declaration and one for coercive relief. Most plaintiffs who have an action for coercive relief will seek it; but against responsible defendants, a declaration of rights is all that is necessary, and the substitution of adjudication for coercion will simplify and speed procedure, as well as temper the belligerent atmosphere of hostility which now surrounds litigation. Adjudication not execution is the essence of the judicial function. So greatly have these advantages appealed to some states that the declaratory judgment is given a preferred place on the calendar, as in Kentucky, California and Michigan. Possibly the new United States Supreme Court rules will authorize provision for the speedy adjudication of actions for declaratory judgments.

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<sup>1</sup> Borchard, *Declaratory Judgments* (1934), p. 172, on the construction of Sec. 8. Occasionally, a declaration of legal liability, where damages are still accruing or could not be assessed, has been followed by an assessment of damages.

The suggestion that because Sec. 8 of the Uniform Act provides for "further relief based on a declaratory judgment or decree," that it therefore contains a subject matter going beyond the title of the Act, seems surprising. Such an interpretation, like that given to "further relief," has never before been suggested by any Court, and would seem to be an unduly narrow construction of a constitutional provision intended to prevent serious miscegenation of incongruous subject matter. The purpose of Sec. 8, as above suggested, was not correctly conceived, but even so, it has a very direct relation to the declaratory judgment and, in the light of its true construction, is an indispensable part of the whole. To view it as an independent and unrelated subject, hence improperly included under the title of the Act, seems very strange.

The appearance of novelty often frightens. Caution is properly a characteristic of the legal profession. But caution and timidity are not identical, nor does even timidity justify misconceptions. When a long and varied experience is available as an aid in legal interpretation, it seems a pity to disregard it and give effect to unusual constructions based on fears. The Michigan Supreme Court in 1920 got off to a wrong start in the consideration of the first Michigan Declaratory Judgment Act of 1919,<sup>2</sup> and had to submit to the vigorous criticism of bench and bar until a sounder view prevailed in the Court. It may be hoped that the Indiana Court will not long entertain the views expressed in *Brindley v. Meara*. In extenuation of both courts it may be said that they were probably misled into narrow and unsound views of the declaratory judgment by the poor type of case presented for their consideration. Other courts have been more appreciative of the lessons of history and experience, as for example, the United States Circuit Court of Appeals for the Fifth Circuit which on February 9, 1936, in a unanimous opinion by Judge Hutcheson<sup>3</sup> made the following remarks:

"We see no reason why the statute should not, we think it should, be given the prophylactic scope to which its language, in the light of its purpose, extends, to enable disputants as to whose rights there is actual controversy, to obtain a binding judicial declaration as to them before damage has actually been suffered, and without having to make the showing of irreparable injury and the law's inadequacy required as a condition of granting ordinary preventive relief in equity. This relief, though before the enactment of statutes of this kind [it] was not of general wideness, is neither new nor strange in character. It has been granted numbers of times in construing instruments to give directions to trustees and others obliged to carry out written but doubtful directions. The purpose of the statute is, we think, wise and beneficent. It will, if applied in accordance with its terms, effect a profound, a far-reaching, a greatly to be desired procedural reform. We see no sound reason for limiting it."

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<sup>2</sup> *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 179 N. W. 350.

<sup>3</sup> *Gully v. Interstate Natural Gas. Co.*