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DECLARATORY JUDGMENTS IN COLORADO

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COLORADO blazed no new trail when in 1923 the General Assembly adopted "An Act concerning Declaratory Judgments and Decrees and to make Uniform the Law Relating Thereto," (S. L. 1923, Ch. 98), otherwise known as the Uniform Declaratory Judgments Act. Declaratory relief was known to the Roman law and throughout Europe where the Civil Law prevails, it has always been in use as a most natural part of the procedure. Scotland has used declaratory judgments for three hundred years; while in England their use began with the acts of 1852 and 1858 advocated by Lord Brougham and were fully authorized by the Supreme Court of Judicature Act of 1873. It is strange indeed, that the demand for this kind of relief here did not come sooner and one is startled to learn that the first discussion of declaratory judgments in this country appeared in the Yale Law Journal in 1918 in two articles written by Professor Edwin M. Borchard, of Yale (*28 Yale L. Jour. 1, 105*). These articles were far-reaching in their effect and soon the American Bar Association and the Commissioners on Uniform State Laws gave the movement for this reform their support.

The late T. J. O'Donnell of the Denver Bar was largely instrumental in furthering the movement for the Uniform Act. As early as 1920 he and Charles Evans Hughes persuaded the American Bar Association to urge the passage of a Federal Act. Congress has had under consideration for a number of years a Federal Declaratory Judgments bill but thus far it has failed to pass.

In 1922 the Commissioners adopted the Uniform Declaratory Judgments Act. Its adoption by the States has made rapid progress. Twelve States; Arizona (1927), Colorado (1923), Indiana (1927), New Jersey (1924), North Dakota (1923), Oregon (1927), Pennsylvania (1923), South Dakota (1925), Tennessee (1923), Utah (1925), Wisconsin (1927), and Wyoming (1923) have adopted the Act. In addition to these, eleven other states, making a total of twenty-three, have declaratory judgment acts or have civil practice acts which

provide for declaratory relief. These states are Rhode Island (1876 and 1923), Connecticut (1883 and 1918), Florida (1919), Michigan (1919), New York (1922), Virginia (1922), South Carolina (1922), California (1923), Hawaii (1920), Kansas (1921), and Kentucky (1922). Nearly three hundred cases were reported involving declaratory judgments in this country from 1919 to 1928. Declaratory Judgment Acts are also in effect in Australia, Canada, New Zealand, India and Ceylon.

Borchard is the authority for a statement that the procedure for a declaratory judgment has become so important in England that approximately 60 per cent of the equity cases heard for decades have been brought under that procedure. A study made by him reveals the interesting fact that from 1918 to 1928 the percentage of declaratory judgments in the English Chancery reports varied from a low of 51.4 in 1922 to a high of 68.8 in 1923. This, of course, takes no account of the great number of cases decided in the lower courts and not appealed. It may fairly be assumed that the lower court decisions were more numerous in proportion because it is reasonable to suppose that declaratory actions are less likely to be appealed than cases where coercive judgments are rendered.

In contrast to this situation the three hundred cases appealed in this country would seem to indicate either that the bar is not informed of the advantages of this new procedure or that the courts are unfavorable to declaratory judgments. A study of the decisions indicates no positive unfavorable attitude but here and there, particularly in the United States Supreme Court, there appears to be some confusion as to the scope of this procedure.

The Colorado Supreme Court has considered only five cases in which declaratory judgments were involved since the passage of the Uniform Act. Before discussing these cases in detail it will be well to consider the characteristics of declaratory judgments, the scope of the statutes, their constitutionality and some of the general problems involved.

Since most men are honest,* law suits arise usually from

*The editors of Dicta wish to call the attention of the reader to the fact that they assume no responsibility for opinions expressed in signed articles.

an honest difference in opinion as to the rights of the party. If the parties could find out their rights before acting, their action would conform most frequently to their rights. If counsel had means of knowing with reasonable certainty the rights of their clients, their clients would be saved loss by acting within their rights. However, it is an accepted principle of the common law that a right of action is limited to cases of an actual or threatened violation of a right in which coercive or corrective relief may be granted and this rule has been universally enforced in the United States. The courts have "refused to allow parties to appear in court except under conditions which permit a display of force by the judicial arm of the State." Courts are created to redress private wrongs and punish the commission of crimes and misdemeanors, and do not sit in an advisory capacity to inform the people of their particular rights before injury is inflicted.

The declaratory judgment on the other hand, enables the court to render final judgment between litigants, before breach or violence has occurred, without attaching to that judgment a coercive decree for damages or injunction. The judgment entered differs in no essential respect from any other judgment between opposing parties except for the coercive feature. It declares the rights of the parties after a formal complaint or petition is filed, as in any other suit, without necessarily invoking execution.

Parties may have a controversy as to their legal rights under contracts, or otherwise, and would much prefer to have these rights declared thereunder by a court rather than to await a breach and the seeking of coercive relief. To sue is to fight, and fights make endless feuds, and bitter antagonisms and deep scars are left. A declaration by the court as to the construction of the contract or as to the relative rights of the parties would prevent most of these unpleasant features of litigation. Neither party to a controversy need become an aggressor. In appearance at least every case by this means becomes a friendly suit.

In most of the European countries, under codes of law, relief has been divided into two recognized categories, (a) Definitive or Declaratory, (b) Remedial or Corrective. In England and in this country before the adoption of declara-

tory judgments, only the last kind of relief was recognized. In *28 Yale Law Journal, 1-125,* Professor Borchard explained declaratory judgments as follows:

> "The purpose is to afford security and relief against uncertainty and doubt. It does not necessarily pre-suppose culpable conduct on the part of the defendant, but it enables any party, whose rights, privileges, powers, or immunities—whether evidenced by written instrument or not—have been disputed, in danger thrust, or placed in uncertainty, by another person, to invoke the aid of a court to obtain an authority, determination or declaration of his rights or other legal relations."

Equity has taken account for centuries of this necessary function of courts in suits to quiet or establish title or remove a cloud, and to construe trusts and wills.

In proof of the fact that an action resulting in a declaratory judgment is well known to our law, though not so-called, the following series of actions or proceedings which result merely in a judgment finally determining the rights of the parties without requiring the losing party to do anything, have been listed: bills for the construction of written instruments, mainly wills; for the determination of title to real estate; actions to remove a cloud from a title; to impress a trust; declaring instruments or transactions, such as marriage, invalid, or valid; proving the tenor of lost instruments; the validity of bond issues; decrees of divorce; adoptions; changing names; registering land titles; legitimacy or illegitimacy; title to office; bills quia timet; judgments establishing drains, irrigation rights, line fences, boundary lines, highways, improvements; judgments in escheat; appointing guardians, trustees, receivers, executors, admitting wills to probate; establishing heirship; the action of a trustee for instructions and many other actions and proceedings.

Declaratory judgment acts recognize all of them and many other human relationships calling for declaratory relief and give the advantage of a simple, speedy remedy while the contractual and other relations during and after the proceeding are not disturbed by a breach.

The nature and range of the questions that have been the subjects of declarations by the courts in England, in the Colonies and in the States that have adopted the action for declaratory judgments are indicated by the following enumerations:

(1) Matters relating to the management and distribution of estates and trials; (2) the construction and validity of instruments such as wills, contracts, leases, insurance, policies, bills of sale, mortgages and deeds of trust, and assignments; (3) the construction and validity of statutes; (4) title to real and personal property; (5) rights of life tenants; (6) relations between husband and wife; (7) legitimacy of persons; (8) relations between employer and employee; (9) private associations and corporations; (10) public authorities; (11) easements; (12) taxation.

The constitutionality of declaratory judgment acts has been upheld in at least eight States:

Kansas *(State vs. Grove, 1921, 109 Kan. 619; 201 Pac. 82);* California *(Blakeslee v. Wilson, 1923, 190 Calif. 479; 213 Pac. 495);* Tennessee, *(Miller v. Miller, 1924, 149 Tenn. 463; 261 S. W. 465);* Pennsylvania, *(In re Kariher's petition No. 1, 1925, 284 Pa. 455; 131 Atl. 265);* Virginia *(Patterson Exec. v. Patterson, 1926, 144 Va. 113;* 131 S. E. 217); New York *(Board of Education of Rochester v. Van Zandt, 1923, 195 N. Y. S. 297; 235 N. Y. 644);* Connecticut *(Braman v. Babcock, 1923, 98 Conn. 549; 120 Atl. 150);* New Jersey *(McCrory Stores Corp. v. Braunstein Inc., 1926, 102 N. J. 590; 134 Atl. 752).*

Colorado has not passed on the constitutionality of its act nor has the United States passed on the constitutionality of any of the state acts. If and when the Federal Act is passed, we may expect an early decision by the Supreme Court. There have been three cases before it within the past year or so in which while the decisions were doubtless correct, what was said about declaratory judgments was in all three unnecessary to the decision. The Supreme Court has apparently confused the constitutional jurisdiction of the federal courts and the procedural rule-making power of Congress. See American Bar Association Journal, December, 1928, for a most able article by Edwin M. Borchard, *"The Supreme Court and the Declaratory Judgment"*, in which these three cases are thoroughly discussed: *Liberty Warehouse Co. v. Grannis (1927), 273 U. S. 70, 47 Sup. Ct. 282; Liberty Warehouse Co. v. Barley Tobacco Growers' Assn. (1928), 276 U. S. 71,*

48 Sup. Ct. 291; Willing v. Chicago Auditorium Assn. (1928), 48 Sup. Ct. 507.

The Michigan Act of 1919 was the first to undergo the test of its constitutionality. In *Anway v. Grand Rapids Railway Co., et al. (1920), 211 Mich. 592, 179 N. W. 350,* the act was held unconstitutional. This decision has been very generally criticised. The constitutionality of the Kansas act was the next one tested and it was upheld.

The usual contention urged against the constitutionality of declaratory judgments acts has been that no problem for the intervention by judicial functions is present unless an actual wrong has been done, or is immediately threatened. This contention is unsound. Some of the broad principles relating to declaratory judgments may be indicated briefly as follows:

1. In order to invoke the jurisdiction of the court for a declaratory right or a declaratory order or judgment, it is not necessary that a "cause of action" in the sense of facts entitling him to consequential relief be present.

2. Jurisdiction to render a declaratory judgment is discretionary and should be exercised with great care and with due regard to all the circumstances of the case.

3. A *bona fide* controversy as to which judgment will be *res judicata* is necessary.

4. When future events are involved the courts should not assume jurisdiction, unless a present right depends upon the decision, or there are other special circumstances.

5. A declaration of rights will not be made in a matter where the interest of the plaintiff is merely contingent upon the happening of some event in the future.

6. Where there are disputed questions of fact which may be the subject of judicial investigation in a regular action, the court may refuse a declaratory judgment.

7. A declaration can not be given as to a claim which it is feared defendant may assert.

8. In the absence of very special circumstances the court should not make a declaration of right as to matters over which jurisdiction is vested in another court.

A consideration of the Colorado declaratory judgments act *(S. L. 1923, Ch. 98),* which is the same as the Uniform

Act, reveals that *Courts of Record* are given the power to declare *rights, status,* and *other legal relations* whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either *affirmative* or *negative,* and it has the force and effect of a *final judgment* or *decree.*

The Act provides that *any person interested* under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined its construction or validity and obtain a declaration of rights, status or other legal relations thereunder. A contract may be construed *either before or after breach.* Interested persons of defined classes may have rights declared to determine any class of creditors, devisees, legatees, heirs, etc., or to direct action or non-action of executors, etc., or to determine questions in administration of estates or trusts. The court may *refuse to declare rights where the declaration would not end the controversy.* All declarations are *subject to review.* Further relief may be granted upon application of notice. *Issues of fact* may be *tried* and *determined* as in *other actions.* The Court makes such award of costs as are equitable and just.

All interested persons should be joined and the rights of those not joined are not prejudiced. Municipalities are made parties where municipal ordinances or franchises are *involved,* and if their constitutionality is involved, the Attorney-General is served with a copy of the proceeding and may be heard.

The Act is declared to be *remedial* and that its *purpose* is *to settle and to afford* relief from *uncertainty* with respect to rights, *status* and other legal relations and is to be liberally construed.

As stated above the Colorado Supreme Court has had before it only five cases involving either directly or indirectly the construction of the Declaratory Judgments Act. This indicates that Colorado attorneys are availing themselves of the new procedure very slowly, possibly due to unfamiliarity with the scope of the Act, but certainly not because of any unfavorable decision of the Court.

The first case reaching the Supreme Court was *Colorado and Utah Coal Co. v. Walter, 75 Colo. 489, 226 Pac. 864,* decided June 2, 1924. The plaintiff, Walter, prayed judgment declaring the respective rights of the parties in certain waters. After defendants' demurrer was overruled judgment on the pleadings was entered for plaintiff and the judgment was affirmed. The Court held, over defendants' objection, that the controversy was between the plaintiff and defendants and that a judgment therein would terminate it, hence, the Act was applicable. At page 491, the Court said:

"Section 12 of the Act asserts that its purpose is 'to settle and to afford relief from uncertainty and insecurity with respects to rights, status and other legal relations,' etc. In the instant case it appears that such uncertainty exists. * * * If these facts do not furnish a proper basis for an action under the Declaratory Judgments Statute, it is difficult to conceive of any good purpose to which that legislation can be put."

Mulcahy v. Johnson, et al, 80 Colo. 499, 252 Pac. 816, decided June 24, 1927, was the next case concerning the act to be decided by our State Supreme Court and probably the most important. This was an action for an accounting, and construction of a will. In one clause of the decree, the Court declared that the general taxes on vacant, unimproved and unproductive real estate are payable out of the general income and also that local improvement taxes assessed against unimproved and unproductive real estate are payable out of general income, while those against improved and productive real estate likely to out last the life estate should be pro-rated. The Court considered these declarations and held that the decisions were not uniform with respect to the matters in question, that it was not safe or good practice for a Court of equity by general directions or instructions in advance to designate generally in what cases taxes and assessments should be paid or apportioned but the safer rule was to wait until the concrete question arose and became important, and decision thereon became necessary, in which case the Court would have power to give such instructions. The Court then said:

"We, therefore, say that the Court erred in issuing general abstract instructions, as to these controverted questions in advance of any necessity therefor. Our conclusion that it was premature for the district court to issue instructions in this proceeding as to matters that might never arise in the administration of the trust is not at all affected by, or inconsistent with, the

provisions of our Declaratory Judgment Act, Session Laws 1923, p. 268. * * * We think our district courts, being constitutional courts of original jurisdiction of 'All causes both at law and in equity', had as full and complete jurisdiction and power before, as after, the passage of this Act to construe wills and trusts and to control executors and trustees in the administration of estates. It will be observed that the act itself authorizes the determination only of questions 'arising' in the administration of an estate or trust. In this opinion we have at the request of the parties determined all questions that have properly arisen, but we decline to determine those which have not yet arisen and which may never arise during the administration of the trust. Neither under the equity practice nor under this Act are the Courts required to give general advice and instructions upon matters which have not arisen at the time their jurisdiction is invoked. * * * The Court itself must determine for itself the propriety of such action, and should refuse to answer speculative inquiries."

While this decision may appear to limit the scope of the Declaratory Judgments Act in this State with respect to wills, estates and trusts, the holdings of the Court with respect to the general rules of interpretation in the use of the act are sound.

Stratton v. Beaver Farmers' Canal and Ditch Co., 82 Colo. 118, 257 Pac. 1077, decided June 13, 1927, was an action concerning water rights and the prayer was for a declaratory judgment under the Act. It was there held that the facts stated in the complaint concerning interference with plaintiff's water rights were sufficient to entitle him to some kind of relief against defendant but that it would not determine the merits of the case until the parties had an opportunity to make an issue of fact. The judgment of dismissal was reversed with directions to overrule the demurrer and proceed with the case .

In *Rice, et al. v. Franklin Loan and Finance Co., 82 Colo. 163, 258 Pac. 223,* decided April 11, 1927, the plaintiffs in error brought an action under the Act to declare void a note and chattel mortgage which they gave the Franklin Company, on the ground that the note was usurious under the Money Lenders' Act. It was held that the non-suit below was improperly granted where the evidence indicated that the loan was made at a rate greatly in excess of the 12 per cent. permitted by statute. The contention that the Money Lenders' Act is unconstitutional was overruled. This case is a beautiful illustration of the use of the Act in the construction of a statute and a determination of its constitutionality.

The most interesting decision respecting declaratory judg-

ments in this State was rendered in *Gabriel v. Board of Regents of the University of Colorado, 83 Colo. 582, 267 Pac. 417,* decided April 30, 1928. The suit was brought under our Declaratory Judgments Act, to determine the validity of a contract. Clifford W. Mills entered into a contract with the Regents to raise funds for and to erect and furnish dormitories for women upon the campus of the University. Subsequently plaintiff was elected a member of the Board of Regents and he assigned the contract to Gabriel. The complaint alleged "that there is a question of the validity of said contract in that: It may be contended that the University has no authority to lease its property"; that the "contract may be in violation of Sections 1, 3 and 5, Article 11, of the Constitution of the State of Colorado"; that "The Board of Regents of the University of Colorado may not have authority to execute this contract"; and plaintiff prayed that the Court "Determine the validity of the contract". The court noted that the action was filed only three days after the date of the contract.

The Attorney-General contended that the complaint stated no cause of action under our Declaratory Judgments Act.

The decision of the case turned upon the meaning of the word "arising" in section 2 of the Act, *(S. L. 1923, Ch. 98)* which provides that: "Any person interested under a * * * written contract * * * may have determined any question of construction or validity arising under the instrument * * *." In this connection the Court said:

> "The Attorney-General says the complaint is insufficient because the state can not be compelled to carry out a building contract, because the Board of Regents can not encumber the State's property, and because the contract is void for uncertainty. But if these are questions 'arising' under the contract their adjudication is the very purpose of the act. The real question, and the only one considered by the learned trial judge, is, 'Have such questions 'arisen?' The complaint does not say so. This act was not intended to repeal the statute prohibiting judges from giving legal advice, nor to impose the duties of the profession upon the courts, nor to provide advance judgments as the basis of commercial enterprises, nor to settle mere academical questions. All these things are, however, accomplished by the statute, if this complaint is good."

The court then considered the allegations of the complaint set forth above and stated:

"It is perfectly evident that this is no plea that a question has 'arisen' under this contract. At most it is the expression of a fear that one may arise."

After stating that the trial judge had said that the declaratory judgments act was the father of this contract and that the contract was made for the purpose of invoking the jurisdiction of the court, Mr. Justice Burke, who delivered the opinion of the court, concluded by saying:

"We can not here decide any other of the various questions raised, however desirable it might be to have them settled, unless we are now willing to answer questions 'which have not yet arisen and which may never arise' and reply to mere 'speculative inquiries.' We can not thus permit the courts to be converted into legal aid bureaus."

It is reasonable to assume that the Court would have construed the validity of the contract had the questions actually "arisen" and the allegations of the complaint been properly framed.

The value of declaratory judgments is evidenced by the fact of their widespread use elsewhere. It remains for the Bar of Colorado to become better informed regarding their use and then to apply this knowledge of one of the greatest evolutions in remedial rights and procedural reform.