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Article 9

Constitutional Law - Declaratory Judgments

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parties is of precisely the same kind and character, it was properly the province of the jury to determine the proportion of negligence. In affirmance of this proposition the instant case states, "We cannot say that the respondent's negligence, as a matter of law, is equal to or greater than that of the appellant. Necessarily these acts differ in quality and the judgment of the jury under circumstances such as these is controlling." See also *Paluczak* v. *Jones,* supra; *McGuiggan* v. *Hiller Bros.,* (Wis. 1932) 245 N.W. 97.

The statute is not retroactive and in no way affects accidents happening before its passage. *Brewster* v. *Ludtke,* (Wis. 1933) 247 N.W. 449; see 4 Bulletin of the State Bar Ass'n. 232 (1931). If the defendant counterclaims, his case is determined in the same manner as if he were the plaintiff. *Paluczak* v. *Jones,* supra; 4 Bulletin of State Bar Ass'n. 234 (1931). Before the passage of the statute, the plaintiff, guilty of ordinary negligence, could recover full damages from the defendant guilty of gross negligence. *Tomasik* v. *Lanferman,* 206 Wis. 94, 238 N.W. 857 (1931); Professor Campbell in his well considered article, "Wisconsin's Comparative Negligence Law, op. cit., pp. 232-234, states that the statute will probably not change this rule, because gross negligence in Wisconsin, characterized by wanton, wilful misconduct, is not negligence under the terms of the statute. No proportionate reduction of damages then should be made where the defendant is guilty of gross negligence, and the plaintiff merely of ordinary negligence. In *Cox* v. *Chicago M. & St. P. R. Co.,* 159 Wis. 491, 149 N.W. 709 (1915), where the action was brought under section 192.50 (3), Wis. Stats. (the comparative negligence law applicable to actions between railroads and their employees), the court held that assumption of risk by the employee, in that he should have known of the condition and comprehend the danger, should be classed as contributory negligence, going to reduce his damages, and not as a complete defense to the action. (For a distinction between two types of assumption of risk, and a classification of one as contributory negligence under the statute, and the other as a complete bar to the action, see Campbell, "Wisconsin's Comparative Negligence Law," op. cit., at pp. 235-241.)

The use of the special verdict in cases under the statute, as in the principal case, to be the only practicable method. See Judge Werner's suggestions in 4 Bulletin of the State Bar Ass'n. 233 (1931); Wickham, *Proceedings of the Board of Circuit Judges,* 20 (Jan. 1932); *Report of the Committee of Circuit Judges,* (Feb. 1932).

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CONSTITUTIONAL LAW—DECLARATORY JUDGMENTS.—Appellant brought suit in the chancery court of Davidson County, Tenn., under the Uniform Declaratory Judgments Act of that state to secure a judicial declaration that a state excise tax levied on the storage of gasoline is, as applied to appellant, invalid under the commerce clause and Fourteenth Amendment of the Federal Constitution. A decree for appellees was affirmed by the state court and the case was carried on appeal to the United States Supreme Court. The question presented was whether this case, instituted under the Declaratory Judgments Act, presented a case or controversy, within the constitutional provision. *Held,* judgment affirmed. A case or controversy was presented, sufficient to give the Supreme Court jurisdiction on appeal. *Nashville, C. & St. L. Ry.* v. *Wallace,* 53 Sup. Ct. 345, 77 L. Ed. 444 (1933).

Only so much of the above case as pertains to declaratory judgments will be considered. By this decision, the Court not only gave impetus to the passage of Uniform Declaratory Judgment Acts throughout the Union but definitely stated the position of the Federal Courts in regard to cases arising under such Acts. Ordinarily a case at law results in a judgment requiring the award of process or execution to carry it into effect, and according to popular opinion, such are necessary attributes of a legal proceeding. But as the court points out, such relief is not an indispensable adjunct to the exercise of the judicial function. *Fidelity Nat'l. Bank & Trust Co.* v. *Swope,* 274 U.S. 132, 47 Sup. Ct. 511, 71 L.Ed. 959 (1927). The Supreme Court has exerted its judicial powers to adjudicate boundaries, although it gave no relief other than a determination of the legal rights, which were the subject of the controversy. *Louisana* v. *Mississippi,* 202 U.S. 1 26 Sup. Ct. 408, 50 L.Ed. 913 (1906); *Oklahoma* v. *Texas,* 272 U.S. 21, 47 Sup. Ct. 9, 71 L.Ed. 145 (1926); *Michigan* v. *Wisconsin,* 272 U.S. 398, 47 Sup. Ct. 114, 71 L.Ed. 315 (1926); *Georgia* v. *So. Carolina,* 257 U.S. 516, 42 Sup. Ct. 173, 66 L.Ed. 347 (1922). It has acted in a similar manner in regard to naturalization proceedings. *Tutum* v. *United States,* 270 U.S. 568, 46 Sup. Ct. 425, 70 L.Ed. 738 (1926).

Law is based to a great extent on tradition, and its procedure is often followed because the weight of precedent has made it seemingly impregnable. But, that the traditional forms of procedure can, and may, be subject to change, is well expressed by the court when it says, "the constitution does not require that the case or controversy should be presented by traditional forms of procedure involving only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked." The court further says, "Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States." The court holds that procedure should be subservient to the issue to be tried; that the matter involved is the promotion of justice, and that the modes of procedure are secondary to this fundamental purpose. A rather long step from the ancient common law, where failure to follow the strict rule of prescribed procedure was apt to leave the attorney and his client definitely out of court.

Many have doubted the constitutionality of the Declaratory Judgment Acts, and more particularly the ability of the Federal Courts to review matters brought under such Acts, on appeal, even though the Act itself provides for review of the judgment as in other proceedings. Any such doubts should be disspelled by the statement of the court that, "The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the State Courts are not enough to preclude review of the adjudication by this court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below." See *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 724, 49 Sup. Ct. 499, 73 L.Ed. 918 (1929).

In deciding that the proceeding in question was a case or controversy within the meaning of the Constitution, the court says, "As the prayer for relief by injunction is not a necessary pre-requisite to the exercise of the judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the contro-

versy presented is, as in this case real and substantial." *Fidelity Nat'l. Bank & Trust Co.* v. *Swope,* supra.

In entertaining this case, the court takes care to distinguish it from *Gordon* v. *United States,* 2 Wall. 561, 17 L.Ed. 921 (1865), and *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U.S. 693, 47 Sup. Ct. 284, 71 L.Ed. 478 (1927), where the adjudication was subject to revision by some other and more authoritative agency; *Muskrat* v. *United States,* 219 U.S. 361, 31 Sup. Ct. 250, 55 L.Ed. 246 (1911), where an attempt was made to secure an abstract determination by the court of the validity of a statute; or where an attempt was made to obtain advice on what the law would be on an uncertain or hypothetical state of facts, as in *Liberty Wholesale Co.* v. *Grannis,* 273 U.S. 70, 47 Sup. Ct. 282, 71 L.Ed. 541 (1927), and *Welling* v. *Chicago Auditorium Ass'n.,* 277 U.S. 274, 48 Sup. Ct. 507, 72 L.Ed. 880 (1928). The Supreme Court was interested not in form, but in substance, and showed that the difference between the case reviewed and the above cases, was the substance of the matter which was the subject of the proceeding—that in one, a case or controversy existed; and in the others, the subject matter failed to present a case or controversy, but merely asked for an opinion.

Wisconsin has long been a believer in Declaratory Judgments. At present there are two statutes on this subject, section 269.01, Wis. Stats., the "agreed case," and section 269.56, Wis. Stats., the Uniform Act. From an early date Wisconsin has, in effect, granted declaratory relief, even though no express statutory authority existed. *Milwaukee Electric Rwy. and Light Co.* v. *Bradley,* 108 Wis. 467, 84 N.W. 870 (1901); *Johnson* v. *City of Milwaukee,* 88 Wis. 383, 60 N.W. 270 (1894); *Schlitz Brewing Co.* v. *Superior,* 117 Wis. 297, 93 N.W. 1120 (1903). Considering this, it is not surprising that Wisconsin should be among the first to make statutory provision for declaratory judgments. In Wisconsin and other states of the Union where Declaratory Judgment Acts exist, the decision of the Supreme Court will be welcomed, as resolving doubts which have heretofore existed. With this definite pronouncement by the United States Supreme Court on the matter, it is hoped that the Declaratory Judgments Act will take its place with the Uniform Sales Act, the Negotiable Instruments Law, and similar measures, in states throughout the Union.

ARNO J. MILLER.

CONSTITUTIONAL LAW—DUE PROCESS—CHAIN STORE TAXATION.—Action to enjoin tax officials from enforcing Florida's Anti-Chain Store Act, which provided for an increase in the tax per store with the increase in the number of stores and also with the spread of stores into different counties. The act expressly excluded gasoline filling stations. The state court found that the act was constitutional and dismissed the bill. Appeal to the United States Supreme Court. *Held,* judgment reversed. The increase in the tax, if the owner's stores are located in more than one county, is unreasonable and arbitrary and a violation of the guaranties of the Fourteenth Amendment of the Federal Constitution. *Liggett Co.* v. *Lee,* 53 Sup. Ct. 481, 77 L.Ed. 553 (1933); (Fla. 1932) 141 So. 153.

A Wisconsin Statute, sec. 5 of Chapt. 29, Laws of the Special Session of 1931, which provided for a tax on chains of two or more stores or mercantile establishments was considered constitutional by the Wisconsin court. Despite the fact that the act did not expressly except gasoline filling stations, the court was of the opinion that according to the common and approved usage, the