Declaratory Relief

A. J. Vinje
The past year has been the most successful that the Marquette Law Review has enjoyed. After struggling through the period of the war, when everything else was but secondary in the minds of all, it has arisen triumphant to take its place among the really great periodicals of its kind. Because of its high standard and inherent good qualities, together with the business-like methods of the editorial board, the Review's list of subscribers has more than doubled during the last year. This immense increase in its circulation is a source of gratification to those who have the interests of the Law Review at heart, and speaks very highly for the articles that have been presented through its columns. It has ever striven to give to the legal profession the product of the very best legal minds. Its aims have been to present to the lawyer of Wisconsin a Law Review surpassed by none, a publication in which he could find treatises on important legal topics which were prepared by masters on that particular subject.

The Marquette Law Review owes an immeasurable debt to the able writers who have so willingly given their time in preparing
articles for its pages, and we take this occasion to extend to them our very sincere thanks and appreciation.

The editorial staff of the past year is to be congratulated for its untiring efforts toward a bigger and better Law Review. Its splendid success is a lasting tribute to the unselfish and self-sacrificing endeavors of its officers.

The new staff has pledged itself to carry on the excellent work of its predecessors. In order that we may do this successfully and thereby furnish our friends with a first-class publication, we invite the members of the Wisconsin Bench and Bar to use the Marquette Law Review as a medium through which they can submit to the legal world vital questions of law. With the co-operation that has been so generously extended in the past, we feel assured that the ensuing year will show another step forward in the annals of the Marquette Law Review.

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DECLARATORY RELIEF.

THE PURPOSE AND SCOPE OF CH. 242, SEC. 2687m, STATS. 1919.

HON. A. J. VINJE.

Justice of the Wisconsin Supreme Court.

The old adage that "an ounce of prevention is worth a pound of cure" finds but scant exemplification in our administration of law. Not because prevention is not possible in many cases, but because the law refuses to be set in motion till a right has been violated or a crime has been committed. In either case the law requires, so to speak, a corpus delicti, a damage done or a crime accomplished, and it busies itself solely with the question of reparation or punishment and not with that of prevention. In so far as this relates to crimes or to violations of moral duty for which the law gives redress, no just criticism can attach to its administration, for in each case the wrongdoer knows he is violating both the moral and the civil law, and he voluntarily subjects himself to the prescribed penalty, or hopes to escape it, as the case may be. But there is a large class of cases in which persons are desirous of fulfilling their legal obligations, but are in doubt as to what they are. Persons so circumstanced have hitherto usually in vain sought assistance from the courts. They have been told: "Wait till some right has been violated, till some
damage has been done. Our function is to tell you what way you should have done, not what way you should do.” Even religion is more practical than this, for it points the way for future action. It does not content itself with merely correcting past errors. This quality of the church was keenly sensed by the Scotch lad who called a “guidepost” a “minister” because, “a minister is like a guidepost,” he said, “points out the right way, but does not gang it himself.” Now, without indorsing the lad’s slur upon the ministerial office, we must admit that the law does not usually point out the right way to a traveler in quest thereof.

About all it has hitherto done is to admeasure the penalty for having gone astray. The reason for this lies in the ancient, and it must be admitted, even modern, conception that the sole function of the courts is to redress wrongs. That this is a fundamental conception in our jurisprudence is recognized by lawyers and judges alike. Pomeroy, in his Code Remedies, Sec. 347, thus tersely states the principle: “Every remedial right rises out of an antecedent primary right and corresponding duty and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these simple elements.” This language is used with reference to both legal and equitable actions. It is true, we have a few apparent and at least one real exception to the rule stated. The real exception is an action to construe a will or trust for the guidance of executors or trustees thereunder. Actions to quiet title, sometimes given as an example, allege the assertion of a false or apparent title by defendant and so contain a delict on his part, and if the annulment of his title is adjudged, consequential relief is granted.

Since the object of this paper is to treat the subject neither philosophically nor historically, but only to point out the departure made from established procedure and to indicate briefly and only in a general way the new judicial field of jurisprudence that is opened, I will sketch only in outline its origin and develop-
The Scotch have used the declaratory action from an early day, at least since 1531. (Institutions of the Law of Scotland, Mores Ed. 1832, 4, 1.) In England, as early as 1852, it was enacted (15 and 16 Vick C. 86 s 50) that "no suit in said court (High Court of Chancery) shall be open to the 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." This act was limited to the High Court of Chancery alone and received the construction that only cases in which plaintiff was entitled to but did not ask for consequential relief came under it. It was not till 1883, when Rule 5 of Order 25 was adopted, that full declaratory relief as known to the Scotch law was granted. Such order provided "No action or proceeding shall be open to the 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 consequential relief is or could be claimed or not." It will be observed that the granting of declaratory relief under this order was not limited to the High Court of Chancery, but to any court, and it was not necessary that plaintiff was entitled to consequential relief — there need be no right violated. It was sufficient that plaintiff was entitled to declaratory relief only. This order has been adopted practically verbatim in nearly all the British possessions.

France, Germany and Austria also recognize the declaratory form of action.

A better idea of the scope and function of declaratory relief can be obtained by a brief statement of some of the questions dealt with by the English courts in the last few years than in any other manner. I have gone through a number of volumes, selecting only some of the cases. Those for the construction of wills and the guidance of trustees I have omitted, except one or two, as we have like procedure in our own state. I have not set out the facts in the cases, but only indicated broadly the questions dealt with. Among such questions are the following:

Declaration of plaintiff's right in an Ancient Light and permission to apply for an injunction if declaration was not sufficient. Litchfield-Speer vs. Queen Anne's Gate Syndicate, (1919), 1 Ch. 407.

A declaration as to an employer's future rights under an
agreement for service. *Thompson Bros. & Co. vs. Amis*, (1917), 2 Ch. 211.

Whether certain debentures issued by a company were valid. *In re North Eastern Insurance Co.*, (1919), 1 Ch. 198.

Declaration to determine whether a payment of 200 £ per annum “free of all duties” was free from income tax. *Pratt vs. Gamble*, (1917), 2 Ch. 140. Affirmed (1917), 2 Ch. 401.

Action by a company to have one Green and not one Hopkinson declared the owner of certain stock therein. *In re Indo China Steam Navigation Co.*, (1917), 2 Ch. 100.

Action to determine who were entitled to funds in a company no longer of service to the contributors thereto. *Robson vs. Attorney General*, (1917), 2 Ch. 18.

Action by a shareholder against the company for a declaration as to his share of the profits for certain years. *Evling vs. Israel & Oppenheimer*, (1918), 1 Ch. 101.

Question whether a tenant holding over under a lease for a year and a fraction could have his tenancy terminated by a notice expiring on the date the tenancy was entered into or on the date it terminated. *Croft vs. Blay*, (1919), 1 Ch. 277.

Plaintiff engaged a manager at an annual salary plus commissions on the “net profits” of the year. It sought a declaration whether commission should be on “net profits” before or after excess duty to Crown was deducted. *Patent Castings Syndicate, Lt. vs. Etherington*, (1919), 1 Ch. 306.

Declaration whether a notice dismissing a teacher and refusing to pay further salary was valid under the circumstances stated. *Martin vs. Eccles Corporation*, (1919), 1 Ch. 387.

Husband and wife entered into a separation agreement whereby he agreed to pay her 9 £ every Wednesday. He brings action to determine whether he may deduct income tax from future payments. *Wasmuth vs. Janes*, (1918), 2 Ch. 54.

Action by a purchaser to obtain a declaration that an agreement for the sale of a leasehold had been dissolved because the vendor’s attorney in fact, who made the sale, had become a public enemy. *Tingley vs. Muller*, (1917), 2 Ch. 144.

A lessee secured a lease of premises for 30 years to commence in 1946, more than 21 years after its date. The Land Registrar was in doubt as to whether it was entitled to registry because it
was thought to offend the rule against perpetuities. Mann, Crossman & Paulin vs. Land Registry, (1918), 1 Ch. 202.

A company's articles provided that "the instrument appointing a proxy shall be deposited at the registered office of the company not less than two clear days before the day for holding the meeting at which the person named in such instrument proposes to vote." Held that proxies lodged between the dates of an original meeting and the adjournment thereof were invalid, the adjourned meeting being merely a continuation of the original meeting. McLaren vs. Thompson, (1917), 2 Ch. 41. Affirmed on appeal, (1917), 2 Ch. 261.

Declaration whether the lessors of certain premises were entitled to payment in full for the amount necessary to put leasehold in as good condition as the lease stipulated—the lessee having gone into liquidation, or whether lessors must prove for it in liquidation and take their proportionate share. (1919), 1 Ch. 416.

Trustees in a will were directed to pay testator's widow "a clear annuity of 2000 £ during widowhood." Question: Should she pay the income tax out of 2000 £ given her or should they pay her 2000 £ in addition to the income tax. (1919), 2 Ch. 1.

Declaration as to the meaning of a contract for the sale of two plots of land "and buildings, material, etc." Held that the words "etc." did not extend to a right of way not mentioned and that the conveyance should exclude it. In re Walmsley & Shaws Contract, (1917), 1 Ch. 93.

A manager hired at an annual yearly salary plus 5% on profits in excess of expenses, interest on preferred and ordinary shares. Held that he was entitled to 5% of the excess profits before excess profit duty was paid to the crown. William Hollins & Co., Limited vs. Paget, (1917), 1 Ch. 187.

Question whether a railroad act authorized a subsequent roadway to construct its roadbed across a former one by means of an embankment or by means of a trestle. Taff Vale Ry. Co. vs. Cardiff Ry. Co., (1917), 1 Ch. 299.

The purchase price of a business was to be one-third of the "net profits" for a certain number of years. Held that excess duty to crown must be deducted before "net profits" were to be divided. Condran vs. Stark, (1917), 1 Ch. 639.
A claims that B is infringing his patent. B has a valuable plant and can operate at a profit if his own patent is valid, but not if A’s patent is infringed. Under our old procedure A can sue B at any time, but B can bring no action to determine the validity of his patent. He must either quit the business or run the risk of being bankrupted if A shall establish the validity of his patent at some future date when he thinks it is a good time to sue. Under the new statute, B may ask for a declaration to determine the validity of his patent.

Cases like the above could be multiplied indefinitely by the examination of more reports, but those given serve, I think, to show the wide scope of the new legislation. With these cases and the language of the English law in mind, let us consider briefly our new statute. It provides, Sec. 2687m: “Equitable actions 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 an action that no consequen-
tial relief is sought or can be granted if it appears that subst-
tial doubt or controversy exists as to the rights or duties of the
parties, and that either public or private interests will be ma-
terially 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 action shall bind all the parties
thereo and be conclusive and final as to the rights and duties
involved.” Published May 27, 1919.

It will be noted that actions brought thereunder are denom-
inated equitable actions. They are so denominated because they
are addressed to the discretion of the court and relief will be
granted only when public or private interest will be materially
promoted by a declaration. But since both legal and equitable
relief can be granted in this form of action, it is immaterial
whether it be denominated a legal or an equitable one, except
for the procedure to be followed in the trial of the action. Relief
being discretionary, equity procedure is better adapted to its trial
than is the procedure in a legal action. No doubt the advisory
verdict of a jury as to the existence or non-existence of an opera-
tive fact may be had. That is the practice in England. Declara-
tory actions cannot be maintained as a matter of right. On the
other hand, if the case comes within the recognized field of the
statute, relief cannot be arbitrarily withheld. It is only when
judicial discretion will justify a denial of relief that plaintiff will be relegated to his ordinary remedies, if he have any. It must, of course, appear that plaintiff has some interest in the subject matter and that there is a substantial doubt or controversy respecting his rights therein. When that appears, then the crucial inquiry becomes: Will public or private interest be materially promoted by a declaration? If in the opinion of the court it will, then a declaratory judgment will follow, otherwise not. Whether upon appeal to the Supreme Court the rule applied to discretionary orders will obtain in determining the correctness of the judgment, it is perhaps wisest that the writer make no present declaration. The suggestion, however, may be ventured that since usually only questions of law will be presented for decision, the binding force thereof, it would seem, should be determined by what is or ought to be law rather than by that or whether there has been an abuse of discretion.

You will also notice that declaratory actions can be maintained only in the circuit courts and in the Supreme Court in appropriate cases. This is for the reason that large discretionary powers, such as are granted by the statute, are safer in the hands of judges of the circuit court than in those of judges of inferior courts. And here let me add parenthetically that the present tendency to enlarge the number of inferior courts is, in my judgment, to be deplored. A consolidation of inferior courts upon some new plan may be desirable, but the creation of a multitude of inferior courts with practically co-ordinate jurisdiction with the circuit court, I think, has a tendency to lessen the importance of the circuit courts. They were intended by the framers of the constitution to adequately serve all litigants of the state as trial courts and they can and do so serve them. If a circuit judge is overworked, relief can be had by way of outside assistance, re-adjustment of circuits, or the creation of a new one. It should not come by the creation of inferior courts. I trust you will pardon this digression, and while I am digressing, and speaking of what was the thought of the framers of the statute, it is but a just tribute to the good judgment and foresight of our present Chief Justice to say, that it was through his initiative that the bill creating Chapter 2687m was introduced and enacted. Before it was submitted to the legislature, it had the study of each member of the Supreme Court, and after suggestions were made and canvassed, it was drawn in the shape it passed. It is therefore at
least proper to use language concerning the thought that was in
the mind of the framers of the bill. As before stated, it was the
thought that the circuit courts and the Supreme Court were the
safest and most appropriate guinea pigs upon which to try the
new experiment. If it worked well upon them and there was
need of extending it to other courts, it could easily and more
safely be done later. The Michigan statute, the only other one
in the United States, grants this jurisdiction to all courts of
record.

Whether an action will lie to determine a pure question of
fact without any declaration of a right flowing therefrom is doubt-
ful. The statute specifically speaks of a doubt or controversy as
to the rights or duties of the parties. The words "rights" and
"duties" both connote a jural relation and not the mere existence
of a fact. The German code provided that "an action may be
brought for the declaration of the existence or non-existence of
a legal relation." Plaintiff wished to establish that he was not
the father of a certain child. He asked for a declaration that he
had had no access to the mother during the period of gestation.
Relief was denied because that asked for the declaration of a pure
fact, though it is said it would have been granted had he asked
for a declaration that he was not the father of the child, since
that would have established the non-existence of the legal relation
of parent and child. English courts have adopted the same view.
That is, they require plaintiff to put in issue the jural relation
and not the operative fact alone that may determine the jural
relation. Under our liberal rules of procedure, a plaintiff would
probably not be thrown out of court because he failed to specify
the exact relief to which he was entitled, or specified the wrong
relief, provided it was apparent that he was entitled to some cer-
tain relief.

Undoubtedly, under some circumstances future interests or
rights may be declared, but courts are usually hesitant in doing
so, unless it is apparent that a present right or duty is also in-
volved or unless it is clear that all parties to the future right are
before the court and are in a position to adequately protect their
interests. Otherwise it is deemed better to await the time when
the interest, right or duty becomes a present one, or more im-
mediate, at least.

It is also quite probable that the action can be used to estab-
lish the non-existence of a jural relation as well as its existence,
that is, to establish a non-liability or an immunity as well as a liability, right or duty.

So, too, it may be used to establish a status, as that of parent and child, husband and wife, though the latter is provided for in our statute Sec. 3252, providing for an action to affirm a marriage when its validity is doubted or questioned by either party. To establish or dis-establish membership in a society, club, or other organization; the relation of partners or of trustee and cestui que trust.

But the most fruitful field of litigation under the statute will be the construction of written instruments, especially that of contracts. Our books are full of cases for damages for breach of contracts arising out of a difference of opinion as to their construction. Under such circumstances one of the parties may be in such a situation that he must yield to the other party's construction or run the risk of suffering damages out of all proportion to the cost of yielding. For instance, a contractor agrees to lay water mains six feet below the grade of streets in a certain city at so much per foot. The city claims he must lay the mains six feet below the established grade of the street, which is in many places from two to six feet below the actual grade. He claims the actual grade is meant, but he cannot afford to so lay them and run the risk of having to re-lay them at a greater depth if the court should hold that the contract meant six feet below established grade. Such a situation developed in Madison when the water mains were laid in the early eighties.

Whether declaratory judgments can be rendered by Federal Courts without a constitutional amendment is doubtful. Muskrat vs. United States, 219 U. S. 346; 55 Law Ed. 246.

In speaking of the volume of declaratory litigation under the English law, Prof. Sunderland, of the Michigan Law School, says: "The practice is so convenient and so obviously advantageous that it has become almost a matter of course in English chancery cases and is very common on the law side of the court. An examination of the last volumes of chancery reports, Volume 2 for 1916, shows that out of sixty-four cases reported, forty-three were brought for declarations of right. The advance sheets of the Law Journal for September, 1917, show fifteen chancery cases, of which twelve were brought for declarations. It would be safe to say that approximately two-thirds of the current chan-
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cy litigation in the Supreme Court of Judicature is directed to obtain the advice of the court as to rights of litigant parties with or without prayers for consequential relief.” While I do not wish to question the correctness of these statements, it should be borne in mind that Prof. Sunderland includes cases construing wills and advising trustees as to their duties, of which there are many in the English chancery court; also that at the time he made the count for 1916 and 1917, there were a great many cases testing the validity of contracts made with alien enemies. Such cases had then reached their appeal stage.

A rough count made by myself for 1918 and 1919, excluding will and trustee cases, would give approximately 20 to 30 per cent declaratory cases. This is an important volume of litigation measured by volume alone. But its true value lies not in volume, but in its character—in its function and ability to prevent damage. Prof. Sunderland graphically sums up the situation thus: “The new rule authorizing declaratory judgments in cases where no relief is possible, gives one the right to know his rights. Since ignorance of the law excuses no one, the law will furnish an oracle to declare it. Assuming that parties intend to do right, it will point out the way they should go. To use a homely figure, prior to 1883 the English courts were employed only as repair shops; since that time they have been operated as service stations.

“The field which the new rule opens is a wide and fruitful one, and by contrast makes the old practice, which is of course, the current American practice, seem incredibly stupid. It furnishes remedies which no civilized country ought to deny to its citizens, and the lack of them is a serious hardship in this country.

“The practice of making declarations of right has completely revolutionized English remedial law. The American lawyer who peruses the current English reports, is bewildered by their novelty. He is like a modern Rip Van Winkle, who, having gone to sleep in an age when the courts were only the nemesis of wrong-doers, awakens to find that they have become the guardians and advisers of those who respect the law.

“The only recourse of an American who wishes to get a forecast of his rights is to consult his lawyer. But the lawyer's opinion is without the slightest binding force. Vast interests may be at stake, but all the client can do is to gamble on the sagacity of his counsel.
"In England such compulsory gambling has been outgrown. The client consults his lawyer, the lawyer, in case of doubt, frames a case for the court, and the court, on a full hearing with all interested parties before it, makes a final and binding declaration on which the client can act with perfect security."

This may be a strong statement, but it is not far from what may reasonably be expected if the practice becomes common in the United States. So far only Michigan and Wisconsin have statutes permitting it. The Michigan statute is as follows:

**PUBLIC ACTS OF MICHIGAN, 1919, NO. 150.**

Section 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 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 determinations 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 the 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 the said order.

Sec. 4. When a declaration of rights, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered
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.

Approved May 2nd, 1919.

You will notice the Michigan statute deals briefly with questions of practice under it and provides for its liberal construction. The question of practice was considered by the framers of our act, but it was thought best to leave that to future experience, since our code practice is so elastic that it can well incorporate this new feature without any difficulty. Should new rules be necessary they can be framed more safely when the exigencies of actual cases can be resorted to as a guide.

I trust it is needless to add that our statute will receive a liberal construction in furtherance of its beneficent purpose. In view of such beneficent purpose, in view of the wide and useful field it opens up, and in view of the wise discretion that will be exercised in its administration, I venture to express the hope that its adoption will mark an important epoch in the history of our jurisprudence.

(Paper read before the annual meeting of Circuit Judges for 1919.)