

# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Quarterly, November to June, by the University of Pennsylvania Law School,  
at 34th and Chestnut Streets, Philadelphia, Pa.

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VOL. 72.

JANUARY, 1924.

No. 2.

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## SANCTIONS AND REMEDIES.

There are two ultimate kinds of jural relations. The first of these relations is the Claim-Duty relation; where the dominus of the relation can require an act to be performed by the servus of the relation and where, accordingly, the servus of the relation is under a duty to perform that act. The second of these ultimate relations is the Power-Liability relation; where the dominus of the relation can perform an act which has the effect directly or indirectly of cutting down the freedom of the servus of the relation or of otherwise changing his legal position.<sup>1</sup>

There is a striking difference between these two fundamental relations in this, that the Claim-Duty relation is or may be a frangible relation; while the Power-Liability relation is an infrangible relation. Although the servus of a claim is ligated (bound) to his duty, yet in many cases he may break the bond of his duty.<sup>2</sup> His duty requires him to act in one way, but in

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<sup>1</sup>Duty always implies a restriction of natural freedom. Liability may involve (a) restriction of natural freedom (*e. g.*, landlord's power of re-entry); (b) restriction of an artificial freedom enlarging the limits of natural freedom (*e. g.*, destruction of a claim or revocation of a power); (c) artificial legal enlargement of natural liberty (*e. g.*, offer of contract or conveyance).

<sup>2</sup>For example, a duty to pay a debt, created by a sealed instrument at common law, cannot be broken. The action of debt in legal theory is for specific enforcement. Cf. Terry, "Leading Principles of Anglo-American Law," Sec. 147, p. 126.

many cases he has the power to act in a contrary way. On the other hand, a Power-Liability relation cannot be broken. It can be exercised and in that way come to an end. It may also come to an end through the exercise of a conflicting power; it may terminate by the exercise of a congruent power; or it may terminate by non-user.

*Illustrations.* If a note contains a power to confess judgment, the exercise of this power is the end of the power. The power of an agent to ligate his principal may be terminated by revocation. Where there is a choice of inconsistent remedies, as where the claimant may sue in trover or in assumpsit, the exercise of one power terminates the other. Where an offer is made, the power of acceptance must be exercised within a reasonable time.

In none of these cases is the power broken. It is exercised or not exercised or ceases to exist. The reason for this peculiar difference between a claim and a power lies in the fact, that a claim relation is an active relation from the standpoint of the *servus* of the claim relation, while a power relation is an active relation from the standpoint of the *dominus* of the power relation. The bearer of a duty can act adversely to the dominus, but the holder of a power cannot in a legal sense act adversely to himself. Where the dominus of a power refrains from exercising his power, he acts neither against the servus of the relation nor against himself. It is clear that by not acting he does not affect the servus. He does not affect himself in a legal sense because a man cannot sustain a legal relation to himself.

*Duty Powers.* Where there is a duty to do an act, there must be a power to do it. There may be a duty to do an act which the servus economically or physically is unable to perform. A debtor may not have the money to pay, but yet he owes the duty, and in legal contemplation he has the power to pay and also the congruent power not to pay. The power not to pay, when exercised, is directed against and affects the creditor. It is relational. Where the dominus of a non-Duty Power refrains from acting there is no relational fact. The refraining

is not a power, at least not in a legal sense, but a liberty. If, therefore, the dominus of a non-Duty Power does not exercise his power, he exercises his liberty to refrain, but since liberty means a capability of choice, the dominus of the power also has the liberty to exercise his power. Liberty in the latter case coincides with power, but since anomic relations are of no concern in the law, the capability is expressed by power and not by liberty. It may be pointed out in passing that a Duty-Power does not involve a liberty. Where there is duty there cannot be liberty. Likewise, the power to violate a duty is not a liberty.

## I

A sanction as applied to a legal rule is "any conditional evil annexed to a law, to produce obedience and conformity to it."<sup>3</sup> It "is a second intervention . . . inflicting a specific evil upon a specific person in consequence of a specific act or omission."<sup>4</sup> Since legal relations are based on legal rules, the term "sanction" may also be applied to legal relations.<sup>5</sup>

A liability is a passive ligation which can only be suffered or not suffered. A liability cannot, therefore, have a sanction as that term has been defined. In strict type (zeugmanomic) legal relations, a liability is either an evil or it leads to one. In quasi jural (mesonomic) relations a liability is often an economic good (*e. g.*, the liability of having an offer made).<sup>6</sup>

*Illustrations.* Where a trespasser is liable to be ejected, the liability itself is an evil. Since, however, a trespasser is still only *liable* to be ejected, the evil is a conceptual evil. The exercise of the power to eject a trespasser is a factual evil. Where there is a power to rescind, the power is a conceptual evil, but the exercise of it is a factual evil.

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<sup>3</sup> Austin, *Jurisprudence* (4th ed.), 523.

<sup>4</sup> Terry, note 2, *supra*, 13.

<sup>5</sup> In Roman law a sanction was the clause of a penal law which provided a punishment. *Leguum eas partes quibus poenas constituimus adversus eos qui contra leges fecerint sanctiones vocamus*: D. 48, 19, 41; C. 12, 50, 20. For other meanings of the term, see Austin, *Jurisprudence* (4th ed.), 524.

<sup>6</sup> In no case can a reward or benefit be a sanction: Austin, note 3, *supra*, 93.

Under the definition, a sanction exists only where two elements are found: (a) where there is a breach of duty; and (b) where an evil follows. A breach of duty is always followed by an evil, but an evil may be inflicted on a person which is not a sanction. The breach of a duty is an evil inflicted on the dominus of the claim; this evil is not a sanction. Sanction and evil, therefore, are not synonymous.

The evolution of every legal relation has legal consequences, but the term "sanction" is limited to that consequence which results when a legal relation is destroyed by internal devolution.<sup>7</sup> This consequence always takes the form of a new legal relation.

*Illustration.* If A is owner of a chattel, there are unlimited numbers of similar claims against other persons not to interfere with the chattel. These claims correspond to negative duties. Both the claim and the duty in these cases are unpolarized; the connection between the dominus of the claim and the legally unidentified servi is shadowy. It is only by legal hypothesis that unpolarized relations can be denominated legal relations at all. Since a breach of such an unpolarized duty can occur in a moment of time, it is accordingly necessary to assume that these duties in like manner are performed in discrete moments of time. Unpolarized relations, therefore, are that kind in which the servus is legally unidentified by the investitive facts, and which, if negative, call for a numberless series of performances. The same also is true of any polarized negative duty as where a seller of a business agrees not to compete with the buyer for a term of years. These performances, whether considered as one continuous performance or as numberless performances in a continuous series, are the evolution of the relation. If B, in the example given, converts the chattel, the wrongful act is contrary in motion and opposite in sign.<sup>8</sup> This contrary act results in internal devolution (destruction) of the original relation and the consequence of this devolution is the creation of a new polarized claim and a duty to pay damages for the trespass.

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<sup>7</sup> For an explanation of the terms "evolution" and "devolution" as applied to legal relations, see: "Nomic and Anomic Relations" in 7 Cornell L. Q. 11 (19, n. 23) (1921).

<sup>8</sup> The duty was to refrain from a negative act moving toward the dominus of the relation. The wrongful act is a positive act moving against the servus (the former dominus) but from an opposite direction.

Since there are only two ultimate legal relations and since duties alone have sanctions, it follows that these sanctions are expressible only in one or both of these ultimate relations. The sanction of a duty, therefore, is either a new duty or a liability or both.

*Illustration.* If a debtor fails to pay his creditor when the money is due, a new duty immediately arises to pay damages for the breach of duty.<sup>9</sup> This new duty is a sanction and it is called a sanctional duty.<sup>10</sup> The new duty to pay damages is accompanied by a liability of suit. This liability is a sanctional liability. A sanctional duty is infrangible—it cannot be broken; it is not sanctionable. It may be specifically enforced by means of the accompanying sanctional liability, but if it is not enforced in apt time, it perishes or is reduced to a lower juristic level.

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<sup>9</sup> See, however, Prof. W. W. Cook, "Powers of Courts of Equity," 15 COLUMBIA L. REV. 37 (45) (1915); Prof. Cook says: It is "difficult to maintain . . . that there is any 'right' to damages. . . . If there were, however, it would be violated by non-payment and a new remedial right would arise to be again violated by non-payment, and so on *ad infinitum*." The fact that where the damages are unliquidated a tender does not in any case affect costs proves nothing, since it is clear that where the damages are liquidated a tender does affect costs. Cf. Terry, note 2, *supra*, 130. These discussions are very suggestive in calling attention to the peculiar nature of a sanctional right. It seems to us, however, that the true explanation of the matter is that a sanctional right is an infrangible relation. It can not be destroyed by new breach nor can it be destroyed by a tender in any case, although, where a simple contract sanctional right is liquidated, there is a duty in the dominus of the right to accept the tender. The sanction of this duty is shown by its effect on the costs. There is not, if this explanation is sound, any possibility of an infinite series of breaches of an infinite series of sanctional rights. The very difficulty of such an assumption is enough to warrant its rejection without, however, accepting the alternative of a power relation (the permissive theory) as a substitute for a sanctional claim. The permissive theory stated by Dr. Terry (note 2, *supra*, 122) and accepted by Prof. Cook has difficulties of its own in getting over the nature of the action of assumption. Both difficulties are avoided by regarding the sanctional right as infrangible.

<sup>10</sup> The combinations "primary" and "sanctioning" rights, or "primary" and "secondary" rights, or "antecedent" and "remedial" rights, are not altogether satisfactory. Of these terms, the term "sanctioning" appears to be the only one worth preserving. Since legal relations normally occur in a connected series with various accompanying collateral relations also connected in a series, the terms "primary" or "antecedent" and "secondary" are too indefinite for precise use, standing alone. That criticism does not apply, however, to the term "sanctional" right or duty, which in itself indicates what specific legal relation is under discussion. The right from which a sanction flows may be called a sanctioned right. A right which may be followed by a sanction (*i. e.*, frangible right) is a sanctionable right.

Since duties alone have sanctions, there are four ways in which a sanction may arise: (1) by breach of a positive duty; (2) by breach of a duty for the protection of a positive duty; (3) by breach of a negative duty; (4) by breach of a duty for the protection of a negative duty.

Ordinarily, protective duties do not exist, but the increasing development of the prophylactic function of law will, in another generation or two, create a large body of legal rules dealing with protective duties and the growth of the practical importance of these protective duties will require a corresponding theoretical development.

If there is a duty not to commit a tort, ordinarily the civil law will not interfere in the face of preparations to do the unlawful act. In exceptional cases, however, the law will not wait until the wrong actually has been accomplished, but will relieve against preparation of the unlawful act by a civil remedy (*e. g.*, prohibitory injunction) which has for its purpose the laying of a new duty fortified by additional conditional sanctions on the wrongdoer. Likewise, if there is a contract duty, ordinarily the law will not interfere in the face of preparations looking to breach, but, in exceptional cases, the law will not wait until the breach actually has been accomplished and will relieve against preparation of the unlawful act by a civil remedy (*e. g.*, decree of specific performance) antecedent to breach of the principal duty.<sup>11</sup>

In these instances, there is a protected and a protecting relation. They are, therefore, phylactic relations. The relation protected may be called the endophylactic relation and the protecting relation may be called the ectophylactic relation.<sup>12</sup> The endophylactic relation may be likened to the body of an insect, and the ectophylactic relation to its antennæ (feelers) and claws.

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<sup>11</sup> *Dyne v. Vreeland*, 11 N. J. Eq. 370, 13 N. J. Eq. 143 (1857); *Davison v. Davison*, 13 N. J. Eq. 246 (1861); cited by Geo. L. Clark, *Equity*, 110 (1920); cf. *Staley v. Murphy*, 47 Ill. 242 (1868).

<sup>12</sup> For a further discussion of legal phylaxis, see "Classification of Jural Interrelations," 1 BOST. UNIV. L. REV. 208 (218-19) (1921).

*Illustrations.* If a debt is owing, and the debtor before maturity of the debt conceals property or is about to take property out of the state, there may be, in some jurisdictions, an attachment of the debtor's goods for the protection of the principal relation. In such case, there is a protecting duty not to jeopardize the principal relation, and it is for the breach of the protecting duty that a new liability is inflicted by way of sanction. The same remarks apply to a writ of *ne exeat*. Many other well-known illustrations are found in the field of equitable remedies; for example, bills *quia timet* and bills of peace. It is especially in the field of equity that ectophylactic rights prevail. A familiar illustration in the law field is anticipatory breach of contract. There is a protecting duty not to do acts which make ultimate performance impossible. The breach of that duty is the imposition of a duty to render compensation as for a breach of the principal relation. In this case, there is not an accelerated breach of the principal duty, but a present breach of the protecting relation. Logically, a judgment for damages should be taken only as security awaiting the day of performance of the principal duty, but the law prefers the simpler though fictional operation of accelerated breach of the principal duty.

A wide field of ectophylactic rights has been opened up by the so-called declaratory judgment procedure, the principle of which is already familiar in various legal and equitable remedies.<sup>13</sup> The juristic novelty of that procedure lies precisely in the creation of new duties of a protective nature to supplement other principal duties. There is a duty not to begin (or to maintain) an unmeritorious action. The sanction of this duty is nullity of the procedural act.<sup>14</sup> It would be incomprehensible that a privilege of free access to the courts should be restrained unless that restraint were directed against an abuse of privilege. The plaintiff is restrained from proceeding because he is doing or attempting what should not be done. The point is sometimes misunderstood or overlooked that the state never prohibits an act or commands one, where a contrary act is in motion, unless

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<sup>13</sup> See Borchard, "The Declaratory Judgment," 28 YALE L. J. 1, 105 (1918).

<sup>14</sup> Terry, note 2, *supra*, 123; Austin, note 3, *supra*, 522.

the contrary act is a wrong. The command to a defendant to desist from a nuisance does not in the slightest way differ from the command to a plaintiff, whatever the procedural form, to desist from an unfounded law-suit. Juristically, a prohibitory injunction against a trespass or a nuisance is of the same nature as a command, in the form of a non-suit or a *nil capiat*, from prosecuting an unfounded claim.

The declaratory judgment procedure is only one step in advance of the ordinary judgment for the defendant. There is a duty by virtue of that procedure in every party to a legal transaction not to make an unfounded claim as to the legal effect of that transaction.<sup>15</sup> That duty is broken by one of the parties when a controversy arises on the legal effect of a transaction. The sanction of the duty is a repetitive official formulation of the old duty. There may be a further sanction in a duty to pay costs.

It is interesting to observe the complicated series of steps which follow a breach of a legally frangible relation to the last stage of economic repose. The reactions of nature are immediate and concrete. In the legal field, except in the sphere of self-help, reactions are either not immediate or not concrete. If, for example, there is a breach of duty to perform a promise, the first reaction often is, a new legal relation involving a duty to repair the consequences of the first breach. This new relation is infrangible and, if not evolved by performance, may be specifically enforced by an action. When the power to sue is exercised and carried to judgment, an officially formulated repetitive duty is substituted for the second duty. Upon failure to perform this latter duty in the form of a judgment, economic satisfaction, if possible, can be attained only by the application of a new sanction, the power of execution by a levy or attachment, leading in the normal case to a sale of property and a new duty in the executive officer to pay over the proceeds. As to the debtor, the breach of the primary duty is followed by a series of sanctions in the form of new duties and liabilities.

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<sup>15</sup> For the scope of the declaratory judgment in modern law in the various countries, see Borchard, note 13, *supra*.



Three points may here be noticed. The sanctional duty to pay compensation for the breach of a duty was said to be infrangible. In that respect it is like a sealed debt at common law which is not susceptible of breach, or like a valid promise to convey land which may be specifically enforced. In these cases, however, there is an accompanying duty of a phylactic nature—the duty to perform aptly. The latter duty is frangible and it is for the breach of that duty that a sanction is imposed. If a duty is infrangible, it cannot have a sanction, and since there is a sanction in these cases it can only be connected with some other form of duty which accompanies and protects the principal relation.

The next point to be noticed is that a sanction, in the sense of a state-imposed or state-authorized evil to a wrongdoer, may be in a form which only repeats the old duty. But to be effective as sanction it is not enough that it be merely repetitive. The nature of the sanction lies in the strengthening of the legal bond between the parties—all to the end that the basal relation between the parties may be normally evolved. This strengthening of the legal bond may be made effective by repetitional formulation of the duty in an official way, as in the case of a declaratory judgment, or it may be a substitutional form of duty accompanied by an added power relation, as in the case of a breach of duty followed by a new duty to render compensation for the breach, accompanied by a power of action.

The third point to be noticed is that when speaking of phylactic relations we are concerned only with those which are homomorphic—where there is a principal duty<sup>10</sup> which is accompanied by a protecting duty, and not cases where there is a duty accompanied by a power. For example, the claim to corporal integrity is accompanied by the duty not to *attempt* to commit a battery. These are phylactic relations and they are homomorphic. The breach of the latter duty creates a sanc-

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<sup>10</sup> To avoid the possibility of confusion, it may be stated at this point that endophylactic and ectophylactic relations are varieties of principal and accessory relations which in their turn are divisions of dependent relations. See "Classification of Jural Interrelations," 1 BOST. UNIV. L. REV. 203 (218-19) (1921).

tional power of self-defense, and a new sanctional duty to pay compensation for the assault with an accompanying power of action. A breach of the principal relation creates a new sanctional duty to pay compensation and an accompanying power of action. We are concerned here with any form of sanction, but the point to be noticed is that a protecting duty is not a sanction.

Summing up, sanctions consist of new duties and of powers (or the exercise of powers). Sanctions are private when they are executed by private force; they are public when executed by state force. Sanctions are automatic when they are imposed directly upon a breach of duty; they are executive when they result from an act of choice. Sanctions are specific when they involve particular duties or powers; they are general when they involve duties to pay or powers to proceed generally to realize a sum of money. Finally, sanctions are intermediate and ultimate.<sup>17</sup>

*Illustrations.* If a landowner ejects a trespasser, this is the exercise of a specific sanctional power; it is a private, executive, ultimate sanction. Where a sheriff sells goods at execution sale, this is a general sanctional power; it is a public, executive, ultimate sanction. Where a debtor makes default, the new duty to pay damages is a sanctional duty; it is an automatic, general, intermediate sanction. Where judgment is entered on the debt, the judgment is a new sanctional duty; it is a general, executive, intermediate sanction.

## II

The activities of courts, as courts, are reducible to the creation of duties and the creation of powers. Courts never act in an adjudicative capacity except where a legal relation has been violated. More specifically, *a court never acts as a court unless a duty has been infringed.*

Courts, like other organs of government must and do exercise other functions than those that give them their chief char-

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<sup>17</sup> For a somewhat different classification of sanctions, see Terry, note 2, *supra*, 16.

acter and name. Courts in all countries have legislated (*i. e.*, made legal rules) and continue to do so. The common law is almost entirely a product of the courts, and a large part of legislation has been converted into a judicial gloss. But the process of making new legal rules or of changing old rules is for the most part subsidiary to the settlement of controversies. The leading exception is where courts make rules of procedure.

There is a large class of cases where it is supposed the state administers justice without the use of physical force. A typical instance is where a bill is filed by trustees asking for construction of a will or where an executor or a receiver petitions for leave to compromise a claim or to do some other act in the course of administration. Such situations compel us either to amend the statement that courts never act as courts except on the violation of duty, or in the alternative, to discover in them a violation of duty. If a will is construed by a court, the decree of the court amounts to a command; that is to say, a duty is imposed on the trustees to act in accordance with the decree. There does not seem to be any difficulty for this illustration in assuming that the decree is a sanctional duty based on a breach of a protecting duty not to controvert the legal relations created by the will.

If leave is granted to a receiver or to an executor to do an act in the course of administration, there is not in form at least any command to do the act or not to do it. If the receiver does the act, he is not responsible if the court had jurisdiction to authorize it. In substance, however, the legal effect of the order is either (1) to command the receiver to act or else (2) to impose a duty on creditors and others not to bring in question the act if and when done. The difficulty here is not in finding the actual or potential force of the state, but in discovering an antecedent breach of an endophylactic or ectophylactic relation. There are two juristic alternatives:

(1) It may be claimed that in these cases courts do not function as courts but as administrative agencies, or as legislative agencies enacting special legislation creating legal relations in specific persons, as where a legislative body grants a divorce or

enacts a law legitimizing a particular person; or (2) it may be assumed that there has been breach of an ectophylactic (protecting) relation.

The second view may be maintained with some plausibility but the first is probably the easier to support and seems to us the correct one. Writs of error, of *supersedeas*, of *certiorari*, and of *procedendo*; decrees to perpetuate testimony, for testimony *de bene esse*, and of adoption; and orders governing the administration of executors, administrators, receivers, guardians, conservators, and trustees in bankruptcy—whether procedurally contentious in form or not—are administrative in substance.<sup>18</sup> They are not sanctional dispositions and courts when acting in such instances do not exercise judicial functions in the strict sense. The same observation applies also to the concluding steps in such administrative proceedings—to settlements of accounts, discharges of receivers, executors, etc., and also to discharges in bankruptcy.<sup>19</sup> But this observation does not apply, for example, to decrees of foreclosure, of divorce, jactitation of marriage, or for the dissolution of partnership. These are abrogative declarations of a sanctional character based on precedent violations of duty. They are strictly judicial in character according to the proposed test.

Excluding, therefore, all administrative functions of courts as in the proper sense non-judicial, and having in mind that legal relations may be accompanied by protecting relations, the activities of courts may be invoked in the following cases: (1) before infringement of the principal relation; and (2) after infringement of the principal relation.

From the standpoint of a harmonious and effective social life, the remedy involving the least amount of social friction is

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<sup>18</sup> It would perhaps be readily admitted by those who do not accept the test of judicial action proposed in this article, that the appointment of a receiver, etc., is a pure act of administration.

<sup>19</sup> To these examples may be added the numerous instances of prudential justice (*freiwillige Gerichtsbarkeit*), among the rest, declarations of death, of legitimacy, and of majority, authentication and registration of documents, issuance of patents, trade-marks, etc. See Gareis, "Science of Law," 256 sq., 260 sq.; Dorner, "Verfahren der freiwilligen Gerichtsbarkeit," in Kohler-Holtendorff (1913) *Enzyklopädie* III, 407 sq.

to be preferred where a remedy is necessary. The existence of law and the social instinct normally are in themselves a sufficient safeguard of social harmony, but when legal relations become discordant, a remedy is necessary and the one which is the least destructive to the social tissues is the one which simply restates a duty in an official and authoritative form without any further present intervention. This is the declaratory remedy.

1. The declaratory remedy may be invoked in two classes of cases: (1) Before breach of a principal relation; and (2) after breach of a principal relation.

The declaratory remedy when invoked *before* breach of an endophylactic relation has two forms: (1) *repetitive*—restating in authoritative form the existence of a duty or power which has become the subject of controversy; and (2) *excluding*—negating in authoritative form the existence of an asserted legal relation (duty or power).<sup>20</sup>

The declaratory remedy when invoked *after* the breach of an endophylactic relation has two forms: (1) constitutive and (2) abrogative.

*Illustrations.* Where a duty or power exists and the servus of the relation denies the existence of such duty or power, the denial of the existence of the duty or power is a breach of an ectophylactic relation. The endophylactic re-

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<sup>20</sup> The term "declaratory" is used here in the wide, and, as it seems to us, proper, sense to include any judgment of the existence or non-existence of a legal relation or any judgment creating or dissolving a legal relation in whatever form, so long as that judgment is merely declaratory and does not formally include a present constraint. The effort to confine the term to one species of judicial declaration (the so-called declaratory judgment as commonly understood), if it prevails, will make it necessary to invent another term for the remaining declaratory remedies or else create the risk that the legal nature of this important group of remedies will be misunderstood. It may be suggested that the generic term should be permitted to stand for its generic purpose and that for the narrower function of declarations which precede the breach of principal (endophylactic) relations, the term prophylactic (or preventive) declaration be employed.

At this point, it may also be stated that the terms "repetitive" and "excluding" are generic terms as here used and are not intended to be substitutes for the terms "affirmative" and "negative" as applied to judicial declarations of legal relations. It is entirely proper to speak of affirmative or negative preventive declarations, but these terms cannot be used in the wider sense, since there would be instant conflict with constitutive and abrogative declarations.

lation, however, remains unimpaired, and the court in the so-called declaratory judgment procedure enters a finding which repeats the duty or power. The legal relation which was uncertain and disputed is now judicially established. Where, on the other hand, a duty or power is asserted which in fact does not exist, the court will enter an exclusory finding which officially establishes the non-existence of the asserted legal relation. In the latter case the endophylactic relation is the duty not to sue on the asserted duty or the duty not to attempt to exercise the asserted power. There are, accordingly, two ectophylactic relations: (1) the duty not to make non-procedural assertion of the existence of the duty or power, and (2) the duty not to make declaratory procedural assertion of the duty or power.

An illustration of another type is interpleader in equity. In this case there is an admission of a duty but an expression of doubt as to which of two or more persons that duty is owing. As to the defendant to whom the complainant owes the duty, the decree is a repetitive declaration. As to the other defendants, it is an exclusory declaration. If the decree is based on a duty owing at the time of the bill, it is a repetitive declaration of a sanctional duty and the decree accordingly will take on a constitutive element by merging the sanctional duty into a judgment duty.

A decree reforming an instrument is based on the duty of voluntary reformation. It is, therefore, a breach of an endophylactic relation. The decree, accordingly, is a constitutive declaration. A decree declaring a trust is, likewise, a constitutive declaration.

Examples of abrogative declarations based on breaches of endophylactic relations are decrees of divorce and of dissolution of partnership. A decree removing a cloud is not, however, an abrogative declaration, but an excluding declaration based on breach of an ectophylactic relation. The ectophylactic duty is to release an apparent claim affecting title, accessory to the protection of ownership.

2. Next, in the order of preference from the standpoint of social welfare, to a simple declaration of the existence or non-existence of a legal relation, is the coercive declaration of a legal duty. Compulsory declaration has two forms: (1) phylactic restraint; (2) phylactic compulsion.

The obvious illustration of phylactic restraint is a prohibitory injunction. The basis of this restraint is the breach of an ectophylactic duty in the form of a threat to infringe the principal or endophylactic duty.

The clear illustration of phylactic compulsion is the decree of specific performance.<sup>21</sup> In this case also there has been a breach of an ectophylactic relation, *i. e.*, the duty to perform aptly. In theory, the endophylactic duty is infrangible and it is always susceptible of enforcement, notwithstanding the refusal of the promisor to perform.

A much purer example of phylactic compulsion is the case of a threat to infringe an obligation cognizable in a court of equity. In this case, there is a breach of an entirely different ectophylactic relation. A court of equity in a proper case may fortify the duty of performance by an anticipatory decree commanding performance on the due date. The decree of *ne exeat* is a further example of the same kind. In that case, however, the ectophylactic duty is specifically enforced for the protection of the endophylactic duty. *Mandamus* is a further case of phylactic compulsion.

3. The above types exhaust all the cases of remedies which are declaratory (in the broad sense). The next procedural stage is where declaration in repetitive form is no longer availing because the discordance has gone beyond the applicability of a declaratory remedy. The next remedy, accordingly, in order of preference, is to restore the dominus of the relation to his former legal position. This possibility, when it exists, implies that the endophylactic relation has been infringed but that the corpus of that infringed relation may be restored without, however, nullifying the legal effect of the wrongdoing as against the wrongdoer.

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<sup>21</sup> The term "specific performance" has been appropriated in professional speech for this one variety of coercion. There are, however, juristically many varieties of specific performance. Phylactic restraint is specific enforcement of a required negative duty. In the field of compensatory remedies there are numerous examples of specific performance. The action of debt is one of specific performance: Cf. Terry, note 2, *supra*, 126 (128); The Uniform Sales Act establishes specific enforcement of simple contract debts: sec. 63. Every frangible relation, as has been shown, evolves into an infrangible relation which is specifically enforced. *Mandamus* and other restorative remedies are in substance specific enforcement. Since, however, use of the term "specific enforcement" in a wide sense would be confusing, we have chosen as a generic term, "integral redress."

This form of remedy, which may be termed restitution, is illustrated in various ways by habeas corpus, replevin, forcible detainer, ejectment, and, conditionally, by detinue.

4. The next stage beyond phylactic declaration in its various forms and beyond restitution is to provide the dominus of the relation with an equivalent for the harm which he has suffered measured in money. This is the compensatory remedy of damages. Compensatory remedy has six forms based on (a) the pecuniary loss or gain of the plaintiff and (b) the pecuniary gain or loss of the defendant. This remedy, therefore, may present the following variations: (1) where the plaintiff's loss and the defendant's gain are equivalent; (2) where the damages are measured by the plaintiff's loss and where the defendant has received no pecuniary gain; (3) where the plaintiff has sustained no economic loss and the defendant has received an economic gain; (4) where neither plaintiff nor defendant has sustained or received pecuniary loss or gain; (5) where the plaintiff has received pecuniary gain and the defendant has suffered pecuniary loss; (6) where both plaintiff and defendant have received pecuniary gain.

We assume in each of these cases an infringement of duty. That being so, the plaintiff is entitled at least, in any one of these cases, to nominal damages. The bearing of these permutations lies in this, that they are instances where the question whether a duty has been infringed depends on the further question whether a pecuniary loss has been sustained. They may also have an importance for the determination of the question of what is remedial responsibility as distinguished from penal responsibility. The distinction between remedial and penal responsibility often is of importance in the construction of statutes and in controversies involving rights of foreign incidence (so-called conflicting laws). This distinction is one of some difficulty but it does not lie within the scope of the present discussion.<sup>22</sup>

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<sup>22</sup> Cf. Salmond, *Jurisprudence* (3d ed.), 85 sq., 372 sq.



5. The last procedural stage in the order of preference is punishment. The term punishment is a narrower term than penalty. Penalty may or may not include punishment, but punishment can never include a purely compensatory or restorative remedy.

*Further classification.* Remedies may be classified as penal and remedial, phylactic and non-phylactic, repetitive and non-repetitive, and as those which provide integral enforcement or protection of the endophylactic relation and those which furnish substitutional redress. Adopting the last as a basis, remedies may be arranged into the following table:<sup>23</sup>

TABLE OF JUDICIAL REMEDIES

Restraint	}	Integral Redress
Compulsion		
Restitution		
Declaration		
Compensation	}	Substitutional Redress
Punishment		

*Resumé.* The remedy of restraint is always proleptic (anticipatory). Restraint can only come before the act to be restrained. If the wrongful act has been accomplished, another form of remedy is necessary.

Compulsion, also, is proleptic. Restraint is coercion against the doing of an act, while compulsion is coercion requiring an act to be done. Compulsory coercion is used because an act which ought to be done is not done. If the act required is or has been done, no remedy is needed. Restraint and compulsion, therefore, are opposite forms of coercion; the one for prohibiting an act; the other for compelling an act.

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<sup>23</sup> The German classification of Actions is : 1. *Anspruchsklagen*: (a) *Anfechtungs*; (b) *Kündigung*; (c) *Rücktritts*; (d) *Aufrechnungs*; (e) *Leistungsklagen*; 2. *Feststellungsklagen*: (a) affirmative; (b) negative: Kohler "Zivilprozess und Konkursrecht" in Kohler-Holtzendorff (1913), *Enzyklopädie*, III, 308 sq. Cf. Seuffert, "Kommentar zur Civilprozessordnung," (10th ed., Munich, 1907), I, sec. 253, p. 361.

Restitution is a remedy for restoring a person, whose legal rights have been infringed, to his original position.<sup>24</sup> This remedy is purely analeptic (curative). It can be employed only where there has been a deprivation of the substance or corpus of a legal right. Restitutive remedy restores the corpus of the right to the innocent party by coercive measures.<sup>25</sup> In all the foregoing remedies, the distinguishing mark is a specific coercive sanction. Some act is commanded or prohibited. The sanction is specific. That particular act must be done or omitted. In the case of phylactic restraint or of phylactic compulsion, the duty, to omit an act or to do it, is sanctioned by direct measures against the person of the defendant. In the case of restitution, there is a specific executive sanction, but no duty in the defendant to act or to refrain, except the duty not to interfere with the execution of the sanction. Restraint and compulsion require acts of the defendant. The restitutive remedy rests entirely on public executive initiative.

The declaratory remedy determines the existence or non-existence of a legal relation.<sup>26</sup> It does not involve any coercion except the coercion implied in the legal relation. In that respect it differs from the remedies of phylactic restraint, phylactic compulsion, and restitution, all of which are directly coercive, requir-

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<sup>24</sup> The restitutive remedy is not to be confused with the Roman "in integrum restitutio." The latter remedy was purely declaratory in substance, while the restitutive remedy is coercive. Cf. Savigny, "System des heutigen Römischen Rechts, VII, Secs. 315 sq., p. 90 sq.

<sup>25</sup> There are instances which present some apparent, if not real, difficulty of classification. If a plaintiff has been prevented unlawfully from taking an office, he cannot be restored to that which he has not had. If he invokes the remedy of mandamus, the order compels the defendant to give way to the plaintiff and perhaps to do other acts. This remedy is clearly coercive compulsion. It is not otherwise even though the plaintiff has been unlawfully removed from office. The remedy is still not restitutive because it commands acts of the defendant. Judged by its ultimate purpose, however, in the latter case, the remedy is restorative.

The remedy of quo warranto is more difficult of classification because of the variety of ways in which it may be employed. The form of a judgment alone will determine its proper place. It may take on the form of phylactic restraint like the writ of prohibition, or it may be purely restitutive. When the judgment is simply of ouster, it may conceivably be purely declaratory. Cf. Mechem, "Public Officers" (1890), secs. 496-7.

<sup>26</sup> For a discussion of declarations of fact, see Borchard, note 13, *supra*, 43 sq.

ing acts to be done or omitted as parts of the execution of the remedy.<sup>27</sup>

Declaratory redress may be invoked in two cases: (1) after breach of an ectophylactic duty and prior to breach of an endophylactic duty; and (2) after breach of an endophylactic duty. In the first case, the declaratory remedy is proleptic or preventive (with reference to the endophylactic relation). In the second case, the remedy is analeptic or curative. Proleptic declarations may affirm the existence of legal relations; these are repetitive declarations. They may negate the existence of an asserted legal relation; these are exclusory declarations. Analeptic (curative) declarations may either constitute a legal relation or abrogate a legal relation.

The declaratory form of redress may be shown by the following table:

Declaratory	}	Preventive	}	Repetitive
		Exclusory		
Redress	}	Curative	}	Constitutive
		Abrogative		

All the forms of remedy considered up to this point in the summary afford integral redress. The plaintiff is afforded protection of the identical legal relation which is asserted. Protection of this asserted legal relation is effected by restraint, compulsion, or declaration. Where, however, the complainant does not seek specific protection of an asserted legal relation, but requires a substitutional form of redress, then the sanction is general and takes the form of compensation or punishment.<sup>28</sup>

<sup>27</sup> As has already been observed, the term "declaratory" is ambiguous. It may mean the following: (1) any judicial finding, order, or entry, whether directly coercive or not; (2) a judicial finding not directly in itself involving coercion; and (3) a judicial finding of a prophylactic nature. For reasons, already stated, the present writer uses the term in the second sense. In the first sense, all orders, findings, and entries of court (*e. g.*, money judgments, administrative orders, etc.) are declaratory. In the third sense, the term is limited to the so-called declaratory judgment.

<sup>28</sup> It may be observed that even though the relation adduced is infrangible, unless the defendant can obtain the enforcement of a specific legal relation, the remedy must be compensatory. Thus, in the action of debt, which on historical grounds must be classified as a species of real action and which clothes an infrangible relation, the judgment in form is for money and satisfaction is made by payment of any money which equals the amount of the judgment. From the standpoint of redress a specialty debt does not differ from a simple promise.

Redress, especially in equity, is often complex. A decree may be declaratory in part; it may restrain an act in another part; it may compel an act by another part; and it may award compensation by another part. Finally, it may be noticed that redress may be afforded either by mesne or final process. Thus, where a writ of replevin issues upon complaint, affidavit, and bond, the chattel is restored to the plaintiff, and the final judgment is either declaratory of plaintiff's restored possession or for restitution to the defendant. Remedies, therefore, may be classified from the standpoint of the ultimate result of the entire proceeding or with reference to a particular step in a judicial proceeding. Thus, in the case of replevin, the remedy is restitutive from the standpoint of the whole proceeding, or declaratory from the standpoint of the final judgment if the plaintiff prevails, and compulsory if the defendant prevails.

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