Appellate Review of a Declaratory Judgment

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It is difficult to define an action for a declaratory judgment. It may be described and compared to other actions; its utility may be discussed and its origins traced with accuracy. This material is already available,[1] and the Bar is indebted to Professor Borchard. The definition of the action and its proper classification in the armory of legal remedies remains to be worked out in practice by the lawyers and the courts. It may be suggested that the action for a declaratory judgment is an aggregate of operative facts giving rise to right-duty relations between the parties.[2] It indicates that these relations are in dispute; that the plaintiff is thereby in a position of peril and insecurity and he asks that relief be given him by declaring his rights. The judgment rendered is the determination or sentence of the law that a legal relation does or does not exist.[3]

That such a judgment is reviewable requires no discussion, since the act itself provides that declaratory judgments "may be reviewed as other orders, judgments and decrees."[4] This wording is not particularly helpful to the practicing lawyer when he is faced with the choice of a method of review. Of course the judgment is reviewable by proceedings in error,[5] and perhaps this is the most satisfactory method to use. It is probable that the great majority of declaratory judgment cases will be submitted upon agreed statements of fact, or that the facts will be found separately by the court or jury. The complaint of the party seeking review in such a case will be in regard to the application of the law to the facts. He will contend that the court erroneously declared that certain jural relations existed

[1] Borchard, "Declaratory Judgments," Banks Baldwin Law Publishing Co. 1934.
[2] Clark, "The Code Cause of Action," 33 Yale L. J. 81, 837.
[3] Borchard, "Declaratory Judgments," 7 Tulane L. R. 183.
[4] O.G.C. 12102-7.
[5] O.G.C. 12247.

or did not exist. This may be conveniently presented to the reviewing court by petition in error. Such a proceeding in error would not differ from any other; all questions, including weight of the evidence, might be taken up on a record prepared as in ordinary actions.

In Ohio, however, the aggrieved party may have the case reviewed by appeal, if it is a chancery case.[6] He may desire review by this method for various reasons; he may regard it less technical; it may be less expensive, or he may desire a trial *de novo* rather than a review of the record. Whatever the reason, the right cannot be denied. The determination of the right to appeal turns solely upon the question, Is the action a chancery case?

It is unfortunate that the procedural distinctions between law and equity are still preserved in Ohio. They are administered by the same courts; the process and pleading are the same, but nevertheless the difference persists, and arises from time to time to plague the practicing lawyer. No authority need be cited to point out to him the danger in making the wrong guess and in attempting to appeal a case which the court holds to be an action at law.

The Supreme Court has recognized the difficulty of the question, and has said:

> "We will not attempt to categorically and finally answer the much-mooted question, What is a chancery case? It would be a difficult if not dangerous thing to do and of doubtful benefit. It ought, however, the be approached, generally speaking, not from the modern viewpoint, but rather from the old-time conception. Especially would this be so with reference to well-recognized equitable remedies known to the courts prior to the adoption of the Code of Civil Procedure. This much, however, may safely be said. A chancery case is one in which, according to the usages and practices in courts of chancery prior to and at the time of the adoption of the Code of Civil Procedure, remedies were awarded in accordance with the principles of equity and not in accordance with rules of law. And the proper definition of the term in our new Constitution cannot be regarded as affected by the provisions of statutes relating to appeals nor by the introduction bodily of equitable remedies into our statutes. It would not do, however, to lay down the hard and fast rule that only such chancery cases as were known to that period of our legal history could have been intended by the constitution makers as being the cases subject to appeal. The changing condition

[6] Ohio Constitution Article IV Section 6.

of the times, development along new lines, the springing up of new problems, progress in many of the avenues of life—these things beget new rights and obligations that call for new equitable remedies. Equity is not only elastic as to its remedies, but is is progressive. Its principles are indeed immutable, founded as they are on exact justice and equality before the law, but equitable remedies are constantly subject to enlargement. These considerations make it manifest, therefore, that an all-embracing and satisfactory definition of chancery case would be most difficult to obtain, and if obtainable, might well promote injustice rather than justice."[7]

The court here is looking at the remedy and it suggests that there may be new remedies. The action for a declaratory judgment is a new remedy; but is it a new equitable remedy? The action, says Professor Borchard, was born under equitable auspices and has preponderantly equitable affiliations.[8] It has many characteristics of an equitable remedy. It is conceivable that the courts might lay down a simple rule, that the action for a declaratory judgment is an equitable remedy and hence appealable. If such a rule were limited to appellate practice it might not be objectionable. It would have the advantage of certainty. However, it could not be so limited and many unfortunate holdings would result. The effect would be the same as holding that the action for declaratory judgment was available only on the equity side of the court. Ohio, then, under the unform declaratory judgment act, would be in the same position as New South Wales, Florida, and Rhode Island where the declaratory judgment is available only in courts of equity.

The plain fact is that the remedy is not alone considered in determining whether a case is legal or equitable. In an Ohio case action was brought against an administrator charging that he had made a fraudulent settlement of his accounts and that he had fraudulently sold real estate. The plaintiff prayed for judgment in the sum of $6000. In determining whether the case was appealable, although the remedy demanded was a money judgment, the court said, "If we look to the prayer of the petition alone, it plainly appears to be an action for the recovery of money only. But if we look to the case made, or the facts stated in the petition, it plainly appears to be an action to set aside a fraudulent settlement, and to compel an account by an administrator or trustee. . . . The action is not one in

[7] Wagner v. Armstrong, 93 Ohio St. 443, 456, 113 N.E. 397.
[8] Borchard, *op. cit.*, 178.

which a jury trial is demandable as of right, and the parties had the right of appeal."[9]

Again the Supreme Court has said:

"In discussing the question by which the extent of equity jurisdiction is to be tested and practically determined, it is stated in I Pomeroy's Equity Jurisprudence, 3d ed. §62, that 'the question is . . . whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity.' It is further said that one of the results which follows is that 'a court of equity will not, unless perhaps in some very exceptional case, assume jurisdiction over a controversy the facts of which do not bring it within some general principle or acknowledged head of the equitable jurisprudence'."[10]

In England the first declatory judgment act in 1852 provided that the Chancery Court might make "binding declarations of right without granting consequential relief." It would seem that court might have construed this to give them the power to administer a new equitable remedy in any case in which it was demanded, whether the rights involved were legal or equitable. The court limited the act, however, to those cases cognizable traditionally in chancery where other equitable relief might have been demanded.[11] In 1883 the power to render declaratory judgments was extended to the law side of the High Court.

In England the question is not frequently raised since the procedural distinction between law and equity is only nominally maintained. In an action on the chancery side to declare void a mortgage, the respondent contended that since the action was in equity the plaintiff should do equity by tendering the actual consideration. In denying this contention Cozens-Hardy, M.R. said:

"The simple answer is that this is not equitable relief. It is a mere accident that the judgment has been given in the Chancery Division and not in the King's Bench Division, since this action might perfectly well have been brought in the Common Law Courts."[12]

New South Wales, where the remedy is limited to Chancery

[9] Reed's Admr. v. Reed et al, 25 Ohio St. 442 (1874).
[10] Building Show Co. v. Albertson, 99 Ohio St. 11, 121 N.E. 817.
[11] Borchard, *op. cit.*, p. 241.
Bankes, L. J. in Guaranty Trust Co. v. Hannay & Co. (1915) 2 K. B. 536, 538.
[12] Chapman v. Michaelson (1909) 1 Ch. 238.

court, takes the contrary view and holds that where a legal right is sought to be declared the court has not jurisdiction.[13]

In Florida there seems to be a tendency for the Chancery courts to regard the remedy as equitable and to take jurisdiction in cases that would not otherwise come before them. A suit for interpretation of a will was held maintainable even though no equitable estates were involved.[14]

In New Jersey where the separation of the courts of law and equity is rigidly maintained the courts look at the case and not at the remedy to determine jurisdiction. If the question is one of law, equity will not take jurisdiction.[15]

The question sometimes arises as to the right of trial by jury. Where a corporation sought a declaration as to its contractual obligation to 381 defendants and prayed for "further equitable relief" the court held that the action was one at law since only legal rights were involved. The plaintiff contended that the action was in equity under the doctrine of avoidance of multiplicity of actions. The court said:

"Some generations ago, principles of equity were administered only by courts of equity. But our courts administer both equity and law. Heretofore an action in equity, without the right of trial by jury, was necessary in order to enforce the principle against multiciplicity of actions. But surely the principle exists without reference to the court in which it is applied or the particular form in which it may be administered; and though a case may in some respects require the application of a principle of equity, it does not on that account necessarily lose the characteristics of an action at law. And simply because the court without a jury must determine whether the rule against multiplicity of action is applicable, does not, we think, hinder the determination of the facts in the case by a jury, as is provided for in section 9 of the Declaratory Judgments Act. In the instant case, a number of parties, though having separate contracts, have a community of interest in the facts and the law involved herein. That, under the circumstances of this case, gave rise to the application of the principle of equity that a multiplicity of actions should be avoided by joining all in one suit. But the action may, nevertheless, be called one (at law if you please) under the Declaratory Judgments Act. An action thereunder is not one heretofore known (except to a limited extent), and if a plaintiff invokes that act, he must submit to its terms. The facts in the case, in so far as material, might accordingly, have been submitted to a jury, had that been demanded."[16]

[13] Langman v. Handover (1929) 43 C.L.R. 334.
[14] Roberts et al v. Mosely (1930) 100 Fla. 267, 129 So. 834.
[15] Di Fabio v. Southard (1930) 106 N. J. Eq. 157, 150 Atl. 248.
[16] Holly Sugar Corporation v. Fritzler et al., (1931) 42 Wyo. 446, 296 Pac. 206.

In actions to construe a will the Ohio Courts have held that the subject matter of the action must be examined to determine whether the case was appealable. In *Gearhart v Richardson*[17] the court found that a charitable trust was involved and the action was held to be appealable. In *Oglesbee v Miller*, Exr. an action was brought under O.G.C. 8593 to forfeit a life estate on the ground of waste. It was held that the action was at law and not appealable. The court said:

"In the final analysis this is a case involving the determination of a legal title and for the recovery of specific real property. If the case be said to have any of the characteristics of a suit in chancery, these are merely incidental to the principal relief prayed for."[18]

In *Crowley, Admr. v Crowley et al* the Supreme Court again considered the apepalability of an action to construe a will. The opinion might well have been written in a declaratory judgment action. Marshall, C. J. said:

"Each year a large number of cases are appealed from the trial courts to the Courts of Appeals, only to be dismissed because they are not in fact chancery cases; and not a few of them each year are carried to the Supreme Court on the constitutional ground, where they are again dismissed because the particular question is no longer debatable. It frequently results that meritorious cases are denied review because of the mistaken remedy, and that substance is sacrificed for form. The mistake is not always that of the novitiate. Seasoned lawyers and experienced judges frequently differ in opinion as to the appealability of given cases. It has become a seriously mooted question whether the constitutional amendment of 1912 was not a serious mistake. If so, it is a political problem which courts may not correct by the process of interpretation. In the overwhelming majority of cases the question of appealability can be solved with certainty by patient research in the principles of equity jurisprudence. There is, however, a twilight zone of cases where the difficulty is a real one. In such cases it becomes necessary to search both the English and American authorities to ascertain what has been decided by English courts of chancery and American courts of equity.

Equity is a separate system of jurisprudence whose principles are universal among jurisdictions which administer the common law. It is as old and its principles are as fixed and permanent as those of the common law itself. It follows that the basis of American equity jurisprudence must be found in the equity jurisdiction of the high court of chancery in England. It finds its basis and its concept in English equity

[17] Gearhart v. Richardson, 109 Ohio St. 418 (1924).

[18] Oglesbee v. Miller, 125 Ohio St. 223, 227 (1932).

jurisprudence, yet it finds no limitations anywhere. It is progressive and expands and develops with the progressive changes of modern civilization; yet, as was declared in *Wagner* v. *Armstrong, supra,* "the term in our new Constitution cannot be regarded as affected by the provisions of statutes relating to appeals nor by the introduction bodily of equitable remedies into our statutes."

Following that declaration, it must be said that Section 10857, General Code, does not create new, equitable remedies. That statute provides a legal remedy for construction of wills involving only legal estates. It must be held that on the equity side of the court of common pleas that section only authorizes the direction and judgment of the court in matters where trust estates are involved, and that as to all other matters they are heard on the law side of the court.

If the legislature should be declared to have the right to provide an equitable remedy, and make it the basis of appeal as a chancery case it would follow that it would be in the power of the legislature to materially change the jurisdiction of the Court of Appeals."[19]

The types of action considered in these cases are analogous to the action for a declaratory judgment. They lay a basis for a rule as to appeal in such actions.

The actions for a declatory judgment is available on both sides of the court; it is an appropriate remedy to determine either legal or equitable rights. If such a judgment is rendered determining purely legal rights then the case is at law and review must be had by way of error proceedings. If, however, a judgment declares equitable rights and interests then review may be had either by error or appeal. Such a rule is consistent with Ohio cases in related fields, is workable and will tend to keep the action flexible, and readily adaptable to widely different states of fact.

[19] Crowley, Admr. v. Crowley, 124 Ohio St. 454, 457 (1931).