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DECLARATORY JUDGMENT

By James Schoonmaker*

After writing the article printed in the December issue of the Minnesota Law Review[1] I learned of the decision in *Anway v. Grand Rapids Ry. Co.*,[2] in time to append a note calling attention thereto, and stating that I would refer to it in a later article.

The decision seems to be based on these grounds: First, the act in question will impose upon the judges more work; second, it makes the courts the legal advisers of the people; third, the act provides for a moot procedure; and, fourth, the duties imposed are not judicial. Of these in their order. Space will not permit very extensive quotations from either the prevailing or the dissenting opinion, and, therefore, I refer the reader to the report.

First.—The writer of the prevailing opinion seems to have labored under the impression that the rendering of declaratory judgments imposes additional work upon the courts, and that this fact should be taken into consideration in determining the constitutionality of the law. I quote from the prevailing opinion as follows:

"Before this court, with its membership of eight, takes up the work of advising 3,000,000 people, and before the legislature is called upon to increase the membership of this court so as to efficiently conduct this work, it is well that this court pause long enough to consider and consider fully, whether the act calls upon us to perform any duties prescribed by the constitution or to exercise any power therein conferred."

Conceding that it is proper for courts in construing an act of the legislature to consider whether the duties imposed by the act are within the terms of the constitution, yet the fact that the act imposes more work upon the judges furnishes no reason for holding the law unconstitutional. This is a very proper matter for the consideration of the legislature, but it is unbecoming for judges to assign any such ground for decision. If they consider

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[1] Vol. 5, p. 32.

[2] (Mich. 1920) 179 N. W. 350.

themselves overworked, their proper remedy is to decline office, resign, or appeal to the legislature or to the people. However, the assumption that declarations will burden the courts with work is not supported by the experience of the courts of England and other countries where declarations are made. While it is doubtless true that not all of the controverted questions upon which declarations will be sought would otherwise result in actual litigation, yet it is also true that it will consume much less time of the courts to construe contracts, etc., than to try with juries the actions for damages resulting from breaches of contracts; besides it is a great saving in expense to the state or county.

Second.—It is asserted in the prevailing opinion concerning the act that "it at once becomes apparent that by the act the courts of this state are made the legal advisers of all seeking such advice." The most casual examination of the act shows that this assertion is wholly unjustified by the terms of the act. This and other statements in the opinion characterize it as the brief of a partisan advocate rather than an unbiased judicial utterance. That part of the act material on this point is found in section 1 as follows:

"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."

It will be noticed that this language is copied, with the addition of a few immaterial words, from the English court rule of 1883. It is also in substance the English act of 1852. There is nothing in this language which by any stretch of the imagination can be tortured into the statement of the opinion that "by the act the courts of this state are made the legal advisers of all seeking such advice." But granting this to be true, how does it offend the judicial dignity? Is it necessary that the parties to a controversy batter each other in court before the writing of any opinion settling the controversy becomes a dignified occupation? This law has been in force in England during the last 68 years, and the reports fail to disclose the slightest evidence that the English judges have been converted into "legal advisers," or that the rendering of declaratory judgments has been considered by them in any way derogatory to their judicial dignity. The people of this country do not take kindly to this sort of self-asserted dignity, and are not disposed to allow it to thwart their wishes

expressed through the legislature, nor to retain judges who indulge in that kind of thing.

Several decisions and constitutional provisions are cited concerning the power of the legislative or the executive department to call upon the judicial department for advice, but as the act in question contains no such feature these decisions and provisions have no bearing on the question of what is meant by the term "judicial power," as admittedly the giving of advice does not come within that term.

Third.—It is contended in the prevailing opinion that the proceedings authorized by the act constitute a moot case. I quote therefrom as follows:

> "In short it requires that time of the court shall be taken, not in the determination of actual controversies when rights have been invaded and wrongs have been done, but in the giving of advice to all who may seek it. If the proceedings do not square with the technical definition of a 'moot case,' they possess all of its objectionable characteristics."

A moot case is nothing more than a supposed case as distinguished from a case based on existing facts. As the determination of a moot issue serves no useful purpose, the discussion of such an issue is nothing more than mental gymnastics. No one will find fault with judges for declining to determine such issues, because the people do not appoint them for the purpose of conducting debating societies; but on the other hand the people will not long tolerate a judge who assigns the "moot case" as an excuse for his failure to discharge his full duty to the people, whose servant he is.

The opinion fails to specify a single one of these so-called "objectionable characteristics," unless the alleged "giving of advice" constitutes such characteristics. The fact is that nothing in the act has the slightest resemblance to a "moot case," and this is too plain to admit of argument. If the writer of the opinion had consulted the decisions of the courts of England and other countries, covering a space of over half a century, he would have found that the questions upon which declarations have been made related to real facts arising from the actual affairs of life, and that these same courts have uniformly declined declaration on purely moot or academic questions. It is a significant fact the jurisdiction of the English courts was extended by rule of court in 1893 to the construction of deeds, wills and other instruments.

It is not to be supposed that the English courts would have adopted this rule if they looked upon declarations as moot cases.

As England has no written constitution like ours the decisions of its courts furnish us no guide for the determination of what is meant by the words "judicial power" in our constitution, but their decisions construing their declaratory judgment law and court rules as not being a moot procedure are entitled to the highest respect.

Fourth.—We now come to the real question in the case, namely, is the rendering of judgments without immediate consequential relief the exercise of a "judicial power" within the meaning of the constitution?

The writer of the prevailing opinion refers to the constitution of Michigan, which like our constitution[3] vests the "judicial power" in certain courts, and he then cites certain decisions, especially from the Supreme Court of the United States, which he claims supports his contention that the awarding immediate consequential relief, such as execution, is an essential part of an adjudication; and that the rendering of judgment declaring a right without at the same time granting further relief is not the exercise of a judicial power. He seems to rely chiefly on federal decisions, for he says:

"We have examined the decisions of many state courts of last resort, but, as would be expected, have found more aid in reaching our conclusion from the decisions of the federal courts of last resort than from any one other source."

I shall refer only to such decisions as have a bearing on the definition of the term "judicial power" with reference to consequential relief. I have already attempted to show that rendering of declaratory judgments does not involve the giving of advice, and hence the decisions concerning the legality of statutes requiring the judicial department to advise the legislative or the executive department have no bearing on the question here considered. In passing, I call attention to the fact that the federal decisions are undoubtedly influenced by the fact that the framers of the federal constitution intentionally eliminated the giving of such advice from the judicial power. An unsuccessful attempt was made to continue the practice of English judges of rendering advisory opinions by incorporating the provision of

[3] Art. 6, sec. 1.

the Massachusetts statute in the federal constitution.[4] Here we have an express intention to change the common law on this point.

Only three of the cases cited from the United States Supreme Court seem to have a direct bearing on the point under consideration.[5]

Chief Justice Taney is quoted in the *Gordon case* as follows:

"The award of execution is a part and an essential part of every judgment passed by the court exercising judicial power. It is no judgment in the legal sense of the term without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court, in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress."

Justice Brewer is quoted in the *Tregea case* as follows:

"But, going beyond this matter, we are confronted with the question whether, in advance of the issue of bonds and before any obligation has been assumed by the district, there is a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment. . . . It may well be doubted whether the adjudication really binds anybody."

Justice Day is quoted in the *Muskrat case* as follows:

"That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."

It will be noticed that Chief Justice Taney's definition makes the award of execution an essential part of a judgment. Justice Brewer's definition makes "a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration, and judgment" which is binding, the essentials of judicial power. Justice Day makes "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction," the test of judicial power.

[4] Madison's Jour. of the Fed. Conv. (Scott's ed., 1884) 558, 559.

[5] Gordon v. United States, (1864) 117 U. S. 697, appendix; Tregea v. Modesto Irrigation District, (1896) 164 U. S. 179, 17 S. C. R. 52, 41 L. Ed. 395; Muskrat v. United States, (1911) 219 U. S. 346, 31 S. C. R. 250.

Several other federal and state cases are cited in the prevailing opinion to the effect that the courts will not decide abstract questions, declare future rights, etc., and in at least two of these cases the granting of immediate consequential relief is made essential.

The statutes of several western states relating to irrigation provide for submitting the proceedings to the court, upon notice and hearing, and requiring the court to determine the validity thereof. The prevailing opinion disposes of these decisions in this language:

"Their validity has been frequently assailed and quite uniformly upheld by the courts of last resort of the several states. The usual ground of attack has been that they do not provide for due process of law, but in several instances they have been assailed on the ground that the power conferred upon the court was not judicial power. These holdings, however, lose much of their value as authority upon the question of judicial power from the fact that one of them [involving the California act] found its way into the United States Supreme Court in *Tregea v. Modesto Irrigation District,* 164 U. S. 179, 17 Sup. Ct. 52, 41 L. Ed. 395."

Justice Brewer is then quoted among other things as above. The court declined to either reverse or affirm the decision of the supreme court of California sustaining the validity of an order for the issuance of irrigation bonds on the grounds that it presented a purely moot question unless the bond should be issued, and the proceeding is only one to secure evidence. Three justices dissented.

The prevailing opinion disposes of the California statutes relating to Torrens System and to the establishment of titles after the earthquake in this manner:

"The proceeding contemplated by both acts was a proceeding to quiet title, a well recognized field for the exercise of equitable jurisdiction, and the cases are not persuasive of the validity of the act here under consideration."

Certainly the justice who wrote the opinion must be presumed to know that there is not the slightest resemblance between the proceedings under these acts, or the statutes authorizing actions to determine adverse claims, and the old equitable action to quiet title, except that they provide for a hearing upon notice followed by a judgment, and except that they all relate to real property.

The material feature of a complaint to determine adverse claim, or of an application to register under the Torrens Sys-

tem, is an allegation of ownership in the plaintiff or applicant. While the proceedings determine title to real property, and hence in one sense quiet the title thereto, it is a misnomer to refer to them as the old equitable action to quiet title by removing a cloud from the title. The judgment in the latter action frequently granted consequential relief whereas the judgment in registration simply declares the title. This is illustrated by the decision in *Reed v. Siddall,*[6] wherein the court held that the validity and existence of mechanics liens might be determined in the proceedings, but not their foreclosure. The simple fact is that the judgments in the Torrens System, adverse claim, and similar matters, are mere declarations of right; and insofar as they alter the common law concerning consequential relief, if such is the case, they are legislative changes made necessary and advisable by changed conditions and the progressive development of economic affairs. To stifle this growth and development by asserting the sacredness of common law principles, developed under different conditions, is like attempting to stop the growth of a tree by endeavoring to prevent any change in the bark.

The mere fact that the Torrens System, the adverse claim action, and similar matters, relate to real property does not change the principle involved, because the right to real property is of no higher degree than the right to personal property, nor is it any more sacred than the right of personal liberty—the right to contract, etc. It is begging the question to attempt any such distinction, and the sooner such sophistry is eliminated the better.

Concerning the decisions of our supreme court the prevailing opinion has this to say:

"Counsel also say that in proceedings to determine heirship the courts have exercised powers analogous to those here involved. They say such determinations of the courts are binding and cite us to *Fitzpatrick v. Simonson Bros. Mfg. Co.,* 86 Minn. 140, 90 N. W. 378, which does so hold. One difficulty in following this case, however, and it is a sufficient one, lies in the fact that this court has held exactly to the contrary in *Lorimer v. Wayne Circuit Judge,* 116 Mich. 682, 75 N. W. 133. . . . But the supreme court of Minnesota has quite definitely gone on record on the question of what is judicial power."

Then follows a quotation from the opinion *In re Application of the Senate,*[7] in which case the court declined to answer certain questions propounded by the Senate. Notwithstanding the

[6] (1905) 94 Minn. 216, 102 N. W. 453.
[7] (1865) 10 Minn. 78, (Gil. 56).

above assertion that our supreme court "has definitely gone on record on the question of what is judicial power," there is not the slightest attempt in the opinion to define judicial power further than the holding that the act in question constituted the court the advisers of the legislature, and that this was not a judicial power within the constitution.

The pith of the decision is seen in the following language of the court, to-wit:

"The impropriety of an unauthorized expression of opinion by a judge or court, especially one of last resort, upon a matter which may subsequently come before the court for adjudication, will immediately suggest itself."

However, our supreme court has gone definitely on record as to the meaning of the word "judicial" contained in our constitution. *In re Application of the Senate* was decided in January, 1865, by Justices Wilson, McMillan and Berry. In January, 1868, and eleven years after the adoption of the constitution, the same judges decided *Home Insurance Co. v. Flint,*[8] and here is what they say concerning the word "judicial:"

"The word 'judicial' is defined: (1) Pertaining to courts of justice, as judicial power. (2) Practiced in the distribution of justice; as, judicial proceedings. (3) Proceedings from a court of justice; as, a judicial determination. Webster's Dic. Bouvier defines it—'belonging to and emanating from a judge as such.' 'Judicial powers' he defines—'the authority vested in the judges.' A judicial investigation proceeds after notice, and eventuates in a judgment, which is the final determination of the rights of the parties, unless reversed by an appellate tribunal. *The necessity of notice in the inception, and the conclusive character of the determination, are perhaps as good a test as any other, as to what proceedings are judicial.*"

Again in *State v. Ueland,*[9] our supreme court had occasion to consider what constitutes judicial power. In reference to certain duties imposed on a probate judge, Chief Justice Gilfillan refers to them as follows:

"No one is summoned before him; no notice of it is given; there are no parties, there is no trial; he decides no controversy, determines no rights; his order, when properly called in question, as by quo warranto, would not have the conclusive effect of a judicial decision."

In *Foreman v. Board of County Commissioners*[10] the court says:

[8] (1868) 13 Minn. 244, (Gil. 228).
[9] (1882) 30 Minn. 29, 14 N. W. 58.
[10] (1896) 64 Minn. 371, 373, 67 N. W. 207.

"There are many duties which may be either the one or the other, depending upon the officer or body performing them, and the effect to be given to the action or determination of such officer or body. When duties of this ambiguous or equivocal nature are imposed upon a judicial officer or tribunal, to whom none but judicial duties can be constitutionally assigned, the doubt should be solved in favor of the validity of the statute, and the duties held to be judicial, and the presumption indulged in that the legislature intended them to be performed in a judicial manner."

This language is quoted with approval in *McGee v. Board of County Commissioners,*[11] wherein an act was sustained which imposed upon the district court the duty of determining whether a certain local improvement was for a public use. Again, in *State v. Bates,*[12] this language was referred to with approval, where the court says:

"But it is not always easy to discover the line which marks the distinction between executive, judicial, and legislative functions, and when duties of any ambiguous character are imposed upon a judicial officer any doubt will be resolved in favor of the validity of the statute, and the powers held to be judicial."

The authorities are reviewed at considerable length in the opinion.

A statute imposing upon the district court the duty of confirming local assessments is sustained in *State v. Ensign.*[13] The similar duty in reference to the establishment of ditches was likewise sustained in *State v. Crosby.*[14] That court says:

"The marked tendency of legislation in recent years, not only in this state, but in other states, has been, to a large degree, to break away from the theory of three separate and independent departments of government, by imposing upon other departments duties and powers of a legislative character, which the courts have been inclined to sustain. Perhaps few, if any, cases are to be found, however, where statutes imposing purely legislative duties and powers upon the courts have been upheld; but the authorities are numerous, sustaining statutes which impose upon the courts powers involving the exercise of both judicial and legislative functions—such as the condemnation of land for public purposes, the appointment of commissioners of election in proceedings for adding territory to municipal corporations, and laying out and establishing highways."

The authorities relating to the power of the legislature to impose non-judicial powers on judges are fully reviewed in

[11] (1901) 84 Minn. 472, 477, 88 N. W. 6.
[12] (1905) 96 Minn. 110, 116, 104 N. W. 709.
[13] (1893) 55 Minn. 278, 56 N. W. 1006.
[14] (1904) 92 Minn. 176, 180, 99 N. W. 636.

State v. Brill.[15] At page 511 the court says among other things concerning *Gordon v. United States,*[16] cited in prevailing opinion:

"Neither the court, the court of claims, nor the Supreme Court could do anything more than certify an opinion to the secretary of the treasury, and that officer at his discretion included it in his estimates, and it then rested with Congress to determine whether the claim should be paid."

This shows that neither the court of claims nor the Supreme Court was authorized to render a binding judgment, which is of the essence of judicial power.

The opinion in *Snow v. Excelsior*[17] refers to and sustains what appears to be a purely declaratory judgment. It appears from the report that a controversy arose between the village and the town of Excelsior concerning their duty to maintain a certain bridge, and the same was submitted to the court upon an agreed statement of facts pursuant to General Statutes 1913, section 7920; and a judgment was entered thereon to the effect that the village should keep in repair the bridge and approach south of a certain point. The court says at page 107, concerning this judgment:

"The court had jurisdiction to render the judgment relied on by defendant in this case. There was a bona fide controversy between the village and the town of Excelsior as to the respective portions of the bridge in question and its approaches each should maintain. This was the primary question in dispute, but to determine the question and definitely to fix the part the village should maintain, it was necessary that the judgment should fix the boundary line between the village and the town."

There is a vigorous dissenting opinion by one of the justices in the *Anway case* from which I quote as follows:

"In my opinion, the construction which he places on the provisions of the act is not warranted by the language employed. I

[15] (1907) 100 Minn. 499, 111 N. W. 294, 639.

[16] (1864) 117 U. S. 697.

[17] (1911) 115 Minn. 102, 132 N. W. 8. See also In re Ungaro, (1917) 88 N. J. Eq. 25, 102 Atl. 244, followed in Miers v. Persons, (1920) 111 Atl. 638. More particularly in the first case the court had under consideration N. J. Laws 1915, Sec. 9, which provides that any person claiming a right cognizable in a court of equity under a will or other instrument may apply for a declaration of the rights of the persons interested without seeking equitable relief in the premises. The view of the court is shown by the following from the opinion:

"The fact that so many cases have been brought for construction where no relief was available and the suitors were turned away seems to indicate a situation where a construction without relief was a right much desired and one which might be extended with propriety."

can find nothing in the act itself which places upon courts the duty to serve as 'legal advisers of all seeking such advice' in advance of any existing controversy."

"The benefits to be derived by being able to secure a somewhat summary determination of controversial rights without the tedious delay incident to the ordinary lawsuit and the acrimony between litigants usually engendered thereby have long appealed to thoughtful students of legal procedure."

"The courts are not thereby required to pass on moot cases or to answer abstract questions of law. There must be an action or procedure brought in the court by petition or bill of complaint. This must be determined in the usual way except as modified by the provisions of the act. The rights of the parties must be declared—that is determined and stated—and, when ready to be promulgated in the legal form of judgment, decree or order, it shall not be subject to the objection that no consequential relief is or could be claimed thereunder. In the action or proceeding all of the parties to be affected by the determination of the court must be made parties. The judgment, decree or order declaring the right of the parties is final and binding upon all such parties, though unenforceable, so far as issuing execution or mandatory process is concerned, without further application to the court under section 3. To entitle such an action or proceeding to be brought, there must be an actual, concrete controversy, a bona fide contest over asserted, existing legal rights. All of the parties interested must be brought before the court. A trial must be had of the issues presented in the usual way. The court must determine the rights of all of the parties interested in the controversy, and a judgment, decree or order entered conforming to such determination. The act does not authorize a mere declaration of obligation. It is only when the plaintiff has rights in the matter in respect of which the declaration is sought that a declaration of rights can be made. In my opinion the performance of such duties is an exercise of judicial power, and no other duties are imposed on the courts by this act.

"The conclusion thus reached leads to a consideration of what I deem to be the only doubtful question presented: Does the lack of power under the act to enforce obedience to the determination of the court by award of execution or mandatory process render the proceeding non-judicial? I cannot so conclude. Neither do I find that this element has usually been included in defining such power."

The dissenting justice then cites several contra authorities, refers to several Michigan statutes authorizing merely declaratory judgments, distinguishes the United States cases cited in the prevailing opinion, and observes "that the Supreme Court of the United States has frequently rendered judgments under

statutes which provided for mere declarations of rights," citing several cases. He also says:

"The power to be exercised by the court of claims under the provisions of the federal Judicial Code[18] is simply declaratory of the rights of the parties. No process may issue for its enforcement. The statute, however, declares: 'The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties.'

"It further provides that the United States may bring action to recover the amount so found to be due. See, also, *United States v. Nye,* 21 How. 408, 16 L. Ed. 135; *United States v. Huertas,* 8 Pet. 475, 8 L. Ed. 1015; *United States v. Clarke,* 8 Pet. 436, 8 L. Ed. 1001."

He also quotes Wisconsin Statutes, sec. 2352, and cites a case thereunder as follows:

"When the validity of any marriage shall be denied or doubted by either of the parties, the other party may commence an action to affirm the marriage, and the judgment in such action shall declare such marriage valid or annul the same and be conclusive upon all persons concerned. Proceedings under this act were had in *Kitzman v. Werner,* 167 Wis. 308, 166 N. W. 792, and the marriage there called in question was annulled."

I am unable to find that the test of a judicial proceeding announced by the supreme court in *Home Insurance Co. v. Flint,*[19] nearly fifty-three years ago, to-wit: "the necessity of notice in the inception and the conclusive character of the determination," has ever been questioned in any subsequent decision, though the case has been cited with approval in many decisions. Having been followed without question for so long a period, it has become a settled rule of action which the court is now no more at liberty to change than it would be to change a statute. *State v. National Accident Society.*[20] In this case the court had under consideration a certain statute which twenty-eight years before that time had been construed in a certain matter by the supreme court. In speaking of the effect of this construction the court says:

"The construction of the law of 1891, given as stated, doubtless governed its administration by the insurance department of the state from the time the decision was rendered down to about the time of the commencement of this litigation, covering a period of several years. It cannot now be changed. A construction so long followed must be considered a part of the legislative enact-

[18] U. S. Compiled Statutes, sec. 1171 et seq.
[19] (1868) 13 Minn. 244, (G. 228).
[20] (1899) 103 Wis. 208, 79 N. W. 220.

ment the same as if plainly written into it originally. It cannot now be changed by construction any more than plain language used by the lawmaking powers can be added to or taken from by judicial construction."

In fact, the test applied in the Flint case is the only test to which all subsequent decisions fully square. In all cases you will find that the proceeding was instituted on due notice, and the termination thereof was conclusive on all parties in interest. Apply this test to the declaratory judgment there can be no doubt about its judicial character.