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COMMENTARIES ON THE PUBLIC ACTS OF INDIANA, 1927. I: THE UNIFORM DECLARATORY JUDGMENTS ACT[1]

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SECTION 2

WHAT INTEREST NECESSARY TO SUPPORT THE PROCEEDINGS?

"Any person interested under a deed, will, written contract, or other writing constituting a contract, * * * may have determined any question of construction or validity arising under the instrument * * * and obtain a declaration of right, status, or other legal relation thereunder."

The interest contemplated by the statute means a substantial interest, not only in the contract or other subject-matter, but in the *particular question presented.* It must be something more than an academic interest or mere interest in securing the establishment of a precedent. The interest must be direct, vested, substance perfect, and of a nature that, were a plenary action instituted for damages by virtue of a wrong claimed to arise from the same matter, the petitioner in declarator would be the proper plaintiff. It means such legal interest as may, by the decree of court, be either enlarged or diminished.[52]

A person has such an interest as will sustain a petition in declarator in the subject matter, if he has some legal right or is under some legal liability that may be enlarged or diminished by the judgment.[53]

Section 3 of the code of civil procedure (Section 258 Burns' R. S. 1926) is a most authoritative criterion, under the numerous decisions construing that section, as to who is, and who is not, the real party in interest. With the abundance of authority on the subject decided under that statute, it should never become a matter of difficulty for the court to determine whether the parties are real parties in interest or not.

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1 Continued from the February issue, 3 Ind. Law Jour. 351.

* See biographical note, p. 461.

52 *Hemmingway v. Corey,* 16 Vt. 225.

53 In re Clark's estate, 79 Vt. 62, 64 At. 231, 118 Am. St. Rep. 938.

WHEN DOES A QUESTION ARISE SUBJECT TO DECLARATION?

"Any person * * * may have determined any question of construction or validity * * * and obtain a declaration of right, status or other legal relation thereunder."

The statute contemplates a *bona fide* question. By "question," is not meant a bare uncertainty. Jurisdiction will not be assumed on a mere quibble. An actual question involving substantial right is essential. Not only in those courts of the United States which recognize the action of declarator, but also in England, it is held that it rests largely in the discretion of the court as to whether or not the matter is of judicial cognizance so as to vest the court with jurisdiction.[54]

Jurisdiction will never be assumed unless the tribunal appealed to is satisfied, that an actual controversy, or the ripening seeds of one, exist between the parties, all of whom are *sui juris* and before the court so that the declaration sought will be of practical assistance in ending the controversy.[55]

An action of declarator will not lie where the happening of an event, which will make the declaration effective, is but problematical—an event which may never happen. The court will wait until the event actually takes place—unless special circumstances appear which warrant an immediate decision, as for instance where present rights depend on the declaration sought by plaintiff.[56]

It was held by the judicial committee of the House of Lords:[57]

"The question must be real, and not theoretical; the person raising it must have a real interest to raise it; he must be able to secure the proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought. The statute does not contemplate declarations upon remote contingencies or where the question arises out of a closed incident. No declaration is rendered which can only serve an expression upon a supposititious case. Parties are not entitled to an expression of opinion to help them in another transaction. *Barwick v. Southeastern & County Railroad Company*, 1 K. B. 187. Nor should a declaration

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[54] *Byson v. Attorney General*, 1 K. B. 410; *Bramen v. Babcock*, 98 Conn. 549, 120 At. 150; *British South Africa Co. v. Companhia DeMocambique*, 2 Q. B. 58; Karihir's Petition, 131 Atl. 265. *But see Greene v. Holbrook*, 220 N. Y. S. 151.

[55] *Lewis v. Green*, 2 Chancery, 340; *Stada v. Board of Commissioners*, 117 Kans. 150, 230 Pac. 531; *Axton v. Goodman*, 205 Ky. 382, 265 S. W. 806; *Ezzell v. Exall*, 207 Ky. 615, 269 S. W. 752; *Holt v. Custer County*, 243 Pac. 811; *West v. Wichita*, 234 Pac. 978.

[56] In re Staples, 1 Chan. 322; *Norton v. Moran*, 206 Ky. 415, 257 S. W. 171; *Ackerman v. Union & New Haven Trust Co.*, 81 Conn. 500, 100 At. 22.

[57] *Russian Commercial and I Bank v. British Bank*, 19 A. L. R. 1101.

be made on an abstract question. *Gray v. Spyer*, 2 Chan. 549. Nor on remote and incidental questions."[58]

The initiatory pleading must show the facts upon which the legal relation of the complainant to defendant is based, and if there be more than one defendant, it must show the relationship of all so as to afford relief by declaration of the respective rights of the parties *inter sese*. A declaratory judgment is essentially one of construction and its primal purpose is the construction of definitely stated rights and to define other legal stated relations. A determination of issues of fact between the parties will ordinarily be relegated to the proper jurisdictional forums otherwise provided. Very wide discretion is vested in the court to which application is made, but it should be exercised with the utmost caution. A demurrer on the ground of multifariousness may be sustained because the claim of the defendant is separate and independent.

It is not only in cases of remote contingencies that a proceeding in declarator is improper, but where a plain remedy at law or in equity exists under the facts stated or are shown at the hearing, plaintiff must pursue it, and his petition will be dismissed.[59]

Where it appears, *ex facie* the complaint, that complainant can have no relief as against the party named as defendant, and defendant should not be forced into a litigation which can have no final result in favor of complainant, especially when such litigation would delay defendant in the enforcement of his rights as against complainant, a court of chancery should not undertake to decide or declare the rights and status of parties upon a state of facts which in future is contingent and uncertain.

Where there is no actual controversy there can be no justiciable question and hence no jurisdiction.[60]

To render a question justiciable, plaintiff should aver his legal rights in the premises and that defendant claims other or contrary rights or occupies some official relation thereto, with imposed duty, which, if exercised, would impair, thwart, obstruct, or defeat plaintiff in his rights.

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[58] *Goetz et al. v. Smith et al.*, 278 S. W. 417; *Newsum et al. v. Interstate Realty Co.*, Tenn. 278.

[59] *Loesch v. Manhattan Life Inst. Co. of New York*, 218 N. Y. S. 412.

[60] *Revis v. Daugherty*, 287 S. W. 28 (Ky.); *Burton v. Durham Realty Co.*, 125 S. E. 3; *Tanner v. Boynton Lbr. Co.*, 129 Atl. 617.

IS RELIEF LIMITED TO DECLARATION ON WRITTEN DOCUMENTS?

"Any person interested under a deed, will, written contract or other writings, constituting a contract, or whose rights, status or other legal relations are affected by * * * contracts * * * may have determined any question of construction or validity arising under the instrument * * * or contract * * * and obtain a declaration of right, status, or other legal relation thereunder."

A first blush reading of this section would lead to the conclusion that the legislature intended to limit declaratory judgments to questions arising on instruments in writing; however, Section 1 is susceptible to a much broader construction, and Section 5 specifically provides that

"The enumeration in sections 2, 3 and, 4 does not limit or restrict the exercises of the general powers conferred in section 1 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

Consequently the power of the court is as broad as the subject of which it deals, to-wit: "Rights, status, and other legal relations." The English act construed in conjunction with the general order[61] assumes to cover a wide field of action. A declaration on the question of fact as to whether or not under the circumstances a crew had abandoned its ship so as to entitle the owner of the cargo to elect to accept the cargo at the point where the ship was brought ashore by the receiver of wrecks without paying freight was made.[63] A question of fact was determined as to whether or not an infant was a Roman Catholic within the terms of a will.[64] Whether or not a wife held real estate of her husband under a parol trust;[65] as to whether or not a parol contract was valid notwithstanding noncompliance with the statute of frauds;[66] as to whether, under the circumstances given in evidence, title to goods sold had passed as to seller's creditors;[67] the right of creditors to property sold to the wife of the defendant was declared;[68] and title to personal property was settled;[69] as to whether good title to certain hereditaments

61 XXV R. 5.

63 *H. Newsum & Co. v. Bradley*, 2 K. B. 112.

64 In re: Ma. 2 Chan. 126, 117 L. Tn. S. 401.

65 *Gascoigne v. Gascoigne*, 1 K. B. 223.

66 *Lovesy v. Palmer*, 2 Chan. 233, 114 L. T. N. S. 1033.

67 *Prictehett, G. E. P. Storage Company v. Currie*, 2 Chan. 515, 115 L. T. N. S. 325.

68 *Walker v. Brown*, 36 Ont. L. R. 287.

69 *Rawlinson v. Mort*, 93 L. T. N. S. 555.

had been shown by an abstract in accordance with a contract was declared.[70] Proceedings for the purpose of declaring the legitimacy of a person was entertained;[71] although the court in a later case[72] refused to make a declaration as to the legitimacy of a person on the ground that jurisdiction to pass upon the question was controlled by the Legitimate Declaration Act.[73] The right of children between designated ages who were residents of certain places to attend specified schools was decided;[74] and declaration was made that the defendant sewer district was not entitled to send sewage from its district into plaintiff's sewer without the consent of the plaintiff.[75] The court made a declaration that an adjoining property owner was not entitled to an easement over the plaintiff's land for light and air in respect of any of the windows or openings or otherwise;[76] a declaratory judgment was rendered as to whether plaintiff was exempt from military service under the circumstances stated.[77] A declaration was made as to the validity of a notice to quit;[78] a declaration was sought by a solicitor to the effect that he was entitled to a charge upon certain property recovered in the prosecution of certain action;[79] and the validity of a resolution passed at a meeting of the company was declared upon whether it conformed with the law,[80] and a declaration as to the right of a telephone company to a certain right of way;[81] and it was determined that plaintiff was entitled to a supply of water from a certain farm on the theory of an appurtenance;[82] it was determined as to whether or not the plaintiff was liable for a license tax before engaging in his business;[83] the question of the citizenship of the plaintiff was determined;[84] and it was determined

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70 *In re Schafer v. Randall's Contract*, 2 Chan. 8, 114 L. T. N. S. 1076.
71 *Beresford v. Attorney General*, 118 L. T. N. S. 133.
72 *West v. Sackville*, 2 Chan. 378.
73 *Gateshead Union v. Durham County Council*, 1 Chan. 146, 117 L. T. N. S. 796.
74 *St. Mary v. Hornsey Urban District Council*, 1 Chan. 695, 82 L. T. N. S. 580.
75 *Ankerson v. Connelly*, 2 Chan. 544, 94 L. T. N. S. 717.
76 *Flint v. Attorney General*, 1 Chan. 216.
77 *Bedington v. Wildman*, 1 Chan. 559, 124 L. T. N. S. 561.
78 Egen, 2 K. B. 333, 123 L. T. N. S. 134.
79 *Wise v. Lansdaall*, 1 Chan. 420, 124 L. T. N. S. 503.
80 *Rex v. Cheshire County Court Judge*, 90 L. J. K. B. N. S.
81 *Adamson v. Bell Telephone Co.*, 48 Ont. L. R. 724.
82 *Westwood v. Haywood*, 90 L. J. Chan. N. S. 515.
83 *Little v. Attorney General*, 60 D. L. R. 335.
84 *Markwald v. Attorney General*, 1 Chan. 348, 122 L. T. N. S. 603.

as to whether or not there was an infringement of the copyright.[85]

So, it is to be observed, where the action of declarator has been available in the past, it has been applied to a great multitude and variety of cases, whether foundation for the action rested upon a writing or not. Numerous other instances of the applicability and efficacy of the law might be suggested, to-wit: to determine the location of a property line between parties; to define the duties of adjoining property owners in regard to party walls—their maintenance and restoration; to determine relative rights in event of fire under an insurance policy between occupying tenant for a period of years, and the landlord, so that proper insurance might be written by the respective parties and spare payment of unnecessary premiums for which there can be no corresponding recovery in event of loss; unfair trade competition; the status and authority of an agent as between the principal and the one with whom the agent deals, where there has not arisen a cause of action; the terms of an oral lease; the terms of a contract to pay for services after death and before death; questions of rights between vendor and vendee, and, in fact, to protect every applicant against being required to take a step or adopting a policy which is bound to affect his substantial rights, without being able before-hand to know definitely how his rights will be affected. No valid reason is perceived why declaratory relief cannot be granted as supplemental of, or ancillary to, the relief prayed in causes heretofore recognized as causes at law or in equity. The occasion for such supplemental relief frequently arises in ordinary actions, e. g., an action in ejectment by a life tenant where the defendant might seek to have established his right to the remainder; a decree of injunction against the use of a trade name, where the defendant wishes to have established his right to use one similar to the one enjoined against, etc.

DETERMINATION OF VALIDITY OF STATUTES

"Any person interested * * * whose right, status or other legal relations are affected by a statute, municipal ordinance or franchise, may have determined any question of construction or validity, arising under the instrument, statute, ordinance, contract or franchise, and obtain a declaration of right, status or other legal relations thereunder."

This opens a vast field for immediate, definite, certain, and expeditious determination of the validity of all statutes and ordinances, which, under the pre-existing state of affairs, could only

[85] *Dunston v. Winox*, 1 Chan. 664, 37 T. L. R. 361.

be tested by violating the law or by injunctive relief against officials charged with the duty of enforcement on the threat to enforce the statute if the plaintiff violates it. The constitution does not grant to the citizen full and adequate protection if he must technically break a law, threaten to break it, or be threatened with punishment if he does break it, in order to secure a determination as to its validity. Indiana is one of the few states which hold that no mandate will lie against a public officer to compel him to do some act or thing the doing of which would, in terms, violate an ordinance or statute, even though the same be unconstitutional. The theory of this holding is that the right to mandatory relief must be clear and certain, and the officer is obliged to obey the ordinances and statutes, though unconstitutional, until the courts have determined their invalidity.[86] It is rather singular that in one case the Supreme Court of Indiana[87] affirmed the lower court and awarded a writ of mandate against the secretary of state, notwithstanding it involved the holding of a statute as unconstitutional by the secretary of state, and, therefore, his disregard thereof. The point was made, but not discussed in the opinion, that it could not be held unconstitutional by mandamus proceedings in face of the precedents. Shortly afterwards the Supreme Court again reverted to the prior decision and held such proceeding by mandate inadmissible.[88] It must, however, be held that Indiana is committed to the proposition that the constitutionality of a statute or ordinance cannot be tested by mandamus against an officer who must disregard the statute if the mandate is to be obeyed.

Particularly useful will an action of declarator be found in regard to the numerous zoning acts, and the various sections thereof involved, in the construction, interpretation and determination of the validity thereof, without necessitating resort to injunctional proceedings or a violation of the law before securing a judicial determination thereon.

SECTION 3

"A contract may be construed either before or after there has been a breach thereof."

We assume this means oral as well as written contracts. *Inter partes* this remedy will prove influential in avoiding litigation of an expensive character and the hazard of breaching a

[86] *State v. Winterrow*, 174 Ind. 592, and *State ex rel. Rabb v. Holmes et al.*, 147 N. E. (Ind. Sup.) 622.

[87] *Jackson, Secretary of State, v. State*, 142 N. E. 423, 194 Ind. 248.

[88] *State ex rel Robb v. Holmes et al.*, 147 N. E. 622.

contract because one or the other (even on advice of able counsel) has misconstrued it.

SECTION 4

"Any person interested as or through an executor, administrator, devisee, legatee, heir, next of kin or *cestui que trust*, in the administration of a trust or of the state of a document in infant (sic) lunatic, or insolvent, may have a declaration of rights or legal relation in respect thereto."

There is manifest verbal error in this part of Section 4, and we believe the latter part of the general provision is meant to read

"in the administration of a trust or of the estate of a *decendent*, an infant, lunatic, or insolvent," etc.

This section does not materially enlarge the rights of those enumerated thereunder, as heretofore recognized in the state. Particularly unnecessary was Section 4 in virtue of Section 5, which provides that the enumeration therein "does not limit or restrict the exercise of the general powers conferred in Section 1" unless it means thereby that declaratory judgments may be entered, in reference to the enumerated classes, even though the declaratory relief obtained will not admit of a "judgment or decree which will terminate the controversy or remove an uncertainty."

Section 5 undoubtedly means to avoid a construction of the act under the doctrine of *ejusdem generis*, on the theory that where particulars follow a general declaration or statement of powers or properties, the particulars will control and the generalities will be confined to such as partake of the nature of the particulars.[89] That this was the legislative purpose, is borne out by Section 12 providing for a liberal construction of the act and its application and operation.

SECTION 6

"The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings."

This section eliminates the objection of invalidity because a court may be called upon to decide moot questions. A good illus-

[89] *Strange v. Board of Commissioners of Grant County*, 173 Ind. 640; *U. S. Cement Company v. Cooper*, 172 Ind. 599; *Wiggins v. State*, 172 Ind. 78; *Miller v. State*, 121 Ind. 294; *State ex rel. Shanks v. Board of Commissioners*, 162 Ind. 183; *LaPorte Carriage Co. v. Sullender*, 165 Ind. 290; *State ex rel. Board v. Jackson*, 168 Ind. 384.

tration is that of a tenant whose lease contains a provision requiring the tenant to pay, on the commencement of the second year of his term, a monthly rental of one per cent of the then market value of the property, to be determined by two appraisers. Another provision of the lease requires the tenant to pay his rent monthly in advance, and on the failure so to pay his rent, his lease determines. The landlord insists that the appraisement must take place before the beginning of the second year. The tenant contends it cannot be fixed until after the termination of the first year, because the appraisers cannot establish the value of the property until the time has arrived for its determination. The landlord appoints an appraiser a month before the termination of the first year. The tenant refuses to appoint one. A declaratory judgment in these circumstances in behalf of the tenant would eliminate the risk of the tenant standing on his construction of the lease and then finding that he has defaulted in his rent, and a decision thereon would definitely terminate the uncertainty or controversy giving rise to the proceedings.

However, take another lease, with the provision that the appraisers shall meet the last month of the term, and determine the value of the property. The appraisers have met but failed to agree on its value, and the court is asked to ascertain whether the value shall be as of the time of the appraisement or as of the beginning of the subsequent term. The court's determination of this question would not determine the controversy between the parties in view of the disagreement of the appraisers (it not being shown to be predicated solely upon the difference in time as to which value shall relate). What should have been prayed for in such case, is a declaratory judgment as to the method of procedure where no umpire has been provided for to resolve differences between the appraisers. In like manner the case of the establishment of a restrictive provision in a deed to the effect that no building shall be constructed nearer than fifteen feet to the street line. The grantee contends that he has a right to construct an open porch that extends nearer than fifteen feet to the street line. The grantor contends he has not. In the course of the hearing it is not shown that definite plans are laid for any particular kind of porch to be constructed. A determination of the question of encroachment (unless the court should determine that all porches—regardless of character—constitute a violation of the restriction) will not solve the question and finally settle nothing between the parties. The court will not lend itself to decide a moot question. However, if it were

determined by the grantee to construct a porch of a particular design which he can describe in detail, so far as material, and he brings the suit for the purpose of determining whether he can construct *that particular* kind of porch, the court may definitely and decisively determine the controversy.

The section does not say that the court shall refuse to enter or render a declaratory judgment in such circumstances, but the word is "may." What discretion has the court to enter a declaratory judgment which does not terminate the uncertainty or controversy giving rise to the proceedings? What effect has a declaratory judgment where the court has exercised its discretion in favor of such a declaration, notwithstanding nontermination of the controversy. We believe if the adjudication does not possess the characteristics of finality it has no greater authority than *obiter dicta* in an opinion. It is *brutum fulmen.* If the declaration is so uncertain and indefinite, it has settled nothing. For illustration: A's contract with B provides for a commission of one per cent on all sales, and necessary traveling expenses. Breach of contract by either party entitles the other to terminate, and liquidated damages. B does not want A to terminate but believes A is claiming too much expense—that traveling expense does not comprehend repairs to the automobile he uses, but only fuel, lubrication and storage. B applies for a declaration of right under the contract. The court declares that *ordinary* repairs are embraced. The decision settles nothing—unless it establishes that *some* repairs may be charged for. Had the declaration been that all repairs necessitated by travel—as distinct from those rendered necessary through inherent defects in the mechanism of the automobile—are allowable, the decision would have been definite. So also had the judgment been that re-tiring and repairs directly due to operation on duty were included as traveling expenses.

SECTION 7

"All orders, judgments and decrees under this act may be reviewed as other orders, judgments, and decrees."

This section undoubtedly also permits appeals to courts of general jurisdiction from justice courts, if justice courts are to have jurisdiction to render declaratory judgments. The mode of review undoubtedly is the same as in any other proceedings. A new trial would be asked; conclusions of law could be stated on special findings of fact, and the same remedies for appeal to courts of review allowable. We presume a ruling on a demurrer addressed to a complaint, when the complaint states insufficient

facts to grant any relief, would be reviewable under this section. In general, we presume substantially the same pleadings and procedure is intended in actions of declarator as in other proceedings.

SECTION 8

"Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefore shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith."

Casual perusal of this section does not give expression to its great significance. As an instrument of summary relief, it can be used with effect in numerous cases. Take the case of promissory note. The maker has stated, on the note falling into the hands of an innocent purchaser, and his receiving notice of that fact, that he does not intend to pay at maturity, because the same was procured from him by fraud. The holder institutes a proceeding for a declaratory judgment before maturity to show his status as an innocent purchaser for value. He accomplishes the object before maturity. On maturity of the note, the note is not paid. Summary relief will be granted him by filing his application setting up the declaratory judgment, the maturity of the note since, and its non-payment. Delay of four or five months incident to an ordinary action before the case can be put to trial, will be obviated. Take the case of a landlord. The tenant advises the landlord that his lease runs from year to year because his leasehold is agricultural land. The landlord contends that the land is not agricultural but residential land. The landlord wants to be in a position to terminate the tenancy on thirty days' notice. It is a general tenancy. Proceedings to declare the status are commenced in justice court and the status determined. The landlord later gives thirty days' notice, but tenant refuses to vacate. Summary relief is available.

SECTION 9

"When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner that issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."

This undoubtedly authorizes trial by jury if demanded, on any question of fact properly triable under existing rules, to a jury,

and removes any constitutional objection that the act infringes on Section 20 of the Bill of Rights of our Constitution preserving the right to trial by jury. So, likewise, in equity cases, the court may take the advice of the jury on questions of fact, as heretofore.

SECTION 10

"In any proceeding under this act the court may make such award of costs as may be deemed equitable and just."

The court would have the right to apportion the costs or tax them against either one of the parties. The section is susceptible to the construction that the items of cost taxable lie within the discretion of the court to determine. So where the court appoints experts for the purpose of determining some question of fact, who testify as witnesses in the cause, such experts' compensation, over and above statutory witness fees, could be taxed as costs. It does not confine or restrict the court to award *taxable* costs, and it appears that the wording of the statute would justify inclusion of attorney's fees. "Award" signifies something above the actual taxable costs as now assessed. Had the legislature intended to restrict the court to the power to adjudge division *inter partes* of the *statutory* costs, it would have used the term "apportionment" or "division" or "assessment" of *taxable* costs. By the use of the term "award" it was intended that a judicial discretion should supplant the old statutory provision that taxable cost should be adjudged against the losing party, and also grants discretionary control over the items taxable, and their respective amounts. In other words, the whole matter of taxing costs and against whom taxable, has been lodged in the discretion of the court, and is not, under this act, a ministerial duty of the clerk.

SECTION 11

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings."

Section 20 of the civil code[90] and the construction placed thereon by the courts of review in this state, will solve all questions as to who shall be made parties defendant to be bound by the decree; and as to who are necessary, and who are proper parties.

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90 Burns' R. S. 1926, Section 276; *De. Charette v. St. Matthews Bank & Trust Co.*, 283 S. W. 410.

Privies to any party to the action, assignee, or grantee, devisees, or heirs, will be bound like the person who is actually made party.

"In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceedings and entitled to be heard."

This portion of Section 11 is somewhat awkwardly drawn. By "such municipality" is undoubtedly meant the municipality which has granted the franchise or enacted the ordinance. It surely cannot mean that when a particular section of a zoning ordinance in one city is assailed as invalid, every municipality having a like provision must be notified, or made a party to the proceedings. Nor can it mean that every other municipality having an interest in the particular ordinance or franchise assailed, because of some contractural relationship with the city enacting the ordinance, must be made party.

This is a considerable departure from the usual proceedings involving the constitutionality or validity of an ordinance. Individuals *inter sese* have frequently had such question determined, where one claims a right under such ordinance, without participation by or notice to the municipality. The requirement that the municipality be made a party, is a salutary one. As the general topic of franchises by municipalities has been constricted to practically a nullity, due to the governance of public service commissions, not much attention need be given to that phase of the statute.

It should be noted that in any action in declarator wherein it is alleged that a

"statute or ordinance is unconstitutional, the attorney-general of the state shall also be served with a copy of the proceedings and entitled to be heard."

He is not to be made a party, but he shall have a copy, presumably, of the *complaint* and not of the entire proceedings. A service of the complaint upon the Attorney-General and notice to him of the pendency of the action and the time given for him to appear, we assume, satisfies the statute. It is to be observed that the Attorney-General is entitled to notice whenever in the proceedings an allegation of unconstitutionality is made, whether coming as the initiatory pleading, or any subsequent pleading.

No default, of course, can be taken against the Attorney-General. After he has had an opportunity to be heard, he may entirely ignore the proceedings and subject himself to no default.

He is not a party to the action. He stands in the position of the prosecuting attorney in a default divorce case, and not as a necessary or essential party to the proceedings.

SECTION 12

"This act is declared to be remedial; its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status or other legal relations."

Notice heretofore has been given to this section in regard to its bearing on the other sections of the Act.

SECTION 13

"The word 'person' wherever used in this act, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporations of any character whatsoever."

The provision for treating an "unincorporated association, or society" as a person, is of importance in construing the Act. The Legislature here meant to render unnecessary the joinder as plaintiffs or defendant, all persons belonging to the unincorporated association or society. It grants to them the quality of a legal entity for the purpose of an action of declarator.

The fact that all municipal corporations are privileged to proceed or be proceeded against under this Act, will be found of immeasurable benefit in determining the validity of ordinances, contracts, improvement resolutions, etc., if any doubt or uncertainty exists, particularly where important bond issues are involved. Any taxpayer may be made defendant, and determination of the validity had. After a court of review has thus passed on the question, it will, in all likelihood, adhere to any decision rendered in the matter as to any subsequent appeal on the same subject. Heretofore it has been very difficult to secure a decision on such matters which would satisfy a purchaser of bonds.

SECTION 14

"The several sections and provisions of this Act, except Sections 1 and 2, are hereby declared independent and severable, and the invalidity of any part or feature thereof, shall not affect or render the remainder of the Act invalid, or inoperative."

We do not believe any section or any part or feature of any section of the act is unconstitutional.

SECTION 15

"This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with the Federal Laws and regulations on the subject of declaratory judgments and decrees."

This section is a new feature in uniform legislation. Were it to be given its literal interpretation, it would be unconstitutional, for each sovereign state must be the judge of its own laws, insofar as they affect its property and inhabitants, and the law of each state must stand on its own foundation. At most, it might be an admonition to the courts that uniformity is desired —the expression of a wish, and not a mandate, to the courts. In view of Section 14, we believe it does not affect in any manner the remainder of the act. It would have been best to have left it out altogether.

SECTION 16

"This act may be cited as the Uniform Declaratory Judgments Act."

So, it is to be observed, the body of declaratory adjective law —so necessary to orderly procedure—is rapidly taking form in this country as it did in England when there introduced.

WILL THE BAR PROVE ITS UTILITY?

There has been considerable newspaper criticism concerning the ineffectiveness of the Legislature of Indiana for the year 1927. If we discount and disregard every other piece of legislation for that year, and preserve as a valid enactment the Declaratory Judgments Act, it will stand as a monument of great legislative accomplishment. If properly used by the bar, as we predict it will be, posterity will regard it as the most epochal step forward in legal procedural progress since the adoption of the code in 1852. Its provisions are a model of brevity, and as all great charters of right and liberty, such as the Constitution of the United States, nearly every word is significant and pregnant with tremendous potentiality. While it might appear to some as a striking innovation, and it cannot be regarded as the ultimate embodiment of supreme wisdom, it does contain the germ and kernel of a power for good, a preventive, rather than a cure. It is to potential trouble what a germicide is to potential infection. Heretofore we have waited, and have been compelled to wait, until the infection had focused and a surgical operation

became necessary. Now, when the germ makes itself manifest, we are able to sterilize the area and prevent the spread of infection. The laity will rightly judge ill of us if we do not employ this scientific discovery to its available extent.

NOTE

Since what has preceded in this article was written, there has been published an extensive supplemental note on this very interesting and important subject in 50 A. L. R. commencing at page 42; and since compilation of that note, a few later decisions illustrative of the principles formulating under the declaratory judgments act are: *Dodge v. Campbell,* 220 N.Y.S. 262, holding remedy under the act available to determine decedent's status under questioned divorce proceedings and a subsequent remarriage as affecting title of his heirs to property; *Fidelity & Columbia Trust Co. v. Levin,* 221 N.Y.S. 269, held proper to adjudicate status of tenant who failed to give timely notice of renewal of lease.

In re Brown's Estate, 137 Atl. 132, it was held by the Supreme Court of Pennsylvania that uncontested points in a proceeding for declaratory judgment, not averred to be likely to become matter of future controversy, should not be decided in the action.

In *Moore v. Moore,* 137 S. E. 488, it is held that under the declaratory judgment act the auditor of state as an individual may maintain proceedings against himself as auditor of state by way of mandate to compel himself as auditor of state to pay to himself as an individual certain money by way of compensation under the inheritance tax law.

In *City of Corbin v Underwood,* 298 S. W. 1090, resort was had to this remedy to determine the duty of the sheriff to transport prisoners from the city jail to place of trial.

Two interesting and illuminating decisions have been recently decided by the Court of Appeals of the state of New York. The question of jurisdiction, scope, and procedure under the act received considerable attention in *Bareham v. City of Rochester,* et al., 158 N. E. 51, and in *Westchester Mortgage Co. v. Grand Rapids & I. R. Co., et al.,* 158. N. E. 70,

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