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Constitutional Law -- Declaratory Judgment -- Remedy in Federal Constitutional Cases

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the damages are such as to be a penalty.[9] Even though under such a contract the dealer is not required to prove his actual damage,[10] it would be safer to do so and to show that it was difficult to estimate the amount accurately when the contract was drawn.

In the two cases now reported involving the enforcement of these contracts, it has not been necessary for the courts to pass directly on the main issues. In *Larson Buick Co. v. Mosca*[11] the facts disclosed obvious fraud and the resale had been enjoined before an innocent purchaser intervened. In *Schuler v. Dearing Chevrolet Co.*[12] the purchaser's demurrer was sustained because the company's pleadings did not show that it had been damaged. However, from an over-all survey it appears that the first problem is whether such contracts will be recognized at all by the courts, to which it is submitted that in light of the present situation in the automobile business they are highly desirable. The second problem, notice to the third party who buys from the original purchaser, can be met by a notation on the title where it must be transferred as part of a sale or by recordation of the contract in states like North Carolina which do not make this requirement.

The solution most advantageous to the dealer would be a repurchase contract which had its liquidated damages secured by a non-negotiable note and a recorded chattel mortgage. Since this note and mortgage would take effect only in event of a breach, they cannot be attacked as a promise to pay more than the regular purchase price for the car. Such a contract would deter reselling for it is not likely that a "used car" dealer would want a vehicle with a mortgage against it which must be paid to perfect the title. It would also give the notice necessary for the use of an equitable remedy and protect against a breach by an insolvent person. The majority of states recognize comity for recordation, therefore a chattel mortgage properly recorded would be constructive notice to a purchaser outside the state.[13]

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Constitutional Law—Declaratory Judgment—Remedy in Federal Constitutional Cases

The basic accomplishment of proceeding by declaratory judgment is "that it enables the point in dispute to be raised at the inception of the controversy, before damage has been done by acting upon one's own

[9] MCCORMICK, DAMAGES §157 (1935); Pace v. Zellmer, 194 Iowa 516, 186 N. W. 420 (1922).

[10] If the court took judicial notice of the prevailing situation with regard to "used cars," the opposition's claim of penalty would be met; if not, the better procedure would be to show the situation to rebut the claim.

[11] 79 N. Y. S. 2d 654 (Sup. Ct. 1948).

[12] 76 Ga. App. 570, 46 S. E. 2d 611 (1948).

[13] 10 AM. JUR., Chattel Mortgages §21; see Note, 57 A. L. R. 702, 711 (1928).

view of his rights. . . ."[1] In the field of constitutional law this accomplishment has various facets:

1. Plaintiff can prevent uncertainty and insecurity in personal and business transactions without waiting until the damage has been done.[2]
2. Plaintiff can proceed on his own initiative to obtain a declaration of his constitutional rights.[3]
3. Plaintiff can avoid the dilemma of making a choice, based on *his* judgment of constitutionality, either of complying with a statute and its restrictions, which may be unconstitutional all the while, or of refusing to obey the statute and thereby subjecting himself to its penalties if it later proves to be constitutional.[4]
4. Plaintiff need seek no coercive relief in order to obtain an adjudication of his constitutional rights.[5]
5. Plaintiff can avoid circuity of action and multiple litigation in many cases by a single declaration of constitutionality.[6]
6. Plaintiff can pursue his action to a speedier conclusion.[7]
7. Also, plaintiff *should* not have to show that there is impending irreparable injury[8] or that his remedy at law is inadequate.[9]

In view of the extensive and seemingly successful utilization of the declaratory judgment in other jurisdictions,[10] Congress passed the Federal Declaratory Judgments Act,[11] and apparently intended that the

[1] BORCHARD, DECLARATORY JUDGMENTS 55 (2d ed. 1941).

[2] "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step." Representative Ralph Gilbert in 69 CONG. REC. 2108 (1928).

[3] "It is true that (the plaintiffs) might translate their claims into actions, and await prosecutions, but that is precisely the dilemma from which (the declaratory judgment) was designed to afford relief." Faulkner v. Keene, 85 N. H. 147, 155, 155 Atl. 195, 200 (1931).

[4] "Either course was fraught with danger. To afford relief to parties in such a situation is the very purpose of the Declaratory Judgments Act." Acme Finance Co. v. Huse, 192 Wash. 96, 108, 73 Pac. 2d 341, 346 (1937).

[5] UNIFORM DECLARATORY JUDGMENTS ACT §1; 48 STAT. 955, 28 U. S. C. §400 (1934), as amended, 49 STAT. 1027 (1935), 28 U. S. C. §400 (1946).

[6] Socony-Vacuum Oil Co. v. City of New York, 287 N. Y. Supp. 288 (1936), *aff'd*, 272 N. Y. 668, 5 N. E. 2d 385 (1936).

[7] "The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar." FED. R. CIV. P., 57.

[8] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933) so held, but later cases have indicated a tendency to the contrary as will be shown.

[9] "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." FED. R. CIV. P., 57.

[10] UNIFORM DECLARATORY JUDGMENTS ACT is now adopted substantially in thirty-two states; see also New Zealand Declaratory Judgments Act, 1908, 8 Edw. VII, No. 220; Dill v. Hamilton, 137 Neb. 723, 291 N. W. 62 (1940) (statute regulating religious activities); Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481 (1934) (banking statute).

[11] 48 STAT. 955, 28 U. S. C. §400 (1934), as amended, 49 STAT. 1027 (1935), 28 U. S. C. §400 (1946).

full advantage of this new procedure should inure to the benefit of federal constitutional litigants.[12]

But the federal judiciary has found difficulty envisaging the declaratory judgment as a proper remedy in many constitutional cases. Before the Federal Declaratory Judgments Act was passed the Supreme Court had apparently waged a campaign through its decisions to avert enactment, by continued reference to the declaratory judgment as a mere advisory opinion.[13] A drastic change occurred in *Nashville, C. & St. L. Ry. v. Wallace,*[14] arising under the Tennessee Declaratory Judgments Act, when the Court accepted as valid the distinction between an advisory opinion and a declaration of constitutional rights in a real and substantial controversy. However, a year later in 1934 the Court said, "This court may not be called on to give advisory opinions or to pronounce declaratory judgments."[15] But later the Supreme Court in *Aetna Life Ins. Co. v. Haworth*[16] held the Federal Declaratory Judgments Act constitutional and declaratory relief appropriate where there is an actual controversy, even though the litigant be in no position to seek coercive relief and suffers no irreparable injury. However, since the *Haworth* case it has become increasingly apparent that the federal judiciary, in line with its earlier attitude, is still reluctant to grant declaratory judgments as to constitutional issues.[17]

The reason most often advanced by the Supreme Court in denying declarations of constitutionality is "no case or controversy," based on the old conception of the declaratory judgment as a mere advisory opinion. A labor union sued under a state declaratory judgment act for a declaration that a statute regulating the union as to strikes and pickets, and subjecting union officials to possible imprisonment if violated, was unconstitutional. *Held:* that since the plaintiff had not violated the statute, there was no justiciable controversy, no concrete factual basis for a decision.[18] The union and its officers were thereby forced to violate statutory regulations in order to test the constitutionality of the statute, subjecting themselves to fines and possible imprisonment.[19] Similarly the Circuit Court of Appeals for the Ninth Circuit held that

[12] Sen. Rep. No. 1005, 73d Cong., 2d Sess. 2, 3; H. R. Rep. No. 1264, 73d Cong., 2d Sess. 2.

[13] Willing v. Chicago Auditorium Ass'n, 277 U. S. 274 (1928); Liberty Warehouse Co. v. Grannis, 273 U. S. 70 (1927); Note, *Declaratory Relief in the Supreme Court,* 45 HARV. L. REV. 1089 (1932).

[14] 288 U. S. 249 (1933).

[15] Alabama v. Arizona, 291 U. S. 286, 291 (1934).

[16] 300 U. S. 277 (1937).

[17] See Comment, *Declaratory Judgments in Federal Courts,* 41 YALE L. J. 1195 (1932) in reply to Note, *Declaratory Relief in the Supreme Court,* 45 HARV. L. REV. 1089 (1932).

[18] Alabama State Fed. of Labor v. McAdory, 325 U. S. 450 (1945). The effect of a state court decision was used as a secondary basis for the decision.

[19] *Contra:* Dill v. Hamilton, 137 Neb. 723, 291 N. W. 62 (1940).

there was no case or controversy where plaintiff sued for a declaration that the Arizona Train Limit Law was unconstitutional, alleging that penalties for violation would cost plaintiff $1,600 to $37,000 per day, while losses in freight if it obeyed would amount to not less than $300,000 per year.[20] The court held that since there had been no violation, there was no controversy. The court failed to perceive that until its constitutionality was declared, the statute was a real threat to plaintiff, leaving his legal and financial position in a state of suspension.[21] Even where the SEC sought to enforce the no-mail penalties for failure to register under the Public Utilities Holding Company Act and defendant asked by counterclaim for a declaratory judgment that the Act was unconstitutional, it was held that defendant had no case or controversy because it had not registered under the Act.[22] Thus defendant was compelled either to register under the Act in order to contest the validity of any part thereof, or refuse to subject itself to rigorous controls by registering and thereby lose United States mail privileges.[23] One of the most flagrant violations of the spirit and intent of declaratory judgment legislation is the case of *United Public Workers v. Mitchell*,[24] where the Supreme Court held that civil service employees who desired to participate in political activities forbidden under the Hatch Act had no justiciable controversy as to the constitutionality of the Act until they had actually violated the Act and thereby subjected themselves to possible dismissal from governmental service with simultaneous loss of seniority. Justice Douglas, dissenting in part, presented the more realistic viewpoint:[25]

> "Declaratory relief is the singular remedy available here to preserve the *status quo* while the constitutional rights of these appellants to make these utterances and to engage in these activities are determined. The threat against them is real not fanciful, immediate not remote. The case is therefore an actual not a hypothetical one."

It is submitted that each of the above cases involved justiciable con-

[20] Southern Pac. Co. v. Conway, 115 F. 2d 746 (C. C. A. 9th 1940).

[21] *Contra:* ". . . the mere continued existence of article 88 under the color of right and authority constitutes a continuing threat to collect, exact, and enforce the tax." Socony-Vacuum Oil Co. v. City of New York, 287 N. Y. Supp. 288, *aff'd*, 272 N. Y. 668, 5 N. E. 2d 385 (1936).

[22] Electric Bond and Share Co. v. SEC, 303 U. S. 419 (1938). Even though the suit was to enforce the no-mail penalties of the statute, the Court said of the counterclaim, "It presents a variety of hypothetical controversies which may never become real." Mr. Justice McReynolds dissented without opinion.

[23] *But cf.* Carter v. Carter Coal Co., 298 U. S. 238 (1936) in which the more limited injunction was granted, although the provision of the statute held to render it unconstitutional was not even shown to be involved in plaintiff's case.

[24] 330 U. S. 75 (1947); see Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69 (1917).

[25] 330 U. S. 75, 119 (1947).

troversies well within the limits of the declaratory remedy. It is difficult to appraise these decisions without concluding that the test of justiciability was more rigidly applied by the federal courts because the remedy sought was declaratory judgment.[26]

Increasingly apparent in Supreme Court decisions is a failure to distinguish the declaratory judgment from injunction. There seems to be a concerted attempt by the Supreme Court to restrict the use of declaratory relief in constitutional cases to the area already covered by injunction, requiring irreparable injury with no other adequate remedy. Although the declaratory judgment is closely related to equitable actions, it is not exclusively an equitable remedy, but a remedy *sui generis*, applicable in both law and equity.[27] Under the Federal Rules, the availability of declaratory relief is by express provision *not* dependent on the inadequacy of other remedy.[28]

Yet in two recent cases involving the constitutionality of statutes, where declaratory judgment and injunction were jointly sought, the Court based much of its reasoning in throwing out the declaratory judgment, as well as the injunction, on adequacy of remedy at law.[29] Such reasoning was applicable to the injunction only,[30] the court overlooking the fact that there are many instances in which declaratory relief is appropriate where the technical prerequisites for injunction are not found.[31]

The Supreme Court has in one instance misrepresented the import of its former words as to the necessity for showing threatened irreparable injury in a declaratory judgment action. In deciding in *Nashville, C. & S. L. Ry. v. Wallace* that irreparable injury was not necessary, injunction not being involved, the Court said:[32]

> "Thus the narrow question presented for determination is whether the controversy before us, *which would be justiciable in this*

[26] See Note, 25 N. C. L. Rev. 436 (1947).

[27] Grosse Pointe Shores v. Ayres, 254 Mich. 58, 235 N. W. 829 (1931); Borchard, Declaratory Judgments 239 (2d ed. 1941).

[28] See note 9 *supra*.

[29] Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752 (1947) (exhaustion of administrative remedy was involved); Coffman v. Breeze Corp., 323 U. S. 316 (1945).

[30] "We see no reason why the statute (declaratory judgment statute) should not, we think it should, be given the prophylactic scope to which its language, in the light of its purpose, extends, under its disputants as to whose right there is actual controversy, may obtain a binding judicial declaration as to them, before damage has actually been suffered, and without having to make the showing of irreparable injury and the law's inadequacy required for the granting of ordinary preventive relief in equity." Gully v. Interstate Natural Gas Co., 82 F. 2d 145, 149 (1936), *cert. denied*, 298 U. S. 688 (1936).

[31] "Its (the declaratory judgment's) purpose is to obtain a judicial determination of legal relations that are uncertain and the subject of dispute, and to avoid . . . occasions for injunctive relief." 3 Moore's Federal Practice §57.02 (1st ed. 1938); Borchard, *The Next Step Beyond Equity—The Declaratory Action*, 13 U. of Chi. L. Rev. 145 (1946).

[32] 288 U. S. 249, 262 (1933). [Italics added to quotation.]

> *Court if presented in a suit for injunction,* is any *less* so because through a modified procedure (declaratory judgment) appellant has been permitted to present it . . . without praying for an injunction or alleging that irreparable injury will result. . . ."

But in *Colgrove v. Green,* a 1946 case, one portion of this statement was lifted from its context and quoted thus:[33]

> ". . . the test for determining whether a federal court has authority to make a declaration . . . is whether the controversy *'would be justiciable in this court if presented in suit for injunction.'* . . ."

Clearly this is a direct misrepresentation of the *Nashville* decision which held no irreparable injury was necessary if only declaratory judgment were sought. The same year of the *Colegrove* case, Justice Rutledge dissented in *Cook v. Fortson,* feeling that both the *Colegrove* case and the *Cook* case should be reheard together. He explained his reasons in a footnote:[34]

> "It was to avoid the limitations resulting from the fact that injunctive or other immediately effective equitable relief could not be given that relief by way of declaratory judgment was authorized by Congress. This Court has not yet determined that declaratory relief cannot be given beyond the boundaries fixed by the pre-existing jurisdiction in equity. . . ."

A 1948 decision of the Supreme Court indicates that the majority of the Court now regard the declaratory judgment as an action requiring the equity prerequisites, if not an actual action in equity.[35]

The Court has been confronted in many declaratory judgment cases with adversative conditions more drastic than those in earlier cases where the supposedly more restricted injunction was upheld,[36] but has failed to perceive in many instances the potentialities of the declaratory

[33] 328 U. S. 549, 552 (1946). The opinion of the Court was supported by only three Justices, Frankfurter, who wrote the opinion, Reed, and Burton. Justice Jackson took no part in the case. Justice Rutledge concurred only in result. Justice Black dissented and was joined by Justices Douglas and Murphy. [Italics added.]

[34] 329 U. S. 675, 677 (1946). However, the appeal was dismissed per curiam over the opinion of Justice Rutledge.

[35] "But as we have seen, the Bank's grievance here is too remote and insubstantial, too speculative in nature, to justify an injunction against the Board of Governors, and *therefore equally inappropriate for a declaration of rights.*" Eccles v. Peoples Bank of Lakewood Village, Cal., 68 Sup. Ct. 641 (1948). Justice Reed, dissenting, with whom Justice Burton joined, felt that the case should be heard on its merits, saying, "If governmental power is being unlawfully used to constrain respondent's operation of its business, respondent is entitled to protection *now.*" [Italics added.]

[36] Compare three earlier injunction cases, where, although a statute was either not yet applied to plaintiff or not yet even in force, the Court heard the cases on their merits, saying that there was an actual controversy. Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Pierce v. Society of Sisters, 268 U. S. 510 (1925); Terrace v. Thompson, 263 U. S. 197 (1923).

judgment in allowing unconstitutional legislation to be quickly and effectively contested before irretrievable loss has occurred. It is submitted that the Supreme Court could properly allow the declaratory judgment a more liberal application in federal constitutional litigation, consonant with its status and intended use, without being forced to decide any hypothetical cases based on insufficient facts.[37]

RALPH M. STOCKTON, JR.

Eminent Domain—Hydroelectric Adaptability as Element of Just Compensation—Effect of Federal Power Act

The Constitutional provisions[1] for payment of "just compensation" for land taken by means of eminent domain proceedings have generally been regarded as securing to the owner the market value of the land considering its best possible future use, *i.e.*, the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy.[2] This general rule is applied where dam sites are condemned,[3] but a complicating factor arises when the owner claims the special adaptability of his land for hydroelectric development as an element of value. This special adaptability has generally been allowed as a factor to be considered where a reasonable possibility of connection with the other required tracts has caused purchasers in the open market to take hydroelectric possibilities into account, quite apart from the needs of the condemnor.[4] The tendency has been in the direction of a more strict application of this rule so as to eliminate any consideration of dam site adaptability where it appears that combination of the tracts by open market purchases is not reasonably probable.[5]

[37] "If the remedy through a declaratory judgment does not at least in part fill the gap between law and equity there would be little purpose in enacting the statutes providing for such procedure." Schaefer v. First Nat. Bank of Findlay, 134 Ohio St. 511, 518, 18 N. E. 2d 263, 267 (1938).

[1] U. S. CONST. AMEND. V; AMEND. XIV requires the states to provide just compensation for private property taken. Most state constitutions have such a provision. Lenhoff, *Development of the Concept of Eminent Domain*, 42 COL. L. REV. 596 (1942); McKean, *Constitutional Limitations Upon the Power of Eminent Domain*, 6 ROCKY MT. L. REV. 16 (1933); Recent Cases, 7 U. OF CHI. L. REV. 166 (1939).

[2] BAUER, ESSENTIALS OF THE LAW OF DAMAGES 427 (1919); FIELD, THE LAW OF DAMAGES §846 (1876); II LEWIS, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES §478 (2d ed. 1900); III SEDGWICK, DAMAGES §1171 (9th ed. 1920); IV SUTHERLAND, THE LAW OF DAMAGES §1064 (4th ed. 1916).

[3] See Note, 106 A. L. R. 955 (1937).

[4] McCandless v. United States, 298 U. S. 342 (1936), *reversing* 74 F. 2d 596 (C. C. A. 9th 1935); Ford Hydroelectric Co. v. Neely, 13 F. 2d 361 (C. C. A. 7th 1926), *cert. denied*, 273 U. S. 723 (1926); *accord*, Mississippi and Rum River Boom Co. v. Patterson, 98 U. S. 403 (1878). See Notes, 124 A. L. R. 910 (1940), 106 A. L. R. 955 (1937); Note, 2 WASH. L. REV. 192 (1927).

[5] Olson v. United States, 292 U. S. 246 (1934), *affirming* 67 F. 2d 24 (C. C. A. 8th 1933); *accord*, North Kansas City Development Co. v. Chicago B. & Q. R. Co., 147 F. 2d 161 (C. C. A. 8th 1945), *cert. denied*, 325 U. S. 867 (1945);