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COMMENTS

DECLARATORY JUDGMENTS — EXTENSION OF PROTECTION AGAINST INJURIES TO PERSONALITY — The widespread acceptance of the declaratory judgment as a statutory supplement to common law and equitable remedies has raised some searching questions as to the relation between right and remedy in Anglo-American law.¹ The declaratory judgment can operate in anticipation of specific wrongs that would be a basis for ordinary legal or equitable relief. It does not depend for its efficacy on the use of the familiar remedies of law and equity — that is, on damages, specific restitution in replevin and ejectment, and the injunction and specific enforcement in equity.² The question may

¹ Declaratory judgment statutes have been enacted in thirty-four states and territories and by Congress for the federal courts. See BORCHARD, DECLARATORY JUDGMENTS 245-246 (1934).

² BORCHARD, DECLARATORY JUDGMENTS 307 ff. (1934).

therefore be asked whether the development of this flexible device has not made it possible to protect types of interests that have been beyond the reach of traditional equitable and legal remedies.

I.

The decision in the comparatively recent case of *Somberg v. Somberg*³ presented the question. The New York court there held that a declaratory judgment was not available to a plaintiff who sought to establish her position as the wife of one of the defendants. Defendant husband had deserted the plaintiff and had been for some time living with another woman. Neither party had made any attempt to secure a divorce, but the husband and the other woman (who was joined as defendant) were holding themselves out to be lawfully married. Plaintiff asked for a declaration that she was the wife of defendant, and for an injunction against the representations being made by defendants. The injunction having been refused on the ground that no legally recognized right of the plaintiff was involved, the court refused the declaration because it would serve no useful purpose, and because its function was limited to the establishment of "disputed jural relations," which were not considered to be present in the case. In *Baumann v. Baumann*,⁴ decided some years previously, the same court granted a declaration on substantially the same facts, except for the additional factor of a void divorce decree previously procured by the husband in Mexico. It is apparent that the plaintiff's real interest in such cases is not in the establishment of her legal status, but in the vindication of her position in society and the protection that the declaration would afford to her reputation, social relations, and personal peace.⁵ Since the divorce in the *Baumann* case was probably void even in Mexico (though this was not decided in the case) and there was no doubt of its invalidity in New York, it can be said that the plaintiff's interest there was the same as in the *Somberg* case, and that the divorce merely lent color to the representations made by defendants.

The question then is this: given a plaintiff who asks a declaration of the falsity of unsubstantiated attacks on his reputation and social position, by way of affirmative protection against those attacks, should the declaratory judgment be so used as to extend the scope of judicial protection against defamation? The answer to such a question depends on two basic considerations: whether the interest is such as to warrant legal protection;

³ 263 N. Y. 1, 188 N. E. 137 (1933), reversing 238 App. Div. 723 (1933), noted in 82 UNIV. PA. L. REV. 542 (1934).

⁴ 250 N. Y. 382, 165 N. E. 819 (1929). Noted in 17 CAL. L. REV. 681 (1929); 29 COL. L. REV. 213 (1929); 28 MICH. L. REV. 342 (1930); 43 HARV. L. REV. 477 (1930); 78 UNIV. PA. L. REV. 114 (1929); 38 YALE L. J. 111 (1928); 14 MINN. L. REV. 96 (1929).

⁵ BORCHARD, DECLARATORY JUDGMENTS 393 (1934).

and whether there are available to the courts remedies effective for its protection. While the interest in freedom from defamation (and from other conduct principally affecting the personal sensibilities of plaintiff) is perhaps not of an importance to society as commanding as that which attends the increased stability and security of commercial and property interests, it is nevertheless a part of a complete and well-rounded legal system.⁶ The importance to the individual of his reputation and social position cannot be denied.⁷ The objection made in *Somberg v. Somberg* to this use of the declaratory judgment does not seem sound.⁸ "Jural relations" depend for their existence on the action of a court; a right exists when the court will act to protect the plaintiff from the defendant's invasion of the interest asserted. Correlative to the right in plaintiff is the duty of defendant to refrain from such invasions of interest. For the court to refuse to act because no right exists is to beg the question. If the court declares the falsity of the statements and representations of defendant, it establishes a right in the plaintiff to be free of them, and a duty in defendant not to make them.⁹

The important consideration in cases of this sort is that of the effectiveness of the remedy sought. In the *Somberg* case the court contented itself with the statement that the declaration would not have been useful, without discussing its reasons for this conclusion. The efficacy of any remedy must be measured in terms of the interest of plaintiff which it is intended to subserve, and of opposing interests of the defendant which it will defeat. Where the declaratory judgment is sought as final relief against defamation, its effectiveness depends on the moral weight and the conviction which it carries;¹⁰ this in turn depends on the care and thoroughness with which the questions presented to the court are investigated.¹¹ In view of the ever-increasing

⁶ Pound, "Interests of Personality," 28 HARV. L. REV. 343, 445 (1915); Pound, "Equitable Relief Against Defamation and Injuries to Personality," 29 HARV. L. REV. 640 (1916).

⁷ The development of the so-called "right of privacy" illustrates the new emphasis which is being put on protection against injuries to personality.

⁸ *Baumann v. Baumann*, 250 N. Y. 382, 165 N. E. 819 (1929); *James v. Alderton Dock Yards*, 267 N. Y. 298, 176 N. E. 401 (1931); *Wardrop Co. v. Fairfield Gardens*, 237 App. Div. 605, 262 N. Y. S. 95 (1933).

⁹ HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923); Kocourek, "Sanctions and Remedies," 72 UNIV. PA. L. REV. 91 (1924).

¹⁰ Declarations of status, jactitation of marriage, declarations of legitimacy are among the uses to which the declaratory judgment has been put in Continental, Scotch, and English law. See BORCHARD, DECLARATORY JUDGMENTS 238 (1934). See the English Declaration of Legitimacy Act of 1858, 21 and 22 Vict., c. 93; *Re Chaplin's Petition*, L. R. 1 P. & D. 328 (1867); *Mansel v. Attorney-General*, 4 P. & D. 232 (1879); *Hawke v. Corri*, 2 Hag. Con. 280, 161 Eng. Rep. 743 (1820); *Goldstone v. Goldstone*, 127 L. T. R. 32 (1922).

¹¹ It is assumed that the interested parties will give the declaration any necessary publicity, but some doubt can be raised on this question.

volume of litigation which comes before the courts, and the consequent pressure exerted on them, it is doubtful if a case in which only one of the parties is seriously interested would receive the necessary careful investigation.¹² It is only where the defendant has a strong moral interest in the outcome (as in the *Somberg* case¹³) or a pecuniary interest of some sort, or where the question is of sufficient public moment to interest the court in the actual truth of the situation, that the decision will be made upon the necessary basis of care and thoroughness.

Further, the defendant has an interest in not being forced to the trouble and expense of litigating a question in the outcome of which he is not concerned. If the defamatory statements made by the defendant result in a serious injury to the plaintiff, the fact that the defendant is not concerned with their truth should not confer a privilege upon him. But where the usefulness of the declaration to the plaintiff is itself doubtful, the interest which defendant has in not being forced into litigation may be enough to warrant refusing the declaration. It must be concluded, then, that the declaration as final relief against defamation is of doubtful value. It is only in special cases that it should be granted. Nevertheless, when it is asked, the court's attention should be directed to consideration of its effectiveness, and refusal should be a matter of discretion and should not be ascribed to a want of power.

2.

The declaratory judgment has a further possible function as a foundation for subsequent and more drastic relief through the assessment of damages.¹⁴ In situations where damages would ordinarily be refused because those elements which go to establish defendant's fault cannot be said to be present, the declaration removes this obstacle to damage relief and allows plaintiff to proceed against defendant for any injuries subsequent to the declaration.¹⁵ Thus where the fact situation

¹² In re Eubanks, 202 N. C. 357, 162 S. E. 769 (1932).

¹³ In the *Somberg* case the two defendants had a daughter; it is probable that a reluctance to bastardize this child had some influence on the decision of the court.

¹⁴ This function is comparable to the use of the declaration in defining the rights of the parties under a contract, except that in the contract situation the plaintiff will have his action for breach of contract whether or not the declaration is first obtained.

¹⁵ The damage remedy places an unavoidable emphasis on the fault of the defendant and on the mensurability (in money terms) of the injury. These two limitations find expression, among other places, in the fear of fraudulent claims, in the requirement of proof of special damage, intent and scienter, in the classification of slander as actionable per se, and in the limitations on relief for slander as opposed to libel. *Hellwig v. Mitchell*, [1910] 1 K. B. 609; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420 (1858); *Peck v. Tribune Co.*, 214 U. S. 185, 29 S. Ct. 554 (1909); *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127 (1877); *Taylor v. Hearst*, 107 Cal. 262, 40 P. 392 (1895).

is such that it cannot be said that defendant knew or should have known that his actions or statements would result in injury to plaintiff, or where the statements made by defendant are true or not clearly false, or where defendant claims a privilege based on an alleged public interest, damages for past actions cannot, in fairness to defendant, be assessed. If then plaintiff secure a declaration of right and duty, defendant's immunity from damages, which is based on his lack of knowledge or failure to understand the situation, is destroyed.

In most cases of injury to personality, plaintiff's interest would be better served by the injunction than by the damage remedy. An injury to personality — that is to reputation, honor, personal peace, or personal sensibilities — is obviously one which cannot be evaluated in terms of money and for which a money payment is inadequate relief. The usefulness of the injunction in cases of this character was for some time restricted by the requirement of a "property" in the plaintiff. This technical limitation on equitable relief has been evaded or ignored in many modern equity cases and, in the form in which it appeared during the nineteenth century, may eventually disappear.¹⁶ A second limitation on the injunction is that which restricts its use to the enforcement of rights established by the common law damage remedy.¹⁷ Such a restriction rests upon a distinction between right and remedy which is merely verbal and analytical in character.¹⁸ To conceive of rights as limited to those enforceable by the damage remedy and to regard the injunction only as an alternative method of enforcing those rights is to

¹⁶ The property interest which was required through the interpretation placed on *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. 670 (1818), has become so technical and fictitious that it can be said to exist no longer. See *Dixon v. Holden*, L. R. 7 Eq. 488 (1869); many courts disregard it entirely. *Corliss v. Walker*, (C. C. Mass. 1893) 57 F. 434; *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *Munden v. Harris*, 153 Mo. App. 652 (1910); *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 A. 97 (1907); *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. S. 908 (1893); *Hodgeman v. Olsen*, 86 Wash. 615, 150 P. 1122 (1915). See Pound, "Equitable Relief Against Defamation and Injuries to Personality," 29 HARV. L. REV. 640 at 672 (1916). *Hawks v. Yancey*, (C. C. A. Tex. 1924) 265 S. W. 233; *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905); *Williams v. O'Shaughnessy*, 172 N. Y. S. 574 (1918); *Schultz v. Frankfort Marine, etc. Ins. Co.*, 151 Wis. 537, 139 N. W. 386 (1913).

¹⁷ *American Malting Co. v. Keitel*, (D. C. N. Y. 1914) 217 F. 672; *Marlin Firearms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163 (1902); Pound, "Equitable Relief Against Defamation and Injuries to Personality," 29 HARV. L. REV. 669 (1916); Chafee, "Does Equity Follow the Law of Torts?" 75 UNIV. PA. L. REV. 1 (1926).

¹⁸ Cook, "Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L. J. 333 (1933); *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837 (1916). See discussion of the case in Professor Cook's article at p. 348.

ignore the influence which the nature of available remedies has on the scope and development of what is considered the substantive law.¹⁹

It is apparent that the declaratory judgment cannot be useful as preparatory to relief by injunction. The injunction, unlike damages, operates in prospect and penalizes the defendant for only those violations of plaintiff's interest which are subsequent to the decree; it serves the double function of clarifying the situation by defining plaintiff's right and setting up against defendant a judgment which can be summarily executed without further trial of the issues of right. Insofar, then, as the injunction is the appropriate and available remedy for the protection of the interest which plaintiff asserts, the declaratory judgment cannot be used to extend judicial protection. But in courts where injunctive relief against injuries to personality is granted reluctantly because of the lingering force of these older limitations or because of hesitancy in attempting to enforce and supervise personal relations, the use of the declaratory judgment as a foundation for a subsequent damage action may allow the court to extend protection against injuries for which there would otherwise be no remedy.

There is a controlling objection to the use of the injunction or of the declaratory judgment in one type of case. Where the injury complained of proceeds from defamatory statements which relate to a subject of particular concern of the public, the public interest in discussion and knowledge of the subject may confer on defendant a privilege comparable to that existing in the libel and slander field.²⁰ Because the penalty for the violation of the injunction is so much more drastic than the assessment of damages, the defendant's privilege when threatened with an injunction may be somewhat broader than the tort privilege. Since the injunction operates in prospect, the decree must be framed in general terms; in fairness to the defendant it must be clear and definite. The difficulty of framing a decree which will adequately distinguish for future cases between those statements which the interest of the public requires to be permitted and those which the interest of the plaintiff requires to be forbidden may prevent the issuance of any decree. In such cases the declaratory judgment as preparatory to the assessment of damages would encounter the same difficulties and would not ordinarily contribute any new resources to courts extending the scope of legal protection.

¹⁹ Chafee, "Does Equity Follow the Law of Torts?" 75 *UNIV. PA. L. REV.* 1 (1926). See *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, (D. C. N. Y. 1920) 268 F. 575.

²⁰ *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142 (1875); *Emack v. Kane*, (C. C. Ill. 1888) 34 F. 46; *Lawrence Trust Co. v. Sun-American Publishing Co.*, 245 *Mass.* 262, 139 *N. E.* 655 (1923); *American Mercury, Inc. v. Chase*, (D. C. Mass. 1926) 13 F. (2d) 224.

In conclusion it can be said that the declaratory judgment affords the court an opportunity to extend the reach of its effective action against injuries to personality. In dealing with situations which raise the question of an extension of legal rights through the use of this new remedy, the controlling considerations should be the comparative importance of the opposing interests involved and the probable efficiency of the remedy. To refuse the declaration on the legalistic ground that no "disputed jural relations" are in question is to deny to the new remedy its proper influence in the development of the law.

W. H. C.
