

## BOOK REVIEWS

DECLARATORY JUDGMENTS. By Edwin Borchard. Banks-Baldwin Law Publishing Co., Cleveland. Pp. xxxvii, 1152. Price: \$22.50.

This is a second edition of an earlier work which went to press just as the Federal Declaratory Judgments Act was being signed on June 14, 1934. In the intervening seven year period some 300 cases have implemented the federal statute and five additional states have adopted declaratory judgment procedure, so that now only eleven states remain without it. Thus, since Professor Sunderland's publication of the first American article on declaratory judgments,<sup>1</sup> the use of the procedural device has spread like wildfire. And Professor Borchard has now essayed—and indeed accomplished—the monumental task of integrating within the scope of roughly 1000 pages a critical analysis and learned yet smoothly flowing discussion of nearly 3000 American cases from forty jurisdictions, in addition to approximately 3000 English and Dominion cases, for an aggregate of 6000.

This edition I believe to be one of the great books of America's adjective jurisprudence. Its greatness lies in its *integration*, through the author's scholarly, lively and crusading mind, of the distilled essences of the 6000 cases and of the statutes and rules with which he deals. In other words, this is not a catalogue, or a digest, or a scissors-and-pastepot job, or an intellectual quilt in which authorities are stitched end on end. It is a true textbook, in which the author's hand and heart and mind and soul are evident on every page. He has not only put legalistic copper and sulphur in a test tube and mixed them up. He has applied to them an intellectual heat which has produced an entirely new substance which is neither copper, nor sulphur, nor heat.<sup>2</sup> This new entity is the Borchard concept of what a declaratory judgment is or ought to be.

Such concept may be summarized in what for convenience I call the

### Ten Commandments of the Law of Declaratory Judgments

1. Advisory opinions by the judiciary may be authorized by constitutional mandate, and in some cases by legislative mandate, but such mandates exist in only fourteen jurisdictions.<sup>3</sup>

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1. Sunderland, *A Modern Evolution in Remedial Rights, The Declaratory Judgment* (1917) 16 MICH. L. REV. 69, 70.

Professor Borchard says, at page 13, that Sunderland is entitled "to unlimited professional tribute", and he quotes the celebrated paragraphs in which Sunderland urged, "We do not arm our traffic policemen with guns and cutlasses. Why insist that the court must always rattle the sabre."

2. "The search is for some co-ordinating principle, whether the principle be rooted in history or philosophy, in a study of what has been or in some effort of pure reason to determine what ought to be." CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928) 100.

3. England, Mass., Colo., Fla., Maine, N. H., R. I., S. D., Ala., Del., Ky., Minn., Okla., Vt. See for example, *Opinion of the Justices*, 308 Mass. 601, 32 N. E. (2d) 298 (1941); *Opinion of the Justices*, 307 Mass. 613, 29 N. E. (2d) 738 (1940); *Opinion of the Justices*, 145 Mass. 587, 592 (1887); *Answer of the Justices*, 122 Mass. 600 (1877). Compare the interesting discussion in *Self-Insurer's Ass'n v. State Industrial Commission*, 224 N. Y. 13, 119 N. E. 1027 (1918). Professor Borchard recognizes a "growing demand" in the opposite direction, but he concedes that the demand has not yet ripened into law. Some years ago a suggestion of the late James M. Beck that the Supreme Court should give advisory opinions "in extraordinary instances" was roundly denounced in Philadelphia and New York.

2. In the absence of constitutional fiat, advisory opinions by constitutional courts are unauthorized; whether attempted under the guise of declaratory judgments or otherwise.<sup>4</sup>

3. a) Declaratory judgments by state and federal courts are generally authorized, except with respect to federal taxes.

b) Declaratory judgments may grant coercive relief, including damages, in addition to declaring rights and duties.

c) If "further relief" is claimed, it should be stated in the prayer for relief.

4. Declaratory judgments are adjudicatory. They are not advisory opinions. They differ from advisory opinions in that they determine controversies which possess all the requisites of justiciability.<sup>5</sup>

5. Declaratory judgments are tools of the adjective law. They do not create new substantive rights. And they are neither legal nor equitable, but *sui generis*.

6. A declaratory judgment is an alternative remedy, not an extraordinary one. It may be rendered in a case where another form of action is available.<sup>6</sup>

7. Declaratory judgment actions are not limited to the determination of questions of law. They may determine questions of fact, and a jury trial of triable issues of fact may be seasonably demanded.<sup>7</sup>

8. a) A declaratory judgment ordinarily will not be rendered by a court when an adequate administrative procedural device is available, unless the circumstances are extraordinary, important public interests are at stake, or the court finds that substantial justice will be done by ignoring the pathway used for access to just determination.

b) The field of administrative law is opening wide to declaratory rulings by administrative agencies.<sup>8</sup>

4. A declaratory judgment may be had only in cases of actual controversy. It is a final, binding judgment between adversary parties and conclusively determines their rights. See *Aetna Life Ins. Co. v. Haworth*, 309 U. S. 227, 239 (1937); *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249 (1933).

5. See Professor Borchard's excellent analysis of what constitutes a "justiciable" controversy at pages 33-86. At page 86 he says, "It necessarily follows that if an action for a declaration raises issues which are fictitious, colorable, hypothetical, abstract, academic, or dead, and hence moot, the action must be dismissed as decisively as would be any other action presenting the same non-justiciable issues."

6. This principle is vigorously resisted in Pennsylvania and Maryland. But I agree with Professor Borchard that these two states should revise their views in this connection. See pages 318-342, 827, 879, and *Woolard v. Schaffer Stores Co.*, 272 N. Y. 304, 34 N. E. (2d) 316 (1936); *Kariher's Petition (No. 1)*, 284 Pa. 455, 471, 131 Atl. 265, 271 (1925).

A "Pennsylvania muddle" has resulted from the Act of April 25, 1935, P. L. 72, § 1, PA. STAT. ANN. (Purdon, Supp. 1941) tit. 12, § 836, which contained an unhappy amendment of Judge von Moschizker's amendment to Section 6 of the Pennsylvania Uniform Declaratory Judgments Act of June 18, 1923, P. L. 840, § 1, PA. STAT. ANN. (Purdon, 1931) tit. 12, §§ 831-846. Cf. (1937) 85 U. OF PA. L. REV. 317.

7. A "New York muddle" has arisen since the publication of this Second Edition by virtue of the unfortunate language in the opinion in *Seventy-Nine Delancey Corp. v. Meridan Holding Corp.*, 286 N. Y. 354, 26 N. E. (2d) 619 (1941). This decision does violence to Rule 213 of the New York Rules of Civil Practice, and it misses the liberal spirit of *Aetna v. Haworth*, 300 U. S. 227 (1937), and *N. Y. Foreign Trade Zone Operators v. State Liquor Authority*, 285 N. Y. 272, 34 N. E. (2d) 316 (1941).

8. After the publication of this edition, an exhaustive opinion by Mr. Justice Rutledge, in *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235 (App. Div. D. C. 1941), held that "by no necessary implication of statutory language is there indicated a Congressional intent that either the procedure before the [National Railway Adjustment] Board or the statutory enforcement proceeding provided by the Railway Labor Act of 1934 shall be exclusive". Hence, a complaint for a declaratory judgment declaring rights under a collective bargaining agreement was held valid.

9. a) Declaratory judgments may be resorted to for civil construction of penal legislation in lieu of embarrassing resort to criminal prosecutions, such as those colloquially designated as "test cases".

But public policy is paramount in these litigations, and it is difficult to evolve an objective rule to govern them.

b) The dividing line of permissibility is probably near the boundary between *malum prohibitum* and *malum in se*.

c) In the interest of judicial consistency, those actions in which declaratory judgments must be denied for reasons of public policy should generally be so dealt with only for the reason that "*The motive of the plaintiff (or defendant, as the case may be) is so uncertain that NO USEFUL PURPOSE WOULD BE SERVED BY GRANTING A DECLARATION, AND PUBLIC POLICY THUS REQUIRES A DISMISSAL OF THE COMPLAINT IN THE DISCRETION OF THE COURT.*"

It is judicially unwise to say more, lest the pattern of declaratory judgment practice become an unpredictable "medley of scraps and patches".<sup>9</sup>

10. Declaratory judgments rest in the discretion of the court, which should give its reasons in the event that it exercises its discretion to forbid them. In the better view, if the reason given is "untenable", the discretion has been improperly exercised. The best "reason" generally available is that a declaratory judgment would serve no useful purpose in the particular case.

The foregoing I conceive to be the formulae of justice in declaratory judgment actions. I derive them from the algebraic symbols found in this edition of Borchard. If the formulae have fallacies the fault is mine. But the symbols evolved by the master are faultless, I am sure.

It is a privilege to review this book. It has its human imperfection.<sup>10</sup> But it will be many a day before the bar views again a text so forward-looking in its conception and so completely adequate in its execution. From the gold-leaf-on-red of its cover, through its exhaustive Table of Contents, Footnotes, Appendix, Tables of Cases and Index the book has "class". It is authoritative, complete and "required reading" for anyone who would plumb the mysterious, mystic magic of declaratory judgments in all their ramifications.

John F. X. Finn.†

A KALEIDOSCOPE OF JUSTICE. By John H. Wigmore. Washington Law Book Company, Washington, 1941. Pp. xxx, 751. Price: \$5.00.

The reviewer feels that this is the kind of book which is far better understood and appreciated by the practicing attorney who has personally

9. Space does not permit extended discussion of the intricacies of this problem. They are found neatly presented in three cases, which should be read together: *N. Y. Foreign Trade Zone Operators v. State Liquor Authority*, 285 N. Y. 272, 34 N. E. (2d) 316 (1941); *Reed v. Littleton*, 275 N. Y. 150, 9 N. E. (2d) 814 (1937); *Guide Escort Service v. Moss*, 260 App. Div. 520, 24 N. Y. S. (2d) 150 (1940). In the first case a declaratory judgment was granted. In the two earlier cases such a judgment was denied.

10. At page xxxiv, line 6, the word "for" should be "from". At page 645, line 17, the word "privity" erroneously appears twice. At page 821, note 83, the printer gives us "indispens'ble". At page 826, line 28, he gives us "adjudication". At page 975, line 7, a hyphen is omitted. At page 979, line 14, reference is made to Surrogate "Flynn". The Surrogate's name was not "Flynn" but "Sheils", and I certify to this of my own knowledge, for when the late Mr. Surrogate Sheils was my adversary at the bar he put me through some very high paces indeed.

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had courtroom experience, than the law school student who has simply read cases for the purpose of mastering the principles of law. John H. Wigmore, one of the most learned of the modern teachers of law, has herein compiled a collection of trials such as have never appeared in one volume previous to this time. The author portrays the very spirit of life of peoples who lived through these various trials, and of the nations, and parts of our own nation, where they occurred.

To fully grasp and understand these living actors in this living drama, one must approach the collection from the viewpoint of the historian who is going back to a way of life now decadent. There is no more fertile field in which to delve for the purpose of learning how the minds of peoples operated than to read these sample recordings of their comparative judicial systems.

There runs throughout the early cases, regardless of location, whether it be England, France or Germany, the strain of religion and church rule. Especially is this true in the early Saxon trials by ordeal. Our forbears believed strongly in the supernatural and the miraculous. They were prone to link justice and the deity, and so great was the influence of the church on court, that sometimes the former was carried into the latter almost in toto. The oath that is today required of witnesses is the last vestige of idealism remaining in our present judicial system.

The greater number of cases recorded were those of a criminal nature. As even today it is the sensational murder trial that catches the eye of the public, so in these earlier times the trials which were recorded for posterity by the scribes were of that category. It is amazing to read how cunning and wile were so well known and practiced in early times. In France, in England, in China, and in other places, the judges and the lawyers constantly vied with one another in mental gymnastics, while today their respective positions are more definitely fixed by rules of procedure. Their skill was built on a keen insight of human nature, unfettered by our present technical rules of evidence. Especially was this true in China. There was one notable judge who, during the conclusion of a trial of an innocent young student charged with the murder of his sweetheart, sums up admirably the foundation of justice for him: "Your heart", said Judge Pao, in conclusion, "beats, I am pleased to observe, in accordance with the eternal principles of Right. I shall make it my business to forward your prospects in life. . . ."<sup>1</sup> The justice of Frederick the Great ran like this: "First, to proceed to deal equally with all people seeking justice, be it prince or peasant, for, there, all must be alike."<sup>2</sup> The span of space and time has not altered the ideal sought—justice.

This volume gives ample opportunity to examine and compare the manner and means of arriving at the proper verdict, as practiced formerly and today, both at home and abroad. A fundamental concept is constantly being reduced to its lowest common denominator. That denominator is the proper or just thing to do when all the facts are in.

The flavor of the nerve tingling situation; the hard mind, the cultured wit, are all abundantly depicted. A true *practicing student* of law will be both delighted and enlightened from a reading of this composite picture of the world at judicial work.

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1. Page 272.

2. Page 125.

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