



11-1-1930

## Legislation

William Lee O'Malley

Wilton John Sherman

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### Recommended Citation

William L. O'Malley & Wilton J. Sherman, *Legislation*, 6 Notre Dame L. Rev. 119 (1930).

Available at: <http://scholarship.law.nd.edu/ndlr/vol6/iss1/10>

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power of rescission of E. But it is important not only that H shall buy but that E will pay. E will more readily pay if he can be assured that in the case of essential mistake he will be entitled to rescind. So there are two conflicting interests. But the balance seems to be in favor of H. E is under pressure to pay or accept. Then there is the policy of maintaining confidence in negotiable paper by making the time or place of payment or acceptance the time and place for the final settlement, as between drawee and holder.<sup>17</sup>

The theory of commercial interests seems to be the true reason for the rule—a rule that has worked well in substantially all jurisdictions in the United States. Before the adoption of the N. I. L., the rule was in force in the great majority of jurisdictions in this country, there being only two exceptions (North Dakota and Oklahoma). Since the adoption of the N. I. L. there seems to be only one exception—Oklahoma.

In the third case, involving an extension of the doctrine of *Price v. Neal*, we have essential error in the transaction between H and E. *Prima facie* E has the power of rescission. But commercial interests extend to rights on this acceptance, and H should be entitled to retain the money, in case of payment, and H should be entitled to enforce the acceptance, free from any power of rescission on the part of E.

Austin J. Barlow.

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## LEGISLATION

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CRIMINAL LAW—PROPOSAL FOR REFORM IN ILLINOIS.—Complaint of criminal law and procedure in the United States is a commonplace. Bench, bar, and community, with reasonable provocation, deplore our criminal law and procedure as frustrating the expeditious administration of justice and, consequently, defeating the purpose of its enactment. Criminal procedure in this country has been indicted as archaic, slow, uncertain, and, on countless occasions, the rigidity of our substantive law of crimes has suffered by comparison with the elasticity of the criminal law that is England's.

As to the merit of this scathing criticism anyone who has sat in one of our courtrooms and observed the laboring progress of a criminal hearing will give ample and sufficiently cogent testimony. A casual observer is disgusted with the many and varied technical objections and exceptions that infest a criminal cause. This will certainly be the effect on one aware that the simple issue of the trial is the guilt of the accused. To him the red tape and legal-hairsplitting will be, at the best, unnecessary and nauseating, at the worst.

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<sup>17</sup> WOODWARD, *op. cit. supra* note 5, § 86.

No one denies that criminal jurisprudence in America is antiquated and frightfully inadequate. That reformation of procedure and simplification of criminal law is necessary is a truism. It is, in a way, consoling to know that these crying demands are not altogether unheard; but it is, to say the least, discouraging to realize that despite many honest and commendable attempts to reform our criminal body of laws so little has been remedied.

Resistance to reform has come from various sources. Lawyers, strange to say, have furnished no little strength to the formidable ranks of obstructionists. The opposition of lawyers is felt especially because the influence they have in shaping the law of the land. The legislatures in the several states are, in the main, composed of men who have practiced and who intend to continue in the practice of law. Thus the men who have the immediate power to correct and simplify criminal law profit by its very complexity. This adverse interest of our legislators accounts in no small degree, for the involved condition of our criminal codes. In serving their personal interests lawyers have forgotten the higher interest of the community.

The main source of opposition to reform, however, springs from that well-meaning but unduly cautious class of obstructionists who have an inordinate dread of reposing even a modicum of discretion in the judiciary; and, as a result literally bind the courts hand and foot by technical legislation. Unfortunately, in their attempt to safeguard the innocent man who is accused they have opened wide the door for the accused to walk away from justice.

Such is the present state of criminal law throughout the Union. Yet, with the exception of the commendable work achieved last summer by the Committee on Uniform Laws, no extensive plan to improve this deplorable state of affairs is underway. There is, however, one glimmer which if not extinguished will unmistakably brighten the whole body of American law. Reference is made to the proposal of the Illinois and Cook County Advisory Councils for the simplification of the Illinois Criminal Code. The proposal is to be submitted to the Illinois Legislature at its next regular session in January. It is interesting to conjecture what disposition this plan, which is the product of mature thought and the creature of some of the most fertile legal minds of the Illinois bar, will meet with at the hands of the law-making body in Illinois.

The proposal of the Councils has features which ought to commend it to the Illinois assembly. Its single purpose is to improve the criminal code of that state. This end has been attained by simplifying procedure and by complete renovation of the present substantive law of crimes. A consideration of the provisions of this plan will show conclusively that it excels the criminal codes of the several states; that it makes the administration of criminal law more equitable and certain; and, that it sets a precedent the influence of which will be far-reaching.

In the first place the plan proposes that a number of offenses hitherto considered felonies will be reduced to misdemeanors. Thus

treason, murder, manslaughter, robbery with a gun, rape, arson of a dwelling house, kidnapping for ransom, and bombing will be still punishable as felonies by imprisonment in the penitentiary, or, where the offense is capital by death. But attempts to commit the enumerated crimes and conviction of less repugnant crimes; such as, embezzlement, larceny, and forgery, which are now held to be felonies, are made misdemeanors punishable in any institution other than a penitentiary for a period not to exceed three years.

By recognizing this fine distinction in the magnitude of crimes and by punishing them according to their nature, the Councils have not only called into play a principle of justice that is fundamental; but they have made punishment of crime more certain. It goes without saying that a jury will convict more readily if a prosecutor asks that a punishment commensurate with the gravity of the offense be inflicted than when he seeks a punishment out of all proportion to the enormity of the offense. When juries start returning verdicts of "guilty," criminality will decrease noticeably. No principle of criminology is less disputable than that promptness and certainty of punishment are more effective for the deterrence of crime than severity of punishment.

Another feature of the plan which merits consideration is the proposal that the more serious misdemeanors; namely, forgery, larceny, and attempts to commit felonies, shall be punishable on the second offense by life imprisonment. Thus while the Illinois plan reduces crimes ordinarily considered felonies to misdemeanors, consequently, showing consideration for the possible lack of criminality in the first offender, it at the same time provides that an adequate penalty be imposed upon the habitual and incorrigible criminal. Further than that the automatic imposition of life imprisonment in the penitentiary upon conviction a second time of this class of misdemeanor ought to have no little deterrent effect upon the most calloused criminal.

The plan goes on further and provides for a second class of misdemeanors. They are crimes less repugnant to the state. Included in this category are prostitution, carrying concealed weapons, and driving while intoxicated. These misdemeanors are punishable as misdemeanors of the first class, that is to say, they are punishable by three years imprisonment, except that they are never punishable by imprisonment in the penitentiary.

A last provision for improving the substantive criminal law provides for the punishment of less serious misdemeanors and petty offenses. The former includes the compounding of crimes, malfeasance in office where no funds are involved, and frauds where no money is lost. These offenses are punishable by six months imprisonment and a fine of \$200. The latter, petty offenses, are punishable by not more than thirty days imprisonment and a fine of \$200.

The balance of the plan has for its purpose reform of the procedural part of Illinois Criminal Code. This is brought about by simplification of the indictment, limiting the necessity of grand juries and giving discretion to the court to fix the punishment of the accused

within maximum and minimum limits, the jury first having determined the issue of guilt.

By the present code in Illinois, the jury is allowed to determine not only the guilt or innocence of the accused but also the extent of his punishment. Juries, however, are not qualified to impose punishment on a criminal. Punishment should be meted out with a view to the reformation of the offender. While a judge is by no means the most competent one to analyze the condition of the criminal and prescribe a remedy, he is infinitely more qualified than a jury whose punishment for the most part is the result of emotion and, as often as not, arbitrary. The great power of fixing the sentence of the criminal is so often abused by juries that it will surely be safer in the hands of judges. For these reasons this particular provision of the Councils' plan can have only a salutary effect.

The proposal of the Illinois and Cook County Advisory Councils is being submitted to the legislature only after extensive research and mature thought. The Councils made an exhaustive study of the criminal codes of the several states and Canada. If adopted by the Illinois Assembly the new criminal code will indubitably put Illinois out in front of other states in criminal legislation. More than that it will set a precedent that will tend to encourage the people and legislators of other states to modernize their obsolete criminal codes. If, on the other hand, this plan is repudiated by the law-making body of Illinois when they convene next January, all the splendid efforts of the Illinois and Cook County Judicial Advisory Councils will be in vain, proponents of reform will be disheartened and prospects of nationwide reform of criminal law will be extremely darkened. What will be the verdict of the Illinois Legislature?

*William Lee O'Malley*

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DECLARATORY JUDGMENTS—IN GENERAL—INDIANA IN PARTICULAR.—A Declaratory Judgment allows persons who are uncertain as to their rights and duties to ask a ruling from a court as to the legal effect of an act before they have progressed with it to a point where anyone has been injured. England has been much more enterprising in regard to recognizing declaratory judgments than we in the United States. As far back as 1852,<sup>1</sup> the English Parliament passed a Declaratory Judgment Act which provided that the court could give advice to parties with or without coercive relief at the option of parties. The present status of the law in England is that any person claiming to be interested in a deed, will or other written instrument, may apply by originating a summons for the determination of a question of construction arising under an instrument, for a declaration of rights of the person interested. The greatest objection which English Courts found in giving declaratory judgments was that a court may not

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<sup>1</sup> Victoria, c. 86.

express opinions in regard to construction for the mere information of the parties, disconnected from some equitable relief sought. England overcame this objection in 1883 when Parliament passed an act declaring that, "No action or proceeding shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby and the court may make binding declarations of right whether any consequential relief is, could or could not be claimed."<sup>2</sup>

Professor Sunderland has said that "Prior to 1883, the English courts were employed only as repair shops; since that time have been operated as service stations."<sup>3</sup> The advantages that prospective litigants in England have over the same persons in the United States are manifold. There, through declaratory judgments, litigation is a friendly suit, and not a personal animosity. Here, to prosecute a suit is usually to start a fight, and many just causes are not litigated because of the desire not to break friendships. In England, the court in declaratory judgments operates as a diplomatic, instead of a belligerent agency. The defendant is treated as a gentleman and not as a wrongdoer. The court becomes the guardian and advisor of those who respect the law. It is a great advantage from the pecuniary standpoint to have a question decided before breach. To hold that a man must violate the law in order to ascertain its validity or construction, is a barbaric requirement, to say the least. Professor Borchard has truly said "To hold that one must breach a contract before securing a judgment pronouncement upon its obscure terms, is not in harmony with any true concept of justice. To rectify this, declaratory judgments are now legalized."

Many of our courts have objected to these judgments on the ground that they deprive one of his constitutional right of trial by jury. On the contrary, they do not deprive one of his constitutional guarantees as these judgments are declaratory or advisory opinions only. Many attempts to introduce declaratory judgments into the United States were defeated between the years 1875 and 1910. Among these cases is *Greeley v. Nashua*,<sup>4</sup> where the plaintiff requested the court to inform them what their legal rights and those of defendants were in the property devised by a will. The court held that such questions are not ordinarily adjudicated until it becomes necessary to decide them in proceedings instituted for the redress of wrongs. In *Bevans v. Bevans*,<sup>5</sup> Chancellor Magie said, "It is settled that the court will not express opinions in regard to construction for the mere information of parties disconnected from some equitable relief sought." This view was followed by many states, some of them denouncing these judgments even more rigorously than the two cases above. It was not a very promising outlook for the framers who attempted in our country the first Declaratory Judgment Acts. Florida was the first to attempt an act in 1919.

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<sup>2</sup> 16 Mich. L. Rev. 74 (1917).

<sup>3</sup> Sunderland, *A Modern Evolution in Remedial Rights,—The Declaratory Judgment* (1917), 16 Mich. L. Rev. 69, 77.

<sup>4</sup> 61 Ind. 457 (1878).

<sup>5</sup> 69 N. J. Eq. 1 (1905).

The most severe objection it met was that this would be nothing more than a mooted question before the court. This objection is unfounded as a moot case is easily distinguished from a declaratory judgment. A moot case is imaginary, does not exist in fact, and to decide it serves no useful purpose; nothing is adjudicated, no actual rights are determined, and nothing is affected. Whereas a declaratory judgment must always deal with a real dispute of a real fact; it must deal with actual rights of existing litigants.

The State of Indiana was not among the first to formulate and pass a Declaratory Judgment Act; but at a very early period in the history of legislation on this subject in the United States, Indiana lawyers and legislators realized the great possibilities and fruitful field open to such an Act, and their foresight culminated in the Declaratory Judgment Act of Indiana in 1927.<sup>6</sup> Section 2 of the Indiana Act provides that, "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 rights, status or other legal relation thereunder."<sup>7</sup> The interest contemplated by the statute means a substantial interest as may by decree of court be either enlarged or diminished. The Indiana Statute is a very good criterion for determining who is, and who is not the real party in interest."<sup>8</sup> Any person may have determined any question of construction or validity and obtain a declaration of rights, status, or other legal relation thereunder." This must be a *bona fide* question and jurisdiction will never be assumed unless the tribunal appealed to is satisfied, that an actual controversy, or the ripening cause of one, exists between the parties, all of whom are before the court."<sup>9</sup>

Another very useful field for Declaratory Judgment Acts is in the determination of validity of statutes. The Act provides, "Any person interested, whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract 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 rights, or other legal relations thereunder." Particularly useful will an action of declarator be found in regard to the validity of zoning acts and its various sections. "A contract may be construed either before or after there has been a breach thereof." This means oral as well as written contracts and will prove a great aid in avoiding expensive litigation and the hazard of breaking a contract because a party, or even an attorney has misconstrued it. "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

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<sup>6</sup> IND. ANN. STAT. (BURNS, SUPP. OF 1929) § 680. 2.

<sup>7</sup> Hemmenway v. Corey, 16 Vt. 225 (1844).

<sup>8</sup> IND. ANN. STAT. (BURNS, 1926) 258.

<sup>9</sup> Axton v. Goodman, 265 S. W. 806 (Ky. 1924).

the objection of invalidity because a court may not be called upon to decide moot questions. "All orders, judgments, and decrees under this act may be reviewed as other orders, judgments, and decrees." This section 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 is the same as in any other proceeding. As to the jurisdiction to be assumed, the act grants the courts of record within their jurisdiction, power to render declaratory judgments. "Further relief based on a declaratory judgment or decree may be granted whenever necessary and proper. The application therefore shall be by petition to a court having jurisdiction to grant the relief." If the application is sufficient, the court shall then, on reasonable notice given, require the adverse parties to come in and state why further relief should not be granted. "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 authorizes a trial by jury if demanded and removes any constitutional objection that the act infringes on the Bill of Rights preserving the right of trial by jury. "In any proceeding under this act the court may make such award of costs as may be deemed equitable and just." This gives the court great discretionary control over the right to apportion the costs or tax them against either one of the parties.

"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." As to who shall be made parties defendant section 20 of the Civil Code is to be followed.<sup>10</sup> The Act provides that the word "person" means any partnership, joint stock company, unincorporated association or society or municipal or other corporation of any character whatsoever. The several sections of the Act, except section 1, providing what the Act is, are declared to be independent and severable and the invalidity of any part or feature thereof shall not affect or render the rest of the Act invalid, or inoperative. After comparing the above provisions with the Constitution, it does not appear that any part or feature of any section of the Act is unconstitutional.

The gradual but eventual tendency in this country is to adopt the body of declaratory adjective law, so necessary to orderly procedure; and, it seems to be only a question of time until it will be as widely used in the United States as it is in England. The power of the

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<sup>10</sup> IND. ANN. STAT. (Burns, 1926) 276; *De Charette v. St. Matthews Bank and Trust Co.*, 283 S. W. 410 (Ky. 1926).