VIRGINIA LAW REGISTER

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Probably one of the most valuable acts passed by the last General Assembly was the act in regard to declaratory judgments to be found on page 902 of the Session Acts for 1922. This act will be very hard to find because it is neither indexed under Declaratory Judgments or Judgments but indexed under Courts.

Declaratory Judgments.

At the last meeting of the Commissioners on Uniform Laws amongst the States, held at San Francisco, the following act was recommended to be passed, and we publish it in order to compare it with our own act and in order that those interested among our legislators may see whether this act might not be passed in lieu of the one now on the Statute Book. The act is as follows:

SECTION 1. (Scope) Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

SECTION 2. (Power to Construe, etc.) 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 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, status or other legal relations thereunder.

SECTION 3. (Before Breach) A contract may be construed either before or after there has been a breach thereof.

SECTION 4. (Executor, etc.) Any person interested as or through an executor, administrator, trustee, guardian or other

fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que* trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or other legal relations in respect thereto.

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

SECTION 5. (Enumeration not exclusive) The enumeration in Section 2, 3, and 4, does not limit or restrict the exercise 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.

SECTION 6. (Discretionary) 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 proceeding.

SECTION 7. (Review) All orders, judgments and decrees under this act may be reviewed as other orders, judgments and decrees.

SECTION 8. (Supplemental Relief) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor 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.

SECTION 9. (Jury Trial) 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 as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

SECTION 10. (Costs) In any proceeding under this Act the Court may make such award of costs as may seem equitable and just.

SECTION 11. (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 proceeding. 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 proceeding and be entitled to be heard.

SECTION 12. (Construction) This Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

SECTION 13. (Words construed) 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 corporation of any character whatsoever.

SECTION 14. (Provisions Severable) The several sections and provisions of this Act except sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof, shall not affect or render the remainder of the act invalid or inoperative.

SECTION 15. (Uniformity of Interpretation) 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 Federal laws and regulations on the subject of Declaratory Judgments and decrees.

SECTION 16. (Short title) This Act may be cited as the Uniform Declaratory Judgments Act.

SECTION 17. (Time of taking effect) This Act shall take effect ( )

This Act is a department of the old Roman Law of Procedure which allowed a judge to decide in a preliminary way certain questions of law or fact which the parties themselves by agreement, or the magistrate at the request of either one of the parties might submit to the judge for decision. This decision probably had no value except as settling the law as it then stood, but the

exercise of it constantly grew, and in the middle ages we find that the law had so developed that the questions of status of property rights connected therewith and of the validity or invalidity of wills and other legal instruments constituted the principal subjects of declaratory actions. In an action for a declaratory judgment the plaintiff asks a declaration that the defendant has no right as opposed to the plaintiff's privilege; that is to say that the plaintiff is under no duty to the defendant, or that the defendant has no right as opposed to the plaintiff's privilege, or that the plaintiff is under an immunity from any power of or control by the defendant. Of course this was a violent departure from the Common Law conception of the duty of courts. It was only when some wrong had been perpetrated that the Common Law Courts had any judicial notice of the fact. The scope of our judicial function before the passage of the Declaratory Acts was entirely curative. The purpose of this act is really to prevent litigation. Any party to a contract, for instance, or interested in a will may have a judicial construction of the same without undue expense and at a time when the effect of an adverse decision is not likely to prove disastrous. The nearest analogy to this form of proceeding is to be found in *quia timet* proceeding, and though it may well be said that it is not a close analogy, yet it gives some idea of the nature of the proceedings. Its value is beyond question. Had the present Act been in force before the litigation in Surry Lumber Co. *v.* J. F. Wellons, et als., 129 Va. 536, that expensive litigation—which amounted to nothing—would have been prevented and the entire matters in dispute settled without the necessity of further litigation. Under a very simple and inexpensive proceeding the deed in that case could have been construed and the matter ended. It has worked with wonderful success in England, whose elastic rules of court put our cumbersome and antiquated system of practice and pleading to shame. The leading case on the subject is Guaranty Trust Co. of New York *v.* Hannay & Co. (1915), 2 K. B. 536, which is most admirably annotated in Am. Law Reports, p. 1. In this case the court decided—Buckley, J. dissenting—that the court had power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant and that the rule so construed is merely an extension of the practice and procedure of the court

and not *ultra vires*. The rule alluded to is Order XXV & 5: "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 or could be claimed or not." We think it is to be regretted that our Act did not simply contain this rule and no more. We believe it would have been amply sufficient to cover the whole ground. We are inclined to believe that the Act set out in the beginning of this article has several features which might well be substituted for our own Act. For instance: Our Virginia Act only allows the court to entertain an action for a declaratory judgment in *cases of actual controversy*. From this we take it that the parties must have a dispute as to their respective rights in a given case before the courts will take jurisdiction. This would not be the case under the English rule mentioned, nor under the proposed Act. Under that the courts will have power to declare rights, statutes and other legal relations whether or not further relief is or could be claimed and no judgment open to the objection that it is declaratory. In other words, before war is openly declared the courts may decide that there is no occasion therefor. The proposed Act permits the court to construe a contract either before or after a breach. Our present Act may be broad enough to cover the questions which are fully set out in Sections 2 and 4 of the proposed Act, when it sets out that the enumeration therein set out "does not exclude other instances of actual antagonistic operation and denial of right." This language, however, seems to strengthen the language as to "actual controversy" being necessary to invoke the aid of the court, which ought not to be. The objection has been made and in one case *"Anway* v. *Grand Rapids Railway Co."* (Michigan 1920), 179 N. W. 350, a statute similar to ours has been declared unconstitutional on the ground that under a constitution dividing governmental powers into three departments and conferring judicial power upon the courts, the Legislature cannot confer upon the courts a power not judicial nor require them to perform functions not judicial in character. The dissenting opinion of Sharpe, J., it seems to us is an unanswerable reply to the majority opinion. He says: "The courts are not thereby required to pass on moot cases, or to answer abstract questions of law. There must be an

action or proceeding brought in the court by petition or bill of complaint. This must be determined in the usual way except as modified by the provisions of the act. The rights of the parties must be declared,—that is, determined and stated,—and, when ready to be promulgated in the legal form of a judgment, decree, or order, it shall not be subject to the objection that no consequential relief is or could be claimed thereunder. In the action or proceeding, all of the parties to be affected by the determination of the court must be made parties. The judgment, decree, or order declaring the rights of the parties is final and binding upon all such parties, though unenforceable, so far as issuing execution or mandatory process is concerned, without further application to the court under sec. 3. To entitle such an action or proceeding to be brought, there must be an actual, concrete controversy, a bona fide contest over asserted, existing legal rights. All of the parties interested must be brought before the court. A trial must be had of the issues presented in the usual way. The court must determine the rights of all the parties interested in the controversy, and a judgment, decree, or order entered, conforming to such determination. The act does not authorize a mere declaration of obligation. It is only when the plaintiff has rights in the matter in respect of which the declaration is sought that a declaration of rights can be made. In my opinion, the performance of such duties is an exercise of judicial power, and no other duties are imposed on the courts by this act.

The conclusion thus reached leads to a consideration of what I deem to be the only doubtful question presented: Does the lack of power under the act, to enforce obedience to the determination of the court by award of execution or mandatory process, render the proceeding non-judicial? I cannot so conclude. Neither do I find that this element has usually been included in defining such power.

To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.' Cooley, Const. Lim. 7th ed. 132.

'The primary functions of the judiciary are to declare what the law is, and to determine the rights of parties conformably thereto.' 12 C. J. 871.

'All powers, however, even though not judicial in their nature, which are incident to the discharge by the courts of their judicial functions, are inherent in the courts.' 12 C. J. 873.

'The term "judicial power" includes both the power to determine controversies and to interpret laws.' 6 Am. & Eng. Enc. Law, 2d ed. 1053.

'The office of a judicial opinion under the common-law system is to set out the grounds upon which a legal controversy is decided in favor of one litigant and against the other, and incidentally to serve as a guide for determining similar controversies in the future.' 6 Am. & Eng. Enc. Law, 2d ed. 1065.

'Judicial Business.—Such as involves the exercise of judicial power or the application of the mind and authority of a court to some contested matter, or the conduct of judicial proceedings, as distinguished from such ministerial and other acts incident to the progress of a cause as may be performed by the parties, counsel, or officers of the court, without application to the court or judge.' Black's Law Dict. p. 668.

In Risser *v.* Hoyt, 53 Mich. 185, 193, 18 N. W. 615, it is said: 'The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.'

In Heck *v.* Bailey, 204 Mich. 54, 169 N. W. 940, Mr. Justice Brooke said: 'Courts do not speak through their opinions, but through their judgments and decrees.'

The act in question provides for a judgment, order, or decree. In that case, proceedings based on the mere opinion of the court were set aside."

Is not the present scope of judicial functions as much declaratory as curative? Ought it not to be? We find no case directly bearing upon the constitutionality of the Act in any of our State Courts, but in New Jersey—Wisconsin, Minnesota, Illinois and Connecticut there are cases which practically sustain statutes similar in their nature to the "Declaratory Judgment Act." There are two cases in the Supreme Court of the United States—Muskrat *v.* U. S. (1911), 219 U. S. 346, and Tregea *v.* Modesto Irr. Dist. (1896), 164 U. S. 179, in which that court declined to take jurisdiction on the ground that no final order conclusive on the parties could be made. These cases would seem now, not to be authority

against the present Act which while dispensing with consequential relief as a condition of jurisdiction contemplates an actual case or controversy upon which the order or judgment may operate as *res adjudicata.* Of course if there is any question of fact which may be disputed we do not believe the Act would apply for the main ideas of the Act are to settle the law—not the facts. We have had several times in the REGISTER to lament the fact that when a constitutional question was before our court construction was refused on the ground that it was not necessary to the decision of the case, thus leaving for years possibly a doubt which in the end might jeopardise personal and property rights. This Act might and surely should end such a condition of affairs.

Liquor on the High Seas and Elsewhere.

The opinion of Attorney General Daugherty in regard to the sale of liquor on the High Seas on vessels flying the American Flag does not in any way alter our opinion as expressed in our Editorial in the July number of the REGISTER entitled "When and Where Does the Jurisdiction of the United States Cease to Exist?" With all due deference to the learned Attorney General, we insist that his conclusion that "The National Prohibition Act is an act of general jurisdiction in force whenever the Eighteenth Amendment applies, and the Courts of the United States have jurisdiction to punish its violations on the High Seas" is absolutely wrong in so far as it states that the Courts of the United States have jurisdiction to punish its violations on the High Seas. We do not think there can be the slightest doubt that the transportation and sale of liquor on any vessel of the United States, wherever it may be is a violation of the Volstead Act, but that no Court has any power to inflict any punishment for such violation on the High Seas. For it is perfectly clear that no offense on a vessel of the United States can be *punished* unless it is a crime against International Law or the crimes provided for in Sections 5339 to 5391 of the 2nd Edition of the Revised Statutes of the United States of 1878. These are the crimes for which punishment is provided for under the Act. Offenses against the Volstead Act or the Eighteenth Amendment are not set out in those Sections and no punishment therein pro-

vided for; so transportation, sale, etc., are offenses for which no punishment is provided in the only sections providing for punishment of crimes on the High Seas. *Crimen sine penitentia* so to speak. Of course when those ships are in an American Port they are within the rule of the law just like any other "bootlegging" vessel. We are inclined to think that the Attorney General is right in his other contention, i. e., that foreign ships have no right to bring intoxicating liquors into any of our ports, no matter whether sealed or not. The United States has absolute control of its own ports and can say what things cannot be brought into them. They can say no dynamite shall be brought into our ports on any vessel and no foreign vessel could bring in dynamite. In the eyes of many good people—and others—intoxicating liquor is as dangerous as dynamite and our Eighteenth Amendment practically outlaws it. We say no vessel shall bring in any immigrants over and above a certain percentage and no one disputes this. Then why can we not forbid, as we do, any vessel from bringing into our ports liquor which has been outlawed?

Time of Signing Bills of Exceptions. Sections 6252-6253 of the Virginia Code.

We must confess a good deal of surprise in finding that during the session of the Supreme Court of Appeals at Wytheville in June there were as many as four cases which were dismissed for failure to have the bills of exceptions signed within the time required by law, i. e., sixty days; showing a want of attention on the part of attorneys hard to realize.* But we must confess equal surprise at the decision of the Court in *Kelly* v. *Trehy,* decided June 15th, 1922, which construes section 6252, in which the Court practically overrules Bull *v.* Evans, 96 Va. 1, to mean that in computing the time in which bills of exceptions may be filed the first day is counted as one of the sixty—i. e., if a judgment is rendered on March 29th, the sixty days expired on the 29th of May, practically fifty-nine days. We believe that the dissenting opinion of Prentis, J., states the law as it should be

*And were these four the only ones in which such error was committed it would not be so surprising; but there are more than a dozen such cases in the last few years.

and that clause 8 of section 5 of the Code of 1919 does not apply to the sixty days' limit as to bills of exceptions. This view, as Judge Prentis well says, "is the construction which has been placed upon the section by the Bar, the trial courts and until recently by this Court" (meaning the Supreme Court of this State). Certainly this method of computing days is in almost universal use and we trust our next General Assembly will make it plain that in *all cases* where time in days is to be computed the first day is not to be counted, so that no confusion can hereafter arise.

Court Stenographers.

These four cases if they teach us anything teach more strongly the importance of a Court Stenographer. Bills of exceptions ought to be drawn up and signed upon most questions just as soon as a point is made and decided by the Judge. Of course the bill which contains the evidence cannot be so made up and signed. But where there is a Court Stenographer it need not be delayed but a short while. When the writer came to the Bar it was the universal custom to prepare and have signed the bills at the Bar, as soon as the point was decided, excepting of course the bill upon the evidence. We recall the wrath and impatience with which Judge Shackelford—who hated delay and pushed cases to the limit—would watch Judge Egbert R. Watson, when the latter "saved the point" and immediately drew his bill at the Bar. Judge Watson was very deliberate—wrote very slowly—but a most beautiful and legible handwriting—and the Judge on the bench would twist and turn and sometimes remonstrate, but in vain. The Judge who was clearly in his rights, was very courteous—as indeed he always was—but calmly and deliberately went his way and the bill was read and signed and the case went on. Now-a-days this would be intolerable. So many disputes often arise as to what the evidence really was that there should be some indisputable way of settling it. A sworn Court Stenographer—paid by the State—should be provided in each Circuit. In the long run it would pay the State. Some arrangement might be made by which the Stenographer's bill in civil cases might be taxed in the costs. Our ever penny-wise and pound-foolish lawmakers seem to us to fail to recognize the fact that

everything which expedites and aids in the administration of justice is the greatest economy and in the long run a saving of money to the people. Nearly every State in the Union, which is in every way progressive, has Court Stenographers. Why should Virginia lag behind?

Twice in Jeopardy—Previous Trial for Murder of One Person Not a Bar to Prosecution for Murder of Another Killed in the Same Affray.

An interesting question never before raised in Virginia has been decided by our Supreme Court at Wytheville on June 15th in case of *Seymour et al* v. *Commonwealth*. The accused was on trial for the murder of a Japanese named Hadie Sasaki in Norfolk Harbor. Sasaki was one of two Japanese who were killed in a general affray on a Japanese ship in the course of which a number of shots were fired—two Japanese dying from shots and two wounded. The accused was one of a party who conspired to rob the ship, impersonated U. S. officials and attempted to arrest the Japanese as violators of the Volstead Act. The accused, with his co-conspirators, was tried for the murder of Shagji Miyau one of the Japanese who was killed. All of the defendants in this case were acquitted. They were then tried for the murder of Hadie Sasaki and filed a paper designated as a special plea of *res adjudicata*. It tendered no issue of fact, but prayed that the court exclude from the consideration of the jury all evidence purporting to set up or charge them on the occasion in question with robbery or attempted robbery, and a conspiracy to commit the same, for the reason that on the previous trial for the murder of Shagji Miyau, upon substantially the same evidence, the defendants and each of them were duly acquitted, and that as a result of that previous trial each and every issue involved and submitted to the jury, including the issue of robbery, or attempt to commit the same, or conspiracy to commit the same, was decided in favor of the defendants; and they alleged that as the result of that previous trial the commonwealth and the parties to the said indictment were fully and completely foreclosed and estopped from setting up or introducing evidence

of said robbery or attempt to commit the same and conspiracy to commit the same, and other matters bearing upon said robbery and attempt to commit the same and conspiracy to commit the same, and concluded with an offer to verify. This plea was rejected and the accused was found guilty of murder in the first degree. The Supreme Court deemed it unnecessary to pass upon this paper as the testimony was offered a motion made to exclude it which was sustained and decided that no error was committed in allowing the witnesses to testify to the facts as to which they had testified in the other trial. The Court quotes numerous authority to the fact that the protection which is guaranteed to persons accused of crime is that they shall not be placed twice in jeopardy for the same offense. There is no constitutional or statutory guaranty that the evidence upon a trial of an accused person for a different offense from that of which he was either convicted or acquitted may not thereafter be offered to prove a distinct, but related offense. The Court very well says that if the contention is true that a former acquittal for the murder of one man affords them immunity for killing another, what would be the result of a conviction in the former trial. Would it not be that they could not question in the second trial the facts proven in the first. The Commonwealth having the right to indict the accused for each homicide, though committed pursuant to the same conspiracy, had the right to try under each indictment—indeed could not do otherwise—and having this right was entitled to introduce all the evidence tending to prove the commission of the specific crime charged. Of the correctness of this decision there cannot be the slightest doubt.