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## Declaratory Judgment to Declare a Prior Judgment Void

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DECLARATORY JUDGMENT TO DECLARE A PRIOR JUDGMENT VOID.—An order of the state fire marshal directing the removal of plaintiff's house as a fire hazard was affirmed on appeal to the Lake Circuit Court. No further action was taken. The present action was instituted in the same court for a review of the prior judgment and for a declaratory judgment that the prior judgment was void. Held, affirmed for defendant. The Uniform Declaratory Judgments Act<sup>1</sup> may not be utilized to assert the invalidity of a judgment. *Lambert v. Smith* (Ind. 1939), 23 N. E. (2d) 430.

The principal case decides either (1) that the prior judgment involved is not subject to collateral attack or (2) that a declaratory judgment action is not a proper method of collateral attack. If the prior judgment is not subject to collateral attack it is because the prior judgment is not void and is therefore *res judicata*.<sup>2</sup> The more logical inference from the case is that a declaratory judgment is not a proper method of collateral attack. This inference would seem to follow from the court's statement that even giving the Uniform Declaratory Judgments Act "the broadest possible interpretation and conceding that in a proper case a party may have a declaration of rights, status, or other legal relations under a judgment we are convinced that such a statute may not be utilized to assert the invalidity of a judgment. To permit such would amount to a collateral attack."

The Uniform Act provides that courts "shall have power to declare rights, status, or other legal relations whether or not further relief is or can be claimed."<sup>3</sup> The declaratory judgment is neither strictly equitable nor legal in its nature though it has historical roots in equity.<sup>4</sup> The judgment is not an advisory opinion<sup>5</sup> nor the determination of a moot question<sup>6</sup> and when rendered is *res judicata*.<sup>7</sup> As in other actions there must be an actual case or controversy.<sup>8</sup>

<sup>1</sup> Ind. Acts 1927, Ch. 81; Burns Ind. Stat. (1933), Sec. 3-1101-16.

<sup>2</sup> *Steenburg v. Kyle* (1919), 188 Ind. 26, 121 N. E. 537; *Welsh v. Capital Paper Co.* (1921), 76 Ind. App. 416, 132 N. E. 313; *Good Health Dairy Products Corp. v. Emery* (1937), 275 N. Y. 14, 9 N. E. (2d) 758, 112 A. L. R. 401; *Gavit, Jurisdiction of Courts* (1936), 11 Ind. L. J. 324.

<sup>3</sup> Ind. Acts 1927, Ch. 81, Sec. 1; Burns Ind. Stat. (1933), Sec. 3-1101.

<sup>4</sup> *Pacific Indemnity Co. v. McDonald* (1939), 107 F. (2d) 446; *Borchard, Declaratory Judgments and Insurance Litigation* (1939), 34 Ill. L. Rev. 245.

Procedure under the Uniform Declaratory Judgments Act is, however, essentially equitable. *Gavit, Procedure Under the Uniform Declaratory Judgments Acts* (1933), 8 Ind. L. J. 409.

<sup>5</sup> *Rauh v. Fletcher Sav. & Trust Co.* (1935), 207 Ind. 638, 194 N. E. 334; *Karihers Petition* (1925), 284 Pa. 455, 131 Atl. 265. "The mere suggestion that they are alike indicates profound misapprehension," *Borchard, Declaratory Judgments* (1934), p. 50; *Willis, Constitutional Law* (1936), p. 100.

<sup>6</sup> *Washington-Detroit Theatre Co. v. Moore* (1930), 249 Mich. 673, 229 N. W. 618; *Rauh v. Fletcher Sav. & Trust Co.* (1935), 207 Ind. 638, 194 N. E. 334; *Gavit, Procedure Under the Uniform Declaratory Judgments Act* (1933), 8 Ind. L. J. 409.

<sup>7</sup> Note (1933), 87 A. L. R. 1241 (*Declaratory judgment operates as res judicata*); *Rauh v. Fletcher Sav. & Trust Co.* (1935), 207 Ind. 638, 194 N. E. 334 (*Dictum*); *Farabaugh & Arnold, The Uniform Declaratory Judgments Act* (1928), 3 Ind. L. J. 351; *Borchard, Declaratory Judgments and Insurance Litigation* (1939), 34 Ill. L. Rev. 245.

<sup>8</sup> *Nashville, C. etc. R. Co. v. Wallace* (1933), 288 U. S. 249, 53 Sup. Ct. 345, 27 L. Ed. 730 (*Action under declaratory judgments act is a case or controversy reviewable by the United States Supreme Court*); *Zoercher v. Alger*

The vast majority of decisions under the Uniform Act have dealt with the declaration of rights, status, or other legal relations not previously adjudicated.<sup>9</sup> A declaration of contract rights,<sup>10</sup> marital status,<sup>11</sup> or the extent of administrative powers and disabilities<sup>12</sup> are typical examples of the subject matter of declaratory judgments. In only a few cases has the complaining party attempted to question the validity of a prior judgment and such actions have generally been unsuccessful.<sup>13</sup>

Any void judgment is subject to collateral attack because it is not *res judicata*.<sup>14</sup> That a judgment cannot be attacked collaterally follows from the fact that it is *res judicata*.<sup>15</sup> Any statement that a judgment cannot be collaterally attacked is a conclusion rather than a legal reason. There is much confusion in the cases as to what is a collateral attack.<sup>16</sup> The courts frequently discuss *res judicata* and collateral attack indiscriminately, but there is a fundamental difference between the two although both involve the conclusiveness of prior judgments.<sup>17</sup>

If the principal case holds that a declaratory judgment action is not a proper method of collateral attack the Indiana Supreme Court has again limited the applicability of the declaratory judgment device by a narrow interpretation of the Uniform Act.<sup>18</sup> There is authority for the proposition that a declaratory judgment action is a proper method of collateral attack where collateral attack is allowed.<sup>19</sup> The court apparently seeks to restrict the

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(1930), 202 Ind. 214, 172 N. E. 186, 70 A. L. R. 1232; Farabaugh & Arnold, *The Uniform Declaratory Judgments Act* (1928), 3 Ind. L. J. 351, 444 (The interest contemplated by the statute means a substantial interest in the particular question presented).

<sup>9</sup> See generally, Borchard, *Declaratory Judgments* (1934).

<sup>10</sup> *Rauh v. Fletcher Sav. & Trust Co.* (1935), 207 Ind. 638, 194 N. E. 334 (Rights under a contract for the sale of stock); *Owen v. Fletcher Sav. & Trust Bldg. Co.* (1934), 99 Ind. App. 365, 189 N. E. 173 (Declaratory judgment construing the terms of a 99-year lease).

<sup>11</sup> *Lowe v. Lowe* (1934), 265 N. Y. 197, 192 N. E. 291 (Declaratory judgment that plaintiff was the lawful wife of defendant and that a prior Nevada divorce decree was void).

<sup>12</sup> *Meara v. Brindley* (1935), 207 Ind. 657, 194 N. E. 351 (Duties of the township trustee and advisory board).

<sup>13</sup> *Bowser v. Tobin* (Ind. 1939), 18 N. E. (2d) 773; *Ohio Casualty Ins. Co. v. Gordon* (C. C. A. 10th 1938), 95 F. (2d) 605; *Kings County Trust Co. v. Melville* (1926), 127 Misc. 374, 216 N. Y. S. 278; *Back's Guardian v. Bardo* (1930), 234 Ky. 211, 27 S. W. (2d) 960.

<sup>14</sup> *Fidelity & Casualty Co. of N. Y. v. State* (1933), 98 Ind. App. 485, 184 N. E. 916; *Reid v. Independent Union of All Workers* (1937), 200 Minn. 599, 275 N. W. 300; *Buchanan v. Buchanan* (1938), 170 Va. 458, 197 S. E. 426; *Kamp v. Kamp* (1874), 59 N. Y. 212; *Freeman, Judgments* (1925), Sec. 305.

<sup>15</sup> *Permian Oil Co. v. Smith* (Tex. 1934), 73 S. W. (2d) 490, 107 S. W. (2d) 564, 111 A. L. R. 1152 ("Lacking the anchorage of finality a judicial system would be little more than a rule of fiat"); *Keith v. Willers Truck Service* (1936), 64 S. D. 274, 266 N. W. 256, 104 A. L. R. 1471 (Facts *res judicata*).

<sup>16</sup> *Gavit, Jurisdiction of Courts* (1936), 11 Ind. L. J. 324.

<sup>17</sup> *Freeman, Judgments* (1925), Sec. 630; 15 R. C. L. 840.

<sup>18</sup> *Brindley v. Meara* (1935), 209 Ind. 144, 198 N. E. 301, 101 A. L. R. 682, criticized by Borchard, *An Indiana Declaratory Judgment* (1936), 11 Ind. L. J. 376. Professor Borchard states that the Indiana Supreme Court not only gave a narrow but an erroneous interpretation of the Uniform Declaratory Judgments Act.

<sup>19</sup> *Cockrell v. Board of Com'rs, etc.* (1936), 16 F. Supp. 273, reversed on the merits (C. C. A. 5th 1937), 91 F. (2d) 412, cert. den. (1937), 320 U. S. 740,

province of the declaratory judgment to the declaration of rights, status, or other legal relations not previously adjudicated. It is indeed unfortunate if the declaratory action is to be so limited. Other jurisdictions have found the declaratory judgment an effective device to settle controversial issues regarding doubtful prior decisions.<sup>20</sup> Uncertainty may arise because of a statute subsequently passed, or because of some matter at the time of or subsequent to the former trial. The utility of the declaratory judgment, in fact, lies in the ability to secure a declaration to remove uncertainty and insecurity.<sup>21</sup> Its use for this purpose should be encouraged.<sup>22</sup> The United States Supreme Court sanctions extensive use of the declaratory judgment by providing in rule 57, Federal Rules of Civil Procedure, that the "existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."<sup>23</sup> A new application of a procedural device is apt to disturb the ordinary person, but the mere fact that a thing is new is no reason for the denial of its use. The Uniform Act expressly provides that "this act is to be remedial; its purpose is to settle and afford relief from uncertainty and insecurity; and it is to be liberally construed and administered."<sup>24</sup>

The result of the principal case is not questioned.<sup>25</sup> It is submitted, however, that instead of restricting the scope of the Uniform Declaratory Judgments Act, a more logical theory and a more authoritative basis for the present holding

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58 Sup. Ct. 142; *Lowe v. Lowe* (1934), 265 N. Y. 197, 192 N. E. 291 (Declaratory judgment granted to declare plaintiff the wife of defendant and that a divorce decree made without jurisdiction in Nevada was void); *Dodge v. Campbell* (1927), 220 N. Y. S. 262, 128 Misc. 778; *Henry v. Henry* (1928), 104 N. J. Eq. 21, 144 Atl. 18; *Mills v. Mills* (1935), 119 Conn. 612, 179 Atl. 5; *Pignatilli v. Pignatilli* (1939), 8 N. Y. S. (2d) 10, 169 Misc. 534. "The declaratory judgment has been used to determine the effect of a court judgment," *Moore & Friedinan, Moore's Federal Practice* (1938), Vol. 3, 3221.

Collateral attack is allowed in Indiana only when the prior judgment is void. *Fidelity & Casualty Co. of N. Y. v. State* (1933), 98 Ind. App. 485, 184 N. E. 916.

<sup>20</sup> *Mullane v. McKenzie* (1936), 269 N. Y. 369, 199 N. E. 624; *Toomey v. Toomey* (Cal. 1939), 89 P. (2d) 634; *Cockrell v. Board of Com'rs, etc.* (1936), 16 F. Supp. 273, reversed on merits (C. C. A. 5th 1937), 91 F. (2d) 412, cert. den. (1937), 302 U. S. 740, 58 Sup. Ct. 142 (Plaintiff granted a declaratory judgment declaring a prior judgment of the Supreme Court of Louisiana constitutes a complete bar against the assertion by the defendants as against the plaintiff of title to any land within the township in question); *Baumann v. Baumann* (1928), 228 N. Y. S. 539, 250 N. Y. 382, 165 N. E. 819; *Ellerman Lines, Ltd. v. Read* (1927), 44 Times Rep. 7.

<sup>21</sup> "The establishment of social peace in the community without the necessity of prior violence, is the primary judicial function." *Borchard, Declaratory Judgments* (1934), VIII.

<sup>22</sup> "It [Declaratory Judgments Act] is to be liberally interpreted and administered, and should not be used as a technical bar to the administration of justice." *Continental Ins. Co. v. Riggs* (1939), 277 Ky. 361, 126 S. W. (2d) 853, 121 A. L. R. 1421.

<sup>23</sup> 28 U. S. C. A. Sec. 400 provides for declaratory judgments.

<sup>24</sup> Ind. Acts 1927, Ch. 81, Sec. 12; *Burns' Ind. Stat.* (1933), Sec. 3-1112.

<sup>25</sup> Accord: *Bowser v. Tobin* (Ind. 1939), 18 N. E. (2d) 773; *Ohio Casualty Ins. Co. v. Gordon* (C. C. A. 10th 1938), 95 F. (2d) 605; *Back's Guardian v. Bardo* (1930), 234 Ky. 211, 27 S. W. (2d) 960; *Saenger Theatre Corp. v. McDermott* (1939), 237 Ala. 489, 187 So. 460. Cf. *Cockrell v. Board of Com's* (1936), 16 F. Supp. 273, reversed on merits (C. C. A. 5th 1937), 91 F. (2d) 412, cert. den. (1937), 320 U. S. 740, 58 Sup. Ct. 142.

is that the former Lake Circuit decision is *res judicata* as to all matters litigated and which might properly have been litigated in that action.<sup>26</sup> H. R. H.

MASTER AND SERVANT—ASSAULT AND BATTERY.—Plaintiff was a debtor of the defendant corporation, which sent its servant to collect the debt. The jury was instructed that if the servant, at the time of the assault and battery, was acting as the collector for the master corporation and while so acting and while he was attempting to perform his duties, and while in the act of collecting an account due his master, then and there assaulted the plaintiff in an effort and attempt to collect money due the master, the verdict should be for the plaintiff. *Held*, the instruction is erroneous. The instruction would hold a master liable merely because an assault and battery was committed during the time his servant was acting for him, without regard to whether said act was within the scope of his employment. *Moskin Stores, Inc. v. DeHart* (Ind. App. 1940), 24 N. E. (2d) 800.

The doctrine of the liability of the master for the wrongful act of his servant is predicated upon the maxims *respondet superior* and *qui facit per alium facit per se*.<sup>1</sup> Modern authority now holds the master liable for the negligent and intentional acts of his servant, performed while engaged in the pursuit of the master's business, within the scope of his employment,<sup>2</sup> or which, from all the circumstances, may be reasonably, fairly, or necessarily included, or by implication embraced within the objects of the business, the execution of which has been confided to the servant's charge,<sup>3</sup> even though the master had no knowledge of the act,<sup>4</sup> or disapproved it,<sup>5</sup> or had expressly forbidden it.<sup>6</sup>

<sup>26</sup> *Shick v. Goodman* (1939), 333 Pa. 369, 5 Atl. (2d) 363; *Ohio Casualty Ins. Co. v. Gordon* (C. C. A. 10th 1938), 95 F. (2d) 605.

<sup>1</sup> *Hardeman v. Williams* (1907), 150 Ala. 415, 43 So. 726. No distinction need here be made between a corporation and a natural person, as principals. *Brokaw v. New Jersey R. Co.* (1867), 32 N. J. Law 328, 90 Am. Dec. 659. The liability rests on a contract between the master and servant, and an infant, having no power to bind himself by contract, cannot be held for the torts of his servant. *Burns v. Smith* (1902), 29 Ind. App. 181, 64 N. E. 94. This note does not concern tortious conduct of a servant within the scope of his employment, when that employment is *ultra vires* to the corporation. *Cf. Bissell v. Michigan S. R. Co.* (1860), 22 N. Y. 258; Note (1928), 57 A. L. R. 302.

<sup>2</sup> As usual, the question may be for the jury, *Craven v. Bloomingdale* (1912), 171 N. Y. 439, 64 N. E. 169, or in clear cases, for the court, *Drobnicki v. Packard Co.* (1920), 212 Mich. 133, 180 N. W. 459. See *Pittsburgh, etc., R. Co. v. Kirk* (1885), 102 Ind. 399, 1 N. E. 849.

<sup>3</sup> *Brudi v. Luhrman* (1901), 26 Ind. App. 221, 59 N. E. 409; *American Express Co. v. Patterson* (1881), 73 Ind. 430; *Evansville & Terre Haute R. Co. v. McKee* (1884), 99 Ind. 519, 50 Am. Rep. 102.

<sup>4</sup> *Pittsburgh, etc., R. Co. v. Kirk* (1885), 102 Ind. 399, 1 N. E. 849; *Redding v. South Carolina R. Co.* (1871), 3 S. C. 1, 16 Am. Rep. 681.

<sup>5</sup> *Spice v. Astry* (1915), 184 Ind. 1, 110 N. E. 201; *Thomas Steamboat Co. v. Housatonic R. Co.* (1855), 24 Conn. 40, 63 Am. Dec. 154.

<sup>6</sup> *Oakland City Agric. & Ind. Society v. Bingham* (1891), 4 Ind. App. 545, 31 N. E. 383; *Powell v. Deveny* (1849), 3 Cush. (Mass.) 300, 50 Am. Dec. 738; *RESTATEMENT, AGENCY*, Sec. 230. Early law imposed liability only when the act was expressly commanded by the master. *Penas v. Chicago etc. R. Co.* (1910), 112 Minn. 203, 127 N. W. 926. This theory was probably taken from the criminal law, which still requires a command or knowledge and acquiescence. See 43 A. L. R. (N. S.) 1.