A Note on Declaratory Judgment Pleading and Practice

Thomas B. Jackson
Judicial Council of West Virginia
A NOTE ON DECLARATORY JUDGMENT
PLEADING AND PRACTICE*

THOMAS B. JACKSON**

THREE years ago as President of this Association, I delivered an address advocating the adoption of declaratory judgment procedure in the courts of this state by procedural rule to be promulgated by the Supreme Court of Appeals.1 Thereafter the Judicial Council recommended such a rule to the court which, without denying its jurisdiction, declined to make the procedure effective on the ground that, if advisable, it should be effected through legislative action rather than by rule of court. Later, your Executive Council apparently impressed with the desirability of the new procedure, secured the enactment of the Uniform Declaratory Judgment Act at the last session of the Legislature. At the conclusion of my address one of the gentlemen who discussed my paper, made a remark to the effect that there was some confusion in his mind as to the necessary procedure to be followed in obtaining a declaratory judgment. The thought on the part of President Wyckoff, that such confusion, or at least unfamiliarity as to pleading and practice, might exist among the members of the bar, probably accounts for the invitation which he extended for me to read a paper on the procedural aspects of the subject. With equal thoughtfulness, he told me that I had been allotted thirty minutes on the program. Accordingly I will attempt to discuss briefly some of the more important matters which might be considered by a lawyer who seeks to obtain a declaratory judgment under the West Virginia common law system of pleading.

NATURE OF ACTION.

At the outset, it seems desirable to refer to some of the essential characteristics of a suit or action for a declaration, as a basis or background for the practice and pleading thereunder. Speaking of such a proceeding, Borchard says:

---

* Address delivered at the fifty-seventh annual meeting of the West Virginia Bar Association, at White Sulphur Springs, West Virginia, on October 17, 1941.
** Former President of the West Virginia Bar Association; member of the Charleston bar and of the Judicial Council of West Virginia.
... that in form it differs in no essential respect from any other action, except that the prayer for relief does not seek execution or performance from the defendant or opposing party. It seeks only a final determination, adjudication, ruling, or judgment from the court, but that the conditions of the usual action, procedural and substantive, must always be present, namely, the competence or jurisdiction of the court over parties and subject-matter, the capacity of the parties to sue and be sued, the adoption of the usual forms for conducting judicial proceedings (including process, pleadings, and evidence), the existence of operative facts justifying the judicial declaration of the legal consequences, the assertion against an interested party of rights capable of judicial protection, and a sufficient legal interest in the moving party to entitle him to invoke a judgment in his behalf. . . .

Borchard says that "in principle declaratory relief is sui generis and is as much legal as equitable." The same authority refers to the declaratory action as an autonomous institution but admits its relationship to the usual forms of actions in saying:

"Yet it had to be fitted into the scheme of existing remedies. While born under equitable auspices and having preponderantly equitable affiliations, it proved nevertheless an effective instrument available for the adjudication of legal issues, provided the plaintiff were content with an adjudication of his rights only and the court believed that it would terminate the controversy. Yet it did not come into the common law side without protest, and to this day it is probably less frequently employed on the law than on the equity side. The procedure, now in most jurisdictions except New South Wales, Florida and Rhode Island, available at both law and in equity, has nevertheless in its flexibility and adaptability imported many features from equity, for example, with respect to joinder of parties to avoid a multiplicity of suits. In these multiple suits, involving either a class or several parties whose rights arise out of the same transaction, the declaration has displayed some of its most useful functions."

Furthermore, it should be noted that, as pointed out by the Supreme Court of Appeals of Virginia, declaratory actions "... are intended to supplement rather than to supersede ordinary causes of action and to relieve litigants of the common law rule that no declaration of rights may be judicially adjudged until a

---

2 BORCHARD, DECLARATORY JUDGMENTS (1934) 23.
3 Id. at 138.
4 Id. at 178.
right has been violated. Preventive relief is the moving purpose. Whether or not jurisdiction shall be taken is within the sound discretion of the trial court. Something more than ‘an actual controversy’ is necessary. In common cases where a right has matured or a wrong has been suffered, customary processes of the court, where they are ample and adequate, should be adopted.’

Anderson, speaking of the classification of declaratory actions, says:

‘The only sound position that can be taken with respect to such classification is that it partakes of the properties of both legal actions and suits in equity, and that the court will apply the rules with respect thereto as the nature of the case seems to demand; that at times a declaratory judgment may properly be classified as legal, carrying with it the attendant right to a jury trial; and that at other times, it may correctly be designated as a suit in equity, warranting the issuance of an injunction, and authorizing the granting of extraordinary relief generally.’

Some of the courts have sustained Borchard’s view and have expressly held the declaratory action to be sui juris, but exactly what is meant by sui juris is not entirely clear from the decisions or text writers. Presumably it means that in a declaratory action the court is bound neither by strict legal nor equitable rules of procedure but that rather a combination of the principles embodied in the two systems of pleading may be employed where necessary to do justice and to accomplish the broad purposes of the act. This idea is exemplified in the action of courts which have cast aside the strict limitations imposed in the usual forms of action and have made declarations according to the requirements of justice, regardless of the prayer for relief, and has been expressed by Borchard in his statement that the declaratory action ‘has the advantages of escaping the technicalities associated with equitable and extraordinary remedies, thus enabling the substantive goal to be reached in the speediest and most inexpensive form.’ Again, the idea is exemplified in cases wherein ‘it has been held that declaratory proceedings were special in nature and not an ‘exercise of general equity jurisdiction in which the court may grant consequential relief under a general prayer or upon general equitable conditions.’”

Whatever may theoretically be the precise nature of the declaratory action — whether equitable, legal or sui generis — the

---

Anderson, Declaratory Judgments (1940) 160.
West Virginia lawyer who is about to seek a declaration will necessarily proceed under the uniform act adopted in this state, which will generally be referred to as the act or statute, and he will be confronted with certain practical questions, an examination and discussion of which may be of some value in determining what pleading and practice is to be employed in obtaining the declaration. The first question is whether the claim for declaratory relief may be asserted at law or in equity, or in a suit or action partaking of the nature of one or the other, or whether both such forms of action may be ignored and the proceeding treated as being *sui juris* in so far as the nature of the action is concerned. As heretofore indicated, the *sui juris* theory seems to relate principally, if not solely, to the relief granted, rather than to the form of action, and consequently, for our purposes, no further consideration need be given to it as respects the form of action. In view of the present adherence in this state to the forms of law and equity, and to the distinction of one system from the other, the first step in obtaining a declaration is to determine on which side of the court — law or equity — the proposed proceeding shall be brought. To determine the form of action, it would seem that the test is whether, if coercive relief were sought, the claim under the facts involved, or under comparable facts, would be asserted at law or in equity. This determination involves only the process employed in deciding, in a civil action under the federal procedure, whether the so-called civil action under that procedure is in fact legal or equitable in nature, and consequently in the ordinary case in a state court there should not be much difficulty in arriving at a satisfactory answer to the usually simple problem which is presented.

**PRAECIPE.**

Let us assume then that counsel has determined that a suit in chancery is the proper vehicle for the pursuit of his remedy and that he proceeds to prepare his praecipe. No difficulty is encountered, because a request to the clerk for issuance of a summons in chancery to answer the bill of complaint suffices even though the bill seeks only declaratory relief, but suppose counsel has concluded that an action at law, or perhaps more properly speaking a proceeding in the nature of an action at law, for a declaratory judgment, is the proper vehicle. ² How then would the praecipe read? Obviously the usual form of a request for a summons to answer a plea of trespass on the case, or some other plea, with
A NOTE ON DECLARATORY JUDGMENT

damages stated in a sum certain would scarcely be desirable. In such instances, it is suggested that the praecipe should request issuance of a summons to answer the plaintiff of a plea for a declaratory judgment, or perhaps the request might be for a summons to answer the plaintiff in an action for a declaratory judgment in view of the code provision that commencement of a suit may be by a writ of summons against the defendant to answer "the bill or action," from which it would seem that if the bill or declaration sufficiently describes the cause of action and the relief claimed, it should suffice. While it is always desirable to bring an action on the proper side of the court, some comfort may be had in the thought that if a mistake is made the case may not be dismissed but may be transferred to the proper forum. But it is better not to err at the start as a mistake is never satisfactory and a change to another form of action is more or less irritating to counsel and client and often can cause considerable delay, for which reason proper consideration should be given to the form under which declaratory relief is to be sought. Naturally the form of summons follows the order contained in the praecipe and, after issuance of summons and filing of the bill or declaration, further proceedings in general follow the usual course of a suit in chancery or action at law as to rules, demurrers, motions, pleas, evidence and other matters. This necessarily follows in view of the fact that the statute, in contrast with the provisions of the federal declaratory judgments act, which empowers the federal courts to declare rights, etc., "upon petition, declaration and complaint, or other appropriate pleadings" is entirely silent on the subject of pleading. At this point, however, it may be stated that mere matters of form should not preclude relief where a justiciable controversy is properly presented in a case where the court has jurisdiction and the necessary parties are before the court, even though the proceedings may be erroneously entitled.

JURISDICTION.

Having determined the proper form of action, the next question to decide is whether the court can and will exercise jurisdiction

8 Id. at c. 56, art. 4, § 11.
9 Newsom v. Interstate Realty Co., 152 Tenn. 392, 278 S. W. 56 (1925).
12 Faulkner v. City of Keene, 85 N. H. 147, 155 Atl. 195 (1931).
over the subject matter involved in a particular case. If the case was one which was pending at the effective date of the act, then it cannot be transformed into a proceeding for declaratory relief as the statute is not retroactive and consequently not available for amendment of the bill or declaration.\(^1\)

Section 1 of the act provides that "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." Therefore our courts in general have jurisdiction for declaratory relief over all subject matters over which such jurisdiction is now exercised in other forms of actions but not have any jurisdiction over subject matters not heretofore within their jurisdiction. The broad jurisdiction mentioned is, however, definitely limited by section 6 which states that "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." Under this section, the courts have exercised their discretion freely and broadly with the result that in various classes of cases a declaration has been refused, as (1) where it would serve no useful purpose; (2) where special tribunals have been appointed to try certain cases; (3) where the facts sought to be litigated were hypothetical and presented a made case or were uncertain of occurrence; (4) where the question raised was not real but theoretical and the person raising it did not have a *bona fide* interest; and (5) where there was no defender with a *bona fide* right to defend.\(^1\)

The application of the principles determining whether jurisdiction will be entertained or the declaration refused has resulted in a great variety of decisions. Thus it has been held that the legal rights of litigants must necessarily be involved as no court sits for the purpose of settling questions of law which are merely speculative or abstract.\(^1\) For example, a court will not render a declaration in a case where there is no difference between the parties and both of them seek the same judgment, as in such case the proceeding is essentially one for an advisory opinion and nothing more,\(^1\) and in another case it was decided that a declaratory judgment must be refused on the question of the right of voters to determine whether cattle should be permitted to run at large in the

---


\(^{13}\) Sheldon v. Powell, 99 Fla. 782, 128 So. 255 (1930).


---

https://researchrepository.wvu.edu/wvlr/vol48/iss2/6
streets of incorporated municipalities, it appearing that no election had been called and that no actual controversy was presented as to the right to vote. And it should be borne in mind that a declaration need not be made in cases where the plaintiff apprehends that a defendant may assert a claim, when in fact defendant has made no claim, even though the defendant has refused to waive any rights. Similarly, the courts have frequently held that a declaration as to future or contingent rights constitutes an advisory opinion, as a valid declaratory judgment can only be rendered after an event occurs and rights have become fixed under existing states of fact.

There have been many decisions on jurisdictional questions where the constitutionality of a statute was involved. In Ohio the constitutionality of a statute, providing that the district attorney should furnish to persons under indictment copies of all papers to be used in the prosecution of the case, was challenged in a declaratory action by the district attorney. A declaration was refused on the ground that the power of the trial judge in the criminal case, in admitting or rejecting proper evidence, when presented to him, could not be abridged in a declaratory action. In New Jersey a declaratory action was sought for the purpose of enjoining a criminal prosecution and having a statute, under which such prosecution was to be made, declared unconstitutional. Declaratory relief was refused because the chancery court had not therefore had jurisdiction of any criminal matters. On the other hand, in a New Hampshire case, subsequently affirmed without opinion by the Supreme Court of the United States, the court held that a person threatened with criminal prosecution for violation of a statute had a clear right to test the validity of the statute by a declaratory action. In another case, involving the constitutionality of a statutory requirement that voters be able to read and write the constitution in English to the satisfaction of an election official, where a declaratory judgment was sought, relief was granted although plaintiff would have had a remedy at law in case

18 (1931) 12 A. L. R. 73.
19 State ex rel. LaFollette v. Dammann, 230 Wis. 17, 264 N. W. 627, 103 A. L. R. 1089 (1936).
the official acted in bad faith or abused his discretion.\textsuperscript{23} And it has been held that a plaintiff may have a declaration as to the constitutionality of a statute even before the statute has taken effect where it appears that such person will be directly damaged in his person or property by enforcement of the statute, and that the defendant is charged with the enforcement of the statute and is about to proceed accordingly.\textsuperscript{24} In the last case referred to, plaintiff was engaged in the business of making small loans and it was alleged that after the effective date of the statute the defendant, who was director of licenses, would seek to enforce the statute against plaintiff and that if such enforcement were made plaintiff would suffer legal damages.

In another class of cases the courts have refused declaratory judgments because they would be based upon the happening of a contingent event and such a judgment would necessarily violate the principle that there must be justiciable case or actual controversy. Thus in a case, where a life beneficiary under a will at the time had a life expectancy of some twenty years, it was held that a creditor of the beneficiary could not obtain a declaration that, under the terms of the will, the debt should be paid at the death of the beneficiary and before distribution of the trust estate to the remainderman under the will.\textsuperscript{25} In another case plaintiff was refused a declaration as to his right to be subrogated to the rights of a mortgagor upon payment by plaintiff of the mortgage when it was the duty of other persons to pay same.\textsuperscript{26} The rule for the decisions in these two cases is the same as that applied in equity under practice separate from that under declaratory judgment statutes. Courts of equity often refuse to render judgments in cases involving the happening or occurrence of a future event, because, until the event happens the court cannot know who may be the necessary or proper parties.\textsuperscript{27} But it has been held that a person holding a contract of indemnity insurance, when a judgment has been rendered against him, may seek a declaration against his own insurance company which claims that it is not liable until the insured shall have paid the judgment, and that the insurance

\textsuperscript{23} Allison v. Sharp, 209 N. C. 477, 184 S. E. 27 (1936).
\textsuperscript{24} Acme Finance Co. v. Huse, 192 Wash. 96, 73 P. (2d) 341 (1937), 194 Wash. 706, 77 P. (2d) 595 (1938).
\textsuperscript{25} Nashville Trust Co. v. Duke, 162 Tenn. 356, 36 S. W. 905 (1931).
\textsuperscript{26} Heller v. Shapiro, 208 Wis. 310, 242 N. W. 174 (1932).
\textsuperscript{27} (1921) 12 A. L. R. 69.
was voided by breach of warranty, for the purpose of fixing liability
of the insurance company before the insured pays the judgment. 28

In other cases it has been held that courts are limited to the
same subject matter generally dealt with in the usual forms of
action and there is nothing in the statute permitting a court to
extend its powers beyond the borders of the state and consequently
no judgment will be made or rendered in conflict or possible con-


tract with the sovereign power of another state, 29 and that a court
may decline to make a declaration which affects the rights of per-
sons other than parties to the controversy. 30 In New Jersey where
law and equity are administered in separate courts, it has been
held, under the uniform act, that a court of equity has no power
to afford declaratory relief as to a purely legal right, 31 and it would
seem that in West Virginia the same principle would apply but
with the saving statute available in case of error on the part of
counsel in seeking relief in the wrong forum.

As to jurisdiction depending upon the amount involved,
declaratory relief may not be afforded in cases involving less than
the jurisdictional amount prescribed by the statute and similarly
no appeal lies in controversies involving less than the jurisdictional
amount. In one case the refusal to afford declaratory relief where
the minimum jurisdictional amount was not involved, was based
upon the discretionary power of the court, 32 but it is submitted
that, at least in our state, the refusal of declaratory relief would
be mandatory.


29 Westchester Mortgage Co. v. Grand Rapids & I. R. R., 246 N. Y. 194, 158
N. E. 70 (1927).
30 San Diego v. Cuyamaca Water Co., 278 Pac. 840 (1929), 209 Cal. 105, 287
Pac. 475 (1930).
action, was located, and that a declaratory action to determine the right of parties to convey good title, need not be instituted in the county in which premises are located but may be instituted in any county where the defendants could properly be reached by service of process.

**PARTIES.**

*General Principles.*

As to what parties are necessary to a declaratory judgment proceeding, as might be expected, the general rules of equity apply. The subject is covered by section 11 of the act which provides that all persons having any claim or interest which would be affected by the declaration, shall be made parties and that no declaration shall prejudice the rights of persons not parties to the proceeding. A municipality must be made a party in cases involving the validity of a municipal ordinance or franchise and is entitled to be heard, and the attorney general of the state must be served "with a copy of the proceeding" where the statute, ordinance or franchise is alleged to be unconstitutional and likewise is entitled to be heard. The language of the section providing that the Attorney General be served "with a copy of the proceeding" is not altogether clear as the term "proceeding" in its most comprehensive sense includes every step taken in a civil action, except the pleadings, and it has been held in West Virginia that the term includes any step or measure taken in the prosecution or defense of an action, except an order of continuance. In all probability, however, in spite of the technical meaning of the word, it would seem to be intended that service of a copy of the bill or declaration is sufficient while the provision that the Attorney General shall be entitled to be heard, would seem broad enough to give him the right to intervene.

In general the decisions apply the rules referred to and embodied in section 11. In one of the leading cases on declaratory judgments, the Supreme Court of the United States, in holding that it had the power under the Federal Constitution to review a declaratory judgment of a state court, based its decision upon the fact that in addition to the element of a case or controversy being present, the requirement, that all persons interested be before the

---

court, had been met. In a Kansas case, involving the validity of a tax deed there was also raised the question of the validity of quit-claim deeds, which were mere securities for debts owing to a person who was a party to the action and to another person who was not a party, the court refused to make any declaration on such quit-claim deeds as to the person not a party to the suit. The courts have even gone further than to refuse a declaration against persons not parties to the litigation and have held that it was the duty of the court to make such persons parties and to bring them before the court or to dismiss the action without prejudice. In a proceeding to test the validity of an ordinance fixing the basis for a tax assessment, it was held that all taxpayers within the territory affected were necessary parties, and in an insurance case, involving the right to disability benefits as between a corporation and the committee of one of its officers, where the insurance company did not contest the disability and was ready to make payment to the proper party, it was nevertheless held that the insurance company was a necessary party. In another case, where motor fuel dealers contended that a tax statute was unconstitutional, it was held that the application for a declaration should be dismissed because it failed to join, as necessary parties, consumers who had paid the tax on motor fuel. Where a judgment was sought, declaring a change in a zoning ordinance to be invalid, it was held that all property owners in the area affected must be joined as parties, directly or through representation, and in another zoning case a declaration was refused because "a copy of the proceeding" had not been served on the attorney general of the state. Where plaintiff’s property had been taken by a county under a condemnation proceeding and plaintiff sought a declaration against the validity of a city ordinance, the invalidity of which would have increased the value of plaintiff’s property and entitled plaintiff to a larger award in the condemnation proceeding, it was held that the county was a necessary party defendant to the action.

---

37 Colver v. Miller, 127 Kan. 72, 272 Pac. 106 (1928).
38 Savin v. Delaney, 229 Ky. 226, 16 S. E. (2d) 1039 (1929).
40 Ex parte Hirsch’s Committee, 245 Ky. 132, 53 S. W. (2d) 211 (1932).
41 Arlington Oil Co. v. Hall, 130 Neb. 674, 206 N. W. 583 (1926).
42 National Transportation Co. v. Toquet, 123 Conn. 463, 196 Atl. 344 (1937).
Plaintiffs.

The most striking difference between plaintiffs in the declaratory action and in the usual form of action is that a person who would ordinarily or necessarily be a defendant in the latter, may be a plaintiff in the former. This is permissible under section 1 of the act which states that "The declaration may be either affirmative or negative in form and effect", from which it follows that any party to a justiciable controversy may be a plaintiff, if he denies the existence of a right, status or legal relationship of another. Thus, an insurance company may sue to determine whether or not its liability policy covers the liability of the assured arising out of an accident,46 and a lessor is entitled to a declaration as to his lessee's right to renew a lease. Each of these cases illustrates the reversal in the nominal positions of the parties as contrasted with the usual form of action. It may be further observed that under section 2 of the act, and also under section 4 where the plaintiff is interested through a fiduciary, the plaintiff must have a substantial interest in the subject matter with respect to which the declaration is sought. Thus a widow and children of a deceased testator are entitled to a declaration as to the right of the widow to sell real estate devised to her, during widowhood, if necessary for the support of herself and children.47 But a city is not entitled to a judgment as against persons alleged to have deposited materials in a lake and to have erected structures on the bed of the lake, where title to the bed of the lake is vested in the state.48 This principle is of general application, notably in litigation involving attacks upon the validity of tax laws and constitutionality of other legislation. Where a statute provided for review of municipal tax levies by a board of tax commissioners, taxpayers were held to have a sufficient interest to entitle them to a declaration as to the constitutionality of such statute.49 In general, any person having property rights which will be affected by the enforcement of a penal statute may seek a declaration as to the validity or the construction of such statute.50 There are, however, a number of cases in which a declaration has been refused because of lack of interest on the part of the parties in the would-be subject

48 Miller v. Miller, 139 Tenn. 463, 261 S. W. 965 (1924).
50 Erwin Billiard Parlour v. Buckner, 156 Tenn. 278, 300 S. W. 565 (1927).
matter of the declaration. This principle is based on the fact that there must be a justiciable controversy or, as some of the statutes and cases express it, an actual controversy.

**Defendants.**

The question as to what persons must be made defendants is governed by section 11 and in the ordinary case presents no difficulties. It is not necessary always to join all possible parties and it has been held that joinder of all parties having an interest in questions of fact or law is not necessary where merely a personal judgment is sought and the parties in court are not prejudiced by the fact that other parties are not brought in, \(^{51}\) nor do the requirements of section 11 preclude the exercise of the discretion of a court as to who are necessary parties. \(^{52}\) The rule is not mandatory in every case and the court may exercise discretion, particularly in view of the provision that the declaration does not prejudice rights of persons not parties. The necessity for parties having adverse interests is illustrated by the requirement that such parties must be so interested in a relationship between them that a judgment will constitute *res judicata* as between them. \(^{53}\) It is not sufficient that every person on one side, though interested, disagree as to the applicable law. \(^{54}\)

**Joinder of Causes and Parties.**

A consideration of the matter of parties leads to questions involved in joinder of parties and causes. The closest approach to a solution of such questions is contained in section 11 of the act. Where the action for declaratory relief is legal in nature, it is necessary that there be a joint obligation or liability on the part of the defendants and, if in equity, that there be a community of interest in questions of law and fact arising in the action, but the principle of joinder cannot be stretched to cover cases where it is sought to have the court determine which one of several defendants is liable, where it is claimed or admitted that recovery can be had against only one of them.

It has been held that where there is a joinder of two defendants whose claims are separate and independent, either claim being capable of being determined without the other before the court.

\(^{51}\) Holly Sugar Corp. v. Fritzler, 42 Wyo. 446, 296 Pac. 206 (1931).

\(^{52}\) Powers v. Vinsant, 165 Tenn. 390, 54 S. W. (2d) 938 (1932).

\(^{53}\) (1933) 87 A. L. R. 1243.

\(^{54}\) Ibid.
a demurrer on the ground of multifariousness must be sustained, the court remarking that proceedings under the declaratory judgment act are governed by the established rules of pleading. In one case, between a single plaintiff and more than three hundred named defendants, it was held that the action was maintainable as one in equity, upon the ground of avoiding a multiplicity of suits, the court in this instance remarking that although the declaratory judgment law was not clear upon joinder of parties, a liberal construction should be adopted or, if such liberal construction was not justifiable, then the action should be maintained upon the equitable principle of permitting a joinder in case of a community of interest in fact or law, to avoid a multiplicity of suits. In raising the question of liberal construction the court apparently overlooked section 15 declaring the act "to be remedial", its purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" and stating that it is "to be liberally construed and administered." In another case, a town brought suit on behalf of property owners, to enjoin a highway contractor, from doing certain work, and joined as defendants a surety on his bond, a subcontractor, and water commissioners incurring certain expenses in changing water services. It was held that the proceeding was not only desirable as a means of preventing a multiplicity of suits to determine the rights of each of the defendants, but that the action would lie to determine the respective liabilities of the plaintiffs among themselves and also the liability of the defendants to the plaintiffs and to one another. The last mentioned case is a good illustration of the liberality of construction and administration called for by section 13. Also, it has been held that persons, who are not parties to an action for a declaratory judgment or privies to the parties to the action and consequently not bound thereby under section 11 of the act, cannot assert the conclusiveness of the judgment between the parties thereto where such persons seek to establish a claim against one of such parties.

**Bill or Declaration.**

The act permits a form of judgment not heretofore available from which it follows that the bill or declaration need not contain averments or allegations necessary to support one of the usual
forms of action under the same or similar facts, it being sufficient if the "ripening seeds" of a controversy may be adjudicated, provided proper claims of the parties exist and threaten litigation in the immediate future which seems unavoidable, nor need plaintiff allege that relief might be obtained in some other form of action at the time a declaration is sought, because, for jurisdictional purposes, it is not necessary to show a violation or invasion of rights or that plaintiff has acquired a claim against defendant prior to institution of the declaratory suit.

CROSS-BILL.

Defendant's answer or plea seems to require no special comment other than that, in accordance with the principle stated that the usual rules of pleading apply, there would seem to be nothing in the act to prevent a defendant from setting up his side of the controversy, in a proper case, as a counter-claim, or in proper cases, to allow other parties to intervene. In a case where a school district sued one claiming to be an employee, for a declaration that no contract of employment existed, and the defendant counter-claimed, asserting his rights under the alleged contract, the defendant was entitled to a trial of the issues under his counter-claim and a judgment against him constituted a complete adjudication of the controversy between the parties.

AMENDMENT.

As heretofore several times pointed out, the usual rules of pleadings apply in declaratory actions, and this is true as to amendments, as well as in other instances. In accordance with such rules, whenever a declaration may be dismissed on demurrer, leave to amend should be afforded. It seems strange that such a comparatively simple rule should have been questioned as often as it has been. Because of the fact that a court may not enter a declaratory judgment where the necessary facts are not disclosed, a court has full power to require additional pleading or proof where necessary for proper adjudication of the matters involved in the

59 Re Cryan, 301 Pa. 386, 152 Atl. 675 (1930).
62 "Ibid.
63 Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495 (1923).
64 Snowden v. Masonic Life Ass'n, 244 Ky. 286, 50 S. W. (2d) 569 (1932).
action. In a suit to enjoin a criminal prosecution for failure to pay a license fee, where it was held that an injunction would not lie, plaintiff was permitted to transform his suit by amendment into one for declaratory relief against the constitutionality of the statute requiring the license fee and prescribing a penalty for failure to pay the same.

EVIDENCE.

Naturally, the act is silent on the question of evidence as to which the ordinary rules with regard thereto apply. The only noteworthy feature in considering evidence where declaratory relief is sought is the rule that the so-called burden of proof does not shift because of the reversal of the position of the parties from what such position would be in the usual form of action. Thus in an action by an insurance company against an insured to determine the coverage afforded by an automobile insurance policy, it was held that the burden of proof, which would rest upon the plaintiff in an action against the insurer, is not upon the insurer in a suit by the latter for a determination of the coverage, there being no strict and rigid rule that the primary burden of proof is upon the party bringing the suit, as the rule with regard to burden of proof is not based upon initiative action, but rather on expediency and inherent justice. There is nothing in the act to indicate any intent to shift the burden of proof upon a party merely because he avails himself of the act, and it cannot be said that his right to have a disputed claim adjudicated imposes any duty upon him to prove the claim unfounded.

ISSUES OF FACT.

Although section 9 of the act provides for a jury trial in determining issues of fact, in the same manner that such issues "are tried and determined in other civil actions in the court in which the proceeding is pending", no mention is made as to the form of verdict. The federal act provides for interrogatories, whether a general verdict be required or not, and it would seem that the same procedure may be followed under the West Virginia statute, providing for one or more interrogatories to the jury.

64 Woolf v. Fuller, 87 N. H. 64, 174 Atl. 193 (1934).
67 W. Va. Code (Michie, 1937) c. 55, art. 6, § 5.
FORM OF RELIEF GRANTED.

Obviously the form of relief which may be granted is derived from and limited by section 1 of the act,70 although not limited to the issues joined,71 and the decisions of the courts recognize such fact. It has been held though that equitable terms may not be imposed on the parties as a condition to the relief sought.72 Where a declaration is sought under the provisions of section 2 permitting the interpretation and construction of a written instrument, the declaration is limited to rights involved in the question of construction in so far as the same affects the rights of persons interested.73 However, it should be noted that a court of equity may not declare a purely legal right.74 As to the extent of the effect of the declaration, the same limitations apply as in the case of the usual forms of action, and, therefore, no declaration can be made which has the further effect of a declaration as to the rights of persons not parties to the proceeding.75

JUDGMENTS GENERALLY.

The distinguishing feature of the judgment is that it is only a declaration and that it "may be either affirmative or negative in form and effect." The precise nature of the language used with respect to form and effect is in contrast with the English rule,76 which is not so specific although a right to a negative declaration under the English practice is now generally recognized. In a leading English case one of the justices predicted that a negative declaration was one that would hardly ever be made, as the person who might assert it would be left to set up his defense in an action when brought against him, and proceeded to say that the fact of a negative declaration being asked for a purpose which the court did not approve, would not take away the power of the court to make it but only give reason to refuse it.77 The holding in the English case referred to is certainly in contrast to the modern trend of decisions.

70 Miller v. Currie, 208 Wis. 199, 242 N. W. 570 (1932).
71 Stueck v. G. C. Murphy Co., 107 Conn. 656, 142 Atl. 301 (1928).
72 Ladaer v. Siegel, 294 Pa. 368, 144 Atl. 274 (1928).
73 Naungo v. Baumann, 96 N. J. Eq. 183, 125 Atl. 480 (1924).
75 City of San Diego v. Cuyamaca Water Co., 278 Pac. 840 (Cal. 1929).
76 Order XXV r. 5: "No action or proceeding shall be open to objection, on the ground that a merely 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."
Costs.

Section 10 of the act provides for such award of costs "as may seem equitable and just," and the general principles governing the award of costs would seem to apply. It has been held that costs should be imposed upon a plaintiff who has prematurely instituted his suit, and where the plaintiff did not have the legal right to institute the proceeding, and defendant interposed a counter-claim, it was held that costs should not be imposed upon the defendant. In another case it seems that the equities required that no costs be adjudged against the defendant and that all costs be paid by complainants, where the validity of a statute was involved. Costs upon appeal have been denied to plaintiff because of the public character of the question involved in a case involving a license tax on sales at retail in which a state treasurer was defendant.

Review.

Under section 7 of the act, all orders, judgments and decrees "may be reviewed as other orders, judgments and decrees." This section speaks for itself and needs little comment, it being plain that an appeal will lie though the final judgment does not require plaintiff to pay any money or to do any act, and that on appeal a judgment will be affirmed where nothing in it is prejudicial to the rights claimed by the appellant.

Enforcement of Rights Declared.

In cases where one of the parties disregards the declaration which has been rendered against him, the provisions of section 8 become extremely important. The section reads as follows:

"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."

78 Lynn v. Lyman, 293 Pa. 490, 143 Atl. 200 (1923).
It is plain from the second sentence that consequential relief need not necessarily be sought in the court which granted the declaratory relief but such fact does not dispose of the question of how such further relief may be obtained, and on this question there is a marked disagreement between the various courts. Although courts generally have inherent power to enforce their own judgments and such power does not seem to be limited by section 8, yet it has been held in one of the leading cases that the provision, that further relief based on a declaratory judgment may be granted whenever necessary, refers to additional declaratory relief and does not provide a new remedy by which an executory judgment may be had on a matter which was previously the subject of a declaratory judgment," under which decision it appears that the proper method for coercive relief is the institution of a new action on the same facts but disregarding the declaratory judgment. On the other hand, it has been held that supplemental relief, based on section 8, is not limited to further declaratory relief but may include any relief essential to effectuate the declaratory judgment, and that after granting declaratory relief a court may reserve the right to make such further orders as may be necessary to effectuate the declaratory judgment, even though no petition has been filed for further relief. It is submitted that the cases affording further relief in the declaratory action, or in an action based upon a declaratory judgment, are in accord with the theory and purpose of the act and effectuate the provision of the act requiring liberal construction and administration thereof.

In conclusion, let me say that I trust that what is contained in this paper will serve to remove at least some of the confusion relating to, or unfamiliarity with, pleading and practice in declaratory actions, referred to in the beginning, and that it will in some measure convince my listeners that such pleading and practice is as simple, if not simpler, than that prevailing in many of our usual forms of action.

84 Brindley v. Meara, 209 Ind. 144, 198 N. E. 301 (1935).
85 Morris v. Ellis, 221 Wis. 307, 266 N. W. 921 (1936).