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Thomas B. Jackson

President, West Virginia Bar Association

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A PROPOSAL FOR DECLARATORY JUDGMENT PROCEDURE

THOMAS B. JACKSON

The subject matter of this address has not been before this association for many years and so far as the record discloses nothing effective concerning it has ever been accomplished. It relates solely to procedure and for the benefit of those who persistently cling to the archaic, those who are temperamentally opposed to change, those who oppose anything resembling an innovation, and those who worship common-law procedure, let me say that what I propose in no way changes our existing procedure but simply adds to it, and makes available to the practitioner of today, a remedy now available under federal law and the laws of most of the states. I refer to declaratory judgment procedure. Much has been written on this subject within the last two decades and hundreds of cases have been decided in that space of time. Within the scope of this paper, nothing more can be done than briefly to consider the nature of the procedure, the history of the movement and its present status in this country, some of the decisions, the adaptability of such procedure to our system of pleading and practice and its usefulness therein. In speaking on this subject I do so with some diffidence in the presence of our distinguished guest and honorary member, Professor Edson R. Sunderland of the Law School of the University of Michigan, who, as all of you know, is an outstanding authority on procedure of all kinds. I do not make any claim to originality or erudition in presenting this matter to you but do so in the hope that after proper study the remedy which is advocated may be adopted by the courts of this state.

NATURE OF THE PROCEDURE

The essential purpose of the declaratory judgment is, as stated in the Uniform Act,1 "to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." It may perhaps be best defined by pointing out those characteristics which distinguish it from ordinary judgments as we know them, which is aptly done by Borchard in his statement,

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1 Address of the President of the West Virginia Bar Association, delivered at the fifty-fourth annual meeting of that Association at White Sulphur Springs, West Virginia, on August 18, 1938.
2 President of the West Virginia Bar Association 1937-38; 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 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. . . ."2

The question naturally comes to mind as to what operative facts are necessary for a judgment. Such facts are those essential to an ordinary judgment, or those upon which no relief may be had other than by a declaration of rights, status, or legal relationship. The first class is familiar enough and the second also may be illustrated by such instances as where a claim of relationship is made by one person and denied by another, claims of exemption from tax liability or the requirement of a license, or liability to perform a contract at some future time.

The same author enumerates the principal functions of a declaratory judgment as being:

". . . (1) to afford a speedy and inexpensive method of adjudicating legal disputes; (2) to narrow the issues and, by so doing, to dispose of disputes in their initial stages, before they have become full-grown battles with their accumulation of bitterness and impaired relations; (3) to make it unnecessary to destroy the status quo as a condition of bringing a contested issue or adverse claims to litigation, thus enabling written instruments, including contracts and statutes, to be construed without the necessity for prior breach, thereby preventing future litigation; (4) to make it unnecessary for a plaintiff to act upon his own interpretation of his rights and at his peril as a condition of judicial action, or to forbear from a contemplated but challenged step for fear of incurring loss, thus avoiding the dangerous necessity for leaps in the dark or the alternative timorous surrender of legitimate claims; (5) to remove uncertainty and insecurity from legal relations, and thus to clarify, quiet, and stabilize them before irretrievable acts have been undertaken; (6) to enable an issue of ques-

2 Borchard, Declaratory Judgments (1934) 23.
tioned status or fact on which a whole complex of rights may depend, to be expeditiously determined; (7) to enable interdependent rights involving numerous parties to be settled in a single proceeding; (8) to enable trustees, executors, receivers, and others acting in a fiduciary capacity to obtain authoritative guidance and protection against liability in the administration of their trusts. . . .”

The enumeration which I have just given might seem to include all possible functions but such is not the case for the authority quoted continues his enumeration of certain other functions, viz:

“... (9) to enable a creditor or claimant whose interests are jeopardized by attack, challenge, act or new event, to establish his claim, and by vindicating his right to prevent future injury or disadvantage; (10) to enable a debtor or person charged with duty, liability, disability, danger, risk, or forfeiture, to disavow the burden, charge, or risk, and thus remove the cloud on his rights; (11) to enable an obligor or contractor who maintains that time or circumstance has entitled him to release from his obligation, to sue the obligee for a declaration of release, complete or partial, or for a declaration of satisfactory performance; (12) to enable a person claiming his own privilege or immunity or his adversary’s duty or liability to secure a judicial recognition of these claims, without proceeding to enforcement or execution, an opportunity as helpful to the pacification of legal relations in the private as in the public sphere; (13) to enable public duties and powers to be established without the cumbersome and technical prerequisites of mandamus, certiorari, injunction, prohibition, or habeas corpus; (14) to enable a claimant to choose a mild but adequate form of relief by declaration in place of drastic and harsh coercion which he does not desire or need.”

A report to the United States Senate by Senator King in 1934 describes the declaratory judgment as follows:

“The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigation over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice. It enables parties in disputes over their rights over a contract, deed, lease, will, or any other written instrument to sue for a declaration of rights, without breach of the contract, etc., citing as defendants those who oppose their claims of right. It has been employed in State courts mainly

3 Borchard, Declaratory Judgments 94,
for the construction of instruments of all kinds, for the determination of status in marital or domestic relations, for the determination of contested rights of property, real or personal, and for the declaration of rights contested under a statute or municipal ordinance, where it was not possible or necessary to obtain an injunction."

While a declaratory judgment may only be obtained through a certain type of procedure it does not in any way affect substantive rights. This fact was early emphasized in the leading English case of Guaranty Trust Company of New York v. Hannay & Company, where the court distinguished between jurisdiction and procedure in construing Order XXV, rule 5, of the Supreme Court of Judicature, of which it was said:

"... But if its only effect is to provide that the Court may deal with a matter with which it can already deal in a different manner under different circumstances and when brought before it by a different person, it is, in my opinion, only dealing with practice and procedure and is intra vires."

The order in question reads as follows:

"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."

The decisions of the American state courts have in general recognized the procedural nature of the remedy and in the recent case of Aetna Life Insurance Company v. Haworth, the United States Supreme Court held that "... the operation of the Declaratory Judgment Act is procedural only", and that Congress was acting within its constitutional powers in providing for the federal procedure.

**History and Status**

In 1922 at the meeting of this association in Huntington, Mr. J. W. Madden, then Dean of the College of Law of West Virginia University, at the request of our Executive Council, read a paper on Declaratory Judgments. At that time only nine states had

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4 (1915) 2 K. B. 536.
5 Id. at 563.
6 R. S. O., O. XXV, r. 5.
7 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937).
8 Madden, Declaratory Judgments (1922) REP. W. VA. BAR ASS’N 231.
declaratory judgment acts in force, disregarding rather ineffective prior legislation in Rhode Island and New Jersey. Michigan was the pioneer in 1919, followed by California, Connecticut, Florida, Kansas, Kentucky, New York, South Carolina, and Virginia; the Federal Declaratory Judgment Act was far removed from passage by Congress; the American Bar Association had scarcely begun to advocate the declaratory judgment; and the uniform declaratory judgments act had not been adopted in any of the states, having only been approved in the year 1922 by the commissioners on Uniform State Laws. The Committee on Noteworthy Changes in the Statute Law of the American Bar Association in its report in 1919 stated that "No more important statutes dealing with the administration of justice have been passed in recent years than those authorizing the courts to enter declaratory judgments determining rights and duties." There was comparatively little case law on the subject and the bar of the country was generally unfamiliar with such procedure. Since that meeting of this association the uniform act has been adopted in twenty-four states; a number of others have acts of their own; and in addition the federal act has now been in force for four years.

That the declaratory judgment is a comparatively modern idea in the United States is illustrated by the fact that the first article on the subject was written by Professor Sunderland in 1917 and it was only in 1919 that the Michigan act went into effect. However, this form of judgment dates back in England to the year 1852, although in restricted form, by reason of judicial construction, until 1883 when Order XXV, rule 5, was adopted, since which time it has come into wide use. It was known in Scotland for several centuries prior to its introduction into England, and existed for a time in the Roman Law and thereafter became established in other systems of jurisprudence before introduction into the English system. There was no discussion of Mr. Madden's address at the time it was delivered and while the sentiment of the association at the time cannot be ascertained, it appears that the procedure which was suggested later met with favor for we find that thereafter this association made an unsuccessful effort in 1931, to secure the enactment of a declaratory judgment law. The report of the Legislative Committee for the year named, referring to the proposed law, states that "Such an act seems to be in line with

9 (1931) REP. W. VA. BAR ASS'N 79-80.
modern methods of legal administration. The Committee recommends that further study be given to such an act, and that the Committee be authorized to further its passage, if deemed advisable after further study." At that time an article by Professor Borchard appeared, and doubtless influenced the committee in its effort to secure the procedure and its recommendation to the association. Thereafter the matter does not appear to have been pursued further.

Order XXV, rule 5, is the basis of declaratory judgment procedure as known in modern times in English speaking countries, as construed and applied in 1911 in Dyson v. Attorney General, and in 1915 in the Guaranty Trust case. It served to put into effect a procedure much wider in its application than was known under pre-existing practice in England. This order together with order LIV A has been adopted substantially, or without change at all, in Canada and many other jurisdictions of the British Empire. Practically all of the American declaratory judgment acts in use are based on the earlier order. Section 1 of the Uniform Act is based on this order, while Section 2 is based on the later order, which reads as follows:

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

The later order did not enlarge substantially the scope of the earlier one, but simply went into greater particularity and appears to have been promulgated to stimulate the latent powers of the court not in general use. It appears from the Guaranty case that the first order did not really enlarge the existing jurisdiction of the courts and it too was evidently promulgated to encourage the use of declaratory judgments, in much the same manner that statutes conferring rule making powers on the courts, do not, according to the view of some authorities, give the courts any powers not inherent in them, but simply encourage the exercise of such powers. In that case, Banks, L. J., stated:

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11 (1912) 1 Ch. 158.
12 (1915) 2 K. B. 536.
13 R. S. C., O. LIV A, r. 1.
"I cannot doubt that had the Court of Chancery of those days [before 1852] thought it expedient to make mere declaratory judgments they would have claimed and exercised the right to do so. It was amongst other things to amend the practice and procedure of the Court of Chancery in this respect that s. 50 of the Act of 1852 was passed. The preamble of the statute makes this point clear."14

The statutes of New York and Connecticut may be regarded as typical of those statutes based on Order XXV, rule 5, and in those states rules of court supplement the statute. The Uniform Act is in much greater detail than those acts based on the English orders, which is evidently due to the fact that it is designed for those states where the courts lack the rule making power whereby the statute can be supplemented with rules as in the case of the two states referred to. The first and second sections of the act read as follows:

"Sec. 1. Courts of record within their respective jurisdiction 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 declarations shall have the force and effect of a final judgment or decree.15

"Sec. 2. 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."16

The remaining sections of the act provide that a contract may be construed either before or after a breach; make provision for suits by persons in a representative capacity in respect of matters affecting them in such capacity; provide that the enumeration of specific powers shall not restrict the exercise of the general powers conferred in section 1; that the court may refuse a declaration where it would not terminate the uncertainty or controversy giving

14 Guaranty Trust Co. of N. Y. v. Hannay & Co., (1915) 2 K. B. 536, 568 (Italics supplied.)
16 Id. at 123.
rise to the proceeding; that all orders, judgments and decrees may be reviewed as in other cases; that supplemental relief based on a declaratory judgment may be granted whenever necessary or proper; that issues of fact may be determined as in other civil cases; for awarding costs; that all persons shall be made parties who have or claim any interest affected by the declaration; and that no declaration shall prejudice the rights of persons not parties; that municipalities shall be represented in proceedings affecting the validity of an ordinance or franchise; and that the state shall be represented in proceedings affecting the constitutionality of an ordinance, franchise or statute; that the act shall be construed as remedial; define certain words used in the act; provide that the provisions of the act, excepting sections 1 and 2, shall be severable; that there shall be uniformity of interpretation; and contain other incidental provisions.

The federal act of June 14, 1934, marked the culmination of years of effort on the part of the American Bar Association and other interested parties to secure such legislation. A Senate sub-committee as early as 1928 held a hearing on the proposed federal act at which appeared a number of interested persons as witnesses, including Mr. Henry W. Taft, representing the American Bar Association, Professor Edward M. Borchard, of the Yale Law School, an authority on declaratory judgments, and Professor Sunderland. The bill then pending had, at the time, been passed by the House of Representatives in four separate Congresses, was endorsed by the gentlemen named, and was reported by the sub-committee, but in spite of this it was not until some six years later that the federal statutes finally provided for a declaratory judgment. This act reads as follows:

"(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application 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 declaration, to show
cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of
further relief based thereon shall involve the determination of
issues of fact triable by a jury, such issues may be submitted
to a jury in the form of interrogatories, with proper instruc-
tions by the court, whether a general verdict be required or
not."

The first section is quite similar to section 1 of the Uniform
Act; the second section is practically identical with section 8 there-
of; and the third section contains substantially the same provisions
as section 9 of the same act. No necessity for greater detail in the
act appears to have existed, as it made no material change in the
then existing procedure, except to permit a declaration rather than
the usual form of judgment or decree. The distinguishing feature
of the federal act, as compared with most of the state acts, is that
it expressly excepts controversies with respect to federal taxes.

The policy of restricting the benefits to be obtained by a de-
claratory judgment and of depriving the taxpayer of an oppor-
tunity to contest a tax without running the risk of incurring what
in most cases are severe penalties, or in the alternative, of putting
him upon the necessity of paying the tax and then proceeding to
seek to recover it is certainly open to criticism and has been often
condemned. Such a policy appears to be but a manifestation of the
spirit now prevalent in the executive and legislative branches of
our national government to take from the taxpayer all that is
possible and to leave to him, in the case of unlawful exaction of
taxes, a difficult or doubtful remedy, and in some instances no
remedy at all for recovering the tax.

CONSTITUTIONALITY OF STATE STATUTES

As frequently happens when legislation of a novel type is en-
acted, and particularly when such legislation provides for pro-
cedural reform, with which lawyers are more or less unfamiliar,
an assault is promptly made upon constitutional grounds, and such
was the case upon the introduction of the declaratory judgment.
The Michigan statute was promptly assailed in Anway v. Grand
Rapids Railway Company.18 In this case a nonunion street rail-
way employee brought suit against his employer for a declaration

18 211 Mich. 592, 179 N. W. 350 (1920).
of his right to work more than six days a week in the face of a Michigan statute forbidding the employer to require him to work a greater length of time. The street railway workers' union intervened against the asserted right of the plaintiff to work more than six days a week, and was undoubtedly an adverse party, although there was no controversy between the original parties. In deciding the case the Supreme Court of Michigan held that the act was unconstitutional because it required the court to render an advisory opinion or decide a moot case, which would involve the exercise of a nonjudicial function, which was not within the power of the legislature to bestow upon the court. To the extent that there was no real controversy between plaintiff and defendant, the opinion would have been advisory, but apparently the court overlooked the fact that there was a real controversy between the intervener union, which had been made a party to the suit, on the one side, and plaintiff and defendant on the other. The decision was by a divided court and the error of the majority is clearly pointed out in the minority dissent. The decision in this case became immediately the source of severe criticism on all sides, and is referred to in Mr. Madden's paper wherein he argues against the correctness of the conclusion reached by the majority of the court. In the later case of Washington-Detroit Theater Company v. Moore the Michigan court held that the Michigan statute, as amended subsequent to the Anway case was constitutional since the amendment provided that the act should apply only to cases of actual controversy and that declarations should have the effect of final judgments. By basing its decision largely on these amendments, the Michigan court found a way out of the unfortunate effect of the decision in the Anway case although it is generally maintained that the original Michigan act contained impliedly the conditions which were later expressly attached to it. In regard to declaratory judgments applying only to cases of actual controversy the comment of Mr. Chief Justice Hughes in the Aetna case that "The word 'actual' is one of emphasis rather than of definition" is interesting, even though it is now universally conceded that declaratory judgments can only be rendered in cases involving actual controversies. For a time — and perhaps it still exists among those not familiar with the procedure — there was a belief that declaratory judgments involved the

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rendering of advisory opinions. The distinction as to an advisory opinion is stated by Mr. Justice Sharp in the dissent in the Anway case in the following language:

"Herein lies the distinction between declaratory judgments and moot cases or advisory opinions. The declaratory judgment is a final one, forever binding on the parties on the issues presented; the decision of a moot case is mere dictum as no rights are affected thereby, while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between interested persons." 21

The distinction is further made as follows:

"... Strictly speaking, the rendering of advisory opinions is not a judicial function at all, but that of an attorney-general or law officer. It is vested by many jurisdictions in their highest court, because there is no constitutional bar, and the court could not decline. But the opinion binds no one, not even the judges, is not rendered between parties, is given to the asking official or department, and is often rendered without hearing argument. In all these respects, it differs from the declaratory judgment." 22

Following the Anway case several states specifically provided that the judgment should be rendered only "in cases of actual controversy" while Kansas and Virginia went so far as to specify cases involving "actual antagonistic assertion and denial of rights". The statutes in these states have been sustained as constitutional while, in other states, statutes not containing any such specifications have likewise been upheld. There is an excellent article by William Gorham Rice, of the New York State Bar, 23 apparently induced by the decision in the Anway case, from which it appears that the author's argument for constitutionality has been fully sustained by the course of subsequent judicial decisions.

After the Michigan decision, Kansas was the next state where the constitutionality of a declaratory judgment act was attacked. The question was raised in State v. Grove. 24 The defendant was an employee of a railway company who had been elected to a municipal office. A state statute prohibited railway employees from hold-

22 Borchard, Declaratory Judgments 52.
24 109 Kan. 619, 201 Pac. 82 (1921).
ing any elective municipal office in instances where the railroad held a franchise from the municipality. Instead of waiting for Grove to take office and then attempting to inflict criminal punishment upon him for violation of the statute, the attorney general instituted proceedings for a declaration as to Grove's right to hold office. The Kansas Supreme Court in ruling that he was ineligible to take office sustained the constitutionality of the statute, differentiating the Kansas statute from the Michigan statute because the former contained the phrase "cases of actual controversy" although the Kansas court actually disapproved the majority opinion in the Anway case. Of course Grove might have been proceeded against after taking office by quo warranto or injunction, or by criminal prosecution, instead of by a proceeding whereby a declaration of right was obtained.

The Kansas case led the way for other state decisions upholding the constitutionality of other declaratory judgment acts, and thereafter the courts do not appear to have had much trouble in deciding the question in favor of the act. For example in New York, in an action for a declaration as to the amount of a tax levy under the state constitution, it was held that "The constitutionality of such a proceeding... is not open to question." Following the Grove case there was the decision of the Supreme Court of Connecticut in the case of Braman v. Babcock, involving a question of fact as to whether the plaintiff was the devisee designated as "Braman" under a will. The Connecticut court took the position that it could decide the question of fact involved but declined to do so because the property was situate in Rhode Island. The point was raised in this case that the rendering of a declaratory judgment involved the exercise of a nonjudicial function, to which the court answered:

"Turning to the function or duty imposed by our Declaratory Judgment Act upon the Superior Court as set forth above, could it be claimed with any pretense of reason, that the function was legislative or executive? The answer is obvious. We must, then, conclude that the function is judicial, or that it falls outside of the three functions described as legislative, executive, or judicial. It would be a travesty to hold that this method of remedial justice could find no place in our...

29 98 Conn. 549, 120 Atl. 150 (1923).
system of government unless a place was made for it by an amendment to the Constitution. ...”

After the Braman case other decisions as to the constitutionality and nature of the judicial function exercised in rendering a declaratory judgment followed in various states, including Virginia, where the supreme court ruled on the question in Patterson’s Executors v. Patterson, so that today in every state where the validity of an act has been attacked, the courts have sustained the legislation in question.

The decisions as to constitutionality have included the uniform act, the first case relating to which was the Tennessee case of Miller v. Miller. In other states where the uniform act is in force it has been held constitutional without exception whenever the question has been raised.

In the test case under the uniform act in Wyoming, viz., Holly Sugar Corporation v. Fitzler, a declaration, negative in character, was sought by plaintiff, which was engaged in a controversy with certain sugar beet growers, to the effect that plaintiff was not violating its contract with the growers in paying a certain price for beets or in operating its factory as it did. In holding that it had the power to render a negative declaration, the court held such a declaration to be entirely judicial in character, remarking that,

“... In 28 Yale L. J. 1 is contained an article which has traced the history of these judgments, and from which it appears that, though only to a limited extent, they were or have been in use under the Roman, Italian, French and German laws, and continually in Scotland for several centuries, and that our laws are based on those which were first introduced in England in 1852. When mankind has, accordingly, considered proceedings of that character as judicial for the period of 2,000 years, it would ill behoove us to declare the contrary.”

**Constitutionality Under Federal Decisions**

The first case to reach the Supreme Court of the United States involving a state declaratory judgment act was Liberty Warehouse.
Prior to the federal case, the Kentucky court had sustained the validity of an act of that state regulating tobacco sales in warehouses. Thereafter plaintiffs, who were non-resident warehousemen, brought an action under the conformity act for declaratory relief in the federal district court against the prosecuting attorney alleging that he was about to indict them and asserting that the warehouse act was unconstitutional and that they were not subject to penalties for violation of its terms. The district court was of the opinion that it could not exercise jurisdiction under the conformity act and the United States Supreme Court affirmed this decision on the ground that the conformity act could not be used in a question involving "practice, pleading and forms and modes of proceeding", and added the suggestion that the issue presented no case or controversy under the terms of Article III, Section 2, of the Federal Constitution. After the Liberty Warehouse case the Supreme Court sustained the validity of the Tennessee Uniform Act in Nashville, Chattanooga & St. Louis Railway Company v. Wallace. A state excise tax levied upon the storage of gasoline by plaintiff railway company, which used the gasoline in interstate commerce, was attacked as being in violation of the Fourteenth Amendment, in an action in the state court under the Tennessee act. The Supreme Court of Tennessee sustained the act and an appeal was taken to the Supreme Court of the United States, which held that a case or controversy within the power of that court to review was presented under the declaratory judgment procedure of Tennessee, the opinion saying:

"Thus the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax."

In holding that the case presented a controversy within the meaning of the Federal Constitution, the Court said:

"The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the

32 273 U. S. 70, 47 S. Ct. 282, 71 L. Ed. 541 (1926).
34 Id. at 262, 53 S. Ct. at 348, 77 L. Ed. at 735.
Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below.

As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial.15

Thus the question of the validity of declaratory judgment procedure under state legislation was squarely presented and definitely construed and finally decided in favor of such procedure. Prior to this decision some doubt had been expressed by the federal courts obiter dicta as to whether a court in rendering a declaratory judgment was exercising a judicial function, upon the erroneous theory that such a judgment was analogous to an advisory opinion. The Tennessee case was decided when the federal act was being considered by Congress and was doubtless a factor in influencing its action in passing the legislation putting the act into effect.

The federal act came before the Supreme Court in Aetna Life Insurance Company v. Haworth.36 In this case the jurisdiction of the district court in Tennessee was challenged upon the ground that the suit did not set forth a controversy within the meaning of the federal constitution,37 and hence did not come within the legitimate scope of the federal declaratory judgment statute. The facts were as follows: Plaintiff life insurance company had issued policies of

35 Id. at 264, 53 S. Ct. at 348, 77 L. Ed. at 736.
36 300 U. S. 227, 57 S. Ct. 348, 81 L. Ed. 617 (1937).
insurance to the defendant providing for disability payments, waiver of premiums and other benefits, in the event of total and permanent disability of the insured who had discontinued payment of premiums and claimed payments and benefits by reason of disability existing at the time when payment of premiums was discontinued. The insurer denied that any disability existed when the premiums were discontinued and contended that the policies had lapsed for nonpayment of premiums. The suit was instituted to have the policies declared null and void by reason of lapse for nonpayment of premiums and for such further relief as the exigencies of the case might require. The court held:

First, "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than definition. Thus the operation of the Declaratory Judgment Act is procedural only."38

Second, "... In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish."39

Third, "A 'controversy' in this sense must be one that is appropriate for judicial determination... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts."40

Fourth, "Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages... And as it is not essential to the exercise of the judicial power that an

39 Id. at 240, 57 S. Ct. at 463, 81 L. Ed. at 621.
40 Id. at 240-241, 57 S. Ct. at 464, 81 L. Ed. at 621.
injunction be sought, allegations that irreparable injury is threatened are not required."41

The court, reversing a decree of the circuit court of appeals affirming a decree of the district court dismissing the complaint, found that there was a dispute between parties in an adversary proceeding relating to legal rights and obligations arising from the contracts of insurance and that the dispute was definite and concrete, not hypothetical or abstract; that the claim of the insured was to a present specific right and that the insurer made an equally definite claim that the alleged basic fact of total and permanent disability did not exist; that such a dispute was manifestly susceptible of judicial determination; that the fact that the dispute turned upon questions of fact did not withdraw it from judicial cognizance; that the legal consequence flowed from the facts; that it was the province of the court to ascertain and find the facts in order to determine the legal consequences; that such was everyday practice.

ADAPTABILITY

Historically, modern declaratory judgment procedure appears to have originated in equity practice although it was in time adapted to legal actions also where nothing more than a declaration of rights was sought, although the procedure has been described as being neither distinctly in law nor in equity, but *sui generis.*42 Regardless of the exact technical nature of the proceeding, the fact remains that it is employed both in those states where the distinction between law and equity has been abolished and in those states where the distinction is still preserved as in New Jersey, where separate courts administer the two systems, and as in Virginia where the distinction is observed much the same as in our own state. This is true also of the English practice where the distinction is still maintained, although there was in the beginning some resistance to the introduction of declaratory judgments into law actions. Although applicable to both fields, a declaration is sought in law with comparative rarity and it is principally in equity that it is usually employed. In fact, it appears that in England a majority of the equity cases coming before the courts for decision are proceedings for a declaratory judgment.43

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41 Id. at 241, 57 S. Ct. at 464, 81 L. Ed. at 622.
42 Borchard, Declaratory Judgments 634.
43 Id. at 632.
To date all declaratory judgments in this country are authorized either under the federal act or the acts of the various states, and no such judgment appears to have been authorized by rule of court alone, independent of statute, although in many states the act is supplemented by court rules. It is interesting to note, however, that the suggestion was made, before the enactment of the federal statute and some years before the federal rule making statute of 1934, that the Supreme Court of the United States could probably have authorized declarations under its equity rule making power, and unquestionably under the new federal rules for district courts a declaration could have been authorized had the necessity existed.

In West Virginia we have at hand ready for use the rule making power of our supreme court under the Act of 1934, which gives to that court power to make and promulgate "general rules and regulations governing pleading, practice and procedure in such court and all other courts of record in this state" and provides, further, that "all statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled" by such rules. The state statute is substantially similar to the federal act which gives the United States Supreme Court power to prescribe, for district courts and courts of the District of Columbia, "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." The United States Supreme Court has seen fit, under its rule making power, to put into effect an entire new system of practice and procedure for the federal courts and no reason is perceived why the Supreme Court of Appeals of West Virginia should hesitate to put declaratory judgment procedure into effect in this state by rule of that court if, after consideration, it appears that such an addition to our procedure is desired by the bar of the state and will add another useful implement to the legal armory of the practitioner — an implement to be used as a weapon where an affirmative declaration is sought and as a shield where a negative declaration is desired. Certainly such rules in this state would represent far less of a departure from present practice than will be effected in federal practice when the new federal rules go into effect in less than one month. The example of the English Supreme Court of

Judicature, in establishing procedure for declarations by order XXV, rule 5, and other orders, and the subsequent success of the procedure introduced thereby, should not be forgotten. Moreover, the addition of the declaratory judgment to our procedural remedies would in reality represent only an enlargement of the present limited field in which it is now employed, although not *eo nomine*, as, for example, in suits to quiet title and remove clouds on title, proceedings by fiduciaries to determine their powers and duties or suits to determine the validity of a marriage.

Enough has been said to show, that, as its name indicates, declaratory judgment procedure does not affect any substantive rights and therefore it is scarcely conceivable that any rule of court adopting the procedure could be attacked on constitutional grounds. Except as to the amount involved, the only practical limitation upon the general jurisdiction of our courts is to cases involving a controversy, and it is apparent from the cases which have been discussed that the nature of the declaration sought does not remove the controversial element which would exist if some other form of relief were sought.

Because of the basic similarity of procedure between Virginia and West Virginia it may be recalled that the Supreme Court of Appeals of Virginia sustained the Virginia declaratory judgment act in the *Patterson* case.\(^46\) In this case the court defined the term "actual controversy" as used in the Virginia act, which it held constitutional because the act involved only cases of actual controversy. The section of the Virginia act involved reads as follows:

"In cases of actual controversy, courts of record within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right."\(^47\)

\(^46\) 144 Va. 113, 131 S. E. 217 (1926).
In this case the court said:

"We find nothing in the statute which contravenes any of the provisions of the State or Federal Constitutions. Its effect is to increase the usefulness of the courts and remove doubt and uncertainty as to the final result of legal controversies, by empowering the courts to enter declaratory judgments and decrees touching the rights of the parties in such cases."48

USEFULNESS

The various classes of cases in which a declaratory judgment is not only useful but superior to the remedies now afforded under the limitations of our procedural law are almost as broad as the field of litigation itself. The functions of the judgment as enumerated by Professor Borchard and the cases which have been discussed illustrate this fact so well that further detailed discussion is scarcely required. It is unlikely that there is any one of my listeners who does not have some case pending in court today, or who has not had some case in the past, in which the application of declaratory judgment procedure would not have presented a better method of solving the problem with which he was confronted when the litigation was initiated and with which procedure available he would have been in a better and more secure position to advise his client as to the method to be pursued in determining his rights under the facts involved. With such procedure available a lawyer would not be obliged, as is so often the case now, to say to his client, "Under the facts as you state them, the law appears to be thus and I think you may safely proceed on that basis, but if the court should hold otherwise, then you are liable to answer in damages." Instead the lawyer would say, "Under the facts as you state them, the law appears to be thus but before proceeding as you propose, we will bring a suit for a declaration of your rights and if I am correct in my opinion you may then proceed, but if it turns out that I am wrong, or if the court happens to decide the case wrong, as courts sometimes do, then you may not proceed and you will not be liable for any damages, not having done anything which you did not have a legal right to do." The thought may occur that, after all, a declaratory judgment will not be often sought even if available. To a certain extent this might be true at first but if experience elsewhere is a good criterion, it

48 144 Va. 113, 119, 131 S. E. 217, 219 (1926).
is reasonable to assume that such judgments will be sought with increasing frequency as lawyers become familiar with their advantages. Conceding, though, that judgments will not be sought with any degree of comparative frequency, this fact is no argument against them. We have today proceedings which are not often employed such as *quo warranto* but no one would advocate that they be eliminated from our law for that reason.

Much has been written about the social aspects of declaratory judgment procedure and how it serves to reduce the economic waste and the undesirable results, from a social standpoint, of the ordinary type of litigation. This is undoubtedly true and while we already hear too much today about the social aspects of legislation and the administration of laws (and those aspects have been much overemphasized), we cannot close our eyes to the fact that our procedure is susceptible of improvement. It is our duty as lawyers to effect such improvement as can be made consistent with sound principles of procedure. Anything which serves to make the lawyer more useful to his client, which serves to lessen the hazards of litigation, which serves to determine legal rights, status and relations as soon as possible after the questions involving them arise, which serves to lessen the ultimate cost and waste of litigation, which serves to lessen the bitterness and hatred so often engendered by litigation, is deserving of our serious consideration and action in respect thereto when the success of such procedure has been demonstrated. In addition to the advantages enumerated, Professor Sunderland suggested a further advantage, when he said:

"But there is a second result which this procedure accomplishes in cases where coercive relief might be had, and that is a psychological one. Every case may by this means become, in appearance at least, a *friendly suit*. . . . When you ask for a declaration of right only, you treat him [the defendant] as a gentleman."\(^49\)

Of course the objection might be made that very often the defendant is no gentleman and should not be treated as such, at least in many cases the plaintiff is convinced that such is the fact and no doubt the defendant is equally convinced that the same is true of the plaintiff.

The uniform act, the several state acts and the federal act all contain material to draw from in framing any procedure desired for, and adaptable to, our system. To close, I can do no better than to quote an often repeated remark wherein, referring to declaratory judgment procedure it was said: “You have the same court, the same jurisdiction, the same procedure, the same parties and the same question. Under the present law you take a step in the dark and then turn on the light to see if you have stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step,”50 to which might be added — “if you want to take the step after having turned on the light.”

50 Representative Ralph Gilbert in the House of Representatives, Jan. 25, 1928.