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THE DECLARATORY JUDGMENT IN THE UNITED STATES

EDWIN M. BORCHARD*

The common law and other legal systems long professed the assumption that it was necessary to commit physical damage or injury (a wrong) or to threaten an immediate injury, before the protection of the courts could be invoked by the person requiring judicial protection. It was apparently not sufficiently realized that rights may be impaired and disturbed and injuries suffered by the mere assertion of claims which throw rights into doubt, uncertainty, and jeopardy. So the mere unfounded assertion that a person is married or unmarried, illegitimate, insane; the mere fact that title to property is challenged; the mere fact that disputes exist as to the construction of instruments, such as contracts, deeds, leases, will, etc., create situations which endanger or impair rights and which, in order to prevent even greater damage, require clarification and determination. The private interests—the freedom of action or disposition—and the social equilibrium are both disturbed when rights are thus endangered or impaired by unfounded claims. Indeed, the courts of equity have long recognized that an action lies to quiet the title to property if the title is challenged; and statutes have given a right of action to conflicting claimants, both of real and personal property. So actions are allowed to have a void marriage or void instruments so declared and to construe wills.

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But to secure a judicial construction of contracts, deeds, and leases, and of other legal relations, it is still necessary—in the absence of statutes authorizing actions for declaratory judgments—to purport to break or violate them, in order to bring them before a court for construction and determination. It is thus necessary in many instances to act at one's peril in order to find out one's rights and obtain a judicial decision of a dispute. Not all questions of civil status or all disputes as to property rights can yet (except by way of declaratory judgment) be determined without prior violence. It is to remedy these defects, so as to enable parties to obtain authoritative decisions as to their rights—not before a controversy has arisen, but before either party has necessarily acted on his own interpretation of his supposed rights—that the declaratory judgment exists, and that it has now been adopted, as an efficient instrument of preventive justice, in the codes of procedure of many civilized countries, including some 25 American states. It is also used as a substitute for an executory judgment, when a plaintiff is satisfied with a judicial declaration of his rights and prefers to avoid too great a breach of relations with his opponent. By narrowing the issue, with resulting speed of determination, it prevents much hostile and prolonged litigation.

A declaratory judgment in form differs from an executory judgment only in the fact that it does not carry as an appendix a decree of execution. It declares the existence of a legal relation arising out of a written instrument or other circumstances, and that is all the relief that the plaintiff desires or needs. It is a final binding determination of the rights of the parties, hence can be rendered only where there are adverse parties in litigation and when all the parties in interest have been cited before the court. There must be an existing controversy as to their respective rights, and the court must be convinced that the judgment will serve a useful purpose in settling the issue. Its grant, therefore, is discretionary with the court, a discretion which, by long practice, has in part hardened into rule.

Constitutionality. These necessary conditions of a declaratory judgment sufficiently indicate that it differs radically from an advisory opinion (which binds no one, not even the court that renders it, and requires no adverse parties or litigated issues) and from the moot case (which involves issues that are fictitious, abstract, hypothetical, academic, or dead). Only two courts out of some twenty-five in the United States have thought the declaratory judgment unconstitutional, namely, the Michigan Supreme
Court (1919) and the United States Supreme Court, in dicta. To reach this conclusion, each has assumed that the declaratory judgment involved either an advisory opinion without adverse litigating parties contesting a genuine issue, or else a moot case. Such misconceptions cannot permanently prevail. The Michigan court in 1930 overruled its 1919 decision, so that the Federal Supreme Court now stands alone. In twelve states the supreme courts, in considered opinions, have unanimously concluded that the declaratory judgment is as constitutional as any other final judgment of a court, and in the other thirteen states its constitutionality has apparently been regarded as too obvious to require discussion.

The Federal Supreme Court has not had occasion to pass on the constitutionality of any declaratory judgment statute, so that its utterances are dicta. That misconceptions seem to prevail in that court as to the function and scope of a declaratory judgment is evident from the fact that the Liberty Warehouse case and the Willing case have been cited in support of the propositions

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2 Washington-Detroit Theater Co. v. Moore, 229 N. W. 618 (Mich. 1930). The court in part relies upon the fact that a 1929 Michigan Declaratory Judgments Act provides for such judgments in "cases of actual controversies," whereas the 1919 Act was silent on this point. The Michigan court in the Anway case indulged the unfounded assumption that the 1919 Act required the court to decide moot cases and render advisory opinions. The Michigan decision in the Anway case received the condemnation of practically all the commentators who discussed it: (1920) 6 A. B. A. J. 145; (1921) 7 ibid. 141; (1921) Col. L. Rev. 168; (1922) 7 Corn. L. Q. 255; (1922) 4 Ind. L. Q. 126; (1920) 19 Mich. L. Rev. 96; (1921) 5 Minn. L. Rev. 172; Rice in (1921) 28 W. Va. L. Q. 1; (1920) 30 Yale L. J. 161.


* Statutes authorizing declaratory judgments have now been adopted in the following states besides in those mentioned above: Colorado, Hawaii (ter.), Massachusetts, Nebraska, Nevada, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Wisconsin and Wyoming.
that the Court will not render advisory opinions or decide moot cases or pass on conclusions of an administrative body. It would seem clear, however, that an action for a declaratory judgment differs in no respect from any other action except in the fact that a coercive or executory decree does not attach to the judgment, so that there would seem to be little occasion to confound it with an advisory opinion or a moot case. Some of the confusion appears to go back to the Muskrat case, which was invoked both by the Michigan Supreme Court in the Anway case and by Mr. Justice Sanford in the Liberty Warehouse case. In the Muskrat case Congress had authorized certain named Indians to institute an action in the Court of Claims to test the constitutionality of a prior statute concerning Indian lands. There was no evidence that Muskrat had any interest in the lands, that the Attorney General had any conflicting interest, or that the court's judgment could affect any specific property or legal relations. Such a proceeding lacked every element of a justiciable controversy. The obvious distinctions between the Muskrat case and an action for a declaratory judgment were pointed out by Charles E. Hughes, now Chief Justice Hughes, in 1920. It is fundamental to an action for a declaratory judgment that the plaintiff must have a definite legal interest capable and worthy of judicial protection, that the defendant must have an adverse interest, and that the judgment, definitely affecting legal relations placed in issue, be res judicata. These constitute the elements and the only elements

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8 Fidelity Bank & Trust Co. v. Swope, 274 U. S. 123, 131, 47 S. Ct. 511 (1927); Ex parte Bakelite Corp., 279 U. S. 438, 454, 49 S. Ct. 411 (1929) ("a duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Art. III").

9 Barker Painting Co. v. Local No. 734, etc., 281 U. S. 462, 50 S. Ct. 356 (1930), by Holmes, J., in which it is said, citing the Willing case as authority, that a court "cannot be required to go into general propositions or prophetic statements of how it is likely to act upon other possible or even probable issues that have not yet arisen."

10 In Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 S. Ct. 389 (1930), the Supreme Court (by Van Devanter, J.) cites the Liberty Warehouse and the Willing case to the proposition that "the court cannot give decisions which are merely advisory" or exercise "functions which are essentially legislative or administrative."
of an adversary judicial action, or of a "case or controversy," as it is commonly called. It is not necessary that a judgment carry execution in order that it be a judgment. That the Supreme Court seems to be departing from its view that there are constitutional objections to the declaratory judgment may be inferred from its latest dictum to the effect that "such a remedy is not within either the statutory or the equity jurisdiction of federal courts." While it is quite true that as yet a federal statute has not been enacted, though it twice passed the House of Representatives, the statement that such relief is not within the equitable jurisdiction of the federal courts is questionable, for not only the English and colonial courts, but practically all American courts, includ-

an action for quieting title and removing a cloud) that the lessees were privileged under the lease to tear down the building and erect a new one was not a justiciable controversy (though forfeiture of long-term leases was in jeopardy), but a friendly doubt or difference of opinion, inappropriate for judicial determination. That it was a most hostile proceeding, involving millions of dollars, and not at all a friendly difference of opinion, would seem to appear from the record. Somewhat similar cases were properly held justiciable controversies in Woodward v. Fox West Coast Theaters, 284 Pac. 350 (Ariz. 1930); Washington-Detroit Theater Co. v. Moore, 229 N. W. 618 (Mich. 1930); Girard Trust Co. v. Tremblay Motor Co., 291 Pa. 507, 140 Atl. 506 (1928).

"When adverse litigants are present in court, and there is a real controversy between them, a final decision rendered in any form of proceeding of which the court has jurisdiction is a judgment, whether or not execution may follow." In re Kariker's Petition, 284 Pa. 455, 131 Atl. 265, 270 (1925). In Fidelity Bank & Trust Co. v. Swope, 274 U. S. 123, 132, 47 S. Ct. 511 (1927), the Supreme Court said: "While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct of the exercise of the judicial function," citing cases. This was amply reaffirmed in Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 725, 49 S. Ct. 499 (1929), by Chief Justice Taft, so that this particular question, which troubled Mr. Justice Sanford in the Liberty Warehouse case, may be deemed to have been set at rest.


19 In Guaranty Trust Co. v. Hannay [1915] 2 K. B. 536, the English Court of Appeal held the action to be purely a matter of procedure and considered that courts of equity always had the power to render declaratory judgments. See Bankes, L. J., "I cannot doubt that had the Court of Chancery in those days (before 1852) thought it expedient to make merely declaratory judgments they would have claimed and exercised the right to do so." See F. W. Grinnel in (1928) 13 Mass. L. Q. 43, at 52.

20 Hollard v. Ollivier, 1 New Zealand S. C. R. 197 (1881): "This is a mere matter of procedure," and the court assumed that it had power to make a declaratory decree. This power was reaffirmed, even in the absence of statute, in Dufaur v. Kenealy, 28 N.Z.R. 269 (1908).

21 See the actions for quieting title, declaring an alleged cloud nonexistent, determining disputed claims to property, declaring the status of persons, referred to hereafter.
ing the United States Supreme Court,¹⁵ have for years rendered declaratory judgments without special statutory authority and without using the word "declaratory" or "declaration." Those words have induced a little confusion, which the Massachusetts and Kansas statutes have sought to avoid by substituting for the term judicial "declaration" of rights, the equivalent term "determination" or "adjudication" of rights.

**Declaratory and Investitive Judgments.** Judgments that merely declare the rights of the parties fall into two classes: (a) those which declare pre-existing rights and (b) those which create new legal relations. In fact all judgments fall into these groups, though some are accompanied by a decree of execution and some are not. It is to class (a) that the name declaratory judgments is properly confined. The judgments in class (b), though not followed by execution, are better characterized as investitive or constitutive, because they create something new. These include judgments of adoption, divorce, changing names, naturalization, partition, forfeiture, foreclosure, establishing school districts, drains and irrigation canals, highways and their improvements, line fences, appointing guardians, receivers, admitting a will to probate, etc.

**Declaratory Judgment of the Common Law.** For centuries the courts of practically all countries, and long before the enactment of statutes expressly authorizing declaratory judgments,

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¹⁵ See the suits brought by one state against another to determine the location of a disputed boundary line. Louisiana v. Mississippi, 202 U. S. 1, 29 S. Ct. 408 (1906); Arkansas v. Tennessee, 246 U. S. 158, 38 S. Ct. 301 (1918); Georgia v. South Carolina, 257 U. S. 516, 42 S. Ct. 173 (1922). One of the clearest cases is Fidelity National Bank & Trust Co. v. Swope, 274 U. S. 123, 47 S. Ct. 511 (1927), in which the court sustained a Kansas ordinance which authorized a city to bring proceedings against the taxpayers for a declaration that certain public improvements were legally carried out and that the bonds issued pursuant thereto were binding obligations of the city. Said Mr. Justice Stone, for the Court: "That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. Cf. Risty v. Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, 46 S. Ct. 236 (1926). They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city." The action in question resembles the bond validating actions authorized by statute in California, Florida, Georgia, and Mississippi.

have been rendering judgments determining the (pre-existing) rights of the litigants, final judgments incapable of specific execution and the execution of which is unnecessary. These judgments have found their greatest utility in the determination of conflicting claims with respect to (a) status, (b) the ownership of or other rights in property, or (c) other legal relations, and (d) the construction and interpretation of written instruments. With or without express statutory authorization, the necessities of organized communal life have compelled the recognition of the efficacy of the declaratory judgment as a means of terminating legal controversies.

In the field of status, we have long been familiar with actions for the declaration of the nullity of void marriages or divorces,\(^2\) for the declaration of legitimacy, illegitimacy, paternity, for the declaration of the validity of a marriage,\(^3\) for the declaration of heirship,\(^4\) etc.

In the field of property rights, equity has long recognized that disputes as to ownership or possession of property can effectively be determined by a judgment which merely declares the rights of the parties. Since the abolition of real actions in England, this is now the regular method of trying title. Some of the restrictions with which the equitable action for removing a cloud from title is encumbered have led to the enactment of statutes in many states enabling not merely a person in possession, but any claimant of an equitable or legal interest in land (and in some states even in personal property), to institute an action for the trial of the title.\(^5\) Equity has recognized that it is in the public as well as in the private interest that certainty shall prevail in the ownership and right to possession of property.\(^6\) The mere assertion of adverse claims has thus been regarded as a harassment of the person in

\(^3\) Tillinghast v. Tillinghast, 25 Fed. (2d) 531 (D. C. 1928); Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789 (1918).
possession and, under circumstances, of a claimant out of possession. The fact is that the power to quiet the title to and remove clouds from property is but an illustration of the general power of courts of equity to quiet disputed or endangered rights generally; and, so far as concerns equitable interests, chancery courts never lacked that power. It would have been proper to exercise it in Willing v. Chicago Auditorium Association, instead of dismissing the parties, after an expensive litigation in a case involving millions of dollars and important public improvements, with the remark that the court was unable to determine their dispute in an action to remove a cloud from the title, because what the plaintiff was seeking was in effect a declaratory judgment. Even without statutory authority to render such judgments, it is submitted that a court of equity had the power to decide whether the lessee was or was not privileged without forfeiture to tear down the Chicago Auditorium.

Our law is familiar with the declaration of other legal relations. For example, a cestui que trust can obtain a judgment declaring the plaintiff to be cestui and thus impressing a trust upon the legal title of another; or declaring a supposed trust to be invalid. The trustee’s or other fiduciary’s action for instructions, when adversary in character, is an exemplification of a time-honored declaratory judgment. The bill of interpleader by a stake-

[References]

24 Gage v. Abbott, 99 Ill. 366 (1881); Dull’s Appeal, 113 Pa. St. 510, 6 Atl. 540 (1886); 4 Pomeroy, op. cit., § 1378, n. 1.

Our law is familiar with actions to determine the location of disputed boundary lines: Georgia v. South Carolina, 257 U. S. 516, 42 S. Ct. 173 (1922); Spencer v. Mack, 151 Atl. 309 (Conn. 1930); and with actions to determine the existence of rights of way or easements: Greene v. Canny, 137 Mass. 64, 70 (1884); Oddo v. Sabin, 151 Atl. 289 (N. J. Eq. 1930).

It is not at all clear that the court was correct in holding that the cloud on the title, whose removal was sought, could not be derived from the lease itself, but only from some extraneous source. See Professor Langmaid’s criticism of Willing v. Chicago Auditorium in 23 Ill. L. Rev. 595 (Feb. 1929). The C. C. A. had considered the matter so important that they concluded that the lessor’s refusal to permit destruction of the building might constitute a cloud on the lessee’s title. 20 Fed. (2d) 837 (C. C. A. 7th 1927).  
25 Brainard v. Buck, 184 U. S. 99, 22 S. Ct. 458 (1902); Donohoe v. Rogers, 168 Cal. 700, 144 Pac. 958 (1914); Porten v. Peterson, 139 Minn. 152, 166 N. W. 183 (1913); State Lumber Co. v. Cuddigan, 150 Atl. 760 (R. I. 1930).

27 Penington v. Commonwealth Const. Co., 151 Atl. 228 (Del. 1930), (action by receiver to have determined the distributive shares of various classes of stockholders in an insolvent corporation); Sackett v. Paine, 46 R. I. 439, 128 Atl. 209 (1925). See 39 Cyc. 319.
holder who admits that a duty is owing from him to one or more cited persons, but, disclaiming knowledge of which one or more of several persons is the entitled creditor, is a petition for a judgment determining which is the proper claimant.

Among the better-known actions for the construction of written instruments—actions which are in effect declaratory—are those for the construction of wills. While those who can raise the issue are usually few in number, e.g., executors, trustees, or cestuis que trustest, in several states a more liberal doctrine prevails, so that any one interested under a will may challenge the rights of those who set up adverse claims.

Actions are not infrequent seeking the declaration of the nullity of instruments or transactions, although usually incidentally to further relief. When brought by prospective legal defendants to anticipate their defenses under void or voidable instruments, they are declaratory actions. In this category belong actions by insurance companies to declare the invalidity of policies obtained by fraud, sometimes before any loss has occurred; or by those prospectively liable under negotiable instruments. Actions, declaratory in effect, are authorized in some states proving the tenor of lost or spoliated instruments or proving the validity, when contested, of instruments to be recorded. In California, Colorado, Idaho, and Nebraska provision is made for the establishment of irrigation districts and for the institution of an action in rem by the commissioners or directors of the district, citing as defendants the District, the Attorney General or taxpayers, to have the court determine that the proceedings were properly undertaken, that

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20 Chicago Title & Trust Co. v. De Lasaux, 336 Ill. 522, 168 N. E. 640 (1929), which mentions the four conditions of such a bill. The bill of interpleader by a stakeholder is one of the oldest forms of declaratory action. See Pomeroy, Equitable Remedies (1905) § 43 et seq.
21 Mechanics' Bank v. Yale University, 150 Atl. 526 (Conn. 1930); Monypeny v. Monypeny, 202 N. Y. 90, 95 N. E. 1. (1911); Pomeroy, Equity Jurisprudence (3d ed. 1905) § 1157; 40 Cyc. 1841.
the district is lawfully established, and that the bonds issued for
the execution of the irrigation works are valid obligations.24 Not
greatly dissimilar are the so-called bond validating statutes of Cal-
ifornia, Florida, Georgia, and Mississippi,25 which by implication
have been upheld by the United States Supreme Court.26

When an Alternative and when an Exclusive Remedy. The
fact that no coercive decree is sought or is attached to the judg-
ment enables actions to be brought for a declaratory judgment on
two different types of operative facts: (a) those which might just
as readily have justified an action for executory or coercive relief;
and (b) those which are not susceptible of any other relief.

(a) In the former type of case, declaratory relief is an alter-
native remedy. It is invoked in cases where the plaintiff is satis-
fied with a declaration that the defendant owes him a certain duty
or that the defendant is under a disability. For example, a tax-
payer contesting the validity of a tax assessment can, instead of
an injunction or resisting enforcement proceedings, bring an action
for a declaratory judgment that the city or state is not empowered
to levy a certain tax or (if the plaintiff has the necessary interest)
enforce a certain law.27 A declaratory judgment in these cases
enables a speedy determination of issues the clarification of which
is necessary both in the public and private interest. Were declara-
tory judgments universally authorized, it would not be necessary
to abuse the injunction—now so widely under attack—in order to
render what is in effect and purpose a declaratory judgment.28

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24 The statutes, with supporting cases, are quoted or cited in 33 C. J. 1099, 1100.
25 Ingram v. City of Palmetto, 93 Fla. 790, 112 So. 861 (1927); Baker v.
City of Cartersville, 127 Ga. 221, 55 S. E. 249 (1906); Miller v. Silver Creek
Separate School Dist., 131 Miss. 702, 95 So. 688 (1923). California provides
for sanitary bonds, irrigation bonds, water bonds, public utility bonds and

237, 257 Pac. 959 (1927); Pettit v. White County, 152 Tenn. 660, 230 S. W. 668
(1926); Erwin Billiard Parlor v. Buckner, 156 Tenn. 278, 300 S. W. 565
(1927).
(1925), where the statute enjoined was not to come into force for three
years after enactment, hence there was no imminence of wrong or loss. The
proper relief was a declaratory judgment which actually was rendered under
cover of an injunction. See also Village of Euclid v. Ambler Realty Co.,
272 U. S. 365, 47 S. Ct. 114 (1926), where injunction against zoning law
was issued; cf. West v. City of Wichita, 118 Kan. 265, 267, 234 Pac. 978, 979
(1925), where declaratory judgment was refused, because plaintiff
did not state specifically enough the purpose for which he desired to use his
property.
The termination of litigation between private parties may also often be better accomplished by an action for declaratory relief than by a harsher action, and there is no reason why the law should not foster the seeking of mild rather than harsh and destructive relief if that satisfies the plaintiff and determines the issue. This occurs often in cases where a lessee desires to sublet, but is refused permission thereto by the landlord, and seeks to have his rights determined. For example, in *Mill v. Cannon Brewery Co.* the plaintiff was a lessee of premises belonging to the defendant. The lease contained a provision restricting the right to assign or sublet without the landlord's consent. The plaintiff, desiring to sublet to H but being unable to get the landlord's consent and unwilling to risk forfeiture, brought an action for a declaration against the landlord that his refusal to consent was arbitrary and that the plaintiff was privileged to assign to H. The declaratory judgment requested was granted and much damage saved. While the lessee could, under the more conventional forms of action, have sued for damages, he would have had to move out and perhaps break the lease to do so advantageously. Nor could he practically have sublet without the consent, for the sub-tenant would have bought merely a lawsuit. Actions for declaratory judgments instead of actions for replevin, for damages, or for specific performance are often brought and are en-

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20 [1920] 2 Ch. 38; see similar cases in Sarner v. Kantor, 123 Misc. Rep. 469, 205 N. Y. S. 700 (1924); Young v. Ashley Gardens Properties, Ltd., [1905] 2 Ch. 112.

21 Mr. Carmody, in his work on New York Practice (1923) § 304, recites the facts of a parallel case under the conventional procedure, namely, Broadway and 94th St. Inc., landlord v. C. & L. Lunch Co., tenant, 116 Misc. Rep. 440, 190 N. Y. S. 563 (1921): "The plaintiff was a lessee of certain premises belonging to the defendant. The lease contained a provision restricting plaintiff's right to assign or sublet without landlord's consent. Plaintiff, desiring to assign the lease to W and being unable to get the landlord's consent, assigned to W without it, but the sublease was conditioned upon the undisputed and undisturbed possession of W for a period. W went into possession. The landlord gave notice of termination of the lease, rejected W as a tenant and notified W that the supply of steam and hot water would be discontinued. W vacated the premises, the tenant resumed possession. He refused to pay rent. The landlord brought this summary proceeding to recover possession of the premises. The tenant counterclaimed in the summary proceeding for damages sustained through the landlord's breach of this covenant of the lease by refusing to give his consent to the subletting. The jury returned a verdict in favor of the tenant in the sum of $7,045.19."


24 Sheldon v. Powell, 128 So. 258 (Fla. 1930), where action for declaratory judgment was approved, though it was admitted that action for release of a legacy to plaintiffs would also have lain; Grindell v. Bass, [1920] 2 Ch. 487.
couraged rather than discouraged, partly because they enable the issues to be determined in a more peaceful atmosphere, partly because they are more expeditious, and partly because they save destruction of values, of contracts, of business relations. Why should it be necessary, as it now is, to break or purport to break a contract to obtain its judicial interpretation or construction? In an industrial age operating under long-term contracts, disputes are bound to arise. It seems a most inefficient and expensive form of deciding disputes to compel either party to breach the contract or, at his peril, act upon his own interpretation of its meaning, as a condition of a judicial decision upon the merits of a dispute. England and much of the rest of the English-speaking world discovered that fact long ago. An industrial state would do well to adopt this simple measure of reform, which would save much waste and promote orderly economic relations.

But even if no advantages by way of peaceful settlement, expeditiousness, or economy are apparent to the court, why should a plaintiff not be permitted to choose his own form of relief, rather than a harsher or more conventional one? If a New York woman prefers to sue her husband for a declaratory judgment that his Mexican divorce is invalid rather than for an annulment of his second marriage in Connecticut, why should a court interfere? The tendency of some courts to permit the action for a declaration only if it appears that no other form of action is available is quite erroneous and should be stopped before it proceeds further.


These errors, it is submitted, have occurred in Loesch v. Manhattan Life Ins. Co., 128 Misc. Rep. 232, 213 N. Y. S. 412 (1926), criticism in comment (1927) 36 YALE L. J. 403 and In re List’s Estate, 283 Pa. 255, 129 Atl. 64 (1925), in which the court suggested, by way of dictum, that the declaratory judgment could only be employed when no ordinary form of action was available and that the main purpose of the declaratory procedure was to insure a speedy determination of issues ‘‘which would otherwise be delayed, to the possible injury of those interested, if they were compelled to await the ordinary course of judicial proceedings.” There is no authority in the history of the subject for such an unusual conclusion. It is indeed contrary to all authority. See also Kaleikau v. Hall, 27 Hawaii 420 (1923); Dempsey’s Estate, 288 Pa. 458, 137 Atl. 170 (1927). The tendency is particularly noticeable in Pennsylvania, where the declaratory judgment was welcomed in 1925 in one of the most profound decisions of any of the states. In re Kariher’s Petition, 284 Pa. 455, 131 Atl. 265 (1925). See the case note (Nov. 1930) 40 YALE L. J. 129."
There is no authority for it in England, where most of the actions for a declaration could doubtless have been brought for other forms of relief also. It conflicts, moreover, with the wording of the authorizing statutes in this country and in England which empower the courts to render declaratory judgments “in any action or proceeding . . . whether or not further relief is or could be claimed.” Its only proper application is to a case in which a specific statutory remedy has been provided. Under those circumstances, it has commonly been held that, where jurisdiction of the particular type of case presented has been conferred on a special tribunal, the plaintiff should be required to pursue the statutory remedy especially provided.

This principle that the declaratory judgment is an alternative and not an exclusive remedy does not foreclose a court, in the exercise of its discretion, from declining to issue a declaration if it considers that the decision will not terminate the issue or will not serve a useful purpose or is inappropriate to the occasion. That discretion is controlled by precedent and has to a considerable extent hardened into rule. But the mere fact that the plaintiff might have availed himself of another form of action or relief is not a sufficient ground for declining a declaration.

As already observed, by the terms of the statutes the plaintiff may ask and the court issue a declaration “whether or not further relief is or could be claimed.” This clearly authorizes a prayer for a declaration to be combined with a prayer for coercive relief, such as an injunction, specific performance, or damages. The great advantage of such combination is that, whereas the injunction or other coercive relief may for technical reasons be declined, the declaration may issue, and the plaintiff may thus succeed in his

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46 It is, however, the rule in actions involving title in India, where section 42 of the Specific Relief Act of 1877 provides: “that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.” SARKAR, THE SPECIFIC RELIEF ACT (4th ed. 1922) 169. It was once the rule in Germany, 4 B. G. 437 (1881). See the development of the practice in (1918) 28 YALE L. J. 16-20.
47 NEW YORK CIVIL PRACTICE ACT, § 473; English Order XXV, Rule 5, of 1883; UNIFORM DECLARATORY JUDGMENTS ACT, § 1. See Miller v. Miller, 149 Tenn. 463, 261 S. W. 965, 967 (1924).
main purpose to obtain an authoritative decision on his rights. This, in fact, is a common practice."

(b) The declaratory judgment can be sought, however, under circumstances where no other form of relief is possible, a function which has attracted major interest and which exemplifies some of the more striking social and economic advantages of the procedure. The distinctive feature of this second group of cases—in which the remedy often, though not necessarily, is exclusive—is that no injury or wrong need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty by denial, by the existence of a potentially injurious instrument or the occurrence of some unforeseen event or catastrophe, or by the assertion of a conflicting claim by the defendant, e. g., that the plaintiff claims she is the defendant's wife, which defendant denies; that the defendant public official demands certain tax information, from the exaction of which plaintiff claims immunity; that defendant lessee demands the erection of a three-story fireproof garage under a lease (the old non-fireproof one having burned), whereas plaintiff lessor maintains that he is privileged to erect a two-story building, the new statutory limit for garages; that a state statute requires a heavy license fee from billiard parlors in one county only, whereas plaintiff asserts his immunity therefrom on the ground of unconstitutionality; that plaintiff is not under a duty to return to the defendant certain moneys paid by defendant on forged bills of lading; that defendant asserts plaintiff is bound to perform a contract for a future period, whereas plaintiff maintains he is not so bound; plaintiff claims in 1915 that he is no longer bound to perform certain long-term contracts to deliver iron ore to the defendant from 1911 to 1919, on the ground that war has abrogated the contracts; plaintiff claims, before the expiration of a contract, that he is entitled to a renewal

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40 Erwin Billiard Parlor v. Buckner, 156 Tenn. 278, 300 S. W. 565 (1927); Islington Vestry v. Hornsey U. C., (C. A.) [1900] 1 Ch. 565; and the many cases cited in (1918) 28 YALE L. J. 105 at seq.
42 Dyson v. Attorney-General, [1911] 1 K. B. 410, [1912] 1 Ch. 158.
44 Erwin Billiard Parlor v. Buckner, 156 Tenn. 278, 300 S. W. 565 (1927).
thereof on certain conditions; that plaintiff is privileged to assign a lease, without the consent of the landlord, because unreasonably withheld; that plaintiff lessee under a ninety-nine year lease is privileged (i.e., without forfeiture of the lease) to demolish the building and erect a new one to be used for other than theater purposes; that the plaintiff’s lease with the city, requiring him to undertake extensive improvements is valid, over the objections of a defendant taxpayer; that, without breaking or purporting to break a contract—a deed, lease, charter party, etc.—it means what the plaintiff and not what the defendant claims. In these typical cases, no wrong or even hostile activity has been committed or threatened—a condition, it may be observed, which justified judicial relief in various equitable actions long before declaratory actions and judgments were specifically authorized. What is

2"Sarner v. Kantor, 123 Misc. Rep. 469, 205 N. Y. S. 760 (1925); Young v. Ashley Gardens Properties, [1905] 2 Ch. 112 ("If we refuse a declaration here, the lessee’s property would diminish in value, as his assignee would run the risk of being turned out by the lessor. I cannot imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order," by Cozens-Hardy, L. J.).
4"Woodward v. Fox West Coast Theatres, 284 Pac. 350 (Ariz. 1930). In this case the Fox Theaters made a lease of fifty years with the City of Phoenix for the rental of land for a theater, and agreed to build within two years a building costing not less than $300,000. Taxpayer Woodward claimed by serving notice that the lease was illegal and void for eleven reasons stated. The Fox Theaters as plaintiff thereupon brought an action for a declaration that the lease was valid and to quiet plaintiff’s title as lessee. The court said: "It would seem, in view of the improvements contemplated, their extent and the cost thereof, that plaintiff should, if possible, be assured that the lease is valid before making improvements. The building proposed to be constructed will become a part of the realty and, should the lease be void or invalid and voidable, the investment would be a total loss to the plaintiff. . . . Safe and sound business demands that such questions be settled before the expenditure of so large a sum as $300,000 and such questions should be settled as early as convenient, because the convenient to pay rent begins at the commencement of the lease, July 1929."
5"Colorado & Utah Coal v. Walter, 75 Col. 489, 226 Pac. 364 (1924), that plaintiff had the exclusive right to use certain waters rising on his land; McCrory Stores Corp. v. S. M. Braunstein, Inc., 102 N. J. L. 590, 134 Atl. 752 (1926) (meaning of clause in lease); In re Devlin’s Trust Estate, 284 Pa. 11, 130 Atl. 238 (1925), that a certain provision of a trust deed was void as contrary to public policy; In re Kariher’s Petition, 284 Pa. 455, 131 Atl. 265 (1925), that plaintiff, as life-tenant under a will, had power as lessor to enter into a certain lease; Russian and Commercial Industrial Bank v. British Bank for Foreign Trade, [1921] 2 A. C. 438, that plaintiff mortgagees were privileged to repay a certain loan in rubles rather than pounds sterling (this, without offering to redeem the mortgage); Elliott Steam Tug Co. v. Charles Duncan & Sons, 34 T. L. R. 583 (1918), that a certain charter-party is in force and that plaintiff charterers and not defendant owners were entitled to certain Government hire.
visible is the existence of an opposing claim which disturbs the peace and freedom of the plaintiff and, by raising doubt, insecurity, and uncertainty in his legal relations, damages his pecuniary or other interests. A survey of some of the cases that have been decided under the procedure looking to a declaratory judgment discloses it as an essential means of bringing to judicial cognizance many important legal issues and of settling legal controversies before violence or hostile action has caused irreparable injury.\textsuperscript{63}

Representative Gilbert of Kentucky, in speaking on the federal declaratory judgments bill on January 25, 1928, described the preventive function of the declaratory judgment in this apt metaphor:\textsuperscript{64}

"You have the same court, the same jurisdiction, the same procedure, the same parties, and the same questions. Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory law you turn on the light and then take the step."

Judge Cardozo, Chief Judge of the New York Court of Appeals, has testified to its efficacy in these words:\textsuperscript{65}

"I studied the subject of declaratory judgments before the statute on that subject was adopted in this State. My conviction of its utility has been strengthened by experience of its practical operation. I have not felt at any time that the remedy has been abused. I have been impressed on numerous occasions with the belief that it has supplied a useful expedient to litigants who would otherwise have acted at their peril, or at best would have been exposed to harrowing delay."

And Chief Justice von Moschzisker of Pennsylvania added his testimony to the effect that

"it has proved to be a most useful piece of legislation in our State, and I can conceive of how it would be even more useful in the Federal courts; therefore I take the liberty of stating to you that, after five years of experience with the declaratory judgment as practiced in Pennsylvania, we of the supreme court are satisfied that it serves the present times in

\textsuperscript{63}See the list of typical cases printed in Report of Hearings before a sub-committee of the Committee on the Judiciary, United States Senate, 70th. Cong., 1st sess., on H. R. 5628, April 27 and May 18, 1928, pp. 47-54.
\textsuperscript{64}Cong. Rec., v. 69, No. 33, Jan. 25, 1928, p. 8108.
\textsuperscript{65}Hearings before a sub-committee of the Senate, supra n. 62, p. 55.
a most excellent way, and actually avoids much of what would otherwise be protracted litigation.'

The Statutes. Statutes authorizing declaratory judgments are fairly modern. Although the Roman law was acquainted with the procedure, and the Middle Ages developed it considerably, the only English-speaking country to take it up actively was Scotland. There it flourished from the fifteenth century on, having evidently been brought over from France and the Scotch judicial experience in Roman law. It took until the nineteenth century to reach England, where its introduction was promoted by Lord Brougham and other reformers. In 1846, Lord Brougham, in delivering his opinion in the House of Lords in the case of Earl of Mansfield v. Stewart, said:

"I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy, under it, the security and the various facilities and conveniences which they have from the most beneficial and most admirably contrived form of proceeding called a declaratory action. Here, you must wait till a party chooses to bring you into court; here, you must wait till possibly your evidence is gone; here, you have no means whatever, in ninety-nine cases out of a hundred, of obtaining the great benefit of this proceeding."

Lord Brougham lived to see his proposed reform partially adopted in an amendment to the Chancery Procedure Act of 1852, which provided, in section 50, that

"no suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief."

This was given so narrow a construction by the courts, not without criticism from bench and bar, that, under authority of the power vested in the Supreme Court of Judicature by the Act of 1873, the Court issued an Order, XXV, rule 5 of 1883 which has paved the way for a wide application of the declaratory judgment. It reads as follows:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the Court may make binding declarations of

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^{5} Hearings, *ibid.* p. 47.
^{6} Weismann, *J. Die Feststellungsklage.* Bonn, 1879.
^{7} 5 Bell 139, 160.
^{8} 7 Statutory Rules and Orders 54.
right whether any consequential relief is or could be claimed, or not."

So fully did the courts consider the declaratory judgment merely a matter of procedure that they adopted it in its broadest form merely by rule of court. The 1883 Rule, which is the parent of most of the statutes or rules now adopted in nearly every British possession throughout the world, was supplemented in 1893 by a further rule (Order LIV, A), reading as follows:

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other 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 American experience began with a brief general statute of 1876 in Rhode Island, although limited authority to render declaratory judgments was conferred at an earlier date in one or two other states. Maryland adopted a declaratory judgment statute in 1888. None of these statutes appear to have aroused special interest and their use was desultory only. In 1915 New Jersey passed an Act along the lines of the 1893 Order LIV, A, which has been applied in a number of cases. This, like the Florida Act of 1919 and the Massachusetts Act of 1929, confines the power to the declaration of rights under a written instrument. In 1919 Michigan passed a broad Act and from that time on, every legislative session has witnessed the accession of one or more states to the list of states enjoying this procedure. Twenty-five states now have this procedure, including several of the neighbors of West Virginia. The fact that over three hundred decisions have been rendered under them within ten years is an indication of their utility. The number is increasing annually. It may be added that in England approximately 60 per cent of the cases in equity are brought for declaratory judgments and in New Zealand about 25 per cent of all actions are declaratory. This is a guaranty that those familiar with the procedure recognize its value.

The American statutes have taken three general forms. The

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60 Statutory Rules and Orders, 1893, p. 552.
61 The New Jersey Act respecting the court of Chancery, Suppl., approved March 30, 1915, Public Laws, 1915, c. 116, p. 185 § 7, reads as follows: "Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will or other written instrument, may apply for the determination thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested." See In re Ungaro’s Will, 88 N. J. Eq. 25, 102 Atl. 244 (1917).
New York Act and Rules, which approximate the Connecticut and a few other Acts, read as follows:

"Section 473. Declaratory judgments. — The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section.

"Rule 210 — Practice assimilated. — An action in the supreme court to obtain a declaratory judgment, pursuant to section 473 of the civil practice act, in matters of procedure, shall follow the forms and practice prescribed in the civil practice act and rules for other actions in that court.

"Rule 211—Prayer for relief.—The prayer for relief in the complaint shall specify the precise rights and other legal relations of which a declaration is requested and whether further or consequential relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated.

"Rule 212—Jurisdiction discretionary.—If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised.

"Rule 213—Verdict of jury on facts.—In order to settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. Such verdict may be taken by the court before which the action is pending for trial or hearing. The provisions of sections 429 and 430 of the civil practice act apply to a verdict so rendered.

"Rule 214—Costs.—Costs in such an action shall be discretionary and may be granted to or against any party to the action."

The Massachusetts Act, which is confined to the interpretation of written instruments, provides:

"§1. Section 3 of Chapter 213 of the General Laws is hereby amended by adding after clause 'Tenth' the following new clause: Tenth A, Providing that an action at law or a suit in equity shall not be open to objection on the ground

\[\text{CIVIL PRACTICE ACT, § 473, and Rules thereunder. The annotations of the New York Act present the cases. New York has employed the declaratory judgment more frequently than any other state.}\]

\[\text{Statutes 1929, c. 186.}\]
that a mere judgment, order or decree interpreting a written instrument or written instruments is sought thereby, and providing procedure under which the court may make binding determinations of right interpreting the same, whether any consequential judgment or relief is or could be claimed or not, providing that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or to affect their right to jury trial.

"§2. This Act shall become operative on September first of the current year."

The Uniform Declaratory Judgments Act which, with or without modification, has been adopted in most of the states, reads:"

"An act concerning and regulating declaratory judgments and decrees and to make uniform the law relating thereto.

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

"Sec. 2. Power to Construe, etc. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Sec. 3. BEFORE BREACH. A contract may be construed either before or after there has been a breach thereof.

Sec. 4. EXECUTOR, ETC. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or
(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Sec. 5. ENUMERATION NOT EXCLUSIVE. The enumeration in sections 2, 3 and 4 does not limit or restrict the exercise of the general powers conferred in section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Sec. 6. DISCRETIONARY. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Sec. 7. REVIEW. All orders, judgments and decrees under this act may be reviewed as other orders, judgments and decrees.

Sec. 8. SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

Sec. 9. JURY TRIAL. When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

Sec. 10. COSTS. In any proceeding under this act the court may make such award of costs as may seem equitable and just.

Sec. 11. PARTIES. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and
no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State also be served with a copy of the proceeding and be entitled to be heard.

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

"Sec. 13. Words Construed. The word ‘person,’ wherever used in this act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

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

"Sec. 15. Uniformity of Interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

"Sec. 16. Short Titles. This act may be cited as the Uniform Declaratory Judgments Act.

"Sec. 17. Time of Taking Effect. This act shall take effect from and after its passage, the public welfare requiring it." (The Tennessee provision.)

One reason for the length of the Uniform Act lies in the fact that in many states the courts have no or little rule-making power and a self-executing Act was hence desired. In fact, however, aside from the requirement of jury trial for questions of fact—and even this may be assumed under general laws or constitutional provision—rules are hardly essential, for the procedure is or should be identical with that prevailing in any other action, with the one exception of the prayer for relief, which seeks only a declaration or determination of the rights of the plaintiff or the parties, instead of coercive relief by way of damages, injunction, specific performance, or other mandate.

The procedure has now been so thoroughly tested in courts throughout the country that it may be hoped that all the states will soon find it to their interest to adopt this useful instrument for the more speedy and effective administration of justice.