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THE NORTH CAROLINA DECLARATORY JUDGMENT ACT

M. T. VAN HECKE*

The new Declaratory Judgment Act¹ introduces to our judicial administration a device whose utility can best be seen through contrast with familiar local procedures and a sampling of the experience of other states.

It differs from an advisory opinion² in three respects. That service is rendered only to the legislative or executive branch of the state government; no question of fact may be involved; and the opinion is not binding. A declaratory judgment, however, is available to all classes of litigants without regard to their public or private status; issues of fact³ as well as of law may be litigated; juries⁴ are available as in other cases; and the declaration has "the force and effect of a final judgment or decree."⁵

The device is distinguished from a controversy without action in two ways. Under the statute⁶ creating that procedure, the facts have to be agreed upon and the case must have been capable of being the subject of a civil action with a right to a judgment for consequential relief. ". . . the purpose is simply to dispense with the formalities of a summons, complaint, and answer, and upon an agreed state of facts to submit the case to the court for decision and . . . the judge shall . . . render judgment thereon as if an action were depending."⁷ Today, however, a declaratory judgment may be obtained in a con-

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¹ P. L. 1931, Ch. 102.

² Note (1929), *Advisory Opinions in North Carolina*, 7 N. C. L. REV. 449. Compare *Cohon v. State*, 201 N. C. 312, 160 S. E. 183 (1931) (recommendatory jurisdiction of Supreme Court on claims against the State).

³ P. L. 1931, Ch. 102, §§9, 10. For various attitudes toward settling disputed questions of fact, under statutes differing from the Uniform Act, see annotations in 12 A. L. R. 72 and 68 A. L. R. 119. An excellent case is *Muskegon Hts. v. Danigelis*, 253 Mich. 260, 235 N. W. 83, 73 A. L. R. 696 (1931). Compare *Transport Oil Co. v. Bush*, 1 Pac. (2d) 1060 (1931) (oral contract).

⁴ *Ibid.*

⁵ *Ibid.*, §1.

⁶ N. C. ANN. CODE (Michie, 1927) §626 and annotations; McINTOSH, N. C. PRAC. & PROC. (1929), 294, 555-557. For a case combining an agreed state of facts and a declaratory judgment, see *Joplin Waterworks Co. v. Jasper County*, 38 S. W. (2d) 1068 (Mo., 1931).

⁷ Pearson, C. J., in *McKethan v. Ray*, 71 N. C. 165 (1874), quoted in *Burton v. Durham Realty Co.*, 188 N. C. 473, 125 S. E. 3 (1924).

trovsky without action. For the whole point of the innovation is that no cause of action, as for damages, specific performance, possession, criminal prosecution, injunction, or what not, need exist. The relief is anticipatory, to prevent the necessity for a breach of contract or covenant, the commission of a tort or a crime, or any other violation of a duty, before the legal relations of the parties may be determined.

In fact, however, under the statute authorizing the controversy without action, the North Carolina court has on occasion rendered what might be called left-handed declaratory judgments. In *Farthing v. Carrington*,⁸ decided in 1895, no cause of action existed, and normally the case would have been dismissed. Instead, no formal disposition was made of the appeal from an adverse result below by the party raising the question of law. But, relying upon an advisory opinion to the Governor as a precedent, the court treated the matter "as in the nature of a submission of the controversy without a formal action," and determined the construction of a statute relating to preferences between creditors. The late Chief Justice Clark dissented on the ground that the court had in effect, and without statutory authority, entered a declaratory judgment. In *Hicks v. Greene County*,⁹ decided in 1930, the necessary factor of a cause of action was again found to be missing. The court held that it was without jurisdiction and dismissed the proceeding, but went on, nevertheless, to determine the validity of a county bond issue under conflicting statutes.

The Declaratory Judgment Act adopts the idea of the equity jurisdiction of the Superior Courts¹⁰ to entertain requests from executors and trustees for instructions and extends that service to trusts and to estates of deceased persons, infants, lunatics and insolvents, whether the question is raised by the fiduciary, the creditor, devisee, legatee, heir, next of kin, cestui que trust, or other person interested. The question may involve the ascertainment of classes of creditors, devisees, legatees, heirs, next of kin or others; directions to fidu-

⁸ 116 N. C. 315, 22 S. E. 9 (1895). And see *Burton v. Durham Realty Co.*, *supra* note 7.

⁹ 200 N. C. 73, 156 S. E. 164 (1930). Compare *Muskegon Hts. v. Danigelis*, *supra* note 3 (declaratory judgment as to validity city bonds).

¹⁰ *Haywood v. Wachovia Loan and Trust Co.*, 149 N. C. 208, 62 S. E. 915 (1908); *Commercial National Bank v. Alexander*, 188 N. C. 667, 125 S. E. 385 (1924); *Mountain Park Inst. v. Lovill*, 198 N. C. 642, 153 S. E. 114 (1930); *Finley v. Finley*, 201 N. C. 1, 158 S. E. 549 (1931); *McINTOSH*, N. C. PRAC. & PROC. (1929), 68.

ciaries with reference to official acts; or any questions arising in the administration of wills and other writings.¹¹

The declaration may be of rights, status or other legal relations, whether or not other relief is or could be claimed, under contracts, deeds, wills, franchises, ordinances, statutes or other instruments. It may be affirmative or negative in character. And the above enumeration of items of subject matter is not intended to be exclusive. Instead, the jurisdiction is to exist in any situation where the judgment will terminate the controversy or remove an uncertainty. If the judgment will not, in the discretion of the court, have that effect, he may refuse to act.¹²

Procedures similar to that established by this new North Carolina enactment have been known to the Chinese law¹³ for a thousand years, in Scotland for four centuries, in England and Canada¹⁴ since the 1880s, and in the United States since 1919.¹⁵ Congress has not yet provided for declaratory judgments in the federal courts, but approximately thirty states have adopted legislation authorizing such proceedings in state courts. These statutes vary considerably in detail.¹⁶ The North Carolina law is that submitted in 1922 by the National Conference of Commissioners on Uniform State Laws and since enacted with some local modifications in more than fourteen states.¹⁷ Section ten of the North Carolina statute was drafted by

¹¹ P. L. 1931, Ch. 102, §§2, 3.

¹² *Ibid.*, §§1, 2, 4, 5.

¹³ Statement in conversation by Professor Jean Escarra, of the Faculty of Law of the University of Paris, since 1921 one of the legal advisers to the Chinese Republic.

¹⁴ Martin, *The Declaratory Judgment*, 9 CAN. BAR REV. 540 (October, 1931).

¹⁵ There were "little used and narrow statutes granting a limited power of rendering declaratory judgments in Rhode Island (1876), Maryland (1888), Connecticut (1893, 1915), and New Jersey (1915)." But "the first broad statute in this country was enacted in Michigan in 1919." Borchard, *The Constitutionality of Declaratory Judgments*, 31 COL. L. REV. 561, 562 (1931).

¹⁶ See *ibid.*, and FREEMAN, JUDGMENTS (5th ed., 1925) §1354. *E.g.*, the Michigan statute originally recited: "No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not." PUB. ACTS 1919, Act 150. This was founded upon the English rule of court. See Martin, *op. cit. supra* note 14. Other variations will be noted occasionally in the text. Differences in statutory provisions should be carefully noted in considering decisions from other jurisdictions in the United States. Even the Uniform Act has frequently been modified, as in North Carolina, to meet local procedural habits. See 9 UNIFORM LAWS ANNOTATED, 1930 Pocket Supplement, 112 *et seq.*

¹⁷ *Ibid.*

Professor A. C. McIntosh to adjust the procedural detail to the local practice.

The constitutionality¹⁸ of state declaratory judgment statutes, as against the charge that they impose non-judicial functions upon the judiciary by requiring decisions on moot questions and the rendering of advisory opinions, is now quite established. Fifteen state courts have expressly so held,¹⁹ and twelve others have so assumed,²⁰ indicating that the charge proceeds from a misconception of the declaratory judgment's nature. Michigan alone, and then in a dictum,²¹ took the other view. Wisconsin repealed²² its first statute for a similar reason. Both Michigan and Wisconsin, however, have since enacted new legislation. And both courts have now upheld the validity of the new statutes.²³ The Wisconsin substitute is the Uniform

¹⁸ This and the next following paragraph are based upon the able discussion by Professor Borchard of the Yale Law School, *The Constitutionality of Declaratory Judgments*, 31 COL. L. REV. 560 (April, 1931). Other discussions of importance are: 9 UNIFORM LAWS ANNOTATED, 1930 Pocket Supplement, 113; 3 FREEMAN, JUDGMENTS (5th ed., 1925) §1355; annotations in 12 A. L. R. 57, 50 A. L. R. 44, 68 A. L. R. 113.

¹⁹ *Morton v. Pacific Constr. Co.*, 283 Pac. 281 (Ariz. 1929); *Blakeslee v. Wilson*, 190 Cal. 479, 213 Pac. 495 (1923); *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150, 152 (1923); *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930); *Zoercher v. Agler*, 172 N. E. 186 (Ind. 1930); *State ex rel. Hopkins v. Grove*, 109 Kan. 619, 201 Pac. 82 (1922); *Black v. Elkhorn Coal Corp.*, 233 Ky. 588, 26 S. W. (2d) 481 (1930); *Washington-Detroit Theater Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930); *Lynn v. Kearney County*, 236 N. W. 192 (Nebr., 1931); *McCrorry Stores Corp. v. S. M. Braunstein, Inc.*, 102 N. J. L. 590, 134 Atl. 752 (1926); *Board of Education v. Van Zandt*, 119 Misc. 124, 195 N. Y. Supp. 297 (Sup. Ct. 1922), aff'd, 234 N. Y. 644, 138 N. E. 481 (1923); *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924); *Patterson's Ex'rs v. Patterson*, 144 Va. 113, 131 S. E. 217 (1926); *City of Milwaukee v. Chicago & N. W. Ry.*, 230 N. W. 626 (Wis. 1930).

²⁰ Colorado, Hawaii (ter.), Massachusetts, Nebraska, Nevada, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, and Wyoming.

²¹ *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 179 N. W. 350 (1920). A statute forbade street car companies to require employees to work more than six days a week, except in emergencies. A non-union conductor sued the company for a declaration that he had the right to work seven days a week if he and the company were willing. A labor union intervened and insisted upon the enforcement of the literal terms of the statute. From a decision in favor of the plaintiff, the union appealed. The real controversy was between the plaintiff and the intervenor. The defendant and the plaintiff wanted the same result. The case could have been disposed of by construing the statute as not applicable where the original parties were not adverse. A majority of the court, however, took the view that the statute imposed upon the judiciary non-judicial functions and held it void.

²² Note (1924) 2 WIS. L. REV. 376; Borchard, *Declaratory Judgments*, 3 UNIV. CINCINNATI L. REV. 24, 37 (1929).

²³ *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930); *City of Milwaukee v. C. & N. W. Ry. Co.*, 230 N. W. 626 (Wis. 1930).

Act. The Michigan substitute is the original act²⁴ with the added provisions "in cases of actual controversies" and that the declaration shall have the effect of a final judgment.

The Supreme Court of the United States, however, has uttered three dicta²⁵ against the constitutionality of a federal declaratory judgment act, should one be enacted. In one of these cases, Mr. Justice Stone, concurring in the result, said: ". . . the determination now made seems to me very similar itself to a declaratory judgment to the effect that we could not constitutionally be authorized to give such judgments. . . ." ²⁶ The state courts have restricted the effects of these dicta to congressional legislation, and have viewed them as without influence upon state enactments.²⁷ The law writers have been unanimous in subjecting the dicta to adverse criticism.²⁸ The last pronouncement of the Supreme Court, in a case involving a North and South Carolina electric railway, is more narrowly confined to a statement that the declaratory judgment was "not within either the statutory or the equity jurisdiction of federal courts."²⁹

²⁴ Quoted *supra* note 16.

²⁵ *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74, 47 Sup. Ct. 282, 71 L. ed. 541 (1927) (Decision: Conformity Act does not make Kentucky Declaratory Judgment Act available in federal courts. Dictum: A declaratory judgment is beyond the judicial power conferred by Art. III of the Constitution, because it does not involve a case or controversy, and because it does involve merely abstract questions framed to invoke the advice of the court without real parties or issues.) *Liberty Warehouse Co. v. Burley Tobacco Growers' Coöp. Ass'n.*, 276 U. S. 71, 88-89, 48 Sup. Ct. 291, 72 L. ed. 473 (1928) (Decision: striking from a counterclaim in a state court action a request for a declaratory judgment that a certain statute was unconstitutional, that statute already having been held valid, does not present a federal question. Dictum: "Apparently the Declaratory Judgment statute authorizes plaintiffs only to ask for judgment. . . . This Court has no jurisdiction to review a mere declaratory judgment.") *Willing v. Chicago Auditorium Ass'n.*, 277 U. S. 274, 289, 48 Sup. Ct. 507, 72 L. ed. 880 (1928) (Decision: Ambiguous meaning of clause in lease, a threat to mortgageability of hotel property, does not constitute a cloud on title. Dictum: "What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power of the federal judiciary. . . . But still the proceeding is not a case or controversy within the meaning of Art. III of the Constitution.")

²⁶ 277 U. S. at p. 290.

²⁷ *City of Phoenix v. Pacific Constr. Co.*, 283 Pac. 281 (Ariz. 1929); *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930); *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930).

²⁸ These are collected in Borchard, *op. cit. supra* note 18, his footnotes nos. 86, 112, 116. Professor Borchard's own criticism is the latest and the most thorough.

²⁹ *Piedmont & Northern Railway v. United States*, 280 U. S. 469, 477, 50 Sup. Ct. 192, 74 L. ed. 551 (1930). This view necessitated the beginning of actual construction of the railway, and an injunction against the continuance thereof, in order to raise the question of law at stake, *i.e.*, whether the I. C. C.

And the latest expression from a lower federal court, while reasserting all the dicta, finds them without effect upon the equivalent of a declaratory judgment there actually rendered in connection with a patent.³⁰

The mistake made by those who view the declaratory judgment with abhorrence is the assumption that the courts are thereby required to pass upon moot causes, to answer abstract questions of law, and to give legal advice to all who seek it without accomplishing anything more. This is not so, anywhere. Instead, both by occasional specific statutory provisions³¹ and by uniform judicial construction³² of legislation without such clauses, a bona fide controversy or dispute between genuinely adverse parties must either exist or inevitably threaten, as to which the judgment will be *res judicata*. Thus, the Tennessee court,³³ in administering the Uniform Act (which does not specifically recite that "an actual controversy" must exist) adopted in 1924 the following test, previously stated in Scotland, England and in America: ". . . the question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, some one presently existing who has a true interest to oppose the declaration sought." Instances of various applications of this restriction will appear in the following paragraphs.

It is proposed now to sample a number of the more recent declaratory judgment cases, most of them decided during the last year and a half, to see the uses to which declaratory judgments have been put, and the various obstacles, procedural and otherwise, encountered in their administration. Comment has been withheld but it is hoped that the juxtaposition of the cases may stimulate critical analysis.

Contracts. The Nebraska court³⁴ determined the capacity of a had jurisdiction. See *I. C. C. v. Piedmont & N. Ry. Co.*, 51 F. (2d) 766 (W. D. S. C., 1931).

³⁰ *Cleveland Trust Co. v. Nelson*, 52 F. (2d) 276 (E. D. Mich., 1931).

³¹ *E.g.*, see KAN. REV. STAT. ANN. (1923) §§60-3127; CAL. CODES OF CIV. PROC. (Deering, 1923) §1060; VA. CODE ANN. (1930) §6140a; KY. CODES (Carroll, 1927) §§639a, 1, 2.

³² *E.g.*, see *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923); *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924). The earlier cases are collected in annotations in 50 A. L. R. 45, and 68 A. L. R. 116.

³³ *Miller v. Miller*, *supra* note 32. See also, *Perry v. Elizabethton*, 160 Tenn. 102, 22 S. W. (2d) 359 (1929) (absence of a defendant with an adversary interest is a jurisdictional defect).

³⁴ *Lynn v. Kearney County*, 236 N. W. 192 (Neb., 1931). The interest of the plaintiff is not reported.

county to enter into contracts with its townships whereby the county would take over the construction and maintenance of township roads. Similarly, an Arizona court,³⁵ at the instance of a city, expressed itself as quite willing to undertake to construe a paving contract entered into with a construction company, one of the defendants, though it deferred action until non-resident as well as the resident property owners could be made parties. And the New York court,³⁶ upon the petition of a town board, went so far into the construction of a contract for public improvements, that it issued a declaration as to the interests of the contractor, his surety, a sub-contractor, and of certain water commissioners who asserted claims for repairing and changing sewers.

But the New York court refused³⁷ to permit the declaratory judgment proceeding to be used to establish an equitable lien and to obtain a money judgment, where a broker who had sold an industrial plant was suing the vendor and vendee to determine the value of his services after a tender of a certain amount had been refused. And the same court,³⁸ as between a stockbroker and his customer, refused to permit the declaratory judgment to be used as a substitute for the Arbitration Act to ascertain whether a controversy existed under a contract providing that any controversy should be settled by arbitration. The plaintiff contended that none did exist. An action for balance due on margins had already been instituted.

Deeds. All but one of the recent declaratory judgment cases involving deeds, have resulted adversely to the petitioners. In that one case,³⁹ plaintiff had acquired property which defendant alleged was conveyed in fraud of creditors. Plaintiff had executed a mortgage to a third person in good faith. Defendant is proceeding with execution against the property. The status of the mortgage was determined by a Pennsylvania declaration.

The illfated cases went off on these grounds: A judgment creditor who sought a declaration to quiet the debtor's title was referred in California⁴⁰ to an execution. A creditor without lien in Virginia did not have a sufficient interest in the land to sustain a declaration that

³⁵ *City of Phoenix v. Pacific Constr. Co.*, 36 Ariz. 97, 283 Pac. 281 (1929).

³⁶ *Greece v. Murray*, 130 Misc. 55, 223 N. Y. Supp. 606 (1927).

³⁷ *James v. Alderton Dock Yards*, 256 N. Y. 298, 176 N. E. 401 (1931).

³⁸ *Newburger v. Lubell*, 232 App. Div. 501, 250 N. Y. Supp. 363 (1931).

³⁹ *Conemaugh Iron Wks. v. Delano Coal Co.*, 298 Pa. 182, 148 Atl. 94 (1929).

⁴⁰ *Stenzil v. Kronick*, 102 Cal. App. 507, 283 Pac. 93 (1929).

debtor's deed was void for want of recordation.⁴¹ A city to which land had been conveyed on certain conditions could not have a declaration in Michigan as to the validity and effect of the conditions, no act likely to invoke the conditions being contemplated save the laying out of gas, water, lighting and telephone facilities, the condition against these being obviously a nullity.⁴² Where a prospective purchaser from plaintiff refused to take land because of building restrictions which every other owner except defendant had waived, plaintiff's remedy was held in New Jersey to be specific performance against the purchaser, instead of a declaration against defendant.⁴³ And a declaration as to the effect of building restrictions upon plaintiff was denied in New York because of the absence from the list of party defendants of other owners of parts of the tract.⁴⁴

Estates. The Tennessee court dismissed the proceedings for lack of proper parties where an alleged distributee sought a declaration as against a New York personal representative, the Tennessee administrator not being joined, as to who were distributees.⁴⁵ Rival claims to the property of a decedent which prevented the executrix from borrowing money were held in Pennsylvania to entitle the executrix to a declaration, a bona fide controversy being either existent or immediately threatening.⁴⁶ But where the beneficiary of a spendthrift trust had a twenty year expectancy, a Tennessee court refused the trustee a declaration as to whether a judgment creditor's claim would have to be satisfied at the beneficiary's death and before distribution. It did, however, determine whether the trustee had power to compromise the judgment.⁴⁷ And the Pennsylvania court felt unable to act when a trustee asked for a declaration as between two conflicting exercises of a power of appointment, the sole beneficiary being alive, insane and seventy-eight years of age, possibility of her having issue not being extinct, inadequate parties, and no actual controversy.⁴⁸

Other procedural difficulties were faced in three cases. In Florida, a specific statutory remedy to enable legatees to obtain legacies

⁴¹ *Brinkley v. Blivins*, 160 S. E. 23 (Va., 1931).

⁴² *Village of Grosse Pointe Shores v. Ayres*, 254 Mich. 58, 235 N. W. 829 (1931).

⁴³ *Di Fabio v. Southland*, 150 Atl. 248 (N. J. Eq., 1930).

⁴⁴ *Bach v. Grabfelder*, 250 N. Y. Supp. 552, 1016 (App. Div., 1931).

⁴⁵ *Sadler v. Mitchell*, 162 Tenn. 363, 36 S. W. (2d) 891 (1931).

⁴⁶ *Re Estate of Cryan*, 301 Pa. 386, 152 Atl. 675, 71 A. L. R. 1417 (1930).

⁴⁷ *Nashville Trust Co. v. Dake*, 162 Tenn. 356, 36 S. W. (2d) 905 (1931).

⁴⁸ *In re Sterrett's Estate*, 300 Pa. 116, 150 Atl. 159 (1930).

without bond was viewed as not so exclusive as to deprive the legatee of the power to seek a declaration to like effect.⁴⁹ An Arizona court having entered a declaratory judgment that an administrator was entitled to a lien on land for improvements made by the deceased, his subsequent suit for the money was successful, the lien being therein foreclosed.⁵⁰ But where an executor had secured a construction of the will and an order to sell land in an earlier action, a later declaratory judgment proceeding between the heirs (who had received under the first construction *per capita*) and their prospective purchasers was not allowed in Kentucky to serve as a test of the propriety of the first adjudication.⁵¹

Insurance policies. An accident insurance policy⁵² protecting a now insolvent railroad was construed in New York at the instance of the railroad's receiver and of persons who had causes of action against the railroad, as against the insurer, to determine whether liability under the policy attached only after the railroad had actually paid as much as \$25,000 upon such judgments as may be recovered, or before. In California,⁵³ one who had purchased a fire insurance policy from a person who had absconded with the premiums successfully sought a declaration as to whether the insurer was responsible. But in two cases, the Kentucky court refused to make a declaration, in one case⁵⁴ because of inadequate pleadings, in the other⁵⁵ because of insufficient facts in evidence. The first involved the construction of a fraternal benefit policy, the second the disposition of the proceeds of war risk insurance.

Leases have been construed, usually as between the lessee and the lessor, to determine the validity of a lease of municipal property for a theatre;⁵⁶ the depth to which the lessee was required to drill under an oil lease;⁵⁷ the precise date of the lease's termination;⁵⁸ whether

⁴⁹ Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930).

⁵⁰ Lisitzky v. Brady, 300 Pac. 177 (Ariz., 1931).

⁵¹ Back's Guardian v. Bards, 234 Ky. 211, 27 S. W. (2d) 960 (1930).

⁵² Post v. Metro. Cas. Ins. Co., 254 N. Y. 541, 173 N. E. 857 (1930).

⁵³ Frasch v. London & Lancashire Fire Ins. Co., 2 Pac. (2d) 147 (Calif., 1931).

⁵⁴ Supreme Tent of the Knights of the Maccabees v. Dupriest, 235 Ky. 46, 29 S. W. (2d) 599 (1930).

⁵⁵ Mason's Adm'r. v. Mason's Guardian, 39 S. W. (2d) 211 (Ky., 1931).

⁵⁶ Woodward v. Fox West Coast Theatre, 36 Ariz. 251, 284 Pac. 350 (1930). A protesting taxpayer was also a defendant.

⁵⁷ Jones v. Interstate Oil Co., 1 Pac. (2d) 1051 (Calif., 1931).

⁵⁸ Fidelity & C. Trust Co. v. Levin, 128 Misc. 838, 221 N. Y. Supp. 269 (1927), affirmed in 248 N. Y. 551, 162 N. E. 521 (1928). A sublessee was a party defendant. The action was brought by the lessor.

the lessee after termination was entitled to a new term of a certain length or only from year to year;⁵⁹ the reasonableness of the landlord's withholding of consent to subletting;⁶⁰ and the power of the lessee of a theatre for 99 years to demolish it and erect offices.⁶¹ This last case was almost a duplicate of *Willing v. Chicago Auditorium Ass'n*,⁶² in which the federal courts proved impotent because no declaratory judgment statute had been enacted by Congress and because the case could not be fitted into the equity jurisdiction to remove cloud. In both cases, the original use of the property had become unprofitable and burdensome. In both, a modern office building would be a boon to the parties and to the communities. Neither lease had contemplated such a predicament. In each case, the uncertainty as to whether demolition would work a forfeiture made financing of the new project impossible.

Miscellaneous. Rights of abutting property owners in a street laid out through a subdivision were determined upon a cross-complaint to an injunction proceeding, in Connecticut.⁶³ Similarly, the Wisconsin court⁶⁴ determined the relative interests of a riparian owner who desired to erect a structure over an interstate river, and the state, whose Railroad Commission's protest had caused the War Department to refuse a permit. At the instance of the personal representative of a stockholder as against the corporation, the New York court⁶⁵ determined whether the defendant was a stock or a membership corporation, the legality of a number of its acts, the relative rights and duties of members and the company, and whether the corporation was still in existence. Where one Waggoner caused six New York banks to deposit an aggregate of a half million dollars in a seventh New York bank to the credit of a Colorado bank of which he was president, and which failed shortly after, by means of forged telegrams from Denver correspondents, upon which credit the defunct bank drew to pay past debts, the rights of all the parties, an accounting, and appropriate judgments for amounts due were

⁵⁹ *Aaron v. Woodcock*, 283 Pa. 33, 128 Atl. 665 (1925). But see *Nelson v. Burns*, 255 Ill. App. 314 (1930) (courts do not construe leases before cause of action arises for purpose of guiding litigants in some future course of conduct.)

⁶⁰ *Sarner v. Kantor*, 123 Misc. 469, 205 N. Y. Supp. 760 (1925).

⁶¹ *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930).

⁶² *Supra* note 25.

⁶³ *Merino v. George Fish, Inc.*, 153 Atl. 301 (Conn., 1931).

⁶⁴ *S. S. Kresge Co. v. R. R. Comm.*, 235 N. W. 4 (Wis., 1931).

⁶⁵ *Bartlett v. Lily Dale Assembly*, 139 Misc. 338, 249 N. Y. Supp. 482 (1931).

handled by the New York court under a declaratory judgment proceeding.⁶⁶

Nuisances. A printshop was denied a declaration in New York to the effect that it was not a public nuisance.⁶⁷ The Michigan court refused a householder a declaration that no person had a right to park cars in front of his premises so as to interfere with his right of access.⁶⁸ No ordinance forbade this conduct. An ordinance did require police to remove cars after they had stood 48 hours. Plaintiff asked for a declaration that it was the duty of the police to assist him in his plight, and that this ordinance was void for unreasonableness. The action was against the city. The Pennsylvania court was unwilling to make a declaration as to how a large garage in a residential section could be so used in connection with a large apartment house as not to become a nuisance.⁶⁹ An injunction had already been obtained against the operation of the garage so as to be a public nuisance.

Public Officers. A county jailer having refused to comply with his county's demand for a fiscal report, he obtained a declaration as against the county respecting his duty to report, whether he had to pay for light, heat and laundry for the jail, and whether receipts for federal prisoners were to be included in his compensation.⁷⁰ But where a building permit expired without having been acted upon before the final decree below, the Massachusetts court dismissed declaratory judgment proceedings brought by the municipality to declare the permit void, the question having become moot.⁷¹ The Kentucky court refused to entertain a taxpayers' suit for a declaration that persons nominated for certain city offices had disqualified themselves by campaign promises to delegate their duties and salaries to a proposed city manager, because the court could not place the subject matter within any of the categories mentioned in the Declaratory Judgment Act, and because no controversy existed with reference to plaintiff's rights.⁷² The Colorado court could find no controversy

⁶⁶ National City Bank et al v. Waggoner et al, 230 App. Div. 88, 243 N. Y. Supp. 299 (1930).

⁶⁷ Cuneo Eastern Press v. Astrowsky, 246 N. Y. Supp. 510 (App. Div., 1930). The case is inadequately reported.

⁶⁸ Heinze v. City of Detroit, 250 Mich. 597, 231 N. W. 51 (1930).

⁶⁹ Ladner v. Siegel, 294 Pa. 368, 144 Atl. 274 (1928).

⁷⁰ Holland v. Fayette County, 41 S. W. (2d) 651 (1931).

⁷¹ Town of Swampscott v. Knowlton Arms, Inc., 172 N. E. 601 (Mass., 1930).

⁷² Dietz v. Zimmer et al, 231 Ky. 546, 21 S. W. (2d) 999 (1929).

to sustain a city's suit for a declaration that a proposed plan of sewerage benefit assessments would if adopted be valid.⁷³ Nor could the Pennsylvania court, in a suit by certain directors of the poor, to determine the validity under conflicting statutes, of an as yet wholly prospective scheme of poor law administration.⁷⁴

Status. A declaratory judgment in New York determined the plaintiff's claim that she was the illegitimate child of the defendant, an unmarried woman, for purposes of inheritance, citizenship and the right of franchise.⁷⁵ A matrimonial status was protected under these circumstances: The plaintiff's husband, after a Yucatan divorce, remarried in Connecticut. The declaration was sought in New York as against the husband and the second wife. An injunction against the defendants holding themselves out as husband and wife, however, was denied, as involving no substantial right of the original wife.⁷⁶

Statutes and ordinances. Section 2 of the Declaratory Judgment Act specifically authorizes declarations of rights, status and other legal relations arising under or involving the construction or validity of statutes, ordinances and franchises. Sec. 8 provides, in part: "In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and shall be entitled to be heard." Heretofore, in both state and federal courts, the principal method of testing the applicability or constitutionality of statutes and ordinances, in advance of a violation thereof, has been by an injunction against their enforcement. The availability of this remedy, however, has depended upon various notions of the effect of the supposed adequacy of the alternative of raising the question as a defense in a criminal prosecution, after the statute or ordinance has been

⁷³ *Denver v. Denver Land Co.*, 85 Colo. 198, 274 Pac. 743 (1929).

⁷⁴ *Reese v. Adamson*, 297 Pa. 13, 146 Atl. 262 (1929).

⁷⁵ *Morecroft v. Taylor*, 229 App. Div. 562, 234 N. Y. Supp. 2 (1929).

⁷⁶ *Baumann v. Baumann*, 250 N. Y. 382, 165 N. E. 819 (1929). *McCalmont v. McCalmont*, 93 Pa. Super. Ct. 203 (1928), refusing a declaration as to the validity of petitioner's marriage to the defendant, she (the defendant) having been forbidden to remarry by a divorce decree entered in another state, is based upon the unwise Pennsylvania and New Hampshire judicial innovation that a declaratory judgment may not be had where another adequate remedy is available. See 9 U. L. A., 1930 Pocket Supp. 115; *Lisbon Village v. Town of Lisbon*, 155 Atl. 252 (N. H., 1931).

violated.⁷⁷ Under the Declaratory Judgment Act, that criterion has no place.

Thus, as between an elective judicial officer and the Secretary of State who refused to certify that plaintiff's office was one of those to be filed at a general election, the applicability of a state constitutional amendment to those elected the day the amendment was adopted, was determined by declaratory judgment proceedings.⁷⁸

Tax problems have been adjusted by means of declarations as to the constitutionality of a statute relating to review of municipal tax levies by a state board;⁷⁹ and as to the power of a county to tax the plant and distribution facilities of a water company whose pumping station was in another county.⁸⁰ New Hampshire held⁸¹ this to be the wrong remedy to determine the defendant town's jurisdiction to tax the plaintiff, another remedy being available, but treated the declaratory judgment proceeding as if it had been the other action.

Other statutory declarations have been in relation to the constitutionality of legislation restricting pharmacy ownership registrations to licensed pharmacists;⁸² to the applicability to new community schools of statutes requiring district school board room guaranties;⁸³ and to the validity of municipal bonds under a "calamity act."⁸⁴ But no controversy was presented by the petition of a weekly newspaper publisher against a probate judge to determine whether the plaintiff's

⁷⁷ Note (1930) 9 N. C. L. REV. 73. Compare *Standard Oil Co. v. City of Charlottesville*, 42 F. (2d) 88 (C. C. A. 4th, 1930) (opinion by Circuit Judge John J. Parker, injunction against enforcement of zoning ordinance granted, because penalty provided for violation so high as to make test in defense to criminal prosecution oppressive); *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. ed. 1070, 45 Sup. Ct. 571 (1925) (injunction granted against enforcement anti-parochial school law two years before law was to become effective). See Borchard, *op. cit. supra* note 18, at his page 586 *et. seq.*

⁷⁸ *Wingate v. Flynn*, 139 Misc. 779, 249 N. Y. Supp. 351 (1931).

⁷⁹ *Zoercher v. Agler*, 172 N. E. 186, 70 A. L. R. 1232 (Ind., 1930) (suit between taxpayers and state board and city).

⁸⁰ *Joplin Waterworks Co. v. Jasper County*, 38 S. W. (2d) 1068 (Mo., 1931). This was a submission of an agreed controversy, but it was held that the fact that an agreed case was submitted amicably did not render the cause moot or collusive.

⁸¹ *Lisbon Village District v. Town of Lisbon*, 155 Atl. 252 (N. H., 1931).

⁸² *Pratter v. Lascoff*, 140 Misc. 211, 249 N. Y. Supp. 211 (1931) (action between applicant and state board of pharmacy.)

⁸³ *School Dist. No. 19 v. Sheridan Community High School*, 130 Kan. 421, 286 Pac. 230 (1930).

⁸⁴ *Muskegon Heights v. Danigelis*, 253 Mich. 260, 235 N. W. 83, 73 A. L. R. 696 (1931) (suit between city and two taxpayers). Compare the North Carolina controversy without action, note 9 *supra*.

paper was within the statutory class of periodicals in which legal notices could be printed.⁸⁵

Zoning ordinances have been tested as to constitutionality and construction in at least two cases.⁸⁶ Similarly, as to the persons affected by an ordinance regulating movers of household goods.⁸⁷

The Kansas court⁸⁸ combined quo warranto and the declaratory judgment proceeding, to test the validity of an ordinance granting a franchise to an electric utility, the charge being that it had not been approved by the necessary number of voters.

Supplemental remedy. The Pennsylvania court has twice refused the use of the declaratory judgment as an indirect modification or clarification of a judgment or decree previously rendered in another action between the parties. One⁸⁹ involved a consent judgment fixing the price at which a city was to have a waterworks. The electors thereafter voted down the proposal to buy. Seven years later they changed their minds. The city demanded the plant at the judgment figure. The water company asked for a declaration as to the effect of the judgment. The court held as above stated but uttered a dictum that the adverse vote invalidated the consent judgment. The other⁹⁰ concerned an injunction decree forbidding the use of a garage so as to constitute a nuisance. The defendant sought a declaration whether a proposed type of use would be free from the charge of contempt. The question was viewed as so prospective as to be moot. In Kentucky,⁹¹ a county, having instituted an action against the county attorney for money alleged to have been received by him, sought a declaration in a second action as to six points of law relating to the merits, to the burden of proof, and to the statute of limitations, affecting the earlier suit. It was regarded as an application for legal advice to guide the county in its conduct of the main action, and relief was refused. The provision of the Uniform Act that "further relief based upon a declaratory judgment or decree may be granted whenever necessary or proper . . ." was held inapplicable to the original action for declaratory relief.

⁸⁵ *Garden City News v. Hurst*, 129 Kan. 365, 282 Pac. 720 (1929).

⁸⁶ *Faulkner v. City of Keene*, 155 Atl. 197 (N. H., 1931); *Taylor v. Haverford Tp.*, 299 Pa. 402, 149 Atl. 639 (1930).

⁸⁷ *Dowdy v. City of Covington*, 25 S. W. 304 (Ky. 1931).

⁸⁸ *City of Manhattan v. United Power & Light Co.*, 129 Kan. 592, 283 Pac. 919 (1930).

⁸⁹ *City of Williamsport v. Williamsport Water Co.*, 300 Pa. 439, 150 Atl. 652 (1930).

⁹⁰ *Ladner v. Siegel*, 294 Pa. 368, 144 Atl. 274 (1928). And see note 51.

⁹¹ *Jefferson County v. Chilton*, 236 Ky. 614, 33 S. W. (2d) 601 (1930).

For other cases showing the relations of declaratory judgments to other proceedings, see the cases noted above under *Contracts* (arbitration), at note 38; under *Deeds* (execution) at note 40, (specific performance) at note 43; under *Estates* (review prior construction will) at note 51; and under *Status* (annulment) at note 76.

But there have been several instances where declaratory judgments have been successfully sought by way of cross-action or counterclaim.⁹²

In conclusion, three suggestions are respectfully ventured: (a) That declaratory judgment problems be solved, not out of the inner consciousness of the bar and bench, but upon the basis of a study of the best and worst decisions and practice of other jurisdictions.⁹³ (b) That in cases where the merits of substantive questions presented by declaratory judgment proceedings are weak, disposition be put upon that ground, without generalizations likely to impair the scope of the utility of the procedural device itself. (c) That the judiciary take seriously the words of section 12 of the Declaratory Judgment Act: "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 it is to be liberally construed and administered."

⁹² *E.g.*, *Merino v. Fish*, 153 Atl. 301 (Conn., 1931); *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923). The English and Canadian cases are discussed in Martin, *The Declaratory Judgment*, 9 CAN. BAR REV. 540, 541 (October, 1931).

⁹³ The American Digest System, beginning with the 3rd Decennial, classifies declaratory judgment cases under Actions, Key No. 6; excellent annotations, classifying the cases prior to 1930 by subject matter are to be found in 68 A. L. R. 110, 50 A. L. R. 42, 19 A. L. R. 1124, and 12 A. L. R. 52; brief treatise discussions are FREEMAN, JUDGMENTS, (5th ed., 1925) §§1353-1356, and CLARK, CODE PLEADING, 230-235 (1928). And see 9 UNIFORM LAWS ANNOTATED, 1930 Pocket Supplement, 112-117.