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DECLARATORY JUDGMENTS AND INSURANCE LITIGATION†
Edwin M. Borchard*

The passage of the Federal Declaratory Judgments Act in 1934 has stimulated throughout the country the employment of the action for declaratory judgment. In few branches of commercial activity has it been used more successfully than in insurance litigation.

It would be hard to say whether this new device for the construction of written instruments and the clarification and adjudication of all types of legal relations has been more effectively used for the determination of disputed status, the construction of contracts, conflicting claims to property, or administrative law disputes between the Government and the citizen. In the federal courts, however, claims by an alleged infringer of a patent praying a declaratory judgment of non-infringement and petitions by insurance companies asserting an immunity from threatened claims and demands, have for very practical reasons afforded a substantial exemplification of the new judicial relief made available by the declaratory judgment.

† This article is based in part on an address delivered before the Insurance Section of the 1938 American Bar Association Convention.
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The construction of all kinds of contracts before or after breach is one of the special functions of the declaratory action. This procedure is especially appropriate to insurance contracts, at the initiative either of the insured, insurer, or third party, because insurance policies are often of long duration, look to future benefits, involve fiduciary relationships, depend on representations, facts and conduct which the company finds it difficult to control, and in the event of loss, create new relationships between insurer and the injured person or beneficiary and the insured or principal debtor. The multiplicity of clauses in such a contract, whether voluntary or statutory, seeking to safeguard many contingencies, necessarily gives much occasion for construction and interpretation, especially in the case of casualty policies.

In addition, certain economic and social facts have played a part in encouraging resort to declaratory rather than coercive relief. On the part of the insured or beneficiary, a declaration of liability against a company as respons-

† Arkansas, Delaware, Georgia, Illinois, Iowa, Louisiana, Maine, Mississippi, Oklahoma, Texas, and West Virginia have failed to enact declaratory judgment statutes.
sible as most insurance companies is as
effective as a money judgment or co-
eercive relief, and it is cheaper, speedier
and more efficient. Numerous actions
have been brought simply to declare in
force a policy from which a company
sought to escape by reason of alleged
breach by the insured. On the part of the
insurance company other consider-
ations operate. When a casualty com-
pany is a defendant or co-defendant
with the insured, juries are apt to be
partial to the plaintiff; hence insurers
have found great advantage in obtain-
ing a declaratory judgment in an in-
dependent and preliminary action to
the effect that there was "no coverage"
under the policy. Not only are they re-
lieved by a judgment in their favor
from defending a negligence action
against the insured, but the determina-
tion of the fundamental economic fact
that there is "no coverage" enlightens
and guides the injured person and the
insured. Indeed, such a determination
has basic importance for all parties
concerned in the negligence action,
whether an injunction against its con-
tinuance is issued or not, for a suit
against an impecunious insured unsup-
ported by a responsible insurer may not
be pursued, or the indifference of the
insured may be converted into self-
reliant defense. Inasmuch as this phe-
nomenon presents the most striking
application of the new procedure, its
examination will occupy the greater
part of this paper.

Resort to declaratory adjudication
does not require any purported breach
of contractual relations, as coercive
remedies generally presuppose. Indeed,
one of its functions is to clarify disputed
legal relations so as to make breach un-
necessary. It authorizes adjudication by
the courts whenever a useful purpose
is served by settling the issue and re-
moving the doubt, uncertainty and in-
security which gave rise to the dis-
pute. Naturally, that criterion affords
some discretion to the judges, but the
discretion is limited by rule.

It is perhaps not surprising that a
new remedy, even if new in name only,
should have aroused hostility in some
courts whose judges, not familiar with
English practice, had not heard the
term "declaratory judgments" or "de-
claratory relief" in their student days.
Lawyers as a rule are inhospitable to
novelty, whether real or apparent. It
had been assumed that the procedural
writs of common law and equity had
exhausted the possibilities of judicial
relief and that, in spite of the fact that
many disputes disclosed an unsatisfied
need for adjudication which neither
common law nor equity afforded, the
absence of traditional writs or rem-
edies made it impossible to meet the
need. Even when state after state, on
demonstration of the need and proof
that a great proportion of the English
cases seek nothing but a declaration of
rights, had passed the necessary statutes
authorizing declaratory judgments, sev-
eral courts in this country evidenced
their inhospitality toward procedural
improvements by giving the statute a
restricted or indeed improper construc-
tion. It is unnecessary to review the
unfortunate dicta of the United States
Supreme Court before the enactment
of the Federal Act, when some of the
judges mistakenly assumed that a de-
claratory judgment was an advisory
opinion on a hypothetical state of facts, and failed to realize that a useful social purpose is served by deciding a legal dispute before breach and even before the threat of an irreparable injury making the issue ripe for injunction. We owe much to the initiative and diplomacy of Justices Stone and Hughes for redeeming the earlier vagaries of the Court and for giving the "new" procedure an understanding endorsement which has carried it to ever greater usefulness throughout the country.²

Nevertheless, two judicial errors make their appearance with distressing frequency, and insurance cases often exemplify them. One is to assume that when another remedy is available, a declaratory judgment may not be invoked. This is not a mere error in interpretation, but a flat violation of the precise terms of the statutes, which provide that a declaratory judgment may be sought and obtained "whether or not further relief is or could be claimed." That is to say, whether a coercive remedy like damages, injunction or specific performance (1) is also claimed, (2) could be claimed but is not claimed, or (3) could not be claimed, the declaratory judgment may not on that ground be denied. Could any statute be plainer than that?³ Courts then, like those of Pennsylvania and Michigan which on occasion have construed the declaratory judgment as an extraordinary remedy, not to be granted if any other remedy is available, are misconstruing the statute in its clearest terms.⁴ It should make no difference to courts barred to the issuance of a declaratory judgment. Thereupon, some possibly well-intentioned legislator in the Pennsylvania Committee on Judiciary General undertook to confuse what was perfectly clear by adding a further amendment reading:

"but the case is not ripe for relief by way of such common law remedy, or extraordinary legal remedy, or where the party asserting the claim, relation, status, right or privilege, and who might bring action thereon, refrains from pursuing any of the last mentioned remedies." The draftsman probably meant to help out Judge von Moschzisker's amendment by specification, and not to nullify it. Cf. Borchard in 10 Temple L. Quar. 223, at 234-7. Yet nullification is what the Pennsylvania courts have accomplished, for they have held that a declaratory judgment can only be sought when the case is not ripe for a common law remedy (how about an equitable remedy?) a result which is precisely what the original amendment was intended to avoid. In fact, this construction has greatly narrowed the scope of declaratory judgments in Pennsylvania. It is surprising that the Pennsylvania bar has not protested against this judicial error. Allegheny County v. Equitable Gas Co., 221 Pa. 127, 183 Atl. 916. Oberts v. Blickens, 198 Atl. 481 (Pa. Superior, 1938), insisting that a declaratory action for construction of a will involving a title to real estate should be tried in an action of ejectment. Cf. the similar New York case of Woollard v. Schaffer Stores Co., 272 N. Y. 304, 5 N. E. (2d) 829 (1935), tried by declaratory action. If applied literally, the Pennsylvania view will require a reversal

³To avoid the Pennsylvania and Michigan error, the new federal rules provide: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Rule 57.
⁴Nesbitt v. Manufacturers Casualty Insurance Co., 310 Pa. 374, 165 Atl. 403 (1933); Wolverine Mutual Motor Insurance Co. v. Clark, 277 Mich. 633, 270 N. W. 167 (1936). Cf. Utica Mutual Insurance Co. v. Beers Chevrolet Co., 294 N. Y. S. 82 (1937). Perhaps the Pennsylvania view is the least excusable of all. Seeking to avoid the misconstruction of Section 6 of the Uniform Act by which "the court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered would not terminate the uncertainty or controversy giving rise to the proceeding," under which Section the Pennsylvania courts had in a number of cases decided that the declaratory judgment was not to be granted if any other remedy was available and thus compelled distressed litigants to start their case over again under a procedure more agreeable to the judges, ex-Chief Justice von Moschzisker proposed a statutory amendment designed to clarify the limits of discretion under Section 6. The declaratory judgment was to be refused only when a special statutory remedy was provided for that special type of case, or naturally, when no settlement of the issue would result. It specifically provided that the mere existence of a common law or equitable remedy was to be no
through which door the litigants enter the court room, so long as they are properly there and the issue can be conclusively and effectively determined. We still need wider appreciation of the fact that a person having a drastic remedy at his disposal, may prefer for any variety of social and economic reasons the milder but for his purposes equally effective judicial declaration of his rights. This is especially true in the case of financially responsible defendants, for, needless to say, the declaration, as res judicata, can be enforced if disobeyed.

The other error, somewhat less common, is to assume that a litigant seeking a declaration of non-liability, or limited liability, does not present a "cause of action" for judicial relief. The bar has not fully appreciated the fact, ancient in legal history, that an unfounded claim is a cloud upon the title, causing apprehension and distress to the party charged and thus placed in jeopardy, and giving him a legal interest in its removal and in a declaration of its invalidity. Thus, several courts have failed to observe that even a potential claim, such as the probable claim of an injured person against the insured and the insurance company, is sufficient to cause apprehension and jeopardy and thus to warrant the institution of an action for a declaration of non-liability. Such a claim may be contingent, in the sense that it has not yet been brought, but human experience indicates that it is so likely to be brought as to justify making the injured person a party defendant to an action for a declaration that the plaintiff company is not liable under the policy.

District Judge Ragon in United States Fidelity and Guaranty Co. v. Pierson and Judge Lummus of Massachusetts


No other state courts have so seriously misconstrued the Uniform Act, which was designed to make the construction uniform throughout the United States. That Act even in Pennsylvania still provides that the declaratory judgment shall be granted "whether or not further relief is or could be claimed." The Pennsylvania idiosyncrasy should be corrected either by repealing the 1935 Amendment or by restoring it to the original form in which it was drawn by Judge von Moschzisker. Circuit Judge Parker of the fourth circuit who like Judge Hutcheson of the fifth circuit has been hospitable to declaratory relief and appreciates the fact that the declaratory judgment is simply an alternative remedy, (Stephenson v. Equitable Life Assurance Soc., 92 F. (2d) 406 (1937)), used an unfortunate term in the Quares case, 92 F. (2d) 321 (1937) in describing declaratory relief as "extraordinary." The Alabama Supreme Court is subject to criticism for dismissing the declaratory action of Barlowe v. Employers Insurance Co., 188 So. 896 (Ala. 1939) because the plaintiff could have sued as a third party beneficiary.

6 A denial of justice is occasionally perpetrated by the adherence of states like New Jersey to the division between law and equity. It is not always possible to guess whether a court will consider a claim to be legal or equitable in nature. In Springdale Corp. v. Fidelity Union Trust Co., 121 N. J. L. 536, 3 A. (2d) 565 (1939), the owners of an apartment house sued the trustees of a mortgage for a declaratory judgment that the plaintiffs and not the Trust Company were entitled to certain rents collected by one Vanderlipp, President of the plaintiff organization and once agent of the defendant, under agreement. While this looks like a claim at law, the court held that whereas both plaintiff and defendant have legal claims against Vanderlipp, their claims against each other are equitable in nature; and that the action for a declaratory judgment having been brought on the law side must be dismissed. Such injustice to the public is no longer possible in the federal courts and the courts of most states, where proceedings need no longer be labelled legal or equitable. The fact that the declaratory judgment is neither strictly legal nor equitable has served to expose the inefficiency and impropriety of the old division, which has only a historical and no social justification. In cases like that cited it is a positive evil, for which the public must pay.

21 F. Supp. 678 (D.C. W.D. Ark., 1937). This decision seems to involve a complete misunder-
in *Merchants Mutual Casualty Co. v. Leone,* are therefore believed to be in error in assuming, contrary to overwhelming authority, that the issue between the company and the injured person is not ripe for adjudication because no judgment has yet been obtained by or against the insured or because there is only a "contingent future possibility of disputes," or because, as intimated in *American Motorists Insurance Co. v. Busch,* no suit has yet been brought. This is to defeat one of the main purposes of the declaratory judgment, namely, to remove clouds from legal relations before they have become completed attacks or "disputes already ripened." If there is a human probability that danger or jeopardy or prejudice impends from a certain quarter, a sufficient legal interest has been created to warrant a removal of the danger or threat. Naturally, some judgment is required to determine whether such danger is hypothetical or imaginary only or whether it is actual and material. It would seem that the probable claims of an injured person under the usual casualty policy can never be deemed merely hypothetical or insufficiently ripe for an adjudication of the question of insurer's liability.

Claims of this type, which with minor exceptions in equity, could not be brought before declaratory relief was made possible, led inhospitable courts to some curious errors. The fact that a suit was brought for a declaration of immunity or non-liability led a few lower federal courts, prior to the notable decision of the United States Supreme Court in the *Haworth* case, to conclude that immunity was not a "right" within the meaning of the term "rights and other legal relations" which the courts were authorized to declare. Even after the Supreme Court had seemingly made it clear in the *Haworth* case that freedom from a claim asserted by a defendant is a "legal relation," Circuit Judge Stone, a distinguished federal judge, in his dissenting opinion in *Columbian National Life Insurance Company v. Foulke,* still thought he found authority in the Report of the Senate Judiciary Committee reporting out the federal Act for the view that freedom from a duty (to defend or pay a claim) was not intended to be included in the term "parties. The court's view lets form defeat substance, and appearance prevail over fact. See Mr. F. W. Grinnell's able criticism of Justice Lummus' opinion (1937) 22 Mass. Law Quar. 14; yet Justice Lummus is one of the best informed judges in the matter of declaratory judgments.

9 89 F. (2d) 261, 263 (1937).
“other legal relations.” But it may safely be said that the term “rights and other legal relations” was intended to include the Hohfeldian jural relations of rights, privileges, powers and immunities, and their correlative duties, no-rights, liabilities and disabilities. This the courts have now established.

II

The insurance cases which have attracted most attention to the declaratory judgment are those in which the company institutes an action against the insured, joining or not joining the injured parties, for a declaration that the company is not under a duty to defend or to pay any eventual judgment, because the injury or death is not within the coverage of the policy or because the company has some defense which exempts it. The courts, especially those of New Hampshire and the federal courts, having at once conceded that the issue presented a “case” or “controversy,” made the propriety of issuing the declaration turn on questions of policy and discretion in trying the issue of non-liability or limited liability before the suit of the injured person had been litigated to judgment, and raised the question whether that suit should be stayed or the company be relegated to its defense in that suit. Inasmuch as the many questions involved in that type of case will occupy the major part of our attention, it seems preferable to take up first some of the minor questions which have recently been before the courts on a petition for a declaratory judgment.

Whether Policy Had Attached or Is in Force

Either the insured or his beneficiary or the company, before or after loss, may have reason to claim that the policy had or had not attached or is or is not in force. The equitable proceeding for cancellation is conditioned upon a number of requirements, such as evidence that a remedy at law is unavailable, whereas the action for a declaratory judgment, being neither distinctly equitable nor legal and not requiring proof that another remedy is unavailable, may be employed whenever a useful purpose will be served. Thus, in the Stephenson case, the company having contended that the insured had recovered from his disability, disavowed any liability under the disability and double indemnity provisions, tendered return of the premiums, demanded return of the disability benefits already paid, and a return of the policy for cancellation of the respective clauses. Thereupon the insured sued the company for a judgment declaring the policy in full force and effect. Circuit Judge Parker, in one of the best

opinions in the *Federal Reporter*, correctly concluded that the declaratory action was an alternative remedy, that the insured could have proceeded at law or in equity, that both declaratory and coercive relief could be sought in one action and that all the issues could conveniently be determined in one trial.

So the company, seeking to avoid present or future liability under a policy, may sue either for a cancellation of the policy in equity or for a declaratory judgment that it is void or no longer in force. This was the case in the famous *Aetna Life v. Haworth* litigation in which the company sought a declaration that the defendant was not permanently and totally disabled as he claimed, hence not relieved from the obligation of paying further premiums, but that the failure to pay the premiums entitled the company to regard the policy as lapsed. Although two lower federal courts had erroneously assumed this very concrete dispute not to constitute a "case" or "controversy," the United States Supreme Court in a unanimous decision which is bound to exert great influence, held the issue justiciable in every sense. Nor did the circumstance that the issue turned on a question of fact, the total and permanent disability of the insured at a certain date, militate against a declaratory judgment. Many of these cases turn on issues of fact, e.g., whether coverage existed by reason of use, agency, or other attachment of the risk. The Federal Act includes a provision for optional trial by jury on interrogatories of disputed questions of fact. The reluctance of some courts after a loss to permit equitable cancellation in the absence of special circumstances, on the ground that legal defenses are available, should be and in some instances has been overcome by the institution of an action for a declaration of invalidity.


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13 Supra note 2.


16 Cases cited supra note 14.
Action by Insured or Beneficiary to Establish Claim or Interest

It has already been observed that the insured or beneficiary may prefer the simple declaratory action, which in California, Kentucky, and Michigan, and now under Federal Rule 57, may be advanced on the calendar, to the more cumbersome action for a money judgment or other coercive relief. Practically all these cases were susceptible of adjudication by some other procedure, and all involved either construction of the policy or other contractual relationship. Thus, we find an action by the insured to establish that he is still a member in good standing of a mutual benefit society, and entitled to certain privileges; an action by beneficiaries of a life policy claiming a disputed benefit; and an action by a member in good standing of a mutual benefit society, by an overdose of luminal, taken for insomnia, was an accident bringing into force the double indemnity clause; that the company is bound by a fire insurance policy issued by a purported agent who was not licensed and who absconded with the premium; that the insured, allegedly permanently disabled, was entitled to overdue installments and to a declaratory judgment that future payments are also due, a judgment which the California courts refuse and the Kentucky courts grant, but which could always be limited to the period of disability, enabling the company to reopen the case or bring independent declaratory action whenever the disability ceases; that plaintiff's total disability began at a certain date; that vendee, vendor and mortgagee of a burned building are entitled to the proceeds of an insurance policy in a certain priority and amount; that defendant company was under a duty to defend a suit or

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17 Honetsky v. Russian Consol. Mutual Aid Society, 176 Atl. 671 (N. J. 1935). Also held that he need not apply for a new policy, and that his money recovery should be limited to the premiums paid.


20 Erix v. People's Life Insurance Co., 18 P. (2d) 103 (Cal. App. 1933); 29 P. (2d) 233 (1934); 37 P. (2d) 445 (1934); 41 P. (2d) 557 (1935). See cases on right to future payment in Borchard, op. cit. supra note 12, at 128, 130.


pay an actual or eventual judgment against the insured, notwithstanding the company's claim of breach of warranty or lack of coverage;\textsuperscript{23} that plaintiff was entitled to change the beneficiary of a certain policy and to receive disability benefits;\textsuperscript{24} that a trust agreement by which insured assigned the proceeds of his policy in trust and changed his beneficiary was void.\textsuperscript{25}

\section*{III

Company Suit to Disclaim Liability}

Possibly the greatest interest in the development of declaratory procedure has been aroused by the privilege which it affords to the party charged or the debtor or obligor to disavow liability or claim exemption or relief from a burden to which he may be exposed. As already observed, equity long has recognized a legal interest in the removal of clouds from title to real estate, but

premium payments in its several accounts with the insured. Allyn et al. v. Penn. Mutual Liability Insurance Co., 160 F. (2d) 889 (C. C. A. 9th, 1939).\textsuperscript{23} Malley v. American Indemnity Co., 297 Pa. 216, 146 Atl. 571 (1929), successfully claiming that as the company had defended the first suit by injured person against insured, company had waived its claim of breach of warranty of ownership. Court expressly recognized possibility of other remedies no bar to the declaratory judgment. But in Nesbitt v. Manufacturers Casualty Co., 310 Pa. 374, 165 Atl. 403 (1933), a somewhat similar case, the Pennsylvania court announced that the questions raised could “be litigated in the established course of legal and equitable proceedings, and therefore the Uniform Declaratory Judgments Act cannot be invoked.” As already observed, this is an abuse of judicial discretion and a misconception of the statute. Cf. Circuit Judge Parker in Stephenson v. Equitable Life Assurance Society, 32 F. (2d) 406 (1937), and Circuit Judge Clark in United States Fidelity & Guaranty Co. v. Koch, 102 F. (2d) 288, 293 (C. C. A. 9th, 1939).

Franklin Cooper Creamery Association v. Employers Liability Assurance Corp., 200 Minn. 230, 273 N. W. 809 (1937) (that defendant is under duty to indemnify plaintiff for liability to employee; denied as not within coverage of policy).

Baltzan v. Fidelity Insurance Co. (1932) 3 W. S. R. 140 (Saskatchewan), aff'd (1933) 3 W. W. R. 293 (that plaintiff's assistant's negligence in letting patient fall off table was malpractice, and that defendant, though refusing to defend plaintiff in patient's suit, was under duty to pay eventual judgment; so held).

Southern Underwriters, defendant-appellants, v. Dunn, 92 F. (2d) 224 (C. C. A. 5th, 1938) (declaratory action to have defendant declared under duty to defend suits brought in Oklahoma against plaintiffs, as “other assured” and to declare defendant's duties; decided on merits for defendant-appellants). McCabe v. Hartford Accident and Indemnity Co., supra note 12 (that defendant A's policy had attached and that it and not defendant B was under duty to defend). Ostroff v. New York Life Insurance Co., 104 F. (2d) 596 (C. C. A. 5th, 1939), (that company could not contest disability insurance for fraud after two years and that company was under duty to waive premium during period of disability).


it had until recently failed to perceive that any unjustified claim created a legal interest in the party charged to have the claim declared invalid. The importance of this interest in the daily activities of human beings was recognized in the Roman law of the Middle Ages, and through France came to Scotland, whence it found its way into England and now to the United States, where it is receiving its widest development. It goes back to the elementary fact that a person wrongly accused has a legal interest in asking his accuser to come forward and prove his claim or ever thereafter remain silent. This has been extended to cover slander of title, reputation and credit and all claims or demands, burdens or imposition, emanating from a defendant in a position to prejudice the plaintiff. Instead of awaiting the pleasure of the defendant in bringing his demand or claim to
adjudication, equity has found that social peace is promoted by taking under judicial cognizance the desire of the party charged or in jeopardy to be relieved of the peril, the insecurity and the uncertainty created by an unjust claim, actual or potential.

The procedure for declaratory adjudication has thus served as a stabilizer of legal relations. In spite of the inability of the English Court of Appeal in the celebrated case of Guaranty Trust Co. v. Hannay\textsuperscript{26} to fit this demand for relief from insecurity into the traditional definitions of "cause of action," they nevertheless sustained the claim as a legal interest worthy and susceptible of judicial protection and hence necessarily as a "cause of action." The British courts have now gone so far beyond the cautious and often contradictory remarks of the three judges who decided the Guaranty Trust case,\textsuperscript{27} that it is often misleading for our courts to quote selected passages from the three opinions rendered.\textsuperscript{28}

The possibility of a party charged or in jeopardy to initiate the action for declaratory relief made it necessary to revise the ancient conception that only the creditor has a legal right to proceed and therefore a "cause of action." It made it necessary to revise ancient conceptions that courts act only to redress committed wrongs or "threatened" wrongs. It made it necessary to recognize that unjust claims or clouds constituted operative facts warranting judicial protection for the party prejudiced or jeopardized, whether called a "wrong," a claim, a demand, a cloud, or a danger. Thus, the conception of "cause of action" must be broadened beyond the demands of a creditor or of a person in imminent danger of irreparable injury to include the demands of a debtor or party charged to be relieved of an unjust claim or cloud.

By the time Aetna v. Haworth reached the Supreme Court in 1937, these ideas had pretty well been accepted by many of the state and federal courts. The final blessing for the company's privilege to initiate the suit for a declaration that the company was not liable to the defendant, was given by that case. After pointing out that a suit by the insured for disability benefits, or after repudiation of liability by the company, a suit that the repudiation was unjustified and the policy still in force would clearly have presented a "justiciable controversy," the Chief Justice adds that "the character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer. . . . It is the nature of the controversy, not the method of its presentation or the particular party.

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\textsuperscript{26} [1915] 2 K. B. 536 (C. A.).

\textsuperscript{27} Cf. Ruislip-Northwood U. D. C. v. Lee, 145 L. T. R. 208 (K. B. 1931) (that plaintiff sanitary authorities were privileged to tear down the defendant's converted railroad cars used as houses, on the ground that they were "temporary" buildings under the authorizing statute. The declaration saved the necessity of proceeding at their own risk, subject to civil and perhaps criminal liability if the court should after demolition find the buildings not to be "temporary").

Russian Commercial & Industrial Bank v. British Bank for Foreign Trade (H. L.) [1921] 2 A. C. 438 (that the debtor plaintiff was privileged to repay the debt in rubles and not in sterling, and thereupon to get back the bonds as security).

\textsuperscript{28} Cf. Justice Lummus in Merchants Mutual Casualty Co. v. Leone, 9 N. E. (2d) 552 (Mass. 1937); Judge Yankwich in Maryland Casualty Co. v. Hubbard, 22 F. Supp. 697 (S. D. Cal. 1939).
who presents it, that is determinative.\textsuperscript{29}

Special facts have operated to make this method of determining coverage especially useful to insurance companies if not indeed to the insured and to injured persons hoping to rely upon the policy. It is well known that attorneys in negligence actions seek to get before the jury the fact that the defendant is insured and will not himself have to pay the judgment recovered. Where the company defends the action or is a party this becomes obvious. But in most cases involving vehicles not common carriers, the "no action" clause of the policy or the rules of procedure prevent the joining of the insurer as a party defendant.\textsuperscript{30} There is therefore no opportunity to assert the defense of "no coverage" in the negligence action, and it is not certain that a non-waiver agreement with the insured during the defense of the action for negligence is always effective protection to the company.\textsuperscript{31} When a liability insurer conducts the defense of a negligence action brought against the insured without reservation of


\textsuperscript{30} John A. Appleman, in an article (1938) 27 Marq. L. Rev. 75, points out that under the statutes and decisions of ten states (pp. 73-80) action may be maintained against the company by joinder or directly where a required form of policy is involved, before judgment is obtained against insured, anything in the policy to the contrary notwithstanding. He adds that in these states the risks of increased judgments impel the companies to increase the rates (p. 81). Wisconsin and Louisiana by statute permit joinder, even when a voluntary policy is involved. Rhode Island decisions seem to permit it. Texas apparently distinguishes between liability and indemnity policies (pp. 88-90), but gives effect to the "no action" clause.

\textsuperscript{31} See Montgomery v. Utilities Insurance Co., 117 S. W. (2d) 466 (Texas 1938), based on the ground that as a corporation could not practice law the non-waiver agreement was illegal. The case is under certiorari to the Supreme Court of Texas.


\textsuperscript{33} B. & M. Manufacturers Mutual Casualty Co. v. Paquette, 21 F. Supp. 853 (D. Maine, 1938) (ownership by unlicensed son concealed); Utica Mutual Insurance Co. v. Beers Chevrolet Co., 294 N. Y. S. 82 (1937); Merchants Casualty Co. v. Pinard, 87 N. Y. 473, 183 Atl. 36 (1936) (driver had bought car from insured on condi-
emergency, or carrying passengers for hire, or in violation of the particular commercial purpose insured of the business or pleasure clause or for an excluded purpose or activity; that the car was driven by an unauthorized or prohibited driver or that the territorial clause was violated; or that the person injured was not covered or an entitled beneficiary.

The company may claim that the disease contracted was not within the covered.
verage of an accident policy, that there is in fact no total or permanent disability and hence no duty to waive premium payments or pay disability benefits; that a death was not "accidental." The company may demand a declaration that the coverage had terminated. Quite common are the cases in which the company in a declaratory action contends that some conduct or misconduct of the insured, such as the failure to cooperate in the defense of a third party action or wrongful admission of liability or conviction or misrepresentation as to a material fact or change of occupation increasing risk or failure to notify the company of a suit brought against the insured operated to release the company from its liability under the policy.

Even before the Haworth case, the

New Hampshire and several lower federal courts had recognized the complete justiciability of such a suit. After the Haworth case all doubts were removed. There have remained, however, a number of questions of policy on which the courts are not all agreed, and which in part depend on such varying facts that the issue is not always determinable a priori. The main differences in the courts have arisen on the question whether the plaintiff company should be allowed to pursue its state or federal remedy for relief from liability while a suit for negligence against the insured is already pending in the state courts, where the company had an opportunity if not indeed the contractual duty to defend its insured. The company maintains, however, that it is not bound for lack of coverage or for some associated with a claim that insured doctor's criminal performance of an abortion absolved the company.

42 Utica Mutual Insurance Co. v. Hamera, 232 N. Y. S. 811 (1936) (silicosis). In Globe Indemnity Co. v. Sterling Stewart Corp., 13 N. Y. S. (2d) 678 (1939) it was held that the onset of silicosis was not "accidental."


45 Anderson v. Aetna Life Insurance Co., 89 F. (2d) 345 (C. C. A. 4th, 1937) (that group policy had lapsed); American Motorists Insurance Co. v. Central Garage, 86 N. E. 362; 169 Atl. 121 (1933) (that it had been validly cancelled); Prudential Insurance Co. v. Pearson, 24 F. Supp. 311 (W. D. Mo. 1933) (lapsed). Ohio Casualty Insurance Co. v. Murphy, 28 F. Supp. 253 (D. C. Ky. 1939) (term only four months, not one year, hence lapsed). See also cases, supra note 14.

other good reason and wishes to avoid the necessity and expense of defending a negligence action from the consequences of which it claims complete exemption.

The question arises whether the courts should deny a preliminary or independent action on this issue of personal liability and thus force the company to assert its immunity in connection with its defense to the negligence action against the insured, or compel the company to risk standing on its conviction of immunity, let the negligence action, perhaps improperly or even collusively defended by the insured, go to judgment, and then make its defense in an action for indemnity on the judgment (under statute in some states) or in an action by the insured or injured person in garnishment or, under some statutes, directly or jointly with the insured. By refusing to defend, the company loses all opportunity to contest the negligence of the insured or the injured person's right to recover, and exposes itself to a charge of breach of contract. By defending, it incurs considerable expense and may waive the claim of immunity.

It is therefore of exceptional importance to both insurer and insured, if not indeed to the injured person, to know at the earliest possible moment whether the policy covers the loss or not. The liability under the policy and the liability for negligence are indeed two separate transactions. While in general the parties in interest are the same, the company is not usually, except for statute, a party to the negligence action. It may be important, therefore, to try the question of immunity separately. This is especially so where an impecunious or complaint insured is involved who will readily admit liability and accept judgment against him pro-confesso, both he and the injured person realizing that the real parties in interest are none other than the company and the injured person. If the company were exempt, there might be no law suit for alleged negligence. Moreover, the insured or injured person may delay his suit, as in the Haworth case, and it might work an injustice entailing loss of evidence, the setting up of reserves and other inconvenience and suspense to have to await the pleasure of the insured or injured person to commence the action.51 In some states, indeed, the company's defense of the suit for negligence is a bar against any later disclaimer of liability in the subsequent action for indemnity.52

Naturally, the company should not by a declaratory action, often inaccurately called an action in equity, be allowed to deprive the defendants of a jury trial. All the issues of fact, practically always present in these cases, can be tried by a jury; the federal Declaratory Judgments Act and the rules or prac-

52 Cf. Vance, Handbook on the Law of Insurance (2d ed., 1930) 683-6. This seems to be the rule in Michigan, and is invoked by the court in the Wolverine case as a ground for relegating the company to its defense of the negligence action. The court considered that the declaratory action could make no final determination of insurer's liability, for it might be changed by the estoppel consequent on defending the action for negligence. But this seems unsound, for it compels the company to assume risks rather than aids the parties in avoiding risks.
The courts in the states provide for the submission of such issues to a special jury. And even though a jury in equity may be deemed “advisory” only, this is not the case with a jury in the declaratory action. Inasmuch as a responsible insured person should be able to rely upon the company’s help in defending him against third party claims, it may in some cases work injustice to compel him to defend two suits, one by the company for non-liability and one by the injured person for negligence, although after he wins the first he will not be alone in defending the second. Where an action by several injured persons is already pending in a state court and the company has complete opportunity to assert its immunity in one action, and great inconvenience to several injured persons would be caused by compelling them to defend a federal action for immunity, there may on the balance of convenience in exceptional cases be a sound reason for declining to exercise federal jurisdiction.

**Two Suits**

Let us now see how the courts have dealt with this difficult question of two suits and the propriety of a preliminary suit for a declaratory judgment. Courts which erroneously wish to restrict the declaratory judgment to the functions of an extraordinary remedy, like those of Michigan and Pennsylvania, naturally exercise their discretion in relegating the plaintiff company to its defenses in the common law action for negligence. Expressed in its harshest terms, we find the denial of a declaratory action for company immunity explained as follows by the Michigan Supreme Court:

“The question of plaintiff’s liability on the policy depends on a single issue of fact, whether Clark’s son was driving or in control of the car which hurt S. Its liability to pay cannot accrue until S has judgment against Clark. Then, if Clark pays the judgment, his remedy against plaintiff will be an original action on the policy. If Clark does not pay, S’s remedy against plaintiff will be in garnishment. Both remedies are at law, with right to trial by jury. Plaintiff’s defense is legal and has no equitable features, and can be made in either law action as completely as it could be made in the present proceeding.”

Possibly the adherence of Michigan to the classic distinction between law and equity, now abolished under the federal rules, had considerable influence on the decision. As already observed, the declaratory action is neither strictly equitable nor legal, though it has historical roots in equity; and no person should be denied his right to the court thinks the parties should be left to existing forms of action, the declaratory judgment may be denied, (Rule 212), and overlooked the more clearly expressed view in Woollard v. Schaffer Stores Co., 272 N. Y. 394, 5 N. E. (2d) 829 (1936). The court also thought the action an escape from a jury trial, and that other actions might be based on the same accident. General Acc. F. & L. Assur. Corp. v. Becker, 300 N. Y. S. 633 (1937) (that defendant insured should be made a party to suit brought by injured party against plaintiff insurance company).)
a jury trial of issues of fact if he desires it. The assumption that he might by declaratory procedure be denied his right to try issues of fact before a jury was in part responsible for the refusal to grant a declaration in a few federal and state cases.\textsuperscript{54}

In Michigan, it seemed to make no difference to the court whether the negligence suit had already been brought or not.\textsuperscript{55} Where the suit by the insured or injured person has not yet been brought, there seems to be no reason for denying the declaratory judgment.\textsuperscript{56} In most of the federal cases the suit in the state court had already been started or the issue arose on a motion to dismiss for lack of jurisdiction. While as a rule the pendency of a suit in another court involving the precise issues is a ground for denying a declaratory judgment, in many of these cases the identical issues are not involved, for the insurer is not a party to the negligence action but on the contrary wishes a declaration of release; or he claims more immunity under the policy that is placed in issue by the negligence action. In the recent case of \textit{Maryland Casualty Co. v. Consumers Finance Co.},\textsuperscript{57} Judge Watson thought that even though no damage suit had yet been commenced in the state court, the company could as conveniently and at no greater expense try the question of immunity in defending the insured in the seven actions which the court anticipated, and, a more convincing ground, that a decision in the federal action would not necessarily conclude the issue whether the negligent driver was insured's agent, and would not help to terminate the litigation unless it was in plaintiff's favor, whereas the injured persons would be exposed to the expense of defending an additional lawsuit. The court reached these conclusions without knowing in what states the injured persons would sue, although the insurance company's position may vary in different states. The Circuit Court of Appeals reversed the judgment, but declined to enjoin the institution of the negligence actions.

In the \textit{Quarles} case,\textsuperscript{58} Mrs. Quarles sued her husband, insured, in a South Carolina court, for damages arising out of an auto accident. Thereupon the company began its federal suit for a declaratory judgment that inasmuch as the insured had failed to cooperate with the company in defending what the company considered a collusive suit, the company was not bound to defend the negligence action. Thereafter Mrs. Quarles recovered judgment against her husband and began an action at law against the company in the state court to recover the amount of that judgment. It was in that situation that the District Court, affirmed by the Circuit Court of Appeals, concluded that


\textsuperscript{55} In the Wolverine case it was only threatened; in the Wise case it had been instituted.

\textsuperscript{56} District Judge Trimble in New York Life Insurance Co. v. Roe, 22 F. Supp., 1000 (D. C. W. D. Ark. 1938) rev'd 102 F. (2d) 28 (C. C. A. 8th, 1939) sustained the motion to dismiss the declaratory action because defendants would probably bring a suit to establish double indemnity liability.


\textsuperscript{58} Supra note 54.
it would be better to let Mrs. Quarles’ South Carolina suit against the company go to trial and not to draw practically the identical action, with parties reversed, into the federal courts. That seems a correct decision. The issue was not the coverage of the policy or whether the company should be forced to defend a negligence action in the state courts, but the *bona fides* of a suit, which had been instituted in the state courts and the validity of the company’s defense in the action brought against it by Mrs. Quarles. Clearly there was no useful purpose served by trying this pending issue in a new federal action.\(^59\)

So, where judgment had been recovered against the insured in an Illinois court and attorneys had been engaged to file garnishment proceedings against the insurance company, the federal court was right in refusing to exercise jurisdiction of a declaratory action of the company to establish non-liability, since the garnishment proceeding was ancillary to the original state action and the company’s liability could be fully adjudicated in that proceeding.\(^60\) Where identical issues and parties are involved in the state suit and no practical or useful purpose can be served by deciding the case in the federal courts, it is wise policy, especially since *Erie Railroad v. Tompkins*,\(^61\) not to exercise the court’s admitted jurisdiction.

With those few exceptions, practically every federal and state action for a declaratory judgment of non-liability has been sustained as proper procedure. As a rule the issue of duty to defend or bear liability was not directly raised in the suit for negligence against the insured. But Circuit Judge Hutcheson in a thoughtful opinion\(^62\) gave expression to the dictum that even if the same issues and parties...
were involved, assuming the federal court had jurisdiction, the two suits might run along simultaneously, first decided being *res judicata*. This does not seem good policy, for identity of issues and parties should foreclose the exercise of an after-acquired federal jurisdiction. But certainly where there is no complete identity, the federal suit is appropriate. Several courts have considered it logical and expedient to decide in a separate declaratory action the preliminary question of the company’s duty to defend or its immunity under the policy, on the ground that this simplified the litigation. Even the company’s defense of the state suit has been considered no bar to a federal action for a declaration of no-duty to defend or to pay an eventual judgment; not even recovery of a state judgment has had that effect, although the same issue ought not to be tried again.

Until recently the federal courts had with considerable liberality granted injunctions against the continuance of the action for negligence in the state courts until the federal action for non-coverage had been decided. For reasons already cited, this seemed to promote economy in judicial administration; even without injunction insured and injured persons often preferred to await the outcome of the main issue of coverage. Several courts at least thought the stay of the negligence action merely a matter of policy.

Where the federal injunction against the state action has been granted, notwithstanding what seems like an express prohibition in Section 265 of the Judicial Code, it may have been done thoughtlessly or under the second exception laid down by Justice Van Devanter in *Wells, Fargo & Co. v. Taylor,* namely, to protect a federal jurisdiction properly acquired. Lately, however, three federal circuit courts of appeal have held that there is no justification, in view of Section 265, for enjoining the action in the state court

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for negligence. This will result in the two suits running along simultaneously. In spite of the deprecation of an unseemly competition, a race for priority in judgment is pretty sure to occur, unless, as already indicated, the injured parties voluntarily defer the state action. But where they do not, the federal action has an advantage in the possibility of advancement on the calendar. Only to the extent that some incidental issue may be identical would the first judgment be res judicata. But apart from the fact that the declaratory action would not afford the injured parties full relief, there are many reasons why delay should not be imposed upon them by injunction. Even the concurrence of two actions will probably not, as the Harvard Law Review assumes, deter companies from instituting actions looking to a declaration of non-coverage, for many reasons exist for invoking that relief quite independently of the grant or denial of injunction of the state action.

**Declaration of Limited Liability**

Closely related to the actions claiming a declaration that the company is not liable are the suits in which the company may claim, either against the insured or against another insurance company that it is liable only to a limited extent or liable only secondarily after another company's primary liability has first been established and liquidated.

Thus, in a multiple accident where some only of the injured persons have pursued their claims to judgment or settlement, the company may claim against the others threatening or initiating suit a declaration that it is liable to all claimants only to the amount of the policy. Or, even before the first judgment has been paid or settled, the company may implead the insured and all the contingent claimants and seek a declaration of its liabilities to each and if necessary ask for a pro rata division. These suits are not always the equivalent of equity actions in interpleader, because the claims may not all arise out of the policy but include independent creditor's rights, or the insured may not be altogether disinterested. So, the company may admit a limited liability, but ask a declaration of immunity for any excess demanded, e.g., that the risk assumed extended only to a non-hazardous occupation and not to the hazardous one later entered upon or that the death arose...
from natural and not accidental causes, thus rejecting the applicability of the double indemnity clause76 or that particular claims for indemnity are unjustified.76

Even more interesting are the declaratory actions brought against each other by insurance companies directly or by joinder or intervention claiming a declaration of no liability to share risks or responsibility for a loss77 or limited78 or contingent liability79 only or contribution.80 In the recent case of *Maryland Casualty Company v. Hubbard and the Employers Liability Assurance Company*,81 Judge Yankwich of the federal District Court of California, Central Division, had occasion to render a brilliant opinion touching several aspects of this developing branch of the law. The owner of an automobile had obtained from the defendant Employers Liability Assurance Company a public liability policy containing an omnibus clause, covering persons driving with the owner's consent. One Blackwell, employed by Ridgeway Audit, Inc., was thus driving the car in New Mexico when he injured the defendant Hubbard. Hubbard sued Blackwell and his employer, Ridgeway Audit, in the state court at Los Angeles for negligence. The plaintiff Maryland company had issued to Ridgeway Audit a non-ownership public liability policy. Both policies obliged the company to defend actions against the insured. In the state action the Employers Liability Company had been called on to defend the action but refused, denying liability. Thereupon, the plaintiff Maryland company instituted in the federal district court an action for a declaration that its policy constituted excess coverage only, after the defendant Employers Liability Company's primary coverage, so that the plaintiff was liable only after the Employers Company policy had been exhausted.

The defendant-insurer moved to dismiss on the ground that there was no privity between the two companies; that only after the injured person had secured a judgment against the Ridgeway Audit and the Maryland company paid it, would it be subrogated to whatever right Ridgeway had against the defendant Employers Liability Company; and that inasmuch as that right was merely contingent and future, there was no basis for a declaratory judgment.

Judge Yankwich denied the declaratory action.


ant-insurer's contentions and held the case fully appropriate for a declaratory judgment. Privity between the parties he considered unnecessary. A liability that is contingent, if threatened and tangible, is sufficient to give the plaintiff a legal interest in declaring its non-existence. No demand to defend is necessary to create such a legal interest; the facts indicate the plaintiff's jeopardy, which the right of subrogation establishes. It was not necessary to make the owner of the car a party, when the negligent driver was a party. The court relied heavily on the striking case of *Post v. Metropolitan Casualty Insurance Co.* in which the insurer was not liable under the policy until the insured railroad, then hopelessly insolvent, had paid at least $25,000 in judgments. Several negligence actions were pending against the railroad, and one judgment for $7,500 had been recovered. This, added to the amounts claimed in the other actions, would exceed $25,000. The insurance company having denied liability until $25,000 had been paid, the receiver sought a declaration that the insurer was liable for the excess notwithstanding the railroad's inability to pay the minimum $25,000. The New York Appellate Division paid high tribute to the declaratory action as a means of solving this precarious, even though contingent, relationship. The insecurity was tangible and practical, and that made it sufficiently ripe to warrant declaratory relief. In the *Hubbard* case, the contested issue of priority in liability was clearly justiciable and ripe for adjudication, quite apart from the consideration that it was not determinable in the state action where the Maryland company could not be joined. The plaintiff Maryland company, in danger of prejudice from the state action, sought a declaration of its privilege not to defend, thus avoiding the risk of acting on its own views alone, and a declaration that its liability was conditional only. This the court thought entirely sustainable. The only questionable part of the opinion is the suggestion that the plaintiff in whose favor it was deciding had no "cause of action," which the judgment itself refutes.

**Parties**

The question of proper parties has troubled the courts on several occasions. Section 11 of the Uniform Act provides that "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." The procedure for declaratory judgment vests in the courts a considerable discretion to insist upon joining and impleading, or at least serving, all parties they deem interested or likely to be affected by the decision. The reason is that the judgment might not otherwise terminate the controversy, which is the primary purpose of the proceeding.

In the *Maryland v. Hubbard* case, Judge Yankwich considered the defendant-insurer if not an indispensable, at least a proper party, for in equity...
all persons having an adverse claim may properly be joined.\textsuperscript{84} In some cases the insured has been deemed an indispensable party,\textsuperscript{85} but not necessarily all the injured parties.\textsuperscript{86} In other cases, where the insured is irresponsible and is a mere conduit between the company and the injured persons, it may be less important to have the insured a party defendant than at least some of the injured persons. The issue, in the writer’s opinion, should not turn, as the Circuit Court of Appeals in the \textit{Beverforden} case assumed, on any difference between the Uniform Act and the federal Act, which is silent on these technicalities of procedure. These, it was intended, were to be left to ordinary rules of pleading and practice, including joinder, which in the federal courts is now controlled by \textit{declaratory judgment of non-liability for lack of proof}.\textsuperscript{87}

\textbf{Burden of Proof}

A few collateral questions have arisen in these cases which it may be of interest to note. In New Hampshire, which has been most receptive to declaratory action by insurance companies disavowing liability, we have had conflicting decisions on the question of burden of proof. In the \textit{Greenough} case\textsuperscript{87} there was contradictory testimony as to whether or not the car was being driven with the owner’s consent. Finding the evidence equally balanced, the appellate court held that the burden of proving that the use of the car was within the coverage of the policy was on the plaintiff in the negligence action and that the reversal of the par-

\textsuperscript{84} It seems an unduly narrow construction for the Vermont Supreme Court in \textit{Town of Manchester v. Town of Townshend}, 192 Atl. 22 (Vt. 1937) to have denied a declaratory judgment for misjoinder of parties defendant where the plaintiff impleaded three defendants, one of whom should have borne the burden of support of an indigent resident. The issue depended on residence. The dissent seems sounder. The action was dismissed because the three defendants were said to lack a community of interest. Of course the injured persons are “proper” parties, \textit{Builders & Manufacturers Mutual Casualty Co. v. Paquette}, 21 F. Supp. 853, 865 (D. Me. 1938).

\textsuperscript{85} \textit{Auto Mutual Indemnity Co. v. Dupont}, 21 F. Supp. 606 (D. C. D. Del. 1938) (where federal jurisdiction was declined, because insured, not a party, was in Virginia. Suit in Virginia court was deemed necessary. In Lumbermens Mutual Casualty Co. v. Cieri, 23 F. Supp. 435 (M. D. Pa. 1938), the insured were considered necessary parties. See \textit{Appleman} (1937) 23 A. B. A. J. 553, 557. Yankwich, J. considered one insured, owner of the car, not an indispensable party in \textit{Maryland Casualty Co v. Hubbard}, supra note 79.

\textsuperscript{86} \textit{Western Casualty & Surety Co. v. Beverforden}, 35 F. (2d) 166 (C. C. A. 8th, 1937). Injured party’s husband and sister, who had also sued driver in the state court for negligence were not deemed “necessary parties” to federal action for declaratory judgment of non-liability for lack of coverage. See 51 Harv. L. Rev. 926 (1938). Contra: \textit{Central Surety & Insurance Corp. v. Caswell}, 91 F. (2d) 607 (C. C. A. 5th, 1937); \textit{Maryland Casualty Co. v. Consumers Finance Service}, 101 F. (2d) 514 (C. C. A. 3rd, 1938). It may be well to join injured persons, for they are often the real parties in interest. In Continental Mutual Insurance Co. v. Cochrane, Commissioner, 39 Colo. 462, 4 P. (2d) 308 (1931), the court thought that inasmuch as policyholders were not parties to an action for the construction of the company’s policies, the declaratory judgment “would not terminate the uncertainty or controversy” and therefore dismissed. Ex \textit{pae Hirsch’s Committee}, 245 Ky. 132, 53 S. W. (2d) 211 (1932) (insurance company a necessary party to suit for disability benefits). Kline v. \textit{Central Life Insurance Co.}, 103 F. (2d) 130 (C. C. A. 7th, 1939) (assignee of life policy not “indispensable party” in suit against company claiming privilege of changing beneficiary).

\textsuperscript{87} \textit{Travelers Insurance Co. v. Greenough}, 88 N. H. 391, 190 Atl. 128 (1937). Cf. 37 Col. L. Rev. 1007 (1937). In \textit{Merchants Mutual Casualty Co. v. Kennett}, 7 A. (2d) 249 (N. H. 1939), dismissed for poor pleading, the court held that the burden of proof rests where it would have rested had the company been a defendant; yet if it merely seeks “an order to show cause” against a defendant who as yet has made no adverse claim, its petition is defective.
ties in the declaratory action did not change it. It is well-known that the risk of non-persuasion is usually on the plaintiff. Yet in actions invoking affirmative defenses it is often placed on the defendant. It is not always easy, certainly from the form of the pleadings, to determine what is an affirmative defense, a question usually depending on considerations of expediency or fairness. Inasmuch as the company's claim of immunity is in reality negatively defensive, there seems no impropriety in leaving the burden of proof on the normal plaintiff, the insured or injured person. Yet in a more recent case, in which the company sought to disavow the authority of its agent to contract insurer's liability, the New Hampshire court distinguished away the Greenough case and held that by voluntarily assuming the position of plaintiff in opening and closing the case, the company had assumed the burden of proof. But this can better be explained by suggesting that the relations between the company and its own agent are of such a character that the company and not the injured person may properly be required to prove their true nature.

In some recent federal cases the Greenough case has been either expressly or by implication disregarded. In Travelers Insurance Co. v. Drum-
the insurer's representative knew that insured was carrying the explosive butane gas and thus estopped insurer from denying coverage. In all these cases the burden is on him who would overcome a natural inference or presumption.

Public Questions

Insurance is necessarily a contract subject to the strictest governmental supervision. Statute and administrative control subject the insurer to a myriad of regulations, including many of the terms of the insurance contract. It is therefore hardly avoidable that questions frequently arise between insurer and the public authorities as to the scope of the insurer's privileges and immunities. These may arise directly in suits against the insurance commissioner, claiming the privilege of including certain clauses or contracting certain types of insurance or establishing that life insurance agents are not "employees" within a state unemployment insurance act or indirectly in suits against the insured challenging the powers of the Commissioner or the validity of his acts.

One of the most recent cases involved a question that has widespread interest, far beyond its immediate application. A glazier in New Jersey made contracts with his customers to service glass store fronts and replace broken glass for stated periods at a specified consideration. He was indicted by a grand jury at the request of the public prosecutor for engaging in the insurance business without complying with the provisions of the insurance law, which carried heavy penalties. The Commissioner of Banking and Insurance and the prosecutor had threatened to institute criminal proceedings under this indictment. The glazier thereupon brought an action for a declaratory judgment maintaining that his business was not an insurance business and that he was exempt from the provisions of the insurance law under which he was indicted. In addition, he sought an injunction against the impending criminal prosecution. He secured both. So Justice Bailey in the District of Columbia was sound in declaring that the Group Health Association was not engaged in the "business of insurance" and hence violating the criminal law.

In enjoining the criminal prosecution, sometimes deemed unusual, or declaring given business conduct privi-

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92 Continental Mutual Insurance Co. v. Cochran, Insurance Commissioner, 89 Colo. 462, 4 P. (2d) 308 (1931); General Insurance Co. v. Ham, Insurance Commissioner, 49 Wyo. 525, 57 P. (2d) 671 (1936) (privilege to include certain rider; held within administrative discretion of the Commissioner).


94 Northwestern Mutual Life Insurance Co. v. Tone, Commissioner, 4 A. (2d) 640 (Conn. 1938). Cf. the miscarriage in the identical type of issue in State ex rel. Ernst, Director of Social Security v. Superior Court for Thurston County, ... Wash. ... , 87 P. (2d) 294 (1939), where prohibition was denied, but declaratory action recommended.

95 American Motorists Insurance Co. v. Central Garage, 86 N. H. 362, 169 Atl. 121 (1933) (power of Commissioner to rule the policies in force, after company's notice of cancellation).

96 Moresh v. O'Regan, County Prosecutor, 120 N. J. Eq. 534, 187 Atl. 619 (1936).

leged and licit, the court recognized the fact, often overlooked, that business men who claim that their conduct is legally privileged and does not expose them to the charge of violating penal statutes are not congenital criminals and should have the privilege of testing the application of the statute to their business in a civil suit. They are thereby assuming the burden of establishing the truth of their contentions by a preponderance of evidence and relieving the public prosecutor of the burden of establishing their guilt beyond a reasonable doubt. Where the constitutionality of a statute, even penal, is in doubt, there has been no difficulty in permitting directly interested persons to challenge its constitutionality by declaration; there is no substantial difference in placing in issue the legal validity of a course of business conduct. The suggestion of some courts that such actions can be tried only on the criminal side involves, in the writer's opinion, short-sighted and defective administration of justice.

A fairer view was taken by the Missouri Supreme Court in the recent declaratory action of six large casualty companies against the members of a Bar Association committee who had charged that casualty adjusters were practicing law in Missouri in violation of the criminal law. In a long opinion analyzing the various activities of the adjusters, the court held that the general drawing of releases and contracts, advice as to legal rights, general appearance before workmen's compensation commissions and the presentation of contentions, and the general determination of legal liability, constitute the practice of law; whereas the detection and discovery of witnesses and evidence, taking witnesses' statements and photographs, appraisal of damage, informing insured of company attorney's legal opinion, procuring execution and filling out of prepared instruments, including selection of the appropriate form of release, an offer of settlement and payment of money in discharge of a claim and determination of amounts to be set up as reserves, expressing opinion to employer on extent of liability, attending Workmen's Compensation Commission conference to reach amicable settlement of claim, do not constitute the practice of law. This procedure was a sensible method of determining the legal validity of a series of activities which at best are somewhat difficult of classification and at worst might have laid the foundation for criminal charges.

IV

These are among the principal insurance issues which in recent years have been adjudicated by declaratory judgment. Practically all involved questions of construction, often depending on questions of fact. Some of them might have been decided under

99 Liberty Mutual Insurance Co. et al. v. E. N. Jones, General Chairman of Bar Committees of the State of Missouri, et al., decision filed May 2, 1939. ... Mo. ... 130 S. W. (2d) 945. The Circuit Court decision of Judge W. M. Dinwiddie was modified. For documents in the case the writer is indebted to Hogsett, Murray, Trippe, Depping and Houts. Cf. Richmond Ass'n. of Credit Men v. Bar Assoc. of Richmond, 167 Va. 327, 189 S. E. 153 (1937) declaring that the practice of the credit association in selecting attorneys to make collections for customers and fixing fees, and sharing fees without the customers knowing the identity of the attorneys, was the practice of law.
traditional procedure; many of them were not susceptible of such adjudication. Where a declaration was substituted for a coercive remedy, the public and the private interest have profited, for a conciliatory temper has been substituted for hostility, speed of determination has been enhanced and expense diminished. Where in actions for a so-called "negative" declaration of non-liability judgments have been obtained, a new field of judicial relief has been opened up which has met some of the demand for the removal of uncertainty, insecurity, and peril from legal and business relations. In the cultivation of this method of litigation there lies great hope for the development of preventive justice and the friendly adjudication of legal issues without the breach of economic and social relations which the weapons of coercive relief necessarily entail. Applied with the natural sympathy that the procedure enjoys in England, it should aid in the promotion of social peace and the efficient administration of justice.