

DECLARATORY JUDGMENTS IN PENNSYLVANIA

EDWIN M. BORCHARD†

Pennsylvania was among the first states to enact in 1923 the *Uniform Declaratory Judgments Act*.¹ Under it nearly two hundred reported cases, embracing some of the most illuminating opinions in the country and unfortunately, also some of the least defensible, have been decided in the various courts of Pennsylvania. It is a little regrettable that the better decisions seem to have been the earlier ones, whereas some of the later decisions mark a retrogression.

Among the notable opinions is that of Chief Justice von Moschzisker, speaking for a unanimous court, in *Kariher's Petition*.² This was one of the first decisions in the country on the constitutionality of the declaratory judgment, an issue which never should or would have been seriously raised, had it been understood what a declaratory judgment was. The court concluded that from all points of view the proceeding was completely judicial in character and laid down for the application of the statute certain guiding principles which have been of aid in subsequent cases. The *Kariher* case involved a suit by a would-be lessor of mining rights, who claimed to be the owner in fee but whom the lessee asserted to be only a life-tenant, for a judgment declaring that he was the owner in fee and that the challenge of his privilege to make the lease was unfounded. In granting the declaration the court made an exhaustive study of the declaratory judgment, from its English origins, and concluded that many proceedings in Pennsylvania had theretofore eventuated in a judgment merely declaring the rights of the parties and not requiring execution, including the case stated to declare the marketability of title, judgments wherein wills and written instruments are construed, and various other proceedings. The court pointed out the necessary conditions of a justiciable controversy and found in a legitimate proceeding for a declaratory judgment a full compliance with such conditions. The court pointed out from English and American experience certain natural limitations on the declaratory judgment, in the fact that the court must have jurisdiction of the subject-matter and of the parties, that all parties in interest must be served, that hypothetical cases will not be decided, and that the "proceeding to obtain such judgment will not be entertained *where another statutory remedy has been specially pro-*

† Hotchkiss Professor of Law, Yale University Law School.

¹ Act of June 18, 1923, P. L. 840, PA. STAT. ANN. (Purdon, 1930) tit. 12, §§ 831-846.

² 284 Pa. 455, 131 Atl. 265 (1925).

vided for the character of case in hand." ³ The *Uniform Act*, containing seventeen sections, embodies many specifications and limitations on the scope of the remedy and affords the courts a guide in its application. The discretion given the courts by Section 6 of the Act is a judicial discretion hardened by experience into rule and its exercise is judicially reviewable.

I. PROCEDURE

Alternative Remedy

The *Kariher* decision became a leading case in the United States, but in subsequent decisions the Pennsylvania Supreme Court began to make inroads upon it, apparently by inadvertence but yet most effectively. The first departure from sound law lay in certain decisions which, instead of considering the relief an alternative remedy, as made abundantly clear in the statute itself, construed it as if it were an exclusive or an extraordinary remedy, invocable only when no other remedy is available.⁴

This error occurred (1) by attributing to the Act an exclusive purpose, contrary to its terms, and (2) by misconstruing or misquoting the court's own words in *Kariher's Petition*. The statement in *List's Estate* ⁵ that the declaratory judgment was "provided for the purpose of having issues speedily determined, which otherwise would be delayed, to the possible injury of those interested, if . . . compelled to await the ordinary course of judicial proceedings," is only partly true and hence misleading; and the assumption or warning in *Cryan's Estate* ⁶ that this was its "obvious purpose" is unwarranted. Its purposes were numerous, including the following: "to afford relief from the uncertainty and insecurity attendant upon controversies over

³ Italics supplied. Cf. *Barraclough v. Brown*, [1897] A. C. 615; *Bull v. Attorney-General*, [1916] 2 A. C. 564; *Nixon v. Attorney-General*, [1930] 1 Ch. 566; *Stewart, Joint Guardian v. Herten, Joint Guardian*, 249 N. W. 552 (Neb. 1933).

⁴ *List's Estate*, 283 Pa. 255, 257, 129 Atl. 64, 65 (1925) (*dictum*, for the issue was decided); *Sterrett's Estate*, 300 Pa. 116, 124, 150 Atl. 159, 162 (1930) (suit premature; *dictum* that trustee's account action available); *Williamsport v. Williamsport Water Co.*, 300 Pa. 439, 150 Atl. 652 (1930) (city asked declaration as to the validity of a 1920 consent judgment, fixing the purchase price of defendant's utilities to be acquired by the city under statutory authority. After the entry of the judgment a required election had rejected the project, but in 1928 state administrative officers held the acquisition necessary. Dismissed, because declaratory judgment could not be "used to elucidate judgments". Although propriety of action for a declaration was denied, a judgment practically determining the issue was rendered); *Nesbitt v. Manufacturers' Casualty Ins. Co.*, 310 Pa. 374, 380, 165 Atl. 403, 405 (1933) (action for construction of insurance policy, dismissed on ground that the effect of non-waiver between insured's brother and defendant company, and whether brother was within ambit of his authority in driving car at certain time and hence within coverage of policy, and other questions raised "can be litigated in the established course of legal and equitable proceedings, and therefore the Uniform Declaratory Judgments Act cannot be invoked"); *Appeal of Kimmell*, 96 Pa. Super. 488, 490 (1929) (interpleader bill by stakeholder held proper remedy); *Myer's Estate*, 10 D. & C. 291 (Pa. 1928) (petition that trust has terminated; held, ordinary procedure suffices).

⁵ *Supra* note 4, at 257, 129 Atl. at 64.

⁶ 301 Pa. 386, 152 Atl. 675 (1930). See also *Appeal of Kimmell*, *supra* note 4.

legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor";⁷ to afford a speedy and inexpensive method of adjudicating controversies over legal rights;⁸ to narrow the issues, by disposing of disputes at their initial stages, and thus to prevent the accumulation of bitterness and impaired relations which acting upon one's own interpretation of one's rights necessarily invites;⁹ to make it unnecessary to destroy the *status quo* as a condition of judicial relief, thus enabling written instruments to be construed when the dispute first arises;¹⁰ to enable a debtor or obligor to assert compliance with or to disavow his debt or burden and obtain a declaration of release, complete or partial;¹¹ to enable a creditor or beneficiary whose interests are jeopardized by attack or denial to establish his claim and, by vindicating his rights, prevent further and future injury;¹² to enable a claimant to choose a mild but adequate form of relief by declaration in place of drastic and harsh coercion which he neither desires nor needs;¹³ and other purposes identified with the stabilization of contested legal relations.

After the decision in *Kariher's Petition* the Pennsylvania Supreme Court seemed to fear that the declaratory judgment might displace all other forms of relief—an unjustified fear because most suitors need much more than a declaration—and then sought to cut down the effect of the *Kariher* decision by misconstruing or misquoting its language, to the effect that a declaratory judgment will be denied "where another *statutory* remedy has been specially provided for the case in hand," as if it had read "where another *equally serviceable* remedy has been provided." For example, in *Leafgreen v. La Bar*¹⁴ the court says:

⁷ KAN. REV. STAT. ANN. (1923) c. 60, § 3132; see UNIFORM DECLARATORY JUDGMENTS ACT § 5; *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 524, 140 Atl. 506, 512 (1928); *Taylor v. Haverford Township*, 299 Pa. 402, 410, 149 Atl. 639, 641 (1930), and opinion below, 18 Del. 537, 540 (Pa. 1928).

⁸ *Brown v. Levin*, 295 Pa. 530, 534, 145 Atl. 593 (1929) ("inexpensive and expeditious"); *City of Chester v. Woodward*, 13 D. & C. 201, 203 (Pa. 1929) ("for the speedy determination of a real controversy"); *Swank Motor Sales Co. v. Decker*, 4 Cambria 28, 29 (Pa. 1932) ("in the interest of expediency and economy, and as a practical help in ending this controversy").

⁹ *Kariher's Petition*, *supra* note 2.

¹⁰ "The main purpose of the act is to provide a convenient method of determining the disputed interests of parties under 'deeds, wills, written contracts or other writings constituting a contract' and 'rights under statutes'." *Senft's Petition*, 15 D. & C. 792, 793 (Pa. 1930).

¹¹ *Girard Trust Co. v. Tremblay Motor Co.*, *supra* note 7 (that plaintiff's offer of building to replace burned structure was satisfactory compliance with obligation).

¹² *Everts v. Kepler*, 9 D. & C. 439 (Pa. 1927); *Whiteside v. Merchants Nat. Bank*, 187 N. E. 706 (Mass. 1933); and cases cited in *Borchard, Judicial Relief for Insecurity* (1933) 33 COL. L. REV. 648.

¹³ *Lawrence v. American Surety Co.*, 263 Mich. 586, 249 N. W. 3 (1933); *Holly Sugar Corp. v. Fritzler*, 42 Wyo. 446, 296 Pac. 206 (1931).

¹⁴ In 293 Pa. 263, 264, 142 Atl. 224 (1928), the executor's account had been filed and issue was raised on exceptions, denying propriety of certain credit. Before exception was argued, objectors petitioned for declaratory judgment, which was denied on ground that the issue was determinable in the *pending suit*. This was different from denying it on general ground that another remedy was available.

"In *Kariher's* Petition, 284 Pa. 445, 471, [131 Atl. 265, 271] we said, construing the act here invoked, that a proceeding to obtain a declaratory judgment will not be entertained where another *equally serviceable* remedy has been provided for the character of case in hand."

The misquotation is obvious. A "statutory" remedy for the special type of case submitted is merely an indication that a special jurisdiction will not be interfered with by the declaratory judgment proceeding. An "equally serviceable" remedy implies no special jurisdiction but an alternative remedy, and suggests that when an alternative remedy is available the declaratory judgment will not be entertained. In *Ladner v. Siegel*¹⁵ the quotation is in fact made to read "equally available", although qualified by the word "ordinarily". This is a quite considerable deviation from the function of quotation and of the meaning of the well-known English rule concerning special statutory jurisdiction expressed in the *Kariher* case.

In *Taylor v. Haverford Township*¹⁶ the court, apparently unconscious of its prior deviation, reiterates in exact quotation the sound rule announced in the *Kariher* case. But in *Sterrett's Estate*,¹⁷ decided only a month later, the court lurches further than ever in the following quotation:

"Moreover, from the *Kariher* Case down to our latest utterances on the subject of declaratory judgments, in *Taylor v. Haverford Township*, 299 Pa. 402, [149 Atl. 639] this court has uniformly ruled that relief may not be granted under the Act of June 18, 1923 . . . where another *established* remedy is available."

This now converts the declaratory judgment into something like an extraordinary remedy, not to be used where an ordinary remedy is available. The words "established remedy" were repeated in *Cryan's Estate*,¹⁸ although numerous declaratory judgment cases therein referred to could as easily have been brought for different relief; and again in *Nesbitt v. Manufacturers' Casualty Ins. Co.*¹⁹ Thus, the *statutory* remedy for the special case, which was the ground for refusing a declaratory judgment in the *Kariher* opinion, has by mistaken evolution become the *established* remedy of the later cases. This distortion should not be permitted to continue, for it is directly contrary to the words and purposes of the *Uniform Declaratory Judgments Act*, as will presently be shown.

The fact that the courts have the power to grant a declaration "whether or not further relief is or could be claimed," is an indication that the declara-

¹⁵ 294 Pa. 368, 144 Atl. 274 (1928).

¹⁶ *Supra* note 7 (where plaintiff obtained a declaratory judgment that a zoning ordinance was invalid).

¹⁷ *Supra* note 4, at 124, 150 Atl. at 162.

¹⁸ *Supra* note 6, at 394, 152 Atl. at 678.

¹⁹ *Supra* note 4.

tion may be granted, though a coercive remedy might have been but was not sought. The fact that prayers for relief are constantly framed in combination for a declaration plus an injunction, damages, specific performance, *etc.*, clearly shows that a declaration may be asked, although a coercive remedy "is or could be claimed". That is, whether a coercive decree is or is not claimed in the action shall not bar the grant of a declaratory judgment. The declaration may therefore be asked alone or in combination with other decrees or in the alternative. Section 8 of the *Uniform Act* provides:

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

This again makes it clear that a declaration may be sought and granted, even though further coercive relief might be or might have been possible, and that the declaration alone might be and would be sought. Experience has shown that when the rights are declared, the judgment being *res judicata*, further relief is rarely, if ever, required or asked. But if a losing party should have the temerity and recklessness to defy the court's declaratory judgment, which irrevocably fixes the rights of the parties, the winning party is not helpless but, on petition, may obtain an order carrying the judgment into coercive execution. The fact that requests for a declaration and coercive relief are often asked in the alternative²⁰ is an indication that the declaration is not an extraordinary remedy or that there is any inconsistency between the two or that a request for the one excludes the other. In the British jurisdictions the courts frequently grant a declaration *sua sponte* when they feel unable to grant coercive requests, a practice which has the effect of adjudicating conclusively the substantive rights of the parties and terminating the case. Moreover, the fact that the statute enjoins on the courts a liberal construction²¹ should have dissuaded the Pennsylvania court from its illiberal and unsound view.

Finally, another inadvertent misconstruction of the law was made in *Cryan's Estate*. The court says:

"... The provision in section 1 of the statute, that the courts shall have the right to act thereunder 'whether or not further relief is

²⁰ See *e. g.*, *Fess Oil Burners, Ltd. v. Mutual Investments, Ltd.*, [1932] 2 D. L. R. 16 (an action to recover damages for conversion and wrongful detention of an oil burner or in the alternative a declaration that plaintiff was privileged to remove it). See also *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

²¹ "This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered." UNIFORM DECLARATORY JUDGMENTS ACT § 12.

or could be claimed,' does not mean that proceedings by declaratory judgment are available whenever any controversy exists, but rather that such relief may be had even though, for full relief, other and additional legal remedies must be resorted to after the issues in the declaratory judgment proceedings have been determined. The act as a whole shows this to be its meaning."²²

It had never been suggested that "proceedings by declaratory judgment are available whenever any controversy exists." Such judgment may be denied when there is a statutory remedy provided for the special case, when it will not terminate the controversy, when it is not expedient, when a jury should determine facts, when all the necessary parties are not before the court, and in numerous other cases in which courts have been sustained in employing their discretion to deny a declaration. But although the meaning attributed by the court in *Cryan's Estate* to Section 1 would seem to refute the erroneous suggestion that a declaratory judgment cannot be asked when another remedy is available, it does not mean, it is submitted, that a declaration may be obtained although full relief may require a further petition to the court under Section 8 of the *Uniform Act*, but means merely that a declaration may be asked (1) even though a coercive decree is also sought, (2) even though a coercive decree could be but is *not* sought, or (3) even though a coercive decree *could* not have been sought. Alternative (1) indicates the possibility of a combination of prayers; alternative (2) the possibility of alternative actions and prayers, a direct refutation of the Pennsylvania view here criticized; and (3) the possibility of suing for a declaration in certain cases, presently to be discussed, where no coercive relief is possible.

In the great majority of cases in which declaratory judgments have been rendered, including those in Pennsylvania, it would have been perfectly possible to obtain another remedy. Instead of suing for a declaration of right to money or other property, it would have been possible to sue for damages;²³ instead of suing to establish one's interest in a gift, legacy, or real property, it would have been possible to sue for the property or its equivalent or for possession or ejectment;²⁴ instead of a taxpayer's suit for a declaration of invalidity of public action, he could have sued for mandamus or injunction;²⁵ instead of a suit for the construction of a contract or deed, it might have been possible to sue for mandamus, injunction, specific per-

²² *Supra* note 6, at 391, 152 Atl. at 677.

²³ *Reap, Ex'r v. Wyoming Valley Trust Co.*, 300 Pa. 156, 150 Atl. 465 (1930); *Morgan v. Wyoming County Com'rs*, 12 D. & C. 165 (Pa. 1928); *Blakeslee v. Wilson*, 190 Cal. 479, 213 Pac. 495 (1923).

²⁴ *Sloan v. Longcope*, 283 Pa. 196, 135 Atl. 717 (1927) (landlord's right to possession of premises, plus execution); *Morris v. Morris*, 13 D. & C. 634 (Pa. 1930).

²⁵ *Klauder v. Cox*, 295 Pa. 323, 145 Atl. 290 (1929) (Kephart, J., remarked that there were three remedies for official action—injunction, mandamus, and declaratory judgment). Cf. *Borchard, Declaratory Judgments in Administrative Law* (1933) 11 N. Y. U. L. Q. Rev. 139.

formance, or damages;²⁶ instead of a suit for the construction of a statute, an action for a penalty or injunction, *quo warranto* or mandamus might have been brought;²⁷ instead of a suit to establish the validity or marketability of title to real estate, it might have been possible to sue for specific performance or other coercive decree;²⁸ instead of a declaration of rights under a will, it might have been possible to bring a statutory bill for the construction of the will or for coercive decree;²⁹ instead of a declaratory suit to establish the invalidity of a consanguineous marriage, it might have been possible to proceed under a statute.³⁰

These cases, selected at random, merely indicate that in most of the cases alternative remedies were available and were often recognized as having been available. But the declaration was issued because it was a proper remedy, apparently satisfied the plaintiff, and probably was more speedy and efficacious than the more complicated executory remedy he might have elected. There was probably a good reason for preferring the milder to the harsh remedy, for the declaration, in contrast with coercive relief generally, enables the issue to be determined without destroying the *status quo* or the relations between the parties. At all events, if on the facts a plaintiff is entitled to a declaration, it is not the function of a court to force upon him a more drastic remedy. The unfortunate result of the Pennsylvania aberration is the fact that attorneys seem now unable to tell which view the court will take in a particular case, and are hence discouraged from employing the declaratory procedure. Perhaps it is better to be consistent, even if wrong. The discretion to decline declaratory judgments is not the equivalent of arbitrariness or caprice, but, as we shall see, is a well-defined policy founded on definite principles. It is not within a court's proper legal discretion to

²⁶ See *Malley v. American Indemnity Co.*, 297 Pa. 216, 223, 146 Atl. 571, 573 (1929) ("The presence of these direct remedies [garnishment by creditor and suit by insured against insurer] would not affect the right to a declaratory judgment, for reasons unnecessary to state").

²⁷ *Cupp Grocery Co. v. Johnstown*, 288 Pa. 43, 135 Atl. 610 (1927), *aff'g* 88 Pa. Super. 602 (1926); *Fox, Dist. Att'y v. Ross*, 7 D. & C. 263 (Pa. 1926) (after defendant had filed petition for mandamus to have district attorney elected at next election, incumbent appointee to vacancy filed petition for declaration that he held for full term; *cf.* *Wingate, Surrogate v. Flynn, Sec'y of State*, 139 Misc. 779, 249 N. Y. Supp. 351 (1931)); *Commonwealth v. Miliren*, 10 D. & C. 393 (Pa. 1927); *In re* Petition of *Templar Motor Car Co.*, 27 Dauph. 276 (Pa. 1924) ("either by appeal" from decision of board or by declaratory judgment).

²⁸ *Devlin's Trust Estate*, 284 Pa. 11, 130 Atl. 238 (1925); *Smith's Petition*, 291 Pa. 129, 139 Atl. 832 (1927); *Ellis v. Commonwealth Trust Co.*, 10 D. & C. 144 (Pa. 1927).

²⁹ *B'Nai B'Rith Orphanage v. Roberts, Ex'r*, 284 Pa. 26, 130 Atl. 298 (1925); *Dommell's Estate*, 286 Pa. 509, 134 Atl. 379 (1926); *Brown's Estate*, 289 Pa. 101, 137 Atl. 132 (1927); *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930).

³⁰ *Duchi v. Duchi*, 11 D. & C. 610 (Pa. 1928). In *Saintenoy v. Saintenoy*, 10 Wash. 123 (Pa. 1929), the court refused to rule that a declaration could not be brought to establish the invalidity of a bigamous marriage, for which a special proceeding under an 1859 statute was provided.

In the seven wills cases cited by von Moschzisker, C. J., in *Cryan's Estate*, *supra* note 6, all decided under declaratory procedure, it would probably have been possible to resort to another remedy, at least for the determination of some of the issues involved.

dismiss an action for a declaratory judgment merely because another remedy was also available.

In some cases, it is proper to refuse a declaration because another remedy will afford better relief.³¹ It is also proper not to permit a final judgment to be opened or questioned by collateral suit for a declaration,³² although there is no reason why a judgment which has become a source of rights but is unclear or ambiguous cannot be interpreted by declaratory action.³³ While coercive relief often responds more effectively to the plaintiff's needs than a declaration, for which reason a declaration may be refused as insufficient, it often happens that a declaration will be regarded as equally effective or even superior. Thus, a trustee's action to determine the interest taken by a legatee or devisee is frequently tried by declaratory judgment in preference to other actions. In one such case, a Pennsylvania court remarked:

" . . . the remedy sought under this act is probably the most convenient and satisfactory one that exists at present for determining the matter in controversy. An action of ejectment might be a proper and convenient remedy, but, in the end, it would turn upon the construction of the paper writings or the two wills to be construed by the court . . ." ³⁴

The conflicting claims to interests in real property can often be more effectively determined by suit for a declaration than by any other form of action and courts have in such cases made special mention of the advantages of the declaratory action. Thus, the existence or nonexistence of liens or priority among them ³⁵ and the extent of interests or the validity of title taken

³¹ *Gray v. Lee*, 44 Montg. 1 (Pa. 1927) (for case in hand, assumpsit deemed better than a declaratory action, for execution was needed).

³² *Williamsport v. Williamsport Water Co.*, *supra* note 4.

³³ *Lloyd v. Weir*, 116 Conn. 201, 164 Atl. 386 (1933) (invalidity of judgment avoiding will). The *Williamsport* case, *supra* note 4, might have been deemed within this rule.

³⁴ *Morris v. Morris*, *supra* note 24, at 635.

³⁵ In *Troffo v. Camione*, 16 D. & C. 92 (Pa. 1930), it was claimed that defendant's asserted lien is nonexistent. In 1928, defendant conveyed two tracts of land to LC, wife of SC, taking in payment a judgment note payable a year from date and signed by LC and SC. This deed was recorded. About a month later another note was substituted for the original note, this one being payable one day after date. Ten days later, judgment was entered on this note. On the same day, LC and SC conveyed to plaintiff in consideration of \$1 and payment of a 1927 judgment debt which they owed plaintiff. Plaintiff did not know of the judgment lien to defendant and did not search title. Plaintiff could not sell or finance the land because of defendant's assertion of his lien against the land. Broomall, J., at 93: "If the petition asked this court to construe an order or judgment entered in an adverse proceeding, we would feel that it would not be a proper place for a declaratory judgment, but nothing of that kind is involved. . . . This question, we think, is one that the court may with propriety be asked to determine in a proceeding of this nature. Admittedly, the contention of the Camiones that they hold a lien against the property in the hands of Troffo interferes with his advantageous disposition of said property, and except by a proceeding of this sort we are not aware of any action he could take to correct this condition. We cannot insist that the judgment against Lucy Christopher be stricken off or satisfied, because the Camiones have undoubtedly a valid claim against Mrs. Christopher under that judgment, which they may enforce against any of her personal property in this county or against any real estate which may stand in her name. The plaintiffs in the *Camione* judgment against the *Christophers* might raise their present

under deed, will, or statute³⁰ have been conveniently settled by declaration in preference to other actions.

Jurisdiction

The *Uniform Act* provides that "courts of record within their respective jurisdictions shall have power to declare rights." This language was designed to indicate that existing jurisdiction over subject-matter and parties was not intended to be altered by the statute, but that a new procedural device or vehicle of relief was now supplied which, by narrowing the controverted issue, enabled traditional litigation to be determined in a more expeditious manner, and, in some cases, by changing the strategic position of the parties plaintiff and defendant, enabled new types of disputes to be adjudicated and hence new legal interests to be protected. Thus, a debtor can now sue his creditor for a judgment declaring that he is not liable; a covenantor can sue for a declaration that he has been relieved of liability by change of circumstances. Release from an alleged duty or liability, *i. e.*, privilege or immunity, is now recognized as a legal interest as worthy of judicial protection as the imposition of the duty. But the courts in which the issue is to be tried were not intended to be changed by the *Act*.

Relying on the rule expressed in *Kariher's Petition* to the effect that a declaratory judgment will not be issued "where another statutory remedy

question either by a sheriff's sale under their judgment and a subsequent action of ejectment or by a proceeding under the Uniform Fraudulent Conveyances Act of May 21, 1921, P. L. 1045; see *South Central B. & L. Ass'n v. Milani*, 300 Pa. 250; but the present plaintiff cannot compel them to adopt either proceeding at this time, nor can he compel them, prior to 1933, to issue a writ of *scire facias* on their judgment against the Christophers, naming him as terre tenant, in order to determine whether their judgment continues to bind his land." *Moore v. Oyer*, 21 North. 345 (Pa. 1928) (priority in mortgage liens among several claimants; question had arisen at sheriff's sale; *held*, declaration in advance of sale the proper procedure).

³⁰ See *Conemaugh Iron Works Co. v. Delano Coal Co.*, 298 Pa. 182, 188, 148 Atl. 94, 96 (1929) (bill to restrain sheriff's execution on property of which plaintiff holds title, against defendant's claim that it was conveyed in fraud of creditors; property had been mortgaged to trust company, not party to this suit. After denying equitable jurisdiction and suggesting necessity for suit at law by creditor, then execution on judgment, court added: ". . . We think that, if there is a fear of this mortgage being discharged by the proposed sheriff's sale, the status of the mortgage and the rights of the mortgagee can be determined in proceedings under the Declaratory Judgments Act, with all parties in interest on the record . . ."); *Orndoff v. Consumers' Fuel Co.*, 308 Pa. 165, 170, 162 Atl. 431, 432 (1932) (petition by lessee for declaration as to amount of oil royalties due various lessors, several subleases having been made. On the availability of the declaration, Schaffer, J., remarked: ". . . It would be difficult to settle in ejectment all the rights and claims of the three interests involved;—impossible, it would seem, to have adjusted them in trespass, and, while they might have been worked out in equity, that is not a more appropriate remedy than the one invoked, in which the judge sat without a jury . . ."); *Morris v. Morris*, *supra* note 24 (petition by trustees to determine what interest WM took under will. Property devised on condition of occupancy, and when he ceased to occupy, heirs claimed it. Sayers, P. J., considered declaration "most convenient and satisfactory", for ejectment, also proper, would also turn on construction of same will); *Johnson's Estate*, 15 D. & C. 347, 348 (Pa. 1930) (petition by grantee who had mortgaged property and whose title had been questioned for declaration of what interest his grantor had received under will. Said the court [Kent, P. J.]: ". . . the remedy sought under this act is probably the most convenient and satisfactory one that exists at the present for determining the matter in controversy. Any other action would undoubtedly turn upon the construction of the will to be construed by the court under the submission in this proceeding.").

has been specially provided for the case in hand," the Orphans' Court in Pennsylvania has been somewhat strict in refusing to go beyond the functions of construing the will so as to determine questions of title to property arising thereunder,³⁷ or in maintaining that the disputed rights of successors in interest should be determined on the filing of the executor's account³⁸ or specifically under the *Fiduciaries Act*,³⁹ or that special proceedings under other statutes are exclusively appropriate.⁴⁰ Certainty would hardly seem to have been promoted by the decision in *Patanyi v. First National Bank of Pittsburgh*⁴¹ that a petition claiming ownership of money paid by but returned to the bank after a wife's death, should have been brought in the Orphans' Court, wherefore the action must be dismissed. But the suggestion and ruling that a suit for a declaration of rights may be dismissed when there is an adequate remedy at law⁴² cannot be sustained, for the declaratory judgment is, as already observed, not an equitable or extraordinary remedy, but an alternative remedy. The conclusion that the same issue is pending

³⁷ *Frederick's Estate*, 10 D. & C. 591 (Pa. 1927) (plaintiff's title to realty; also dismissed because without defendant it was an abstract question); *Kunsman's Estate*, 11 D. & C. 783 (Pa. 1928) (request for declaration between parties, not as heirs, but as adverse claimants to testamentary fund); *Heist v. Citizens' Trust Co.*, 12 Leh. 333 (Pa. 1927) (attempt to enforce by declaration a decedent's promise to let plaintiffs share in estate); *cf.* *Paine's Estate*, 13 D. & C. 629 (Pa. 1930) (in which construction was sought of right to testamentary gift of rent, in hands of third party). *Gest, J.*, who had construed the power of the Orphans' Court narrowly—*Duff's Estate*, 4 D. & C. 315 (Pa. 1924)—was inclined to hold that declaration should be withheld because of inability to enforce it against third party, but considered that the Supreme Court had construed the Act more broadly: *B'Nai B'Rith Orphanage v. Roberts, Ex'r*, *supra* note 29; *Kariher's Petition*, *supra* note 2; and *Kidd's Estate*, 293 Pa. 21, 141 Atl. 644 (1928), hence granted petition; *In re Sedor Estate*, 24 Luz. 167 (Pa. 1926) (questioned title to real estate, originally devise, where vendee questioned plaintiff vendor's interest). In *Hirst's Estate*, 13 D. & C. 683 (Pa. 1930), court refused to decide amount to be set aside to protect annuity, as this was within exclusive jurisdiction of Orphans' Court.

³⁸ *Sterrett's Estate*, *supra* note 4; *Loughlin's Estate*, 103 Pa. Super. 409, 157 Atl. 494 (1931), *aff'd* 14 D. & C. 670 (Pa. 1931) (no controversy; issue determinable on executor's account); *Follweiler's Estate*, 6 D. & C. 757 (Pa. 1924) (no controversy; trustee should file account and request audit).

³⁹ *Moore's Estate*, 18 D. & C. 37 (Pa. 1932) (petition by executor to determine who takes deceased beneficiary's share. *Held*, adequate remedy on filing account under *Fiduciaries Act*); in the *Estate of Washington L. Stoeys*, 34 Dauph. 63 (Pa. 1930) (on authority of *Sterrett dictum*, *held*, statutory remedy available under *Fiduciaries Act*); *Sacred Heart Church v. Fidelity Trust Co.*, 78 Pitts. 616 (Pa. 1930) (same); *McKinney's Petition*, 79 Pitts. 596 (Pa. 1930) (same).

⁴⁰ *McCalmont v. McCalmont*, 93 Pa. Super. 203 (1928) (Act of 1859 affords procedure for annulment of bigamous marriage; [see also *Shallenberger v. Shallenberger*, 8 D. & C. 235 (Pa. 1926); *Saintenoy v. Saintenoy*, *supra* note 30]); *Reading Council of Boy Scouts v. County of Berks*, 22 Berks 201 (Pa. 1929) (statutory proceeding for tax exemption deemed proper); *In re Petition of Atomite Corp.*, 29 Dauph. 113 (Pa. 1926) (appeal from administrative board proper).

⁴¹ 77 Pitts. 328 (Pa. 1928).

⁴² *Brewer, Treas. v. Brasted*, 11 D. & C. 103 (Pa. 1928) (that defendants are illegally constituted, their contracts void, and plaintiff treasurer will be personally liable if he pays money on them. Two grounds for dismissal were asserted: (1) that the issue was pending in another action, a proper ground; and (2) that there was an adequate remedy at law, an improper ground).

in another action is a sounder ground for dismissal,⁴³ and it is, of course, proper to refuse a declaration where the court concludes in its discretion that the relief necessary to satisfy the plaintiff is not sufficiently afforded by the declaration but can be obtained only by a coercive remedy.⁴⁴ Such a ground, however, requires strong supporting evidence and should distinctly avoid the inference that only an equally adequate remedy is suggested. Yet the mere pendency of another proceeding has not uniformly defeated the declaration, for in *Fox, Dist. Att'y v. Ross*,⁴⁵ after Ross had filed a petition for mandamus to have a district attorney elected at the next election, Fox, the incumbent, who had been appointed to fill a vacancy, successfully filed a petition for a declaration that he held for the full term. The inconsistency which it is feared many of the Pennsylvania decisions disclose is probably due largely to the uncertainty created by the chameleonic position of the Supreme Court in construing the declaratory judgment at times as an alternative remedy, as it is, and at times as an exclusive remedy, which in most cases it is not. This has caused them on occasion to try to find whether another remedy, under statute or otherwise, might not have been brought and, if the conclusion is in the affirmative, to dismiss the petition for a declaration. As already observed, this is only proper when the statutory remedy has been specially provided for that special type of case and when, to depart from it, would defeat the purpose of such statute; or when the other remedy available is deemed more complete in responding to the plaintiff's actual needs so that the petition for a declaration may be deemed not sufficiently conclusive or helpful in terminating the controversy.

Justiciability

In *Kariher's Petition* the Supreme Court laid down a rule as to justiciability in actions for a declaratory judgment which has been followed and

⁴³ *Dempsey's Estate*, 288 Pa. 458, 137 Atl. 170 (1927); *Leafgreen v. La Bar*, *supra* note 14; *Brewer, Treas. v. Brasted*, *supra* note 42. The trustee's account proceeding is sometimes a more complete remedy, *supra* note 39.

⁴⁴ This rule will explain several of the cases cited *supra* notes 38 and 39, *e. g.*, *Follweiler's Estate*, *supra* note 38 (construction of gift believed "safer" in proceeding to audit trustee's account); see also *Board of Trustees of Eastern State Penitentiary v. Gordon, Sec'y of Banking*, 16 D. & C. 54 (Pa. 1931) (plaintiffs claimed declaration of preferred status as bank deposit creditors. Bank had given surety bond for these deposits. *Held*, remedy on the bond should be first resorted to); *Gray v. Lee*, *supra* note 31 (speedy remedy in assumpsit, better than declaration, which would require supplementary procedure to secure execution, which plaintiff really desires); *Patanyi v. First Nat. Bank of Pittsburgh*, *supra* note 41 (could have been speedily decided on administration proceedings).

An affidavit of defense in a pending suit may not be used as a petition for a declaratory judgment. *Leafgreen v. La Bar*, *supra* note 14; *Rockwood & Co. v. Pusey*, 95 Pa. Super. 129 (1928). However, it is quite common for a defendant in a counterclaim to ask for a declaration of rights. *Cesareo v. Cesareo*, 134 Misc. 88, 234 N. Y. Supp. 44 (1929); *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142. See Conn. Rules, § 64 (e), "the defendants in any appropriate action may seek a declaration by a cross-complaint".

⁴⁵ *Supra* note 27. But *cf.* *Commonwealth v. Bradshaw*, 6 D. & C. 472 (Pa. 1924) (*quo warranto* by defendant to try title to office given right of way over declaratory action already brought by plaintiff).

repeated both in Pennsylvania⁴⁶ and in other states. Chief Justice von Moschzisker there stated for the court:

"Jurisdiction will never be assumed unless the tribunal appealed to is satisfied that an actual controversy, or the ripening seeds of one, exists between parties, all of whom are *sui juris* and before the court, and that the declaration sought will be a practical help in ending the controversy."

The statement is sound, for it indicates succinctly the conditions of justiciability, an issue actually contested by adverse parties before the court which an adjudication will terminate. The term "ripening seeds" of a controversy was helpful, because it indicated not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception, before it has accumulated the asperity, distemper, animosity, passion, and often violence of a full-blown battle with its destructive incidents, conditions, and consequences. It describes a state of facts indicating "imminent" and "inevitable" litigation. In the cases of *In re City of Pittsburgh's Consolidated City Charter* and *Cryan's Estate*, the court explained what it meant by the distinction between "actual controversy" and the "ripening seeds of one":

"In the Pittsburgh Charter Case we explained that 'ripening seeds' meant a state of facts indicating 'imminent' and 'inevitable' litigation. . . . If differences between the parties concerned, as to their legal rights, have reached the stage of antagonistic claims, which are being actively pressed on one side and opposed on the other, an actual controversy appears; where, however, the claims of the several parties in interest, while not having reached that active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear."⁴⁷

Yet even this distinction may be misleading. The court could hardly have meant that an actual controversy could be dispensed with as a condition of adjudication in any case. What they must have meant to indicate—a conclusion which might be more clarifying—was that there is a difference between a state of facts where both sides have extra-judicially taken their respective antagonistic positions and acted upon, or indicated their immediate intention to act upon, them, and that state of facts where one of the parties, moved by a challenge or denial or attack upon his rights or by some cloud emanating from documents or new events or prejudicial assertions, cites the

⁴⁶ *Lyman v. Lyman*, 293 Pa. 490, 495, 143 Atl. 200 (1928); *Reese v. Adamson*, 297 Pa. 13, 15, 146 Atl. 262 (1929); *In re City of Pittsburgh's Consolidated City Charter*, 297 Pa. 502, 506, 147 Atl. 525 (1929); *Sterrett's Estate*, *supra* note 4, at 123, 150 Atl. at 162; *Cryan's Estate*, *supra* note 6, at 394, 152 Atl. at 678; *Huester, Tax Collector v. Lackawanna County*, 308 Pa. 9, 161 Atl. 537 (1932).

⁴⁷ *Supra* note 6, at 395, 152 Atl. at 679 (where the court added further, "indicative of threatened litigation in the immediate future, which seems unavoidable").

challenger into court as defendant to remove the cloud and allay the fear or threat to his position.⁴⁸ If the defendant is adverse in interest, and so appears, it is clear that there is an actual controversy before the court. What the court doubtless meant further to distinguish was the actual controversy presenting a tangible and justiciable issue and the hypothetical, moot, or academic issue. For example, when a tenant contends that he is privileged to tear down a leased building or assign a lease, and the landlord denies the privilege, material interests being actually at stake, the controversy is real and actual and not hypothetical, although the building has not been touched or the assignment executed. When two persons in interest dispute as to their right to property, to public office, to a right of way, to a personal status, to a lien, to a privilege to act under an existing instrument or statute, to immunity from an adverse claim, the controversy is actual and fully matured, although no violence or trespass has yet been committed by either party. The mere claim of a right adverse to that of a plaintiff or the denial of the plaintiff's right or even under circumstances the refusal to recognize or the ignoring of plaintiff's right or the claim that the plaintiff has violated the

⁴⁸ *Long v. Uhl*, 8 D. & C. 671 (Pa. 1926) (CH left his residuary estate to his wife to use during her life, or until remarriage, and on her death any residue to their children equally. In payment for money owed and services rendered, the widow deeded realty to her daughter M. She did not remarry. After her death, all the persons interested in the estate except defendant joined in a conveyance of this realty to M. Defendant refused to join, contending that the widow had had only a life estate).

City of Chester v. Woodward, *supra* note 8, at 203 (whether proposed bond issue was within terms of statute. Said Fox, J.: "The legal relations of the parties hereto under the Statute of 1927, *supra*, are disputed, and under the Act of 1923, *supra*, any person interested may obtain a declaration of his rights, status or other legal relations thereunder. A mayor who is advised by his lawfully constituted legal adviser and who, therefore, firmly believes that the act does not apply and that it is not his duty or right to certify, stands in a dangerous position if his adviser and he are wrong. Considerable delay may be caused in the various steps of certification and appeal as provided in the Act of 1927, *supra*, and its supplement, *supra*. Avoidance of delay is within the spirit of the act. It is important to many municipalities within the Commonwealth to have this controversy decided at an early date. . . . We do not concur in the view that the prayer is purely for an advisory opinion; it is for more; it is, we think, for the speedy determination of a real controversy as to whether or not these improvement bonds come under the provisions of the said Act of 1927 and its supplement.").

Equitable Gas Co. v. Smith, 13 D. & C. 616, 620 (Pa. 1929) (plaintiff, transferee of rights under an oil lease, sought declaratory judgment establishing its oil rights in certain property. Plaintiff held under a 1913 title, which had been transferred in 1920 to defendant, but with clause purporting to reserve in the grantor the mineral and oil rights. "A declaration such as is sought here, defining and declaring the rights, status and other legal relations of all the parties concerned, when properly and finally adjudicated, will terminate the uncertainty and controversy giving rise to this proceeding. There is no action of law to which the petitioner plaintiff can betake itself, no injunction or proceeding in equity or other statutory proceeding affording relief, and all it possibly can do under the facts and circumstances is to obtain a declaratory judgment in this case, abandon the lease or leasehold upon which it has expended its money, or develop the lease at considerable more expense and run the risk of being deprived of its property and estate in the lease or leasehold as it may exist at the date of the death of Imri T. Smith. There is no attempt here to reform the deed or to construe it by any of the extraneous facts or circumstances. It is not necessary to consider anything outside of the written deed and agreement of lease submitted in this case. The admitted facts in the case are sufficient to enable the court to adjudicate this case, and the denied facts, which are the only facts that could be submitted to the jury, are immaterial to this issue.").

defendant's right may all be sufficient to entitle the plaintiff to claim a judgment establishing his own right. Such controversies are "ripe" for decision, as soon as the court is convinced that the antagonism is genuine, susceptible of adjudication, and that the court's judgment will conclusively determine the issues involved.

But where a declaration was sought as to whether a building not yet constructed would amount to a nuisance,⁴⁹ where the declaration sought depended upon proof of the conclusive incompetence of a person who might later recover his competence,⁵⁰ where the plaintiff's rights depended upon the future happening of an event which might never occur,⁵¹ the action was properly dismissed as premature, not ripe and academic. The state of facts on which a judgment was requested, was predicated on an assumed and not actual state of facts, was contingent and not certain, and hence the controversy was hardly justiciable. This is quite different from a controversy dependent upon facts that have happened or are certain to occur, which presents an issue whose decision will determine the controversy finally, although no destruction of the *status quo* or violence has yet been committed. The parties merely stand on their respective claims of right and it is apparent to the court that the deadlock will be broken by an adjudication.

Perhaps the principal contribution that the declaratory judgment has made to the philosophy of procedure is to make it clear that a controversy as to legal rights is as fully determinable before as it is after one or the other party has acted on his own view of his rights and has perhaps irretrievably shattered the *status quo*.⁵² Such violence and destruction make the issue more painful and socially undesirable, but they do not make it any more controversial. The controversy was ripe for decision before the violence and destruction had begun. "When adverse litigants are present in court and there is a real controversy between them, a final decision rendered in any form of proceeding of which the court has jurisdiction is a judgment in the proper sense of that term, and the giving of it is a judicial function, whether or not execution may follow thereon."⁵³

Unless the parties have such conflicting interests, the case is likely to be characterized as one seeking an advisory opinion and the controversy itself as academic,⁵⁴ a mere difference of opinion or disagreement not involving or

⁴⁹ *Ladner v. Siegel*, *supra* note 15.

⁵⁰ *Sterrett's Estate*, *supra* note 4. Cf. *Straus's Estate*, 16 D. & C. 231 (Pa. 1931), *aff'd* 307 Pa. 454, 161 Atl. 547 (1932) (claimant's interest in property depended upon death, childless, of two life tenants, now beyond child-bearing age).

⁵¹ *Lyman v. Lyman*, *supra* note 46.

⁵² See UNIFORM DECLARATORY JUDGMENTS ACT § 3: "A contract may be construed before or after there has been a breach thereof." So may a statute or other instrument or claim of right.

⁵³ *Kariher's Petition*, *supra* note 2, at 469, 131 Atl. at 270.

⁵⁴ *Lyman v. Lyman*, *supra* note 46 (no one disputed the claim, and right was still contingent on uncertain event); *Brumagin's Petition*, 6 D. & C. 431 (Pa. 1924) (doubt as to title of person in the chain, but no defendant cited); *Frederick's Estate*, *supra* note 37 (devisee sought construction of will, without defendant).

affecting material legal relations⁵⁵ and hence not justiciable. Pennsylvania discloses numerous cases dismissed for lack of the necessary interest in the plaintiff or defendant or of the necessary conflict of interest. A plaintiff must demonstrate a tangible personal interest in the issue, which will be definitely affected by the judgment rendered.⁵⁶ Where a plaintiff company sought a declaration of the validity of a zoning ordinance, although it did not own or propose buying property in the zone, the plaintiff's legal interest was deemed inadequate for an adjudication.⁵⁷ So, where both parties joined in a petition to determine defendant's tax liability, but plaintiff's counsel failed to appear.⁵⁸ Nor is doubt of the plaintiff as to his legal rights and duties alone adequate.⁵⁹ A defendant's interest or adverse interest has been deemed insufficient in cases where the plaintiff challenged the validity or construction of a statute, but the attorney-general or administrative officer cited as defendant was deemed not to have shown any adverse interest or taken any adverse position.⁶⁰ The defendant must show a personal interest adverse

⁵⁵ *Nagle's Estate*, 9 D. & C. 392 (Pa. 1926) (widow asked, against trustees, declaration of status, if she elects to take against the will; *held*, advisory opinion); *Estate of Martha Lichty*, 39 Lanc. 327 (Pa. 1925) (action for declaration to determine interest taken under will); although court decided that named devisees took life estates, it refused to pass on interest of heirs, as "advisory" only. The result is not clear. *Gray v. Lee*, *supra* note 31, at 4 ("In construing statutes, wills or contracts, before a breach occurs, or irreparable damage is done, the Uniform Declaratory Judgments Act serves a useful and necessary purpose, but it was never intended that it should or could be used by counsel to seek the advice of the court in all cases when they may be in a quandary as to how to proceed.").

⁵⁶ *In re Annexation of Part of Lancaster Township to City of Lancaster*, 6 D. & C. 36 (Pa. 1924) (that county commissioners, in printing ballots for election, were violating statute; plaintiff, though resident in the district, considered to have no special interest); *Public Defence Ass'n v. Allegheny County*, 6 D. & C. 182 (Pa. 1924) (corporation not a proper party, as the constitutionality of the statute challenged did not affect plaintiff's powers).

⁵⁷ *Bell Telephone Co. v. Lansdowne Borough*, 18 Del. 307 (Pa. 1927). *Cf. In re Annexation of Part of Lancaster Township to City of Lancaster*, *supra* note 56 (plaintiff, resident in affected district, sought declaratory judgment construing order submitting to vote the question of annexation, and in particular whether only those in portion annexed should vote thereon).

⁵⁸ *Spring Township School Board v. Reading Council, Boy Scouts of America*, 22 Berks 59 (Pa. 1929) (plaintiff and defendant joined in the petition stating that plaintiff was about to tax defendant's property, defendant denying liability). In *Loughlin's Estate*, *supra* note 38, the declaration was denied because both parties sought the same judgment.

⁵⁹ *Lyman v. Lyman*, *supra* note 46 (plaintiff was doubtful of his rights under a will, but there was no one who disputed his claim and an event, now uncertain, must happen before the plaintiff's right can be deemed vested); *cf. Straus's Estate*, *supra* note 50 (executors seek declaration of their interest in residuary estate of a third party; *held*, not determinable until life estate terminates, for life tenants, although beyond child-bearing age, might have children).

⁶⁰ *Follweiler's Estate*, *supra* note 38 (*cestui* claims right to take whole fund, having reached twenty-one; *held*, filing of brief as *amicus curiae* by person having an interest or opinion adverse does not make a controversy); *Additional Law Judge*, 53d Jud. Dist., 10 D. & C. 577 (Pa. 1927) (taxpayer sought declaration construing statute for an additional law judge; defendants, Attorney-General and county commissioners; dismissed, because no evidence that defendants adverse); *Collingdale Borough's Petition*, 18 D. & C. 684 (Pa. 1932) (borough asks declaration that statute imposing municipal liability for torts of municipal motor vehicles cannot constitutionally apply to vehicles of volunteer fire companies, which plaintiff does not control, Attorney-General cited as defendant; *held*, defendant's interest not adverse, and eventual parties in interest not before court); *School Dist. of Union Township v. Walton*, 76 Pitts. 257 Pa. 1928) (plaintiff sought declaration fixing date on which bond election was to be held; defendant administrative officer held to have no interest therein, as he was charged with preparation of ballots only).

to that of the plaintiff, so that the conflict is clear. Public officers, uncertain as to their privileges and duties, may often secure an adjudication of their legal position, but only where they can cite and bring in a defendant adverse in interest.⁶¹ A qualified person must appear as an opponent of the plaintiff's claim; otherwise it lacks the necessary character of a controversy.⁶² The *Uniform Act* provides that "all persons shall be made parties who have or claim any interest which would be affected by the declaration."⁶³ For failure to meet this requirement, several cases have been dismissed.⁶⁴ But it may happen occasionally that a case can be effectively decided without the presence of some parties who ordinarily might be deemed necessary, because

In *Long's Estate*, 9 D. & C. 196 (Pa. 1926), city attorney asked and obtained declaration as to who, under statute, were successors of park commissioners. Whether any defendant was cited does not appear. If not, it was an advisory opinion. In *In re City of Pittsburgh's Consolidated City Charter*, *supra* note 46, three election commissioners of Allegheny County sought by declaratory judgment to determine whether they were authorized to resubmit a charter to the electors of Pittsburgh, who had once rejected it. The petition averred that they had no opinion on the law, and they did not allege that they had determined to resubmit the charter. The defendants were intervenors, an elector, and a city commission who advanced a certain contention on the law. Clearly, the election commissioners misconceived the function of an action for a declaratory judgment and were in effect seeking merely advice.

⁶¹ *Reese v. Adamson*, *supra* note 46 (suit between administrative officers under conflicting statutes; defendant had not challenged any of plaintiff's acts; where public officers are "uncertain and insecure with respect to their legal status and duties", they must show an actual controversy for relief by declaratory judgment); see also *Huester, Tax Collector v. Lackawanna County*, *supra* note 46 (plaintiff sought to determine whether defendant county or City of Scranton should bear costs of advertising lists of delinquent taxpayers; defendant held that city should, which plaintiff did not deny; city was not made party); *Wagner v. County of Somerset*, 96 Pa. Super. 434 (1929).

⁶² *Brumagin's Petition*, *supra* note 54 (plaintiff merely asserted that there was some doubt as to the title of *M*, a person in the title chain, neither *M* nor any one alleging the invalidity of the title was joined); *Loughlin's Estate*, *supra* note 38 (executor sought declaration of power to sell, trustee and prospective purchaser concurring in suit; dismissed, no opponent); *Alcorn's Estate*, 18 D. & C. 462 (Pa. 1933) (trustees ask declaration of authority to retain non-legal investments; not contested, hence dismissed); *Huffman's Estate*, 11 Erie 302 (Pa. 1928) (plaintiff residuary legatee paid testator's debts from his own purse and then asked declaration fixing his rights in certain property, testator had left property to be sold and the proceeds used to pay his debts, plaintiff was the only heir; *held*, with no conflicting claims, declaration would be futile); *Schoudt Estate*, 14 Leh. 54 (Pa. 1930) (question: power of administrator to sell, when no opportunity to sell alleged; not contested).

⁶³ UNIFORM DECLARATORY JUDGMENTS ACT § 11.

⁶⁴ *Collingdale Borough's Petition*, *supra* note 60 (refused to declare statute unconstitutional when persons who might be affected by statute imposing municipal liability in tort were not before court); *Carter v. Blakely Borough School Dist.*, 29 Lack. 91 (Pa. 1928) (school directors sought declaration of their right to use a certain surplus for building gymnasium; denied because, *inter alia*, taxpayers were not properly represented). That taxpayer representation is not always necessary, see *City of Salem v. Oregon-Washington Water Service Co.*, 23 P. (2d) 539 (Ore. 1933); *Note* (1933) 43 YALE L. J. 340.

The following cases were dismissed because designated necessary parties were not served: *Schoen's Petition*, 6 D. & C. 256 (Pa. 1924) (parties in interest must not only be made parties, but must be notified that they have been made parties and that they should appear and defend); *Brumagin's Petition*, *supra* note 54 (plaintiff doubtful of his title sues to establish title of *M* in the chain, but *M* and others not cited; denied, *inter alia*, because interested parties not cited); *Hoffman's Petition*, 7 D. & C. 88 (Pa. 1925) (in first instance dismissed without prejudice for lack of "necessary" parties; cured in second instance, and declaration made, but against plaintiff); *Moorhead Estate v. Nelson*, 10 Erie 58 (Pa. 1928) (petition for interpretation of will, dismissed because all beneficiaries not made parties); *Focht v. Security Trust Co.*, 44 Montg. 217 (Pa. 1928) (petition for immunity from building restriction dismissed because other grantees and persons interested in case of forfeiture should have been made parties).

there are sufficient parties before the court; in that event, the court may exercise its discretion favorably to the issue of the judgment.⁶⁵ One of the main reasons for refusing a declaration where all necessary parties are not served is that the judgment rendered would not be *res judicata*⁶⁶ or would not terminate the controversy.

Discretion

The *Uniform Act* provides that the court may refuse the declaration if the judgment would not terminate the uncertainty or controversy.⁶⁷ At one time it was common for courts to suggest that the declaration would be granted only with caution, and even now courts occasionally announce such a policy.⁶⁸ But that view finds its source in opinions rendered when the declaration was relatively rare. With the ever-growing demonstration and conviction of the practical utility of the declaratory judgment, the policy of issuing declarations has changed materially. The *Uniform Act* expressly enjoins a liberal construction on the courts by declaring it to be "remedial"; that its purpose is "to afford relief from uncertainty and insecurity"; and that it "is to be liberally construed and administered."⁶⁹

As already observed, the discretion which the courts exercise in issuing declaratory judgments is subject to rule and appellate review. But its exercise should be guided primarily by the criterion whether or not the declaration will serve a useful purpose in terminating the controversy which gave rise to the proceeding. It is for this reason that parties must be represented before the court, and that the necessary parties must be served, for otherwise the controversy would not be terminated by the judgment. Its special appeal to favor lies in the fact that it is a convenient, expeditious, and inexpensive method of conclusively settling the issue. The courts should therefore bear these advantages in mind⁷⁰ and should grant the declaration whenever it

⁶⁵ *Hite v. Clark & Snover Co.*, 27 Lack. 225 (Pa. 1926) (receiver distributing surplus of defunct corporation serves preferred and common stockholders, but only latter represented; court declares there was no preference, and that receiver did all he could to get all parties into court); *Hoffman v. McAbee*, 41 Montg. 164 and 167 (Pa. 1925) (plaintiff sought immunity from building restriction, and although naming ten property owners, some of whom had objected to his proposal to build an apartment house, he served only some of them; on second opinion, it seems court considered those served sufficient).

⁶⁶ *Dictum* in *Ladner v. Siegel*, *supra* note 15; also, *Ritter v. Leach*, 97 Pa. Super. 386 (1929) (plaintiff trustees sought declaration of their right to extinguish ground rents, along with other relief; denied because it would have to be followed by other orders to be effective).

⁶⁷ UNIFORM DECLARATORY JUDGMENTS ACT § 6.

⁶⁸ See *Duff's Estate*; *Paine's Estate*, both *supra* note 37; *Petition of Dunmore School Dist.*, 25 Lack. 170, 38 York 80 (Pa. 1924).

⁶⁹ UNIFORM DECLARATORY JUDGMENTS ACT § 12. Some state statutes, *e. g.*, Kansas, Michigan, Virginia, Hawaii, add the words, "with a view to making the courts more serviceable to the people". Cf. *Carolina Power & Light Co. v. Iseley*, 203 N. C. 811, 167 S. E. 56 (1933) (a "liberal construction of the Act, to the end that its purpose may be accomplished, is manifestly desirable").

⁷⁰ *In re Application of School Dist. of Steelton*, 31 Dauph. 75 (Pa. 1927) (two public authorities sue each other contesting disposition of school funds, again the court suspected advisory opinion, but deemed it an actual controversy partly because petition "comes from public authorities and the question involves the disposition of public funds").

will determine the issue conclusively and serve a pacifying function in removing clouds and uncertainty from a disputed legal relationship. A recent Michigan decision was therefore eminently sound in granting a declaration *sua sponte*, while denying the plaintiff an injunction against impairment of his unused easement of light caused by a structure which had not yet injured him, for he had not built to the building line.⁷¹ But the courts properly exercise their discretion against the grant of the declaration, again because uncertainty would not be terminated, where the plaintiff's allegations require proof of facts not before the court, or where it is considered that there must be a jury trial, which was not arranged for,⁷² where further proceeding would be necessary to enable the plaintiff to obtain the relief he really needs or to make the judgment effective,⁷³ or where the court has no power to grant relief in the premises, either because the property to be affected is outside the jurisdiction or because the court for some other reason is unable to enforce its judgment,⁷⁴ or where in the court's opinion a declaration is inexpedient, by reason of public policy or of the fact that the question might be raised again in some other way,⁷⁵ or because it would result in possible injustice to third parties.⁷⁶

Facts

Owing to the terms of the *Uniform Act*, which gives power to determine "rights, status, or other legal relations," it is sometimes assumed that courts have no power to declare facts. But this would be an improper inference, even though it is usually possible to convert a disputed issue of fact into an issue of law, and thus have the fact declared incidentally. The refusal to declare facts in a particular case is usually based on the inconvenience or

⁷¹ *Hasselbring v. Koepke*, 263 Mich. 466, 248 N. W. 869 (1933).

⁷² *Lockwood v. Lockwood*, 98 Pa. Super. 426 (1930) (plaintiff, woman, sought declaration of right to use defendant's name, on the ground that he had never secured divorce from her, he was living with another woman; *held*, judgment would not terminate controversy, because dependent on proof of facts not tried); *Gray v. Lee*, *supra* note 31 (rights under lease controversy; *held*, case involves issues of fact requiring jury trial, which was not arranged for).

⁷³ *Brown's Estate*, *supra* note 29 (legatees could raise the issues later, upon termination of life estates, hence not ripe for decision); *Ritter v. Leach*, *supra* note 66 (had to be followed by other orders).

⁷⁴ But *cf.* *Paine's Estate*, *supra* note 37 (where court refers to fact that declarations have been granted by the Orphans' Court in Pennsylvania, although that court was not in position to grant affirmative relief in premises: *B'Nai B'Rith Orphanage v. Roberts*, *Ex'r*, *supra* note 29; *Kariher's Petition*, *supra* note 2; *Kidd's Estate*, *supra* note 37).

⁷⁵ *Brown's Estate*, *supra* note 29 (question might be raised again by legatees, on termination of life estates); *Achenbach's Estate*, 22 North. 129 (Pa. 1929) (inexpedient because trust active).

⁷⁶ *Board of Trustees of Eastern State Penitentiary v. Gordon*, Sec'y of Banking, *supra* note 44 (to determine whether plaintiffs were entitled to preferred status as depositors in insolvent bank, after holding that recourse should be had to surety bond, court says that declaration asked would prejudice other depositors, whose shares would be reduced); *Huffman's Estate*, *supra* note 62 (plaintiff seeks declaration of his interest; *held*, declaration denied, because record must show "that there are no parties whose interest could be affected other than the petitioner", declaration hence useless).

impropriety of determining complicated issues of fact by declaration, either at all ⁷⁷ or without a jury trial,⁷⁸ the dismissal being therefore based not on principle but on convenience. As the procedure is somewhat summary, the prolonged taking of testimony is not adaptable to it. And it is, of course, impossible to pass on such a question as whether a building not yet erected will constitute a nuisance.⁷⁹ But questions of fact have been determined on occasion by the Pennsylvania courts, *e. g.*, whether the conditions of a devise have been violated,⁸⁰ whether a car was delivered in damaged condition.⁸¹ The *Uniform Act* provides ⁸² that issues of fact arising in an action for a declaration may be tried in the same way as such issues are determined in other civil actions.

Future Rights

It has sometimes been said that "future rights" will not be declared. But this again is ambiguous. While the courts properly refuse to declare rights based on the effect of remote contingencies which may never happen, they do not hesitate to declare rights based on events certain to happen, or solve dilemmas where the plaintiff asks the declaration of his rights under alternative conditions imminent and susceptible of determination. Every judgment is in effect a guide to future conduct, and where the issues relate to a state of facts actual or certain to arise there is no reason why the court cannot determine the issue at a point where it will avoid delay, risk, and prejudice to one or other of the parties. Removal of clouds and uncertainty, rendering prejudicial acts unnecessary, is one of the major functions of the declaratory judgment. This valuable purpose was made evident in a leading Pennsylvania case, *Girard Trust Co. v. Tremblay Motor Co.*,⁸³ which has been cited throughout the country. In that case the plaintiff trust company had in February, 1923, leased to defendant, who subleased to defendant motor company, a three-story, non-fireproof building used for a garage. A clause in the lease required the lessor, in the event of fire, to abate the rent until the premises were completely rebuilt and placed in tenantable condition. In May, 1923, a statute was enacted prohibiting the erection for garage purposes of any building not of fireproof construction if more than two stories high. In 1927, fire destroyed the old building. The lessor offered to con-

⁷⁷ *Lockwood v. Lockwood*, *supra* note 72 (that divorce was improperly obtained, and nature of relations between defendant and another woman).

⁷⁸ *In re Jenkins Township Fire Truck*, 25 Luz. 144 (Pa. 1928) (existence of an emergency); *Gray v. Lee*, *supra* note 31 (breach of lease).

⁷⁹ *Ladner v. Siegel*, *supra* note 15.

⁸⁰ *Morris v. Morris*, *supra* note 24 (trustee's petition to determine interest taken by devisee under facts, and whether conditions violated).

⁸¹ *Swank Motor Sales Co. v. Decker*, *supra* note 8.

⁸² UNIFORM DECLARATORY JUDGMENTS ACT § 9.

⁸³ *Supra* note 7, at 524, 140 Atl. at 512. In *Morgan v. Wyoming County Com'rs*, *supra* note 23, the court determined the present and future liability of the county for stenographic services rendered to plaintiff superintendent of schools.

struct a three-story building like the original, or a two-story, fireproof building at the lease rent. The defendant declined the former, as it would not be permitted by law to use it for a garage, and declined the latter unless the rent were reduced. It demanded instead a three-story, fireproof building, which the plaintiff claimed would cost a prohibitive sum and could only be considered on a great increase in rent. The *impasse* was complete. The plaintiff thereupon brought an action for a construction of the lease and a declaratory judgment that by its offers it had complied with its obligation under the lease as a condition necessary to restore the duty to pay rent and that the defendant's refusal to accept operated as a termination and forfeiture of the lease. The Supreme Court of Pennsylvania, in sustaining the position of the plaintiff, said:

"In a case like the present, by proceeding according to the Declaratory Judgments Act, the parties avoid the necessity of first actually erecting a building in order to be in a position to obtain a judicial construction of their respective rights and liabilities. The lessor . . . can have it judicially declared whether, under the governing rules of law, the structure tendered meets the requirements of the situation, and if erected, would oblige the lessee, or the subtenant, to recommence payment of the rent named in the contract of lease. Lessor can also have a further declaration as to its rights consequent upon a refusal by defendants to accept the kind of a building tendered; and this latter declaration must be, as found by the court below, that the lease is at an end and plaintiff can repossess itself of the demised premises.

"A prime purpose of the Declaratory Judgments Act is to render 'practical help' in ending controversies such as the one now before us: Kariher's Petition (No. 1), 284 Pa. 455, 471. Had defendants, instead of refusing the offers of plaintiff, simply taken the position that, according to their understanding of the law applicable to the admitted facts, the building tendered would not give them what they were entitled to under the lease, and, on that state of affairs, asked for a declaratory judgment, or joined with plaintiff in asking for such a judgment, their respective rights might have been judicially declared. Then, after such a determination of the governing principles of law as we have here made, plaintiff could either have erected the proposed three-story building, and insisted on payment of rent for the balance of the term named in the contract of lease, or, in place of actually building, plaintiff could have given defendants notice that its offer to build was still open; if, under these circumstances, defendants had persisted in their refusal, plaintiff could have accepted such refusal as an abandonment of the lease. In other words, had the parties seen fit, they could have had the help of a judicial declaration of their respective rights and liabilities before taking a definite stand amounting to an ultimatum on each side and asking for a declaratory judgment on that state of fact."

So, there is no reason why the rights of the parties accruing under the clauses of a lease upon the expiration of the present term, cannot be

determined before the lease has expired,⁸⁴ an adjudication which will relieve the existing uncertainty, clarify future action, and enable the parties to steer a course which will avoid shoals and possible wreck.

Prayers for Relief

There is and should be the greatest flexibility in prayers for relief. Modern procedure has encouraged the freedom of amendment. Declarations and coercive relief, as already observed, are often prayed for in the alternative or in combination. This has the advantage of enabling the substantive rights to be declared, notwithstanding the fact that coercive relief has had to be denied, a contingency which under traditional procedure would have served to dismiss the proceeding while leaving the substantive rights unadjudicated. That awkward result can now be averted. Indeed, where the coercive relief alone is asked, the court may on its own initiative grant a declaration, although not requested, where it believes that this will conclusively determine the rights of the parties. Possibly it is a little more doubtful whether the court should issue coercive relief where only a declaration is asked.⁸⁵

II. SUBSTANTIVE LAW

It may now be of interest to review briefly the issues of substantive law which have been brought before the Pennsylvania courts by actions for a declaratory judgment. While they do not exhaust by any means the types of issues that have been presented and solved in the United States by that procedure, they do serve to illustrate some of its uses.

There is no type of legal relation which cannot be determined by declaratory judgment, but some issues lend themselves more readily to that procedure than others. Inasmuch as the simplification and narrowing of issues, determinative of larger disputes, is a major function of the declaratory judgment, we find that the most common uses of the declaration are in the adjudication of disputed issues of status, issues involving the construction and interpretation of written instruments of all kinds, including contracts, wills, and statutes, and disputed titles to property. Some of the cases could have been brought under more traditional procedure, but others, particularly where it was desired to escape peril or establish security, could hardly have been brought in any other form. These cases attract the most attention, but they do not necessarily indicate the major utility of the declaratory action.

⁸⁴ *Aaron v. Woodcock*, 283 Pa. 33, 128 Atl. 665 (1925) (plaintiff lessee asked declaration fixing his renewal term under option clause giving "the privilege of releasing" at a named yearly rental); *cf. Manhattan Bridge Three-Cent Line v. City of New York*, 204 App. Div. 89, 198 N. Y. Supp. 49 (1923) (plaintiff's privilege to renew franchise not yet expired).

⁸⁵ *Sloan v. Longcope*, *supra* note 24 (lessor's demand for declaration of right to possession only resulted in grant of writ of execution; *held*, execution merely incidental to real subject of the Act and need not be recited in title).

Status

Frequently the determination of the petitioner's status, alone placed in issue, will determine a complex of other consequential rights. Thus, a declaration that a marriage is void, that a person is a legitimate child, a husband, wife, owner in fee, life tenant, partner, stockholder, remainderman, *etc.*, will establish a train of legal consequences. On several occasions an effort to determine status by declaration has been made in Pennsylvania. Thus, in *Kariher's Petition*⁸⁶ the petitioner sought a declaration that he was an owner in fee and not a life tenant, as asserted by the defendant, a conclusion determining the plaintiff's privilege and power to enter into the lease, then in question. In several cases the attempt to have bigamous marriages declared void by declaration was frustrated in the lower courts, on the ground that an 1859 statute had provided a special procedure for that purpose.⁸⁷ But in an action to declare void a consanguineous marriage the court did not hesitate to use the declaratory procedure, while remarking that an act of 1815 might alternatively have been invoked.⁸⁸ The petition of a borough to have it declared a school district of the fourth class was granted in the *West Leechburg Borough* case.⁸⁹

Written Instruments

Section 1 of the *Uniform Act* confers the general power to declare "rights, status, and other legal relations" and Section 2, the power to pass upon the "construction or validity" of a "deed, will, written contract, or other writings constituting a contract," or of any statute, ordinance, or franchise. Section 4 empowers the court to deal with any question involving decedents' estates or trusts, from the powers of executors, administrators, and trustees, to the rights of heirs, legatees, beneficiaries, cestuis, and creditors, including any question arising in the administration of an estate or trust.

Contracts

It has been only since the beginning of the twentieth century, with the expansion of commerce, that the construction of contracts has become a common function of the declaratory judgment. Thus, the existence of a contract or its continued existence at a particular time, a fact which may

⁸⁶ *Supra* note 2.

⁸⁷ *McCalmont v. McCalmont*; *Shallenberger v. Shallenberger*, both *supra* note 40. But in *Saintenoy v. Saintenoy*, *supra* note 30, the court refused to rule on the availability of the declaratory judgment, notwithstanding the 1859 statute.

⁸⁸ *Duchi v. Duchi*, *supra* note 30.

⁸⁹ *West Leechburg Borough v. Allegheny Township School Directors*, 300 Pa. 73, 150 Atl. 88 (1930) (plaintiff district had been incorporated with defendant township by judicial decree; the required administrative consent for the erection of such district had been refused; a tax collector had secured a declaration fixing his rights in the district but thereafter the ruling statute had been declared unconstitutional).

depend upon the title of either party to the subject-matter of the contract, has been successfully challenged by declaration. In *Swank Motor Sales Co. v. Decker*⁹⁰ the plaintiff had agreed to sell the defendant a Buick car, taking a Graham-Paige as a trade-in. When the latter was turned over, defendant refused to sign a certificate of title as required by law, setting up instead the damaged condition of the Buick and an oral agreement modifying the contract. Thereupon the plaintiff successfully sought a declaration to clear the defendant's title to the Graham-Paige and to deny the admissibility of oral evidence to vary the contract. In *Alumnæ Ass'n of the William Penn High School for Girls v. Trustees of the Univ. of Pennsylvania*,⁹¹ the plaintiff, before incorporation, had made inquiry as to endowing a bed in the MC Hospital to be used by members of the plaintiff association, and when not in use by any of them, then for other patients of the hospital. Satisfied as to the terms, the association raised in 1913 a fund of \$4500. In 1916, the MC Hospital was merged with the defendant. Under the agreement the hospital's property was to be used as a separate fund for the Graduate School of Medicine of the University. In 1916 and 1918 the plaintiff was notified that a bed in a certain hospital was designated for the use of the endowment. At the beginning of 1931 the director of the Graduate School notified the plaintiff that the expense of maintaining the endowment was increasing and that the defendant wished to return the \$4500 and terminate it. Such a contingency had never been provided for, whereupon the plaintiff sought a declaration that the endowment was perpetual so long as the hospital and its successors remained in operation and that it was not permissible to return the fund and discontinue the service.

The validity and binding character of the contract may be tried by declaration whenever the dispute arises and without the necessity of purported breach. Its nullity may in the same way be asserted. So, the respective rights and duties of the parties, requiring construction of the contract, have been raised by declaration, *e. g.*, the defendant's no-right to exclude the plaintiff from drilling on defendant's land or the amount of royalties due.⁹² Release from the obligations of a contract may be claimed by declaration, before any overt act has been committed. Thus, in the rapid changes of urban neighborhoods within a single generation the effect of restrictive covenants may be extremely harsh and awkward to a covenantor who believes that the restriction has become obsolete. Yet he would incur serious risks of forfeiture and much besides if he acted on the assumption that it had become

⁹⁰ *Supra* note 8.

⁹¹ 15 D. & C. 769 (Pa. 1931), *aff'd* 306 Pa. 283, 159 Atl. 449 (1932). In *Trustees' Petition*, 12 D. & C. 538 (Pa. 1929), trustees and eventual beneficiary successfully sought declaration that original trust had terminated. *Cf. Snavelly's Estate*, 4 D. & C. 405 (Pa. 1923) (termination of trust under will).

⁹² *Equitable Gas Co. v. Smith*, *supra* note 48; *Hutchinson v. Hutchinson Mfg. Co.*, 4 D. & C. 387 (Pa. 1924) (on what basis, machines or parts, royalties should be paid).

obsolete and then proceeded to violate it. It has therefore become common for covenantors who claim the privilege of building structures of a type different from that required by a restrictive covenant to seek a declaration of their privilege so to do or a declaration that the proposed structure challenged by the defendant conforms to the restrictions of the covenant or that the covenant was personal only and did not run with the land. Pennsylvania discloses some interesting cases of this type.⁹³

The legal effect of the contract or of a statute or new event, such as fire or war, on an existing contract has frequently been raised by declaration. The case of *Girard Trust Co. v. Tremblay Motor Co.*,⁹⁴ already mentioned, is a striking example of judicial aid in the solution of a dilemma created by a new event, not contemplated by the parties, but which may decisively affect their legal relations. Doubts as to which of two contractors bears the loss entailed by fire have been determined conveniently in this form of action.⁹⁵

Judgment and other creditors have had occasion to sue for a declaration of the nullity of a conveyance by their debtor deemed in fraud or derogation of their rights, an action which may be brought against the debtor himself or his transferee or both. Whether the creditor's claim has been reduced to judgment or is in process of suit or is liable to be impaired by an alleged

⁹³ *Garvin & Co. v. Lancaster County*, 290 Pa. 448, 139 Atl. 154 (1927) (plaintiff landowner desiring to build four- and six-story buildings asked declaration construing an 1852 deed and its provisions for easements of light and air; defendant contended that plaintiff's proposed buildings violated these provisions); *Brown v. Levin*, *supra* note 8 (plaintiff owner of corner lot asked declaration fixing the building line on the side street, contending that the restriction did not apply there); *Henry v. Eves*, 306 Pa. 250, 159 Atl. 857 (1932) (restriction as to type of building and area to be built upon; plaintiff sought and obtained declaration of privilege of building certain structures and of covering entire lot); *In re Plastic Club*, 7 D. & C. 50 (Pa. 1925) (plaintiff landowner desiring to erect an art gallery asked declaration fixing its right to do so under a restriction made in 1825); *Hoffman's Petition*, *supra* note 64 (plaintiff landowner asked declaration fixing his right to build apartment houses in view of existing restrictions); *Barmach v. Barwick*, 8 D. & C. 479 (Pa. 1926) (where plaintiff relieved his own doubts and the fears of a title guaranty company and the refusal of defendant purchaser to take title without such guaranty, by declaratory judgment that a covenant of 1814 deed restricting building to three-story brick was personal only and did not run with land); *Hoffman v. McAbee*, *supra* note 65 (plaintiff landowner asked declaration of his right to build apartments under a restriction in favor of "private residences"); *Focht v. Security Trust Co.*, *supra* note 64 (plaintiff claimed to have secured a release; dismissed for want of proper parties).

Issue may arise because of an impending sale of the property. *O'Neil v. Lex*, 9 D. & C. 149 (Pa. 1927) (plaintiff had contracted to purchase property, when he was notified of restriction as to types of houses; the houses which he wished to build violated this restriction; neither he nor his prospective transferee had had notice of the restriction).

⁹⁴ *Supra* note 7.

⁹⁵ *Commonwealth ex rel. Schnader, Att'y Gen. v. Nelson-Pedley Constr. Co.*, 303 Pa. 174, 154 Atl. 383 (1931) (plaintiff asked declaration fixing person to bear loss caused by the destruction of a partially constructed building; defendants were the contractor and surety); *Commonwealth ex rel. Schnader, Att'y Gen. v. Evans*, 304 Pa. 445, 156 Atl. 139 (1931) (same). See also *Fidelity & Casualty Co. of New York v. American Surety Co. of New York*, 169 Atl. 226 (Pa. 1933) (plaintiff surety of P bank asked declaration fixing surety bound to pay balance due state on deposits; defendant was surety of A bank, which had merged with P bank in 1931; issue: co-suretyship).

fraudulent conveyance⁹⁶ makes but little difference. Creditors also have occasion to seek to establish by declaration the priority of their claim to that of others. So, bank depositors and judgment creditors have sought to establish a preferred status in the distribution of a debtor's estate.⁹⁷

Leases

Some of the most interesting examples of the utility of declaratory actions have arisen under leases. The celebrated *Kariher* case⁹⁸ involved a proceeding by a prospective lessor, whose title had been challenged, for a declaration of his title and of his privilege to make the lease proposed. The power of school trustees to rent, instead of erecting a school building, has thus been determined.⁹⁹ So has the validity or invalidity of leases, as well as the identity among several defendants of the lessor entitled to particular rents; and while this is undoubtedly equivalent to a bill of interpleader, the Pennsylvania Superior Court in *Kimmell's* case¹⁰⁰ is believed to have been in error in dismissing a suit for a declaration because interpleader was possible.

The construction and interpretation of leases, and the respective rights and duties of the parties thereunder, have frequently been determined by declaration. Thus, the term of the lease or of a renewal period, whether for a stated term or from year to year,¹⁰¹ has thus been tested. The amount of rent or royalties due has been successfully adjudicated by this procedure. In the case of *Orndoff v. Consumers' Fuel Co.*¹⁰² the plaintiff sought a declaration fixing the amount of royalties due the lessors. When plaintiff secured the original lease, he was informed by the lessors that their father

⁹⁶ In *Stalwart Bldg. & Loan Ass'n v. Monahan*, 104 Pa. Super. 498, 159 Atl. 189 (1932), plaintiff mortgagee sought to have a conveyance declared void as fraudulent. Defendant had conveyed the property and the security to AB, subject to plaintiff's lien and a bond from AB for prompt payment. When AB could not meet payment to defendant, property was deeded back to defendant. AB defaulted two months later on debt to plaintiff.

⁹⁷ Board of Trustees of Eastern State Penitentiary v. Gordon, Sec'y of Banking, *supra* note 44 (dismissed on ground that remedy on bond should first be exhausted by plaintiff bank depositors in defunct bank); *English v. First Nat. Bank of Lock Haven*, 9 D. & C. 718 (Pa. 1926) (plaintiff judgment creditor who had started suit before, but did not obtain judgment until after debtor had been adjudged lunatic, sought declaration against other creditors and lunatic's guardian that plaintiff is entitled to priority against estate of lunatic).

⁹⁸ *Supra* note 2.

⁹⁹ In *Mansfield Boro. School Dist. v. Mansfield High School Ass'n*, 9 D. & C. 113 (Pa. 1926), contract had been made, but members of district, intervenors, attacked its legality. Defendant association in answer claimed it was legal. Declaration refused, without prejudice to renewal when one term changed.

¹⁰⁰ In Appeal of *Kimmell*, *supra* note 4, plaintiff lessees sought declaration fixing person to whom rent was due. In 1914, S leased oil rights in certain tract to plaintiff's transferor. In 1919, S sold to defendant a portion of this tract. Plaintiff's wells were not on this tract, but in 1926, defendant claimed a portion of the gas rental due under the lease. S, when made defendant, alleged that plaintiffs and defendant had complete remedy in interpleader.

¹⁰¹ *Aaron v. Woodcock*, *supra* note 84 (whether the privilege of renewal was for a term of ten years or from year to year).

¹⁰² *Supra* note 36, at 170, 162 Atl. at 432. Also *Hutchinson v. Hutchinson Mfg. Co.*, *supra* note 92.

held a life estate in the property and that he would have to grant the right of entry. Without developing the property, plaintiff assigned the lease to C Company, reserving additional royalties for himself. The following year he bought the interests of four of the five lessors. Four years later the father of the lessors and the remaining lessor joined in an oil lease to N Company. No drilling was done in this period. Three years after that defendant acquired the interests held by C Company and N Company and began drillings which proved to be profitable.

Schaffer, J., for the court remarked:

" . . . It would be difficult to settle in ejectment all the rights and claims of the three interests involved; impossible, it would seem, to have adjusted them in trespass, and, while they might have been worked out in equity, that is not a more appropriate remedy than the one invoked, in which the judge sat without a jury under the Act of April 22, 1874, P. L. 109."

One of the commonest forms of declaratory action, although it has not apparently arisen in Pennsylvania, is the proceeding by a lessee, under a covenant not to assign without the consent of the lessor which may not be unreasonably withheld, for a declaration that he is privileged to assign, notwithstanding the covenant or because under the covenant the landlord does unreasonably withhold consent. The issue of reasonableness of the refusal is determined before rather than after the assignment has been consummated, with all the risks involved, thus avoiding the necessity of acting on the lessee's conjecture as to his rights. By declaratory action the doubt and dilemma are resolved before the risk of error has been incurred. Other covenants have also been successfully considered in this way before fatal mistake has been made. Thus, in *Equitable Gas Co. v. Smith*,¹⁰³ a lessee, frustrated by the lessor's successor in the exercise of his claimed privilege to drill oil wells, a privilege which was to be forfeited for failure to complete the well within a certain time, successfully sought a declaration of his privilege under the lease. In the important case of *Girard Trust Co. v. Tremblay Motor Co.*,¹⁰⁴ the lessor, whose three-story wooden building had been destroyed by fire after a statute had prevented the erection of such buildings for garage purposes, offered to rebuild under the covenant the same type of building, which, however, could not be used for the garage desired by the lessee, or else a two-story fireproof building, which the lessee refused except at a reduction in rent. With the *impasse* thus complete, the lessor brought an action for a declaration that by the offer it had made it had complied with its obligations under the lease as a condition necessary to restore the duty to pay rent and that defendant's refusal constituted forfeiture. As already

¹⁰³ *Supra* note 48.

¹⁰⁴ *Supra* note 7.

observed, the supreme court strongly commended the utility of the declaratory action in solving this dilemma.¹⁰⁵ So, the lessee's privileges under the lease, such as the claimed privilege to demolish the building and erect another, may be determined before commencing to demolish with its attendant risks of waste and forfeiture.¹⁰⁶

The distribution of tax and other burdens as between lessor and lessee has occasionally been put to issue by a declaratory action, which permits the controversy to be determined without any purported breach of the lease and during its existence. It is not always easy to determine who under the covenant is to bear the increased burden of new taxes, especially where the terms of the lease are inadequate or ambiguous. The plaintiff, lessor or lessee, as the case may be, therefore finds it convenient to ask that the burden be borne by the defendant, or shared or apportioned, as not falling within the limits of the plaintiff's contractual obligation.¹⁰⁷ The right as between the lessor and lessee to the proceeds of insurance received after destruction of the building by fire and upon exercise of the option to purchase was brought to trial in the interesting case of *Schnee v. Elston*.¹⁰⁸

Not infrequently the lessee, learning that the lessor had leased or was about to lease or sell the premises to some third party, to take effect at the expiration of the present lease, or having been notified that the lessor considers the lease terminated, or having reason to doubt whether his option or privilege to renew was still in force, petitions for a declaratory judgment of his right to renew or to renew on certain conditions, as, *e. g.*, for a certain term of renewal.¹⁰⁹ Such a proceeding, during the life of the present lease, has manifest advantages in quieting the rights of the parties, present and future. A lessor has successfully sought to establish the date of termination of a period extending the lease, whether notice at a certain date by lessee to lessor was necessary to secure the extension or whether such notice was op-

¹⁰⁵ *Supra* p. 336.

¹⁰⁶ *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930).

¹⁰⁷ *Thornbury v. Forbes*, 7 D. & C. 184 (Pa. 1925) (plaintiff, surface-owner lessor who had leased oil rights to defendant, sought declaration fixing the nature of defendant's interest and defendant's duty to pay half the taxes assessed on the property). In *Cronin v. Dougherty*, 100 Pa. Super. 463 (1931), plaintiff sought declaration of defendant's non-contractual duty to bear costs of rebuilding party wall, as ordered by city officers, after defendant had torn down his own house.

¹⁰⁸ 299 Pa. 100, 149 Atl. 108 (1930). Plaintiff held under a lease containing an option to buy and requiring plaintiff to insure for defendant's benefit. In case of fire, the lease required plaintiff to rebuild or repair, with reimbursement to the extent of the insurance money collected. After a fire, defendant collected insurance, refused to submit plans, and enjoined the erection of any building without his approval. In the course of that suit the type of building was fixed. Thereafter plaintiff exercised his option and demanded a credit on the purchase price of the amount of insurance money collected.

¹⁰⁹ *Aaron v. Woodcock*, *supra* note 84. In *Dattolo v. Stevenson & Ida*, 93 Pa. Super. 588 (1928), the plaintiff lessee claimed declaration that his option to renew was not vitiated by defendant lessor's sale of the property.

tional with the defendant.¹¹⁰ As will have been observed, it is safer to claim a declaration that a lease has been terminated by the lessee's breach, than for the lessor to act on the assumption that forfeiture has taken place and to take steps accordingly.

Mortgages

Even before there has been a default, mortgagees have a serious interest in establishing their exact security in relation to other creditors or a disputing mortgagor. The motive for prompt assertion of priority may be a prospective sale or default or other transaction arousing an interest in security. Occasionally the holder of an earlier unrecorded mortgage seeks a declaration of priority over a subsequent mortgage first registered. The priority of mortgagees among themselves either before a sheriff's sale or on discovery of an unrecorded obligation or attempted creation of new rights in others has been the subject of declaratory litigation.¹¹¹

Successors in interest, judgment creditors, or others may sue the mortgagee, and sometimes the mortgagor, for a declaration of priority of their respective claims or of the nullity of the mortgage, even after foreclosure. In the case of *Conemaugh Iron Works Co. v. Delano Coal Co.*,¹¹² the purchaser of property brought an action against the mortgagee for a declaration that the property was free from a claimed mortgage and that it was not sold in fraud of creditors. The plaintiff unsuccessfully sought to enjoin the defendant from enforcing judgment on the plaintiff's property, on the ground that the issue was under trial on the law side. The property was sold to plaintiff by the B Company, and the plaintiff had placed a mortgage on it to protect the B Company's bondholders. B Company was debtor of the defendant, who claimed that the conveyance to plaintiff had been in fraud of creditors. Said the court: "The status of the mortgage and the rights of the mortgagees can be determined in proceedings under the Declaratory Judgments Act, with all parties in interest on record."

A mortgagor has successfully claimed a declaration of his right to have the proceeds of the sale or the property applied in a certain way.¹¹³

¹¹⁰ *Spector v. Bonwit Teller & Co.*, 10 D. & C. 101 (Pa. 1928) (defendant's lease expired in January but it was agreed that it could be extended two months if defendant's new building was not ready on time, provided defendant notified plaintiff. Plaintiff contended that renewal was dependent on notice under a described scheme; defendant, that it was at their option).

¹¹¹ In *Moore v. Oyer*, *supra* note 35, plaintiff real estate agent has sold property for BK and had received a second mortgage which was to be used for paying BK's debts, any surplus going to BK. BK received a third mortgage. All mortgages were recorded. Later BK bought property through plaintiff from B and assigned his mortgage as part payment. When BK did not pay off plaintiff's mortgage and judgment against defendant, the purchaser in BK's sale, B stopped payment, as he had thought he was getting a second mortgage.

¹¹² *Supra* note 36.

¹¹³ *Victory Realty Co. v. Cosmos Bldg. & Loan Ass'n*, 15 D. & C. 304 (Pa. 1931).

Insurance Policies

Declaratory actions on insurance policies have afforded some of the most striking examples of this procedure. The fact that insurance is a contract which looks to future benefits, that it is a highly fiduciary relationship requiring the utmost good faith, and that it often embraces several or a series of collateral relationships involving those causing the loss and, in the case of indemnity or surety contracts, the position of the principal debtor, makes these contracts peculiarly susceptible to effective adjudication by declaration. This is due to the facts (1) that many questions of the validity of the policy are likely to arise before the loss occurs and it is important that claims and defenses be promptly adjudicated, and (2) because insurance companies operating under public supervision are usually responsible concerns against whom a declaration of liability is equivalent to a judgment for damages. Insurance companies themselves have frequent occasion to move as actors to disavow a policy or liability before loss, on the ground that they have been imposed upon, or to determine the validity or form of a contract challenged by public authority.

After a loss occurs a plaintiff may find in a declaration of the company's duty to pay the policy an adequate protection of his rights as an alternative to a coercive remedy. The issue may arise after the company has indicated some defense to the policy and the plaintiff seeks a declaration that the alleged defense is unsustainable or that it has been waived. Such actions were involved in the interesting Pennsylvania cases of *Malley v. American Indemnity Co.* and *Nesbitt v. Manufacturers' Casualty Ins. Co.*¹¹⁴ Disputes between the unpaid vendor and the vendee,¹¹⁵ or between the protected mortgagee, the owner and the company as to the superior right to the insurance fund or its proper expenditure for repairs, restoration, or otherwise, have been promptly settled by declaration.

Statutes and Ordinances

Since the middle of the nineteenth century, the construction of statutes and ordinances has been the subject of declaratory action. This was espe-

¹¹⁴ In *Malley v. American Indemnity Co.*, *supra* note 26, plaintiff sought declarations establishing defendant's adoption of a course of action. Plaintiff had an automobile liability policy with defendant. After defending suit against plaintiff in trial court, in which judgment was rendered against plaintiff, defendant refused to continue defense, alleging that plaintiff had breached warranty as to ownership. While plaintiff had not paid judgment, he had suffered some loss and an impairment of credit. Sadler, J., at 223, 146 Atl. at 573: ". . . Therefore, following the above line of decisions, under a policy such as we have before us, we hold that there is a potential loss, though money may not have been actually paid; the insured may sue the company directly after judgment and before he pays anything, or his creditor may institute garnishment against the company. The presence of these direct remedies would not affect the right to a declaratory judgment, for reasons unnecessary to state." *Nesbitt v. Manufacturers' Casualty Ins. Co.*, *supra* note 4 (believed to have been erroneously dismissed on ground that other remedy was available). See also *Fidelity & Casualty Co. of New York v. American Surety Co. of New York*, *supra* note 95.

¹¹⁵ *Schnee v. Elston*, *supra* note 108.

cially provided for in Lord Turner's Act of 1850, which established the declaratory action in the narrow form of the case stated.¹¹⁶ In the United States, where the constitutionality or validity of statutes and ordinances can be judicially challenged, it is the regular practice to employ this procedure to attack or maintain constitutionality or validity, or obtain the construction or interpretation of statutes and municipal ordinances. Section 2 of the *Uniform Act* specifically authorizes any person affected by "a statute, municipal ordinance, contract, or franchise" to have determined "any question of construction or validity" thereunder, and Section 11 provides that if unconstitutionality is alleged the attorney-general of the state shall be served and be entitled to be heard. In the twentieth century with its kaleidoscopic changes and the resulting necessity of ever new legislation affecting legal relations, there has been a special need for a speedy determination of the validity and meaning of legislation in its application to individuals. With the declaratory judgment available there is no longer any necessity to abuse the equitable injunction in order to bring the issue to determination.¹¹⁷

Pennsylvania affords a number of instances in which the constitutionality or validity of statutes and ordinances has been challenged. As in all other cases, the conditions of justiciability are demanded, and as already observed, several cases of this type have been dismissed because of a want of necessary legal interest in the plaintiff or defendant,¹¹⁸ because parties were not adverse in interest,¹¹⁹ because facts were not sufficiently ripe for judicial decision, in which event the judgment would have been merely an advisory opinion or have been moot,¹²⁰ because in the court's view there was an absence of certain parties deemed necessary to the suit,¹²¹ or because the court's judgment would not have finally settled the issue.¹²² The constitutionality and validity or enforceability of statutes and ordinances have been attacked on formal and on substantive grounds. On formal grounds they have been attacked because the heading was not descriptive of the body, as demanded by constitutional requirements,¹²³ or for other procedural reasons. The validity of election laws has been attacked by prospective electors ostensibly barred from vote or by those interested in defeating the results of an

¹¹⁶ 13 & 14 Vict. c. 35, § 1 (1850).

¹¹⁷ Cf. Note (1931) 41 YALE L. J. 1195, 1200; Borchard, *The Constitutionality of Declaratory Judgments* (1931) 31 COL. L. REV. 561, 589.

¹¹⁸ *In re Annexation of Part of Lancaster Township to City of Lancaster*, *supra* note 56; *Bell Telephone Co. v. Lansdowne Borough*, *supra* note 57.

¹¹⁹ *Reese v. Adamson*, *supra* note 46 (plaintiff directors of the poor asked declaration construing two statutes which they alleged were conflicting; defendants, other administrative officers, denied that there was any controversy as to these statutes); *Wagner v. County of Somerset*, *supra* note 61; *Public Defence Ass'n v. Allegheny County*, *supra* note 56.

¹²⁰ *Ladner v. Siegel*, *supra* note 15.

¹²¹ Additional Law Judge, 53d Jud. Dist., *supra* note 60.

¹²² *Ibid.*

¹²³ *Moore v. Lewis*, 10 D. & C. 466 (Pa. 1928). See *infra* note 130.

election.¹²⁴ Burdens imposed under the police power and restricting the plaintiff's freedom in business or otherwise have been commonly challenged by declaration. Thus, in Pennsylvania, the validity of a statute requiring the owners of drug stores to be licensed pharmacists was so challenged,¹²⁵ whereas in the federal courts the more or less fictitious injunction had to be invoked as a vehicle of relief.¹²⁶ The validity of restrictions on the use of land or on the erection of buildings to those of certain type,¹²⁷ especially through zoning ordinances,¹²⁸ has been tested in this way. The validity of statutes and ordinances imposing taxes is commonly challenged by declaration. In the leading case on the declaratory judgment in the United States Supreme Court,¹²⁹ the validity of a tax was thus challenged in Tennessee, where it is not possible to enjoin the collection of a tax and where the state unsuccessfully maintained that the only way to challenge it is by paying the tax and suing for its recovery. Occasionally a taxpayer may find his immunity in the constitutionality, rather than unconstitutionality, of a statute, asserted by tax officials, and may then bring an action against the officers to have the statute declared constitutional.¹³⁰

The construction or interpretation of statutes is frequently demanded by the individual affected. The plaintiff, threatened with criminal penalty, money payments, losses, or other risk of undesirable consequences, may demand construction in order to establish his privilege or freedom from the threatened sanction. Thus, plaintiffs have sought declarations of their privilege to conduct their business free from the supposed restrictions of a statute or that the statute did not make unlawful what they were undertaking to do; or that they were entitled to receive a license or permit or that their business required none.¹³¹

The disputed duty or power of a governmental body or official is often determinable by a correct construction or interpretation of the governing statute. Thus, the duties of governmental boards to require certain condi-

¹²⁴ *Brookville's Election*, 5 D. & C. 54 (Pa. 1924) (validity of statute validating election).

¹²⁵ *Evans v. Baldrige*, 294 Pa. 142, 144 Atl. 97 (1928); *cf. Pratter v. Lascoff*, 140 Misc. 211, 249 N. Y. Supp. 211 (1931).

¹²⁶ *Liggett Co. v. Baldrige*, 278 U. S. 105, 49 Sup. Ct. 57 (1928).

¹²⁷ *Commonwealth Title & Trust Co. v. Yeadon Borough*, 19 Del. 232 (Pa. 1928) (ordinance requiring light and air on three complete sides).

¹²⁸ In *Taylor v. Haverford Township*, *supra* note 7, plaintiff owner challenged validity of zoning ordinance which made his property residential. He had sold most of his holding and retained this one piece which adjoined a business section and faced a main street. As business property, its value was four times greater than as residential, and use was not incompatible with safety.

¹²⁹ *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345 (1933).

¹³⁰ *Moore v. Lewis*, *supra* note 123 (plaintiff owner of horses and cattle asserted constitutionality of statute which exempted his animals from taxation; administrative officers had taxed, claiming statute invalid, for defectiveness of heading).

¹³¹ In *re* *Petition of Templar Motor Car Co.*, *supra* note 27 (license for exchanging stock had been held necessary by Securities Bureau and been refused; lack of jurisdiction claimed; *held*, plaintiff could appeal from administrative decision or use declaratory judgment).

tions for the grant of professional licenses¹³² may be challenged by those having a material interest in the proper administration of the function. The necessity of exact compliance with statutes authorizing the issue of bonds makes it often a matter of legal interest to the issuing authorities, to taxpayers, and to purchasers that an ambiguous or unclear statute be promptly construed. Thus, in *City of Chester v. Woodward*¹³³ the city raised the question whether the issue of improvement bonds based on special assessments was "incurring" or "increasing" indebtedness, within the terms of a statute requiring in such event the approval of certain administrative officers. The plaintiff may be the public authority or an interested citizen. Thus, in *Brookville's Election*¹³⁴ the plaintiff administrative officers asked a declaration of the validity of an election increasing the borough debt, claiming that it had been validated by subsequent statute. So, public authorities have raised the question of their power to levy taxes under certain circumstances,¹³⁵ to collect and spend money and distribute the burden of certain expenditures,¹³⁶ to use bond money to pay teachers' salaries,¹³⁷ to spend money for a county comptroller's audit,¹³⁸ to continue to occupy public office, the issue involving the length of the plaintiff's statutory term, placed in doubt by conflicting statutes or adverse claims,¹³⁹ to accept, as a state sheriff, appointment as a federal prohibition officer, under the Pennsylvania constitution forbidding dual offices.¹⁴⁰

Administrative Powers and Disabilities

Ancillary to the interpretation of statutes is the power of administrative officials and bodies to regulate the affairs of individuals, a matter generally dependent on statute. But administrative officials and private individuals dealing with them also have occasion to question their powers and duties when statutory authority may be admitted. Administrative officials have occasion to want the protection of a declaratory judgment of their challenged

¹³² *Lackawanna County Undertakers' Ass'n v. State Board of Undertakers*, 11 D. & C. 503 (Pa. 1928) (association claimed that licenses to new applicants could be issued only when the practical experience required by a statute was "continuous" and exclusive of other employment; *held*, for defendants).

¹³³ *Supra* note 8.

¹³⁴ *Supra* note 124.

¹³⁵ *In re Jenkins Township Fire Truck*, *supra* note 78 (plaintiffs sought declaration of right to impose special levy to secure funds to repair fire truck, on ground of emergency; denied, for defect of parties).

¹³⁶ *Winton Borough's Petition*, 16 Del. 539 (Pa. 1924) (plaintiff sought declaration as to method of apportioning costs of paving streets, in view of conflicting provisions of 1917 and 1918 statutes).

¹³⁷ *Petition of Dunmore School Dist.*, *supra* note 68.

¹³⁸ *Woodside Petition*, 77 Pitts. 8 (Pa. 1928).

¹³⁹ *Fox, Dist. Att'y v. Ross*, *supra* note 27.

¹⁴⁰ *Sterrett's Petition*, 9 D. & C. 430 (Pa. 1926). It is doubtful who contested the petition. If there was no contestant, no declaration should have been issued, for it was then only an advisory opinion.

power to regulate, arrest, demolish property, levy execution, and undertake acts bound to cause loss or damage, if they would escape the painful consequences of mistake. To them such a proceeding is indispensable. Thus, in *Huber, Tax Collector v. Weakland*,¹⁴¹ a tax collector whose right to levy a school tax and arrest a delinquent taxpayer had been challenged on the ground that the tax was illegal, sought, before making the arrest, a declaration that the tax, the levy, and the proposed arrest were legal and that the defendant was subject to them. In another Pennsylvania case a sheriff sought a declaration as to whether he was privileged to levy execution, demanded by a judgment creditor.¹⁴² The power to enter into contracts or carry on enterprises of various kinds has thus been put to the test.¹⁴³

Those asking the performance of duties by public officials or the state generally require no coercive relief. While occasionally an officer may prove recalcitrant and require arrest, as a rule all that is needed to hold an administrative officer to his duty is a judicial decision. A declaratory judgment therefore performs the function of mandamus, injunction, and other extraordinary remedies frequently invoked against public officers. Thus, in Pennsylvania, councilmen, as claimants against the city, have used the declaration to obtain an adjudication of their proper salaries, against a controller who contended that salaries were fixed by a 1923, and not a 1925, ordinance.¹⁴⁴ Occasionally the declaration performs the valuable function of putting in issue the contested right and, by securing a decision, enables the petitioner to determine which of two alternative courses of conduct he should pursue, suspending the necessity of possibly a fatal choice until adjudication has removed the dilemma. Thus, Judge Criswell, having been retired on a statutory pension under an agreement with the auditor-general that he was to hold himself in readiness to perform certain judicial duties until his death, desired to enter practice without forfeiting his pension, a consequence which the auditor threatened. The judge therefore sought a declaration that by entering practice he retained his status as a retired judge as well as his pension or, in the alternative, that it was suspended only during actual practice, as the court in fact decided.¹⁴⁵ The light was turned on first, and the leap in the dark made unnecessary.

The duties of public officials may be declared at the instance of private individuals or other public officials or of the particular official himself.¹⁴⁶

¹⁴¹ 7 D. & C. 496 (Pa. 1925).

¹⁴² *Aronowitz v. Industrial Utilities Corp.*, 5 D. & C. 633 (Pa. 1925).

¹⁴³ *Mansfield Boro School Dist. v. Mansfield High School Ass'n*, *supra* note 99 (that plaintiffs were privileged to rent a school building for forty years); *Long's Estate*, *supra* note 60 (which officers, in view of statutory change, were entitled to administer land devised to city for a public park).

¹⁴⁴ *Easton Councilmen's Salaries*, 8 D. & C. 752 (Pa. 1926). See also *Morgan v. Wyoming County Com'rs*, *supra* note 23 (that county is under duty to pay for services of stenographer to plaintiff superintendent of schools).

¹⁴⁵ *Criswell v. Martin*, 8 D. & C. 425 (Pa. 1926).

¹⁴⁶ *School Dist. of Union Township v. Walton*, *supra* note 60 (duty of defendants to place on ballot question of increasing indebtedness, refused for plaintiff's alleged lack of authority).

Thus, election officials have sought a declaration of their duty to resubmit for voting a plan of municipal consolidation.¹⁴⁷

Immunity from taxation may depend not merely on statute, but on administrative judgment, which may be effectively challenged by declaration. Thus, the claim that the plaintiff's lot and building were used in good faith for the plaintiff's business and were hence tax-exempt,¹⁴⁸ and that the plaintiff was subject only to a limited tax as tendered and not to the amount assessed¹⁴⁹ have been so adjudicated.

Wills

In spite of the rulings of its courts in certain cases,¹⁵⁰ Pennsylvania discloses many cases in which the declaration has been used to decide disputes arising under a will. One of the chief problems, for whose solution the declaration is peculiarly adapted as recognized by the Pennsylvania courts, is the definition of the interest in realty taken under a testamentary gift. This may become important in view of a pending lease, as was shown in the leading case on the declaration in Pennsylvania.¹⁵¹ In *Cryan's Estate*¹⁵² plaintiff sought a declaration of interest taken in realty given under a will, because she wished to borrow money to make repairs and to meet a mortgage which was about to mature. Plaintiff, as executrix and beneficiary, claimed either a fee or a joint fee with a sister but had never taken possession of the property. The children of a deceased devisee claimed a vested interest, because of which the plaintiff could not secure a loan. Plaintiff did not wish to sue for partition, because none of the parties desired to sell; there was no surplus to distribute, so she could not file an accounting; and defendant not being in possession, she could not bring ejectment. The declaration clarified the position. At various times it may become important to fix the extent of the interest taken by the widow, either because of the ambiguous terms of the gift,¹⁵³ her own acts,¹⁵⁴ or the happening of certain

¹⁴⁷ *In re Metropolitan Plan*, 77 Pitts. 481 and 609 (Pa. 1929).

¹⁴⁸ *People's Telephone Corp. v. City of Butler*, 99 Pa. Super. 256 (1930).

¹⁴⁹ *Cupp Grocery Co. v. Johnstown*, *supra* note 27 (plaintiff owner of 33 stores claims liability to only one license tax of \$100 as a corporation, not \$915 as assessed).

¹⁵⁰ *Supra* p. 325 *et seq.* (discussion of cases in which it was held that there was no jurisdiction to grant declaratory judgment).

¹⁵¹ *Kariher's Petition*, *supra* note 2.

¹⁵² *Supra* note 6.

¹⁵³ *Dommell's Estate*, *supra* note 29 (all property to be given to wife, who was instructed to make certain gifts); *Trout v. Knott*, 16 D. & C. 111 (Pa. 1930) (direction to executor to make small payments to wife "to live on", remainder on her death to grandchildren); *Sevock Estate*, 10 Wash. 174 (Pa. 1926) (gift of all property to wife, her heirs and assigns, followed by a wish that she divide all property with their children).

¹⁵⁴ *Shirk's Estate*, 10 D. & C. 170 (Pa. 1927) (gift of all property for life or until remarriage, then as if there were no will, she had remarried); *Lacey's Estate*, 79 Pitts. 126 (Pa. 1930) (widow had elected to take under statute).

events.¹⁵⁵ Likewise the determination of whether or not the rule in *Shelley's Case* is applicable is occasionally vital.¹⁵⁶ The difficulty may arise because the gift was given to a group,¹⁵⁷ because events may have forced a transfer of interest,¹⁵⁸ or because the gift was complicated in terms and facts.¹⁵⁹

The utility of the declaration is not confined to questions of interest in realty but extends to those in personalty.¹⁶⁰ It serves also to crystallize the rights and duties of the trustee and executor, when those fiduciaries are confronted with disputes as to the administration of the estate,¹⁶¹ the validity of the gift which the testator sought to give,¹⁶² points as to the form of the will,¹⁶³ or the rights of some third person, stranger to the estate, who has acquired an interest in the property of the estate.¹⁶⁴

In deciding all such issues, the court takes pains to see that all beneficiaries are made parties.¹⁶⁵

Titles to Property

Questions concerning the title to property, real and personal, are conveniently settled by declaratory judgment and Pennsylvania offers a number of interesting cases of this type. The issue may involve the interpretation

¹⁵⁵ *Snavely's Estate*, *supra* note 91 (widow, who had elected to take under statute, claimed rights after death of one of the children); *Brinker's Estate*, 22 North. 79 (Pa. 1929) (wife had predeceased).

¹⁵⁶ *Wilcox's Estate*, 11 D. & C. 781 (Pa. 1928); *Keith v. Keith*, 12 D. & C. 416 (Pa. 1929).

¹⁵⁷ *Conner's Estate*, 302 Pa. 534, 153 Atl. 730 (1931) (gift of all property to *N*, *A*, and *W*, with directions that *N* take the homestead, maintain it, and divide the income; *N* was a lunatic); *Peters v. Peters*, 307 Pa. 476, 162 Atl. 203 (1932) (gift under intestate laws to heirs of *V* and *H*); *In re Fletcher's Estate*, 103 Pa. Super. 69, 157 Atl. 810 (1931) (gift to *CM* and *MF*, "their children and blood relations forever"; *MF* had willed it to a daughter); *Estate of Martha Lichty*, *supra* note 55 (gift of interest to *L* and *A* "during their natural lives or survivor"; Testatrix, *L*, and *A* had held as tenants in common).

¹⁵⁸ *B'Nai B'Rith Orphanage v. Roberts*, *supra* note 29; *In re Thompson's Estate*, 304 Pa. 349, 155 Atl. 925 (1931); *Morris v. Morris*, *supra* note 24; *Hirst's Estate*, *supra* note 37; *Senft's Petition*, *supra* note 10; *In the Estate of James Boyd*, 28 Dauph. 153 (Pa. 1925).

¹⁵⁹ *Smith's Petition*, *supra* note 28; *In re Lerch's Estate*, 309 Pa. 23, 159 Atl. 868 (1932); *Cole's Estate*, 15 D. & C. 655 (Pa. 1930); *Schmeck's Estate*, 23 Berks 277 (Pa. 1931).

¹⁶⁰ *In re Simpson's Estate*, 304 Pa. 396, 156 Atl. 91 (1931) (right of remaindermen to share in sale proceeds when life tenant exercised his power to sell); *In re Estate of Herbert Cook*, 2 Som. 508 (Pa. 1925) (widow's rights in 5-year timber contract).

¹⁶¹ *Kidd's Estate*, *supra* note 37 (power to sell; case arose after the widow's death and turned on whether or not she had taken a fee); *Kalbach's Estate*, 10 D. & C. 195 (Pa. 1927) (duties in relation to trust for purchase and erection of tombstones); *Koller's Estate*, 12 D. & C. 185 (Pa. 1928) (power to sell farm to widow); *Hahn's Estate*, 22 North. 134 (Pa. 1929) (right to pay over capital under terms of trust).

¹⁶² *Brown's Estate*, *supra* note 29 (validity of complicated gift under rule of perpetuities: note form of declaration given); *Brinker's Estate*, *supra* note 155 (gift to charity).

¹⁶³ *Sevock Estate*, *supra* note 153 (effect of paragraph added after testator's signature and that of the witnesses).

¹⁶⁴ *Everts v. Kepler*, *supra* note 12 (validity of plaintiff's judgment against defendant's interest received under a will); *Johnson's Estate*, *supra* note 36 (plaintiff grantee of FJ asked declaration of interest received by FJ under his father's will, which gave him the farm for life but provided that, if any child died without issue, the survivors took, but that, if there was issue, issue took; at the time of conveyance there had been no challenge of title).

¹⁶⁵ *Moorhead Estate v. Nelson*, *supra* note 64; cf. *Paine's Estate*, *supra* note 37; and discussion, *supra* p. 332 *et seq.*

of a will, deed, or statute, out of which the title is derived, and the action serves in many cases the same purpose as an equitable bill to quiet title.

Thus, a person in possession whose title has been challenged through a defect in the chain may seek a declaration against his predecessors to establish what interest the one challenged took in the governing instrument, deed or will, under which he claimed and conveyed.¹⁶⁶ So, a purchaser or prospective purchaser at a sheriff's sale or from an executor may bring such a proceeding to clear the title.¹⁶⁷ A vendor of land whose vendee questioned his title because of a restrictive covenant successfully brought an action to have it declared that the covenant was personal to his predecessor in the title and did not run with the land.¹⁶⁸ Complicated questions arising out of long-term leasing of oil and gas rights have been determined between the heirs of the owner of the fee and the lessees.¹⁶⁹ Conflicting claims to the succession in property through and against the will have been conveniently determined by this method.¹⁷⁰ The severability of interests as between surface owner and lessee of oil rights has thus been determined, for the purpose of adjudicating the separate liability to the payment of taxes.¹⁷¹

Equally successful have been the attempts to decide the ownership of personal property, which often requires the construction of deeds, contracts, wills, assignments, trusts, and other instruments. The transfer of ownership of a savings bank account by direction of the donor to the bank,¹⁷² the question whether a gift *inter vivos* of a bank account had been properly effected by a decedent just before death,¹⁷³ the effect of a joint owner's insanity on the right of the other owner to draw on the bank account, an issue propounded by the bank as plaintiff,¹⁷⁴ the respective rights of common and preferred stockholders in the distribution of the assets of a dissolved corporation,¹⁷⁵ the defendant's title to an automobile he sought to deliver to the plaintiff¹⁷⁶ are among the questions of title to personal property which have been adjudicated by declaration.

Conclusion

This survey of Pennsylvania declaratory judgments will have indicated the wide range of usefulness of the *Uniform Act* and its proper limitations.

¹⁶⁶ Johnson's Estate, *supra* note 36.

¹⁶⁷ Ellis v. Commonwealth Trust Co., *supra* note 28 (defendant executor's implied power to sell realty declared); Musser v. Grove, 15 D. & C. 628 (Pa. 1930); Moore v. Oyer, *supra* note 35.

¹⁶⁸ Barmach v. Barwick, *supra* note 93.

¹⁶⁹ Havens v. Graybill, 14 D. & C. 401 (Pa. 1930).

¹⁷⁰ Long v. Uhl, *supra* note 48; Senft's Petition, *supra* note 10.

¹⁷¹ Thornbury v. Forbes, *supra* note 107.

¹⁷² Reap, Ex'r v. Wyoming Valley Trust Co., *supra* note 23.

¹⁷³ Patanyi v. First Nat. Bank of Pittsburgh, *supra* note 41.

¹⁷⁴ *In re* Northumberland Nat. Bank, 11 D. & C. 143 (Pa. 1927).

¹⁷⁵ Hite v. Clark & Snover Co., *supra* note 65.

¹⁷⁶ Swank Motor Sales Co. v. Decker, *supra* note 8.

It will become apparent that the Pennsylvania courts, while giving the Act appropriate application in many cases, have nevertheless on occasion fallen into error in considering it in principle an exclusive or extraordinary remedy and have thus failed to follow the statute. The doubts which this aberrant policy must have spread among the lawyers and citizens of Pennsylvania may well have often deterred litigants from invoking the statute. It may be hoped that this unfortunate obstacle to the execution of the remedial purposes of the statute will soon be removed and that the integrity of the *Kariher* decision will be fully restored. In the light of the experience of Pennsylvania and of the thirty-two other American jurisdictions now enjoying the benefits of declaratory procedure, it may be hoped that Pennsylvania and other states will give the Act the same broad scope extended to it in England and other British jurisdictions.