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JUSTICIABILITY

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IT MIGHT be supposed that justiciability, the very foundation of the judicial function, would be a matter on which courts could hardly differ. Yet there seems to be the greatest confusion among the courts as to when an issue is and is not susceptible of judicial decision. This is largely due to a devotion to phrases and symbols which make historical investigation and theoretical analysis seem an unnecessary encroachment on the judicial prerogative. The very system of *stare decisis* invites courts to relieve themselves of the necessity of thinking through again ostensible propositions which seem to have once received the stamp of approval, and tempts them to extend their application to situations far different from those in which they arose. A habit of thought is thus cultivated which unwittingly makes courts slaves to stereotyped terms like "cause of action," "case" or "controversy," terms which are bandied about without adequate analysis. The temptation is not resisted because most appellate courts are continually overworked. But the resulting damage to the law and to the efficient administration of justice is not trifling, for it takes a fortunate concatenation of circumstances to pry a court loose from its erroneous grooves. In the dilemma of choosing between consistency and rightness, consistency often wins. In this psychological process the human unwillingness to admit error, or the belief that higher courts will correct errors below, plays an integral part. Although the system of *stare decisis* postulates a system of trial by combat with a decision confined to the precise questions at issue, the fact is that judicial departures from conciseness sometimes produce legal disquisitions far beyond the necessities of the case, called *obiter dicta*, which, while often illuminating are as often unsound, but are invoked notwithstanding, whether right or wrong, wherever they seem to help in the process of advocacy or persuasion. The

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system encourages litigation because a lawsuit is at best often a gamble and, given the ever-present possibility of entangling the opposition in the bogs of procedure, the wrong and unjust side not infrequently has a reasonable chance of winning out. Yet a decision thus rendered by a hurried court, without opportunity for that study which not only the case at issue but the lawmaking function of the opinion requires, becomes the law of the land or the state, raw materials which the legal profession is expected to accept as essential building stones in the structure of the law. It is a wonder that under such opportunistic architecture the structure has as much intelligent symmetry as it still possesses, a fact partly due to the corrective function of legislatures. European jurists have been accustomed to believe that the Anglo-American system is not a legal system at all, but a haphazard collection of statutes and cases devoid of arrangement or scientific classification, cultivating analytical but not learned minds.

These thoughts are aroused by some recent expressions of judicial opinion concerning what state of facts constitutes a "case" or "controversy" susceptible of judicial decision. The simple words "cases" and "controversies" to which the federal judicial power was extended by Article III of the Constitution, have been tortured into a variety of meanings not anticipated by Marshall, Field, and other judges who considered them broad terms describing properly pleaded issues susceptible of judicial determination.[1] The unfortunate effort of Congress in 1862 to use the court, not to decide finally certain claims against the United States, but to recommend an award which was subject to review by Congress or the Treasury led Taney, Miller and other judges into the unjustified statement that *execution* was an essential part of every judgment.[2] All they probably meant was that the judgment had to be effective, final and binding, but as late as 1927, in the notoriously vulnerable opinion in the

[1] Marshall, C. J., deemed it a case "when any question respecting . . . . [the Constitution, laws and treaties of the United States] shall assume such a form that the judicial power is capable of acting on it." Osborn v. Bank, 9 Wheat. (U.S.) 738, (1824) Field, J., thought the words embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the *protection* or enforcement of rights, or the prevention, redress or punishment of wrongs." (Italics added.) Smith v. Adams, 130 U.S. 167, 173 (1889). In *In re* Pacific Ry. Commission, 32 Fed. 241, 255 (C.C. Cal. 1887), Judge Field added that the term "case" implies "the existence of present or *possible adverse parties* whose contentions are submitted to the court for adjudication."

[2] Taney, C. J., in Gordon v. United States, 2 Wall. (U.S.) 561 (1864), following Hayburn's case, 2 Dal.. (U.S.) 409 (1792). See Miller, Lectures on the Constitution of the United States 314 (1891).

now effectively overruled case of *Liberty Warehouse Company v. Grannis*.[3] Justice Sanford for the court expressed the view that execution was essential to a judgment.[4] This, notwithstanding the fact that the Court had for a century determined boundary disputes, equitable proceedings in interpleader and *quia timet*, declared valid or void titles to realty, and other alleged clouds on legal relations.[5] Although the belief that execution is necessary to constitute a valid judgment was ultimately repudiated in *Fidelity National Bank v. Swope*[6] and *Old Colony Trust Company v. Commissioner of Internal Revenue*,[7] it probably had much influence in causing a misapprehension as to what a declaratory judgment really was and in conceiving it as in effect an advisory opinion.[8] The unfortunate remark of Justice Brandeis in *Willing v. Chicago Auditorium Association*[9] suggesting that declaratory relief was (in 1928) "beyond the power conferred upon the federal judiciary," has since been explained away in *Nashville, Chattanooga & St. Louis Ry. v. Wallace* as founded on the assumption that the *Willing* case, like the *Liberty Warehouse* case, involved "a decision advising what the law would be on an *uncertain or*

[3] 273 U.S. 70 (1927).

[4] The Liberty Warehouse case and Willing v. Chicago Auditorium Association are analyzed in Borchard, Declaratory Judgments 271 ff. (1934). Plaintiffs in the Liberty Warehouse case sought to invoke the Conformity Act to persuade the federal district court to apply the Kentucky Declaratory Judgments Act to their case. Inasmuch as a proceeding for declaratory relief is a matter of "practice, pleadings and forms and modes of proceeding," that would have been entirely appropriate. In Nashville Ry. v. Wallace, 288 U.S. 249, 262 (1933), it is called a "modified procedure," a change "merely in the form or method of procedure" (*id.* at 264). But the name "declaratory judgment" seemed to worry the Supreme Court, so Justice Sanford undertook to show that the issue was not even justiciable; he suggested that there was no adverse litigation between the Warehouse Company, claiming immunity from the restrictions of the Tobacco Cooperative Act, and the Attorney General, claiming their liability to its provisions with a threat of a penalty; that the plaintiffs contemplated nothing forbidden by the statute (a strange conclusion) and that no relief was prayed against the Attorney General defendant (declaratory relief apparently being regarded as "no relief," although in fact an injunction was also prayed). Unfortunately the allegations of the court were not an accurate description of the facts, but on the facts as the court erroneously assumed them, there might have been no "controversy."

[5] Sharon v. Tucker, 144 U.S. 533, 542 (1892); Fidelity Nat'l Bank v. Swope, 274 U.S. 123 (1927); Nashville Ry. v. Wallace, 288 U.S. 249, 263 (1933).

[6] 274 U.S. 123 (1927).

[7] 279 U.S. 716 (1929).

[8] An "advisory opinion" is really an *ex parte* opinion rendered by courts on request of executive or legislature. It has been misused to describe a non-justiciable issue, the opinion that would be rendered in a case in which the facts are hypothetical, uncertain, abstract, or too vague for adjudication.

[9] 277 U.S. 274 (1928).

hypothetical state of facts, as was *thought* to be the case in *Liberty Warehouse Company v. Grannis* . . . . and *Willing v. Chicago Auditorium Association*. . . . . "[10] Nevertheless, to the obfuscation of the law, the *dicta* of both the *Liberty Warehouse* and the *Willing* cases are continually invoked by counsel and the federal courts as if they had not in effect been overruled. What was said about those cases in the *Nashville* case was probably the most charitable way of indicating that their *dicta* were founded on a misconception. In the *Nashville* case, decided in 1933, the Supreme Court finally approved the Tennessee test of justiciability, namely:

> When the complainant asserts rights which are challenged by the defendant, and presents for decision an actual controversy to which he is a party, capable of final adjudication by the judgment or decree to be rendered . . . . Changes merely in the form or method of procedure by which federal rights are brought to final adjudication . . . . are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below.[11]

The *Muskrat* case,[12] decided in 1911, opened a new line of tests of justiciability. The growing policy of the Supreme Court—evolved out of its own consciousness under the leadership of certain judges—designed to keep cases out of the court, synchronizes with and perhaps explains the narrowness of view evidenced in creating and developing the criteria of justiciability. In the *Muskrat* case, Congress had conferred on named Indians the privilege of suing in the Court of Claims to determine the constitutionality of a prior act of Congress. There was no evidence that the Indians named had any personal interest in the matter, that any property of theirs would be affected by the decision, or that any party or public officer had any adverse interest. The case therefore lacked every element of a justiciable controversy, adversary parties, a plaintiff or defendant adequately interested, and personal or property rights, private or public, which would be definitely affected.

This unfortunate case started a train of thought in the court directed toward great conservatism in adjudicating cases, and resulted in a narrow construction of the terms "cases" or "controversies." This was an incident of the increasing reluctance of the court to pass on constitutional questions, a natural concomitant of the expansion in the scope of governmental regulation and the increasing private assertion of violation of constitutional rights. The strict rules evolved in the court for the adjudication of constitutional questions were imperceptibly deemed to apply to

[10] 288 U.S. 249, 262 (1933) (italics added). [11] *Id.* at 260, 264. [12] 219 U.S. 346 (1911).

all legal issues and have been so applied by state courts, thus narrowing unduly the scope of the judicial function as compared with the practice in other countries. Moreover, the various objections to adjudication, such as prematurity or mootness, inadequacy of party interest or inconclusiveness of the judgment were all read into the words "cases" or "controversies," thus overburdening those words with a bulging content making them ever more technical without necessarily dissipating their ambiguity. Most of the tests of justiciability were thus largely identified with the phrase "cases and controversies," so that the broad definitions of Marshall and Field are now almost unrecognizable. Apart from the traditional grounds for refusing to review administrative findings, to pass on political questions, or decide abstract, hypothetical, fictitious, non-adversary or moot cases,[13] cases have in recent years been dismissed on the ground that the plaintiff's interest was inadequate[14] or that the issue was not sufficiently concrete to justify adjudication.

These are broad limitations, susceptible, as matters of degree, to varying interpretations, and vesting wide discretion as to the exercise of the power of adjudication. The cases referred to all involved the issue of constitutionality. The first condition, the adequacy of the plaintiff's interest, may be relatively arbitrary. A taxpayer is recognized in most of the states as having sufficient interest in the expenditure of public moneys to challenge unconstitutional grants from the public treasury. A federal taxpayer, however, is deemed not to have adequate interest for that purpose, so that the constitutionality of federal money grants is probably challengeable under exceptional circumstances only, as in the appropriation of federal funds for publicly-owned utilities which injure privately-owned

[13] See the cases discussed in Borchard, *op. cit. supra* note 4, at 57 ff. See also, 49 Harv. L. Rev. 1351, 1352–53 (1936). See also the rules developed in the court for avoiding passing on constitutional issues, set out by Brandeis, J., in his concurring opinion in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346–47 (1936). Several of these rules are houored in the breach when the court wishes to express an opinion on constitutionality, but they are helpful in justifying a refusal to pass on constitutionality, when that is the policy desired.

[14] Fairchild v. Hughes, 258 U.S. 126, 129 (1922) (taxpayer sought to enjoin the proclamation by the Secretary of State of the Nineteenth Amendment).

Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (taxpayer's injunction against federal Maternity Act, also challenged by the State of Massachusetts, dismissed because taxpayer lacked sufficient financial interest and because state had done nothing as yet (by appropriating money to earn the federal subsidy).

But in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), over the strong protest of Brandeis, J. (p. 341), a group of stockholders challenging the power of their company to enter into a certain contract with the T.V.A. for alleged lack of constitutional power of the T.V.A., were deemed to have sufficient interest to raise the issue. The majority evidently wished to decide the case. *Cf.* Carter v. Carter Coal Company, 298 U.S. 238 (1936).

companies. "Legal interest" has been usually construed as meaning financial interest, by no means the only interest of the citizen in the constitutional functioning of his government. In the absence of a proceeding by which a public officer, as in the British dominions, may challenge the constitutionality of public expenditures, it would not have been impolitic for the court to permit a taxpayer or an association of taxpayers to raise the issue. So long as the court thus throws obstacles in the way of challenging constitutionality, the demand for advisory opinions, however questionable, will be bound to grow.

The second condition, concreteness of the issue, also involves matters of judgment, balance and degree. How concrete must an issue be before the court will pass upon it? In *New Jersey v. Sargent*[15] an original bill of injunction was brought in the United States Supreme Court by the state, as proprietor of water resources from which it received considerable revenue, to enjoin the federal government from the threatened enforcement of the federal Water Power Act which authorized the government to license and control such water resources and receive revenue therefrom. The Supreme Court considered that neither the federal government nor the state had taken or indicated its intention to take sufficiently specific steps so as to "affect prejudicially" any "right, privilege, immunity or duty" of the State of New Jersey. There was "no showing that [the state] has determined on or is about to proceed with any definite project." Yet the Federal Power Commission had certainly acted on every application for licenses to utilize the navigable waters of New Jersey for the development of water power, and once admit the proprietary, or even the jurisdictional, interest of the state in such waters, it would seem that its rights or legal relations had been sufficiently affected to warrant a decision on the question. In fact, although the court purports to dismiss the bill because it does not present a "case" or "controversy," they do in fact pass on the federal act and hold it to be constitutional. Whether *dictum* or not, it was deemed to have decided the issue.

Thus, what is abstract and what is concrete is a matter of breadth of view, of opinion, of judgment. Many who believe the Supreme Court should be liberal in its service to the nation and not withdraw behind disputable technicalities would conclude that there was a justiciable controversy, sufficiently concrete for adjudication, in *New Jersey v. Sargent*.[16]

[15] 269 U.S. 328 (1925).

[16] In New York v. Illinois, 274 U.S. 488 (1927), the effort of New York to obtain an adjudication against Illinois as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future was properly defeated. But this was much more "abstract" than the issue raised in New Jersey v. Sargent and is not

Judging from the experience of Australian and Canadian cases, such an issue would have presented no difficulties to the supreme courts of those dominions.[17] Possibly the fact that a state was plaintiff against the United States induced the court to be especially reluctant in perceiving a proprietary interest to have been affected, although it would seem not improper to consider that a dispute between competing public authorities as to their respective jurisdiction over a concrete subject-matter is sufficiently justiciable to warrant adjudication. It is deemed sufficient in the British Dominions, where suits between public officers placing in issue a disputed question of jurisdiction are not infrequent.[18]

In the light of the narrow view taken in *New Jersey v. Sargent*,[19] the Federal Power Commission tempted fate by bringing an original bill in the United States Supreme Court to enjoin the State of West Virginia and three private corporations from constructing a dam and a hydroelectric plant in or along New and Kanawha Rivers, alleged to be navigable rivers and therefore under the exclusive jurisdiction of the Federal Power Commission and not subject to the control, by power licenses already issued, of the State of West Virginia.[20] What the federal government wished to achieve in one action was to obtain a judicial declaration that the state was without jurisdiction because the rivers were navigable, to cancel the state licenses, stop the construction work by the private corporations, and require the latter to apply for a federal license. Hence the unusual joinder of parties. The dispute centered about a certain Hawks Nest dam and power project, already under way, which the United States contended would obstruct the navigability of the two rivers, but

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comparable with the even more precise factual setting of United States v. West Virginia, 295 U.S. 463, 474 (1935).

[17] See the cases under Public Powers and Disabilities in Borchard, Declaratory Judgments, *op. cit. supra* note 4 at 592, 594 ff.

[18] Sutherland v. Adm'r of German Property, [1933] 1 K.B. 423; Sec'y of State of Canada v. Alien Property Custodian, [1930] 3 D.L.R. 81, [1931] 1 D.L.R. 890, contested jurisdiction over enemy property.

Auckland City v. One Tree Hill Borough, [1933] N.Z. 162, contested jurisdiction to collect taxes. Similarly, David, Sheriff v. Walker, Sheriff-Elect, 212 Ky. 379, 279 S.W. 654 (1926).

City of Stamford v. Town of Stamford, 100 Conn. 434, 124 Atl. 26 (1924) (dispute as to which body had duty to repair certain bridges). *Cf.* Attorney General v. Hornsey Borough Council, [1927] 1 Ch. 331.

See Borchard, *op. cit. supra* note 4, at 607 ff., especially 608, note 84.

[19] The court also regarded as too "abstract" for decision the injunction of the State of Texas against the act enlarging the powers of the Interstate Commerce Commission and creating the Railroad Labor Board. Texas v. Interstate Commerce Commission, 258 U.S. 158 (1922).

[20] United States v. West Virginia, 295 U.S. 463 (1935).

for which a power license had been obtained by the companies from the State of West Virginia; the Federal Power Commission indicated that it necessarily would refuse a license were it applied for. The dispute therefore turned on the question whether the two rivers, one flowing into the other, were in fact and therefore in law navigable and under federal jurisdiction, a question which the court would seem to have determined conclusively by the statement: "The New and Kanawha Rivers are one continuous interstate stream, which throughout its course constitutes navigable waters of the United States."[21]

It appears also that the United States had previously brought a suit, subsequently discontinued, in the United States District Court for West Virginia against the corporation defendants to enjoin them from constructing the dam, and in that suit the State of West Virginia had intervened alleging its interest as a state in the development of power under state licenses at the Hawks Nest dam. Had that suit been continued, there would have been no question that it presented a "case" or "controversy," and every point in issue could have been adjudicated. But when later the government commenced an original suit against the state in the United States Supreme Court, with the corporations joined as defendants, the complexion of the issues seemed to change. The Supreme Court dismissed the bill on the ground that the petitioner, the federal government, did not ask the protection or allege the invasion of any "property right," nor assert any title in the bed of the rivers. It merely asserted, the court said, its exclusive authority or jurisdiction to control the navigable rivers in question and to exercise exclusive power license authority thereon, a dispute over the respective jurisdiction of the state and federal government which the court considered too "vague and ill-defined" for adjudication, but the central fact underlying which, the navigability of the rivers, the court considered to have been admitted by the motion to dismiss. Yet, in view of the construction work that had already been begun under state license and by state insistence on its exclusive jurisdiction, it seems strange that the plaintiff's bill should have been so poorly drawn as to justify the court's remark that

> . . . . the bill alleges no act or threat of interference by the State with the navigable capacity of the rivers, or with the exercise of the authority claimed by the United States or in behalf of the Federal Power Commission. It alleges only that the State has assented to the construction of the dam by its formal permit, under which the corporate defendants are acting. There is no allegation that the state is participating or aiding in any way in the construction of the dam or in any interference with naviga-

[21] *Id.* at 467.

tion; or that it is exercising any control over the corporate defendants in the construction of the dam; or that it has directed the construction of the dam in an unlawful manner, or without a license from the Federal Power Commission; or has issued any permit which is incompatible with the federal Water Power Act; or, indeed, that the state proposes to grant other licenses, or to take any other action in the future.[22]

From this it may be inferred that had the bill alleged these facts, most of which certainly were present and of which the court seems fully informed, a sufficiently adverse claim on the part of the state to warrant justiciability would have been found, a conclusion fortified possibly by Justice Brandeis' willingness to permit the United States to amend its bill. In spite of the fact that the state seems vigorously to have asserted its exclusive rights and to have supported the acts of the private corporations throughout, the court remarks that all that the state had done was to issue the power licenses, which might indicate that the state, as in *New Jersey v. Sargent*, was not deemed to have done enough tangibly to contest or dispute the federal claim. That must be the crux of the decision, for the court finds that the United States as plaintiff has sufficient interest in the maintenance of its control over navigable waters and in the enforcement of the federal Water Power Act to restrain threatened unlawful invasions of its authority, and also to bring a suit in the district court against corporation defendants for obstructing the navigable waters of the United States. It is only as against the state that the court felt that there was no actual or threatened interference with the authority of the United States, but

. . . . a difference of opinion between officials of the two governments, whether the rivers are navigable and, consequently, whether there is power and authority in the federal government to control their navigation, and particularly, to prevent or control the construction of the Hawks Nest dam and hence whether a license of the Federal Power Commission is prerequisite to its construction.[23]

This issue was considered "too vague and ill-defined to admit of judicial determination," hence there was "no justiciable controversy" between the United States and the state, whereas the concededly justiciable controversy between the United States and the private corporations should have been brought in the federal district court.

It thus seems, in spite of the possibility that a better drafted bill would have met a different reception, that the court is not favorably disposed to suits between a state and the United States, as plaintiff or defendant, invoking the court's original jurisdiction to determine questions of disputed power or jurisdiction, unless they are very concrete and relate to

[22] *Id.* at 472. [23] *Id.* at 473.

specific acts. The court evidently thinks that the acts done, threatened, announced or contemplated by the defendants in *New Jersey v. Sargent* and *United States v. West Virginia* were not sufficiently concrete to satisfy this requirement. Although opinions may differ on that point (more especially in the *West Virginia* case) and on the policy of refusing a decision in such cases (a decision which for all practical purposes was probably actually rendered), it indicates that in disputes of that type extreme care is necessary in framing the issue.

Varying influences, reluctance to pass on constitutional questions, opposition to federal jurisdiction in cases involving diversity of citizenship, a tendency to look askance upon suits invoking the court's original jurisdiction, excessive devotion to trial by combat as the condition of adjudication, have induced a narrow view of the scope of the judicial function, converging in an unduly narrow construction of the terms "cases" or "controversies."

II

But these cases by no means justify what happened in the case of *Aetna Life Insurance Company v. Haworth*, decided July 27, 1936, by the Circuit Court of Appeals for the Eighth Circuit, and at present writing on *certiorari* before the Supreme Court. In that case the Aetna Company had issued five insurance policies aggregating $40,000 on the life of one Edwin P. Haworth, in each of which the insured's wife was named beneficiary. By the terms of three of the policies, in the event of the permanent total disability of the insured, the company agreed to waive further premiums, the insurance remaining in force; in one policy, in addition to thus waiving premiums, the company agreed to pay a monthly income; and in the fifth policy, the company agreed to pay the face amount of the policy in twenty annual instalments or a life annuity in lieu of death benefits.

In 1930 and 1931 the insured ceased paying premiums on four of the policies and made claim for total permanent disability benefits thereunder; on the remaining policy he continued premiums until 1934, when he likewise claimed disability benefits. He repeatedly renewed his claim for disability benefits under the several policies by affidavits and letters and demanded that they be kept in force under the provision for waiver of premiums. The company denied that Haworth was permanently and totally disabled, denied that he was entitled to disability benefits and asserted that the policies would have to be deemed lapsed for nonpayment of premiums. These were diametrically antagonistic claims, the respective validity of which depended on the truth or falsity of the allega-

tion of total disability. If the insured was correct, he was entitled at any time to demand the cash surrender value of the policies or at his death the beneficiary was entitled to the face value of the policies minus loans. If the policies remained in force, as the beneficiary claimed, the company was required to carry $20,000 of reserves to meet them.

Up to October, 1935, the insured, in spite of his repeated claims, had failed to bring suit. Thereupon the company, desiring to be relieved of the cloud and harassment created by the allegedly unfounded claim, itself brought an action in the United States District Court for Missouri for a judgment declaring that the insured was not permanently and totally disabled as claimed—for which a jury could be impanelled—that the company was privileged to treat the policies as lapsed, and that the policies were null and void, except for a payment of $45.00 of extended insurance admittedly due at death.

Judge Otis in the United States District Court concluded, astonishingly, that there was not an "actual controversy," and dismissed the petition. He seems to have appreciated the importance of an early adjudication on the question of disability *vel non*, but appeared to believe that when the insured died the beneficiary would sue on the policy and the question of disability could then be determined. He seemed to doubt whether an "actual controversy" can arise when conflicting claims are advanced out of court. Even if that were so—and it is not so—the parties here had brought their conflicting claims into court and the suggestion that the plaintiff company had no present "rights and other legal relations," is founded on a misconception as to what constitutes "rights and other legal relations," an error manifested by the same judge in another case presently to be mentioned. The judge seemed not to understand that a party charged may institute an action against the claimant, for a judgment that there is no duty as claimed; and to accommodate his dislike of this supposedly novel form of proceeding, the precedents for which are abundant, he relied on the cliché that there was "no actual controversy."[24]

In spite of the criticism which this conclusion had received, the Circuit Court of Appeals for the Eighth Circuit held on appeal, by a majority of two to one—Judge Thomas writing the opinion with Judge Stone concurring, over a strong dissenting opinion by Judge Woodrough—that the petition failed to state facts constituting an actual controversy "in the constitutional sense" because the facts did not show that "the defendant is acting or is threatening to act in such a way as to invade or prejudicially

[24] Aetna Life Insurance Company v. Haworth, 11 F. Supp. 1016 (Mo. 1935).

affect, the rights of the plaintiff."[25] Apart from the fact that a right of the company was certainly prejudicially affected by the insistent claims of the insured, resting upon a disputed fact, the court cites in its support such irrelevant cases as *New Jersey v. Sargent*, *Liberty Warehouse v. Grannis*, and *United States v. West Virginia*, and fails to observe, as did the dissenting judge, that the *Nashville* case, involving an assertion of immunity from the demands of the Tax Collector, presented a direct authority for the *Haworth* case.[26] In the *Haworth* case the company asserted immunity and privilege from the unfounded claims of the insured. Again, the Circuit Court of Appeals, like Judge Otis, were worried by the apparent novelty of a party charged, the obligor, instituting an action against the claimant, the obligee, for a declaration of the invalidity of the claim and of release from the cloud thereby created. It is unfortunate that the court apparently had no time to examine the history of this form of proceeding or to appreciate its English and American antecedents, otherwise they could hardly have reached so intolerable and unsustainable a conclusion, which for want of historical background, had to be clothed in the strange suggestion that the issue presented no "actual controversy." As Federal District Judge Sibley remarked in a recent case almost identical with the facts of the *Haworth* case, the "remedy by declaratory judgment seems to be of ideal application to such a case."[27] Circuit Judge Woodrough went beyond the necessary conditions of justiciability, which does not demand proof of threats or imminent injury, when he described the issue in the *Haworth* case as follows:

> But there is a present, clearly-defined claim of right on both sides. The threat to the company's right is imminent in the controlling sense that it is practically certain to materialize in action; being deferred in point of time merely, to the detriment and increased vexation of the company. The insured demands present payment of certain sums and makes present demand that certain insurance be maintained. There is an alleged determination to hold the company to certain obligations, indistinguishable

[25] *Id.*, 84 F. (2d) 695 (C.C.A. 8th 1936).

[26] See note 20 *supra*. See also Gully v. Interstate Natural Gas Company, 82 F. (2d) 145 (C.C.A. 5th 1936) *cert.* denied, 80 L. ed. 967 (1936), in which the company claimed and secured a declaration of exemption under statute from allegedly unfounded claims of the Mississippi state collector of taxes. Judge Hutcheson for the Circuit Court of Appeals praises the efficacy of the declaratory judgment in such cases and criticizes the opinion of Judge Otis in Columbian National Life Insurance Company v. Foulke, 13 F. Supp. 350 (Mo. 1936), presently to be discussed.

[27] Travelers Ins. Co. v. Helmer, 15 F. Supp. 355, 356 (Ga. 1936). See also New York Life Ins. Co. v. London, 15 F. Supp. 586 (Mass. 1936), decided by Judge Brewster, part of the reasoning of which, to the effect that immunity from liability is not a "right" or "other legal relation," will be criticized hereafter. See p. 19 *infra*.

from the alleged determination of the taxing officers in Tennessee to hold the railway company as set forth in the Wallace case.[28]

It is indeed a common form of action for a plaintiff to claim relief from unfounded claims made upon him. Actions have been sustained for a declaration that the plaintiff company was under no duty to defend the insured in a particular case, because the liability asserted by third persons against the insured fell outside the terms of the policy,[29] because the policy had been cancelled,[30] or because the insured by violating the terms of the policy had relieved the insurer of liability thereunder.[31] It would have been anomalous to suggest that in these cases there was "no actual controversy." While to some judges, as at first to the English Court of Appeal in the case of *Guaranty Trust Company v. Hannay*,[32] this form of action may seem novel on the theory that the traditional "cause of action" is in the defendant, more alert judges have come to realize that there is a legal interest in the repudiation and rejection of an unfounded claim and that declaratory relief is the appropriate remedy therefor. The history of this procedure, which has an ancient lineage, will presently be considered.

The majority of the Circuit Court of Appeals in the *Haworth* case seem not to appreciate that a persistently unfounded claim prejudices the party charged and that an allegation of irreparable injury is not essential to invoke judicial protection. The court says:

It is not shown that the business of the plaintiff is prejudicially affected in any way by the alleged acts of the defendants. The alleged irreparable injuries to the plaintiff

[28] Aetna Life Ins. Co. v. Haworth, 84 F. (2d) 695, 700 (C.C.A. 8th 1936). Even Judge Otis, who erroneously seems to believe that freedom from duty (*i.e.*, privilege) or absence of liability, as he calls it, is not a "legal relation," concedes that "In the light of this precedent [the Wallace case] it cannot be said that a proceeding for a declaration that an insurance company is not liable on an insurance contract to the beneficiary under the contract after the death of the insured, during the life of the contract, is not a 'case' or 'controversy.' " Columbian Life Ins. Co. v. Foulke, 13 F. Supp. 350, 352 (Mo. 1936). Judge Otis' professed discovery that "an immunity from unfounded claims or suits by individuals is quite distinguishable from an immunity or right to be free from the unlawful tax claims by a state," as in the Nashville case, on the ground that the latter immunity was conferred by the Fourteenth Amendment (*id.* at 353, note) indicates the judge's dilemma. The legal relation of privilege and immunity from unfounded demands is identical in both cases. Whether the common law or the Constitution safeguards the privilege is immaterial to the issue.

[29] Utica Mutual Ins. Co. v. Glennie, 132 Misc. 899, 230 N.Y.S. 673 (1928) (no duty to defend because president of insured company not an "employee"). Borchard, *op. cit. supra* note 4, at 494.

[30] American Motorists' Ins. Co. v. Central Garage, 86 N.H. 362, 169 Atl. 121 (1933). *Cf.* Fidelity & Casualty Co. v. American Surety Co., 313 Pa. 145, 169 Atl. 226 (1933) (debtor sought declaration of limitation of its liability). Borchard, *op. cit. supra* note 4, at 496–97.

[31] Ohio Casualty Ins. Co. v. Plummer, 13 F. Supp. 169 (Texas 1935); Commercial Cas. Co. v. Humphrey, 13 F. Supp. 174 (Texas 1935).

[32] [1915] 2 K.B. 536.

enumerated in the petition, when examined, are found wanting in the essential constitutional ingredients of a controversy.[33]

But unjust claims, especially when continued for a period of years, do prejudicially affect the party charged and place him in a position to cite into court the party claimant, require him to prove his claims, or to remain silent thereafter. No one needs to submit indefinitely to unfounded claims of financial liability—a form of slander of title—and await the pleasure of the claimant in starting suit. British and most American courts have realized that there is a legal interest in warding off such claims and having them declared invalid, for they necessarily harass the party charged, even if they do not, as in the *Haworth* case, cause him to change his position by setting up reserves for an allegedly live policy which, were it lapsed, would be unnecessary. As for the "essential constitutional ingredients of a controversy," these are mere words serving no other apparent purpose than to confuse the issue by a *non sequitur*. As to the irreparable injuries, which the plaintiff's petition did *not* allege, it suffices to quote from the opinion of the United States Supreme Court in the *Wallace* case:

As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial.[34]

The *Haworth* opinion reiterates in various ways the court's belief that imminence of physical invasion of rights or irreparable injury is a condition of justiciability. The fact that the plaintiff must set up reserves to meet the continuing liability, if it exists, is dismissed from consideration on the ground that this duty is the result of the defendant's "acts" and that the plaintiff is "not thereby deprived of any property right" because the funds continue to be the plaintiff's property. This situation was wrongly claimed to be analogous to New Jersey's position in *New Jersey v. Sargent*, asserting that New Jersey will be deprived of revenue by federal leasing of the state's submerged lands. But whereas in the *Sargent* case no acts had been undertaken by the federal authorities to vindicate their rights under the Water Power Act, in the *Haworth* case the claimant had made harassing demands over a period of years. The court finally invokes the suggestion from the *Sargent* and *West Virginia* cases that in some unknown way the *Haworth* case involved "vague and indefinite questions," a last line of defense which is squarely contrary to fact. It

[33] Aetna Life Ins. Co. v. Haworth, 84 F. (2d) 695, 698 (C.C.A. 8th 1936).

[34] Nashville Ry. Co. v. Wallace, 288 U.S. 249, 264 (1933).

may not unfairly be said that the opinion, to use Justice Holmes' language, approximates closely a "farrago of irrational irregularities throughout."[35]

That irreparability of the injury or imminence of the invasion or threat is not a necessary condition of justiciability is clear not only from the Nashville case, but from a long line of federal authority, of which *Chicago and Grand Trunk Railway Company v. Wellman*[36] is a prominent example. There it was held that justiciability depends upon an "actual antagonistic assertion of rights by one individual against another." In many actions, such as actions for partition, to declare a marriage void, to quiet title or remove a cloud, interpleader by a stakeholder, there is as a rule no invasion or threat or delict of any kind. The occasion of the state's judicial intervention is not an actual physical infringement of the plaintiff's rights but the denial or dispute of his rights, placing him in danger or jeopardy and causing him detriment or prejudice. That was certainly true in the *Haworth* case, where the long-continued claims of the insured necessarily harassed the insurer, who had the right legally to establish the fact that the liability or duty asserted by Haworth was in fact an immunity and privilege. It is hard to conceive an issue more clearly cut.

That it is the antagonistic assertion and denial of rights, and not the irreparability of the injury which creates the "actual controversy" is apparent from other recent federal cases. Thus, in *Black v. Little*,[37] while the court refused to issue an injunction against the enforcement of the N.R.A. codes because the plaintiff had not shown irreparable injury, it nevertheless granted a declaratory judgment that the National Industrial Recovery Act was unconstitutional as to the plaintiff, the court concluding that a controversy existed *inter partes*, involving present rights and duties. Referring to the *Nashville* case as controlling, Judge Tuttle remarked:

> Here, as there, it fairly appears from the allegations of the bill . . . . that the plaintiffs are denying, while the defendants are asserting, the constitutionality, as applied to the plaintiffs, of the provisions of the Agricultural Adjustment Act . . . . ; that certain of the defendants have demanded compliance by the plaintiffs with such statutory provisions; that the defendants intend, in due course, to enforce such provisions against the plaintiffs, to their injury; and that the defendant district attorney is charged by law with the power and duty to institute against plaintiffs appropriate proceedings, both criminal and civil, to execute this law. . . . . It follows that the allegations of the bill of complaint . . . . present an actual controversy within the meaning of the Federal Declaratory Judgment Act, notwithstanding the fact that, in the

[35] Gast Realty Co. v. Schneider Granite Co. 240 U.S. 55, 59 (1916).

[36] 143 U.S. 339 (1892).

[37] 8 F. Supp. 867 (Mich. 1934).

language of the Act, 'further relief' cannot be granted. The actual controversy alleged by the bill is, in substance and effect, that the defendants *are claiming* that the A. A. A. applies to the plaintiffs . . . . ; that the defendants *claim* that the plaintiffs must comply with this law and conduct their business in accordance therewith; and that the defendants have taken the initial steps to demand and insist that the plaintiffs comply with said law, on the theory and under *the claim* that the law, as properly interpreted, applies to the plaintiffs and to their said business, while on the other hand, the plaintiffs claim that their business, as it has been conducted, is being conducted, and will hereafter be conducted, is entirely intrastate business, and that . . . . if this law be interpreted as applying to such business, the law is unconstitutional. *The very fact that the defendants contest this suit praying for such a declaration of invalidity indicates that the defendants take issue with this claim of the plaintiffs*, and evidently intend to raise either an issue of fact as to the character of the business conducted by the plaintiffs or an issue of law as to the interpretation of the statute with respect to its applicability to said business.[38]

So, in *Chase National Bank v. Pan American Petroleum Company*,[39] the court construed a statute relating to foreclosures on a dispute between the parties as to the validity of a sale under court order, before either party had proceeded to destroy the *status quo* by acting on its own interpretation of its rights. In *McAdoo v. Southern Pacific Company*[40] the issue between the parties involved the construction of the gold clause and the currency in which plaintiff's bond was payable. The issue clearly presented a justiciable controversy, but the petition was dismissed because less than $3,000 was involved.[41] In *Penn Bros. v. Glenn*[42] a declaratory action was sustained against the collector of interual revenue, in which plaintiff contested the legality of the Kerr-Smith Tobacco Act and the taxes to be collected under it, notwithstanding the objection of the Government that the only method of challenging the constitutionality of the tax and the act under which it was collected, was to pay the tax first and then sue for its refund.

It thus seems clear that an allegation of irreparable injury is not a condition of a contested issue susceptible of decision by declaratory judgment. It is the conflicting claims of right and the real and substantial nature of the issue which constitute the "actual controversy" within the meaning of the federal Declaratory Judgment Act.

[38] *Id.* at 870 (italics added). *Cf.* the language of Sanford, J., in Liberty Warehouse v. Grannis, 273 U.S. 70 (1927), dealing with an almost identical situation.

[39] 9 F. Supp. 394 (Cal. 1934).

[40] 10 F. Supp. 953 (Cal. 1935); 82 F. (2d) 121 (C.C.A. 9th 1936).

[41] See also Feist v. Société Intercommunale Belge, [1934] A.C. 161, action for a declaratory judgment on mere controverted claims of right as to the currency intended by the term pounds sterling payable in gold.

[42] 10 F. Supp. 483 (Ky. 1935).

Just as the action of the insured against the company for a declaration that the policies were in force and that the company was under a continuing liability thereunder would obviously have presented a justiciable "controversy," so the suit by the company that the policies are no longer in force, as claimed, and that the company is relieved of liability by reason of non-payment of premiums, is equally justiciable. Thus, in *Fidelity National Bank & Trust Company v. Swope*,[43] the Supreme Court sustained the justiciability of a previous suit brought under statutory authority by the City of Kansas City against interested property owners to determine the validity of an ordinance authorizing certain public works and of proposed liens on lands benefited, exactly as if the taxpayers or property owners had sought to enjoin the assessment or the liens on the ground that they and the authorizing ordinance were invalid. As was said by Justice Stone for the Supreme Court:

> That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. . . . . They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city.[44]

III. OBLIGOR V. OBLIGEE

Recent actions similar to that involved in the *Haworth* case have been dismissed by lower federal courts, not on the ground that they did not present a "case" or "controversy," but that they involved no "rights" of the plaintiff, within the supposed terms of the federal Declaratory Judgment Act, and, it was assumed, no "other legal relations." Again this error appears to have emanated from Judge Otis in the Missouri District, who decided the *Haworth* case below. In *Columbian National Life Insurance Company v. Foulke*,[45] Foulke, the insured, died while an accident policy was in force; his widow asserted that the death was accidental and made claim for the insurance under the policy. The insurance company denied liability, on the ground that the death was not accidental. As the widow failed to sue, however, the company itself initiated an action for a declaratory judgment that it was not liable under the policy, because death was not accidental. Judge Otis evidently did not like the proceeding, and then undertook to find the justifying grounds. While admitting, in unexplained contrast with his conclusion in the *Haworth* case, that the issue presented a "case" or "controversy" within the ruling of the *Nashville* case, he nevertheless concluded that it involved no "rights" or "other

[43] 274 U.S. 123 (1927). [44] *Id.* at 131. [45] 13 F. Supp. 350 (Mo. 1936).

legal relations" within the meaning of the Declaratory Judgment Act. Reminiscent of the somewhat hysterical conclusion of the Michigan Supreme Court in the *Anway* case,[46] the learned judge considered such a proceeding "an amazing, a startling evolution of procedure" and doubted that the federal act could be considered to authorize "any person against whom a claim under any contract is asserted [to] sue him who asserts the claim and obtain a declaratory judgment that there is no [or that there is] liability on the contract."

But the court was wrong, it is submitted. As will presently be shown, our law is familiar with innumerable instances where the obligor, a party charged with liability, or an alleged debtor upon whom an improper claim is made, sues the creditor or obligee for a judgment declaring that the claim is unfounded and that the plaintiff is free from the liability asserted or liable to a limited extent only. There are literally hundreds of such cases in Anglo-American law and it can only be assumed that they were not adequately presented in argument. To reach his conclusion that privilege or immunity from the claims of another was not a "legal relation" under Section One of the federal act, Judge Otis drew the inference that the term covered

> .... the relation of master and servant, creditor and debtor, husband and wife, citizen and state, lessor and lessee, bailor and bailee, owner and thing owned..... But the liability of one to another, as on contract, in tort, as liability to the State for a crime, are these liabilities legal relations? I think they are not.[47]

Again, it is submitted, the learned judge was in error. While the examples given may involve legal relations, the term was intended by the draftsmen of the act, as also explained by the Senate Judiciary Committee in its report,[48] and in dozens of cases some of which will be enumerated, to authorize the federal courts to declare in "actual controversies," the "existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status." When Judge Otis remarks, "it also seems clear to me that Congress did not intend to include 'liabilities' with the word 'rights,' except to the extent that a declaration of a given 'right' in one might involve denial of a corresponding right in some other and to that extent the absence of liability to that other," he advances a ground for a conclusion the very antithesis of that which he reached. The judge was

[46] Anway v. Grand Rapids Ry. Co., 211 Mich. 592, 179 N.W. 350 (1920).

[47] Columbian Nat'l L. Ins. Co. v. Foulke, 13 F. Supp. 350, 352 (Mo. 1936).

[48] See also hearings on H.R. 5623, April 27, 1928, p. 43. See the note accompanying Rule 67 of the proposed federal rules for Civil Procedure, Preliminary Draft, p. 116, designed to carry into effect the federal Declaratory Judgment Act.

evidently unfamiliar with the Hohfeldian analysis of jural relations. All that the insurance company wanted—and either party could have requested a jury under the federal act—was a declaration that the company was under no duty ("liability") to pay the widow on the policy because the risk was not covered by its terms. The company's "absence of liability" was the absence of "right" on the part of the widow. That could have been declared as easily when the company initiated the action as when she did, and unless there was some special hardship in pressing her to trial at the time there was no solid reason why the petition should have been dismissed on demurrer.[49]

But a court often helps to decide other cases than the one before it. In a case closely resembling the facts of the *Haworth* case, Judge Brewster of the Massachusetts Federal District Court was led or misled to espouse the Otis view of the meaning of the term "legal relations" and to exclude from its purview a claim of no-duty or privilege ("absence of liability"),[50] although the court ultimately refused to dismiss the petition on the ground that the controversy really involved the extent of the defendant's disabilities upon which turned the "right" of the plaintiff to demand the payment of premiums; that if the premiums remained unpaid without adequate cause, the policy lapsed, and the "relation" of insurer and insured no longer existed. In Judge Brewster's case the insured was stricken with arthritis and claimed total and permanent disability, the right to disability benefits and release from further payment of premiums. After the company had paid disability benefits for two years, it asserted that he had recovered from his illness, that the disability was no longer total or permanent. The insured denied such recovery and actually began suit in the state courts which, when the company removed to the federal court, was discontinued. Then the company began the present action for a declaratory judgment that the defendant was not totally disabled, that

[49] Judge Otis winds up his unfortunate conclusions by the statement: "I have searched the digests, the encyclopedias and the textbooks discussing the subject of declaratory judgments and I have found no American precedent supporting the theory of the petition here. Counsel has cited none. The explanation is not difficult." One wonders where the judge could have looked. A cursory examination of 3 Freeman, Judgments, c. 25 (5th ed. 1925), especially § 2790, 12 A.L.R. 52 (1921), 19 A.L.R. 1124 (1922), 50 A.L.R. 42 (1927), 68 A.L.R. 110 (1930), 87 A.L.R. 1205 (1933), 101 A.L.R. 689 (1936), 103 A.L.R. 1094 (1936), would have shown the scope of material available.

The cases cited and quoted in Borchard, Declaratory Judgments, *op. cit. supra* note 4, at 17 ff., 74 ff., 334 ff., would have disclosed to the judge that his assumptions and arguments were wholly destitute of foundation. The court in Gully v. Interstate Natural Gas Co., *supra* note 22, 82 F. (2d) 145 (C.C.A. 5th 1936), *cert.* denied, 80 L. ed. 967 (1936), criticizes the opinion of Judge Otis in the Foulke case.

[50] N.Y. Life Ins. Co. v. London, 15 F. Supp. 586 (Mass. 1936).

the company was under no duty to pay further disability benefits and that the policies had lapsed for non-payment of premiums.[51] Judge Brewster's conclusions on the meaning of the term "legal relations" are as questionable as those of Judge Otis and fail equally to take into account the history of that term, which by virtue of the work of commentators relieved the court from the necessity of speculation. And while it is true that in Hohfeldian analysis an immunity is not a right, when Justice Stone used the term "rights" in the *Nashville* case, which involved an immunity from taxation, he was using the term in its broad sense of including all legal relations, as did the jurist Holland. Judge Brewster's confusion, therefore, is partly the result of a play on the words "right" and "rights"; but the draftsmen of the federal act added "and other legal relations" to the word "rights" to avoid the possibility that the broad word "rights" standing alone might be used in its narrow sense and thus be deemed to exclude privileges, powers, immunities, liabilities, disabilities.

What actually troubled the courts, in the *Haworth*, *Foulke*, and *London* cases, it is believed, was the supposed novelty of a party charged or obligor or debtor initiating an action for a judgment that he is not liable as claimed. In that sense, they found themselves in the same position as the English Court of Appeal in 1915 in the case of *Guaranty Trust Company v. Hannay*,[52] where the Guaranty Trust sued Hannay for a declaration that it was under no duty to pay back to Hannay certain money which Hannay had paid over under the mistaken assumption that certain bills of lading were genuine, whereas they later proved to have been forged. The American courts in the three cases mentioned manifested their uneasiness by giving an unsustainable construction to the terms "cases" or "controversies" or "legal relations." The English judges, in a decision which has become a landmark, granted the judgment requested by a majority of two to one, but rang the changes on the term "cause of action" which they seemed to feel was a rather rigid term, suggesting that the "legal cause of action" in the "proper sense" vested in Hannay and not in the Guaranty Trust Company. This possibly led the Pennsylvania Supreme Court to the unsound conclusion that a "cause of action . . . . is not essential to the assumption of jurisdiction in this form of procedure."[53] We again have a play on words. The truth is that in *Guaranty Trust Company v. Hannay* both parties had a "cause of action" or "legal interest" in a

[51] The federal act preserves the right to a jury trial, which defendants Haworth, Foulke's widow, and London could have demanded.

[52] [1915] 2 K.B. 536.

[53] Kariher's Petition, 284 Pa. 455, 463, 131 Atl. 265, 268 (1925).

decision and either could have commenced the suit. It is quite immaterial whether the action is initiated by the creditor for the amount of the claim or by the debtor for a judgment that the creditor has no valid claim. The defeat and rejection of an unfounded claim which disturbs or renders insecure a person's rights, whether of status or property, is as much an interest capable of and in need of judicial protection as the assertion of the claim itself. This is sometimes called a "negative" declaration, or a declaration "negative in form," as the Uniform Declaratory Judgment Act provides. Such an action finds its source in the *remedium ex lege diffamari* of the Middle Ages, by which the person who challenges or threatens the security of the plaintiff is cited to come into court and prove his claim, or thereafter remain silent.[54] While thoroughly established on the continent of Europe, this type of action received its modern imprimatur in the *Guaranty Trust* case in England, where it has since been sustained on many occasions. It was definitely incorporated in the American statutes by the use of the term "rights and other legal relations" which includes the plaintiff's no-duty (privilege), no liability (immunity), no disability (power) and all the other Hohfeldian correlatives and opposites. By recognizing in the plaintiff an absence of duty or liability, the court is implicitly deciding that the plaintiff has a right to be free or an immunity from the defendant's claims, and by that very fact recognizes the plaintiff's interest in, need for, and right to judicial relief. Nothing could more clearly demonstrate therefore that he necessarily had a cause for action and therefore a "right of action." Narrow and mechanistic definitions of that term should not be permitted to confuse the courts and restrict the judicial protection which valid legal interests should receive. The unfounded claim may or may not indicate a traditional "wrong" committed or threatened. It does, however, disclose a factual situation which throws a cloud on the plaintiff's rights, a cloud which jeopardizes or prejudicially affects his peace of mind, his freedom, his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it promotes social peace.

Thus, in a petition asserting immunity against the government, the plaintiff successfully claimed a judgment that he was under no duty to answer an official questionnaire for taxation purposes on the ground that it was invalid.[55] In a commercial case the plaintiffs obtained a judgment

[54] Borchard, Declaratory Judgments, *op. cit. supra* note 4, at 205 ff.

[55] Dyson v. Att'y Gen'l, [1911] 1 K.B. 410, [1912] 1 Ch. 158. *Cf.* Holland v. Administrator of German Property, 155 L.T.R. 341 (Ch.D. 1936) (defendant official's claim upon plaintiff trustees declared unfounded and invalid).

that they were relieved from the further performance of certain obligations under a contract, as claimed by the defendant.[56] In a case involving domestic relations,[57] the plaintiff sought a judgment declaring that her husband had not been validly divorced in Mexico, and that she was therefore still his wife. In a case involving the construction of a lease,[58] the plaintiff lessor successfully asserted that he was under no duty to erect a three-story building to replace a burned building, as defendant lessee demanded, but was privileged under the lease to erect a two-story building as he offered. In a case involving the governmental regulation of business,[59] plaintiff obtained a declaration that he was not subject to a heavy license fee because the statute which imposed this obligation on one county only was unconstitutional. In a case involving the construction of a contract and the effect of war upon its obligation, the plaintiffs successfully obtained a declaration that they were no longer bound to observe certain long-term contracts to deliver iron ore to the defendants in the future on the ground that the war had terminated the contract.[60] In a suit by the borrower against the lender of a bank loan,[61] the plaintiffs sought a declaration that they were under no duty to repay defendant creditor certain loans in British pounds, as claimed, but were privileged to repay the debt in Russian roubles, and were thereupon entitled to recover certain pledged securities. In a suit by administrative officers charged with the destruction of "temporary" buildings, claimed by the

[56] Société Maritime v. Venus Shipping Co., 9 Com. Cas. 289 (1904). In this case the plaintiffs had undertaken by contract to load ore on steamers to be furnished by one L, the alleged assignor of the defendants, for five years. The plaintiffs claimed that there was no valid assignment to the defendants, that L was not the defendants' agent, and that there was no novation. As the original contract had over a year still to run, and as plaintiffs did not wish to break it and subject themselves to an action for damages, they availed themselves of the valuable privilege of seeking from the court a declaration that the contract was no longer binding on them. In making the declaration sought, Channell, J., remarked: "Showing the necessity of a decision upon it, I think they are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to refuse to perform it and then to be liable to heavy damages for not performing it for the space of the next year and a half. If they are wrong, they would be liable for damages down to the time of the judgment of the court while they are refusing to perform; but upon the court saying that they were bound, they would then say: 'We will now go on with it for the remainder of the time.' I think that is a sufficient reason [for making the declaration]." *Cf.* Kalman v. Shubert, 270 N.Y. 375, 1 N.E. (2d) 470 (1936) (that certain writings claimed by defendant to constitute a contract created a cloud on plaintiff's privilege and did not constitute a contract).

[57] Baumann v. Baumann, 250 N.Y. 382, 165 N.E. 819 (1929).

[58] Girard Trust Co. v. Tremblay Motor Co., 291 Pa. 507, 140 Atl. 506 (1928).

[59] Erwin v. Buckner, 156 Tenn. 278, 300 S.W. 565 (1927).

[60] Ertel Bieber Co. v. Rio Tinto Co., [1918] A.C. 260.

[61] Russian Bank v. British Bank, [1921] 2 A.C. 438.

owner to be permanent and to expose the officers to civil and criminal liability if they destroyed them, the officers successfully sued the owner for a declaration that his buildings were "temporary" and that they were hence privileged to tear them down.[62] In resisting a recent tax claim of the City of New York,[63] the plaintiff oil companies obtained a declaration that they were not under a duty to pay the sales tax on the entire sale price of their gasoline, which itself included an excise tax, but were privileged to pay the sales tax on the net price, *i.e.*, after deduction of the excise tax. The alleged infringer of a patent has been given a judgment that he was not infringing the patent of the defendant as charged, a new and striking application of declaratory relief.[64]

Thus, the assertion of freedom from the unfounded claim of another is one of the commonest and most useful applications of the action for a declaratory judgment. It is employed against private and against public defendants, whose claims to money, services, administrative or other control harass the plaintiff or prejudicially affect him. Debtors demanding relief from the unjustified claims of their alleged creditors,[65] lessors and lessees claiming an absence of duty under the terms of the lease,[66] covenantors claiming release from the terms of a restrictive covenant,[67] beneficiaries of gifts or legacies on condition, asserting release from a claim of

[62] Ruislip-Northwood v. Lee, 145 L.T.R. 208 (K.B. 1931). See the remarks on the utility of this action by Greer, L. J., at 213–14. *Cf.* State v. Adelmeyer, 265 N.W. 838 (Wis. 1936) (that state privileged to erect certain dams and restore water levels without paying compensation—denied on merits).

[63] Socony-Vacuum Oil Co. v. City of New York, 247 App. Div. 163, 287 N.Y.S. 288 (1936).

[64] Zenie Bros. v. Miskend, 10 F. Supp. 779 (N.Y. 1935). *Cf.* 45 Yale L. J. 1287 (1936). In New Discoveries v. Wisconsin Foundation, 13 F. Supp. 596 (Wis. 1936), the plaintiff's, alleged infringer's, allegations were deemed hypothetical only. The court's explanation is unconvincing.

[65] Cloverdale School Dist. v. Peters, 88 Cal. App. 731, 264 Pac. 273 (1928) (that defendant has no right to claim salary under alleged contract). Boston & M. R.R. v. Peterborough R.R., 86 N.H. 217, 166 Atl. 275 (1933) (plaintiff not bound to pay federal income tax under terms of lease). Similarly, Owen v. Fletcher Bldg. Co., 99 Ind. App. 365, 189 N.E. 173 (1934).

See other cases noted in Borchard, *op. cit. supra* note 4, at 335, note 97.

[66] Lessor's privilege to terminate lease and let premises to third party: Murray Motor Co. v. Overby, 217 Ky. 198, 289 S.W. 307 (1926); Pulsifer v. Walker, 85 N.H. 434, 159 Atl. 426 (1932). See other cases in Borchard, *op. cit. supra* note 4, at 333.

Lessee's privilege to sublet without landlord's consent: Marcelle, Inc. v. Marcus Co., 274 Mass. 469, 175 N.E. 83 (1931); Borchard, *op. cit. supra* note 4, at 329 ff.; to demolish a building without incurring forfeiture: Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N.W. 618 (1930).

[67] Hess v. Country Club Park, 213 Cal. 613, 2 P. (2d) 782 (1931). *Cf.* Union Trust Co. v. Kaplan, 247 App. Div. 588 (N.Y. 1936) (privileged to sue for interest and taxes without forfeiture of privilege subsequently to pursue mortgage indebtedness).

forfeiture for alleged non-performance of the condition,[68] the citizen or businessman claiming the privilege to conduct his life or business free from the restraints of governmental regulations, burdens, license, fees, taxes, or penalties deemed invalid,[69] all present issues in which the plaintiff seeks a judgment that he is under no duty or not liable, as claimed, or that he is not subject to the demands or restrictions of the defendant individual or authority. He has a legal interest in such a judgment from the moment the claim or restriction is advanced, if in fact it exposes him to prejudice, jeopardy, or material inconvenience. A person has a legal right to be free from unjust demands and claims, and to ask judicial protection by a declaration of privilege or immunity, if defendant persists. If, as is well established, an insurance company may go into a court of

[68] Austen v. Collins, 54 L.T.R. 903 (Ch. 1886) (plaintiff legatee, required to take certain name and arms, could not obtain the arms, requests declaration of substantial compliance and release from forfeiture).

[69] Tirrell v. Johnston, 86 N.H. 530, 171 Atl. 641 (1934). In denying an injunction to restrain the attorney-general from criminally prosecuting plaintiff for violation of a tax statute, but in approving the substitution of a prayer for a declaratory judgment, Peaslee, C. J. remarked: "When the law is settled it will be obeyed. It is therefore immaterial whether the proper proceeding is an application for a restraining order or a petition for a declaratory judgment. A final interpretation of the law in either form of proceeding would be binding upon these parties."

The New York Appellate Division, First Dept., was, it is submitted, wrong in concluding in International Mutoscope Reel Co., Inc. v. Valentine, 247 App. Div. 130, 286 N.Y.S. 806, aff'd, 3 N.E. (2d) 453 (1936), that plaintiff's demand for a declaration that its machines were not gambling devices, was ill-founded. It was the proper form of proceeding and the court in fact made a conclusive determination (a declaratory judgment) that the machines were gambling devices. The alleged reasons against issuance of the judgment are thus refuted by the decision itself. The quotation from James v. Alderton Dock Yards, 256 N.Y. 298, 305, 176 N.E. 401, 403 (1931), which is misleading if detached from its context, is inapplicable. See the following cases in which a citizen threatened with criminal penalty under statute or ordinance challenged the validity of the legislation before he committed the forbidden act or before any prosecution was begun: Little v. Smith, 124 Kan. 237, 257 Pac. 959 (1927); Pathé Exchange, Inc. v. Cobb, 202 App. Div. 450, 195 N.Y.S. 661 (1922), aff'd. 236 N.Y. 539, 142 N.E. 274 (1923) (that plaintiff's "news reel" was not subject to screen censorship); Utah State Fair Ass'n v. Green, 68 Utah 251, 249 Pac. 1016 (1926) (plaintiffs privileged to conduct horse races without danger of prosecution). Eddy v. Tierney, 267 N.W. 852 (Mich. 1936) (privileged to erect "public garage under city ordinance").

The New York Unemployment Insurance law, whose constitutionality was approved by the Court of Appeals, Chamberlin, Inc. v. Andrews, 159 Misc. 124, 286 N.Y.S. 242 (1936), 271 N.Y. 1, 2 N.E. (2d) 22 (1936), is now under consideration by the United States Supreme Court on a mere prayer for declaratory judgment.

So, persons warned by the Postmaster General that if they continued to conduct a prize contest over the radio answered by mail, they would be subject to a fraud order for conducting a lottery unless they bought the stamps themselves, a requirement they deem unjustified, have a sound case for a declaratory judgment that they are privileged to conduct their business, free from the requirement and exempt from the charge.

equity within the contestable period and seek relief from *possible* assertion of liability (alleging that the insured was in ill-health when the policy was issued),[70] why may not the company disclaim liability for cause after *actual* assertion of liability by the insured, who in both cases fails to bring suit?

IV. PREMATURITY

Implicit in the judgment of the Circuit Court of Appeals in the *Haworth* case is the suggestion that the insurance company's complaint was premature because the issue could await adjudication on the death of the insured or because the defendant's unfounded claim constituted no threat of irreparable injury. It is not always easy to determine when a grievance is sufficiently ripe to warrant invoking judicial relief. The Supreme Court has not been altogether consistent. At times they have appreciated that the mere passage of a statute cast a sufficient cloud or prejudice upon the complainant to justify an action for judicial relief. So in *Pennsylvania v. West Virginia*,[71] *Euclid v. Ambler Realty Company*,[72] and *Carter v. Carter Coal Company*,[73] the mere passage of the statute imposed burdens, dangers and prejudice upon the plaintiff justifying an immediate resort to the courts in challenge of its constitutionality. Even administrative action, if threatened and certain to occur, such as the collector's claim that the plaintiff is subject to tax and will be assessed, presents a sufficient attack or impairment of the plaintiff's privilege to justify an action to enjoin the assessment.[74] In *Pierce v. Society of Sisters*,[75] a proceeding for an injunction by the owners of a parochial school against the enforcement of a law requiring all children to attend public schools was not considered premature, although the law was not to come into force for four years after the act was passed and nearly three years after the suit was brought. That the injury was not then irreparable and that there was a remedy at law seems apparent, so that the propriety of an injunction is more than doubtful. Yet this restricted vehicle of relief was abused to permit the court to grant what was really desired, a declaratory judgment. In *Terrace v. Thompson*[76] the parties merely proposed to conclude a lease of land between an American and a Japanese and were deterred from actually concluding it by fear of criminal prosecution and forfeiture of the land

[70] Equitable Life Assur. Soc. v. Klein, 315 Pa. 156, 173 Atl. 188 (1934); N.Y. Life Ins. Co. v. W. Bodek Corp., 320 Pa. 347, 182 Atl. 384 (1935).

[71] 262 U.S. 553, 592 (1923). [72] 272 U.S. 365, 386 (1926). [73] 298 U.S. 238, 287 (1936).

[74] City Bank Co. v. Schnader, 291 U.S. 24, 34 (1934).

[75] 268 U.S. 510, 535 (1925). *Cf.* Swift v. United States, 276 U.S. 311, 326 (1928).

[76] 263 U.S. 197, 216 (1923).

under a law of the State of Washington. At that stage they undertook to enjoin the enforcement of the act, on the ground that although allegedly unconstitutional, its ostensible validity hampered their freedom in dealing with each other in the lease of land. Citing the seriousness of their intent to conclude the lease, Justice Butler for the court considered the action not premature, remarking "they are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights." Here is the classic ground for the statement that breach, physical attack, consummated violation, are not necessary to place the parties in gear or to condition justiciability, but that a mere antagonistic assertion and denial of right, if definitely affecting person or property, constitutes the essence of a "case" or "controversy" and the essential condition of adjudication.

Yet in *New Jersey v. Sargent* and *United States v. West Virginia* the Supreme Court concluded that not enough had been done to join issue effectively. In the *Sargent* case it was suggested that some specific administrative action to enforce the Water Power Act was necessary as a condition of justiciability, a ground which seems to have been dispensed with in the *Carter* case and the *Euclid* case. In the *West Virginia* case it was concluded that the State of West Virginia had not taken sufficient steps to concretize the issue, although it would seem as if the issuance of the licenses by the state and the long-standing dispute between the federal and state governments as to the power to issue those very licenses, and the act of the companies in building a named dam without federal license, should have been deemed specific enough to take the case out of the category of "abstract" issues.

When are the facts sufficiently developed to admit of adjudication, and when are they vague, contingent and uncertain so as to justify a refusal to decide? A person seeking a declaration of his privilege to act free from the restraints of the defendant, or an obligor who asks a declaration of his absence of duty or liability, must necessarily show that he has a practical interest in the determination of the question, and not merely an abstract curiosity. He must also show the concreteness of his interest, although not necessarily that he has already acted. Although in the *Haworth* case the operative facts had all occurred, the plaintiff's willingness and readiness to perform in a certain way may justify his invoking a judicial decision that he is privileged thus to discharge his obligation, as in the *Girard Trust* case and the *Russian Commercial Bank* case. Evidence that the parties were prepared to and desired to conclude a lease in the *Terrace* case was deemed sufficient to place them in gear to challenge a public

official who under statute was authorized to prosecute them if the lease was actually concluded. Thus, the imminence or practical certainty of the act or event in issue, or the intent, capacity and power to perform, create justiciability, so far as the plaintiff is concerned, as clearly as the completed act or event, and present a fact situation easily distinguishable as a rule from remote, contingent and uncertain events that may never happen and upon which it would be improper to pass as operative facts. Thus, the validity of proposed acts of the plaintiff may be placed in issue, before risk or penalty has been incurred, provided the court is impressed with their seriousness and imminence. And yet in the absence of a threat or sanction emanating from the defendant in a position to make it effective, we do not as a general rule advocate going quite so far as the New Zealand Declaratory Judgments Act of 1908, Section 3, which provides:

> Where any person desires to do any act the . . . . legality of which depends on the construction . . . . of any statute . . . . , such person may apply to the Supreme Court by originating summons . . . . for a declaratory order determining any question as to the construction . . . . of such statute.[77]

This is practically an order to show cause against a defendant who may have made as yet no adverse claim. But the adverse claim having been made there seems no reason to withhold adjudication at the initiative of a person who asserts privilege or immunity.

So the defendant's acts must be sufficiently definite to constitute a genuine threat or prejudice to the plaintiff's peace of mind or interests. An unfounded claim of right to receive money from the plaintiff is clearly such a prejudice, justifying relief. As already observed, the mere enactment of a statute embodying burdens on the plaintiff may carry such prejudice, although prior to its enactment a complaint would obviously be premature.[78] The same is true when administrative action is the source of prejudice.[79] But mere plans or preparation for administrative action, if ripe enough, may be sufficient to warrant a justiciable fear and jeopardy.[80]

As already observed, the mere threat of a criminal penalty attached by law to the performance of an act affords those affected a necessary legal

[77] See Smith v. Kairanga County, [1917] N.Z. 567. Australian Mut. Prov. Soc. v. Att'y Gen'l, [1916] N.Z. 179; *cf.* Bank Savings Life Ins. Co. v. Baker, 120 Kan. 756, 244 Pac. 862 (1926) (privileged to forfeit policies under statute).

[78] City and County of Denver v. Denver Land Co., 85 Colo. 198, 274 Pac. 743 (1929).

[79] Roesin v. Att'y Gen'l, 34 T.L.R. 417 (C.A. 1918) (before he was called to military service, plaintiff claimed that he was not a Russian, hence exempt).

[80] Colorado Coal Co. v. Walter, 75 Colo. 489, 226 Pac. 864 (1924) (defendant started plans to take in eminent domain water which plaintiff claimed the right to use).

interest in a judgment raising the issue of validity, immunity or status. If the plaintiff's interest is immediate, such a suit can not be regarded as premature.[81] Contests between city and state officials as to their respective powers and duties are justiciable, provided they are adverse and the defendant is in a position to make his hostility effective and limit the plaintiff's freedom of action or security. In these cases the proceedings are in effect orders to show cause why plaintiff is not privileged, free from any restraints of the defendant.[82]

In many private law cases, a mere denial of the plaintiff's right by a qualified person creates a legal interest in judicial relief.[83] Thus, in the patent cases recently decided,[84] the mere charge by the defendant patentee made to the plaintiff, or to customers, licensees or others affected, stating that the plaintiff's manufactured article infringed the defendant's patent gives the plaintiff a legal interest in an adjudication; without such threat or adverse claim, however, the plaintiff would not be in a position to invoke judicial relief merely because of his fear that he might be infringing another's patent. Yet covenantors who find their restraint in a covenant or those affected by a document or other cloud have a sufficient interest by that fact alone to institute an action for a declaration that change of circumstances has released them from the restriction. The defendant's mere assertion that a contract is at an end, without other repudiation, warrants the plaintiff in invoking a judgment that it is still in force.[85] *Per contra*, Haworth's claim that he was disabled, entitled to disability benefits and that the policies were in force without further payment of premiums justified the company in seeking a declaration that he was not disabled, and that the policies had lapsed for non-payment of

[81] *Cf.* the Terrace and Carter cases, *supra*. *Cf.* State *ex rel.* Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1921), and comment in Borchard, *op. cit. supra* note 4, at 47–48.

[82] See the correspondence in the New York Law Journal arising out of the case of Johnson, Justice of the City Court v. Flynn, Secretary of State, issues of July 21, 1936, July 27, 1936, and August 11, 1936, referring to Wingate, Surrogate, v. Flynn, 139 Misc. 779, 233 App. Div. 785, 256 N. Y. 690 (1931); Board of Education v. Van Zandt, 119 Misc. 124, 204 App. Div. 856 (1922).

[83] Sharon v. Tucker, 144 U.S. 533 (1892) (adverse possessor v. holder of record title). State *ex rel.* Enright v. Kansas City, 110 Kan. 603, 204 Pac. 690 (1922); Jenkins v. Price, [1907] 2 Ch. 229. Kariher's Petition, 284 Pa. 455, 131 Atl. 265 (1925) (defendant prospective lessee's unfounded claim that plaintiff prospective lessor had only a life estate justified action for declaration that plaintiff's title was a fee).

[84] See note 64 *supra*.

[85] Harrison v. Walker, [1919] 2 K.B. 453; Spettabile Consorzio v. Northcumberland Ship Co., 121 L.T.R. 628 (C.A. 1919); Pacific States Corp. v. Pan-American Bank of California, 213 Cal. 58, 1 P. (2d) 4 (1931).

premiums. The mere claim of right adverse to that of the plaintiff[86] or even, under circumstances, the refusal to recognize the plaintiff's rights[87] may be sufficient to warrant judicial relief, establishing the plaintiff's right and privilege free from the adverse claims of the defendant.

The great public and private disturbance arising out of the inability to obtain prompt adjudications on contested rights and the narrowness of view which has encumbered the terms "cause of action," "cases" and "controversies" with hampering restrictions have necessarily led to public movements seeking to impose on the highest courts, in the matter of legislation, the duty to render advisory opinions on constitutionality.[88] There are many objections to the assignment of such a function to the courts, especially to the United States Supreme Court. One way to avert the imposition of such an obligation would be to give a reasonable scope to the action for declaratory relief, along the lines developed in England and the British dominions and in most of our states, so as to take advantage of its prophylactic functions in adjudicating disputes at their inception and prevent the accumulation of injury and destruction which accomplished law-breaking and necessarily irreparable breach of obligations carry in their wake. Breadth of view has usually distinguished the United States Supreme Court. At no time in our history has it been more necessary than now.

[86] Woodward v. Fox West Coast Theaters, 36 Ariz. 251, 255, 284 Pac. 350, 351 (1930) (plaintiff sues to establish validity of lease, denied by defendants).

[87] Lane Mortgage Co. v. Crenshaw, 93 Cal. App. 411, 433, 269 Pac. 672, 681 (1928).

[88] See the article, Declaratory Judgments and Advisory Opinions, 19 Am. Jud. Soc. J. 181–84 (1936).