THE UNIFORM DECLARATORY JUDGMENTS ACT

By Edwin M. Borchard*

MINNESOTA is the thirtieth American state\(^1\) to adopt in one form or another the procedure for declaratory judgments, and the eighteenth to adopt the Uniform Act. The bill proposing it had been pending in the Minnesota legislature for a number of years, and the Uniform Law Commissioners of Minnesota, notably Mr. Donald E. Bridgman, had devoted much energy and intelligence to eliciting the experience of other states as to the practical operation of the act for the information of the Minnesota legislature and, incidentally, of other states that had not yet adopted it. Its passage, therefore, is something of a crowning achievement of the public service of the Uniform Law Commissioners of Minnesota.

The main characteristic of the declaratory judgment, which distinguishes it from other judgments, is the fact that, by the act authorizing it, courts are empowered to adjudicate upon disputed legal rights "whether or not further relief is or could be claimed."\(^2\) The judgment stops with the adjudication of the rights in issue and is not remanded to a sheriff for execution. While the opportunity thus afforded for deciding legal issues without the appendage of a coercive decree has enabled the courts to expand their usefulness in the determination of disputes, the customary conditions of adjudication are not thereby altered. So slight is the

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\(^1\)Minnesota, Laws 1933, ch. 286, p. 372. In addition, Hawaii, the Philippines, and Puerto Rico have adopted the statute.

\(^2\)"Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Uniform Act, sec. 1.
modification effected by dispensing with a writ of execution\textsuperscript{a} that it was adopted in England and elsewhere by mere rule of court.\textsuperscript{4}

Moreover, English and American courts had from time immemorial rendered judgments construing wills, interpreting deeds, trying disputed titles to property, real and personal, quieting title and declaring the non-existence of clouds thereon, declaring a plaintiff cestui or a supposed trust invalid, declaring the rights of stockholders in corporations, the nullity of instruments and legal relations, including marriage, the limitation of plaintiff's liability, the obsolescence of covenants restricting the use of land, and judgments in an infinite variety of other proceedings which end in adjudications not requiring, and often not susceptible of, any coercive decree.\textsuperscript{5} These judgments declare the existence of rights in doubt or uncertainty, rather than create new rights. Why there should ever have been any question as to the strictly judicial nature of the declaratory judgment is explainable only by the misconception, now conclusively dissipated, that the declaratory judgment was somehow the equivalent of an advisory opinion or the decision of a moot case. Only on that assumption can one explain the early challenge to the constitutionality of the declaratory judgment statute of Michigan,\textsuperscript{6} now repudiated at its source,\textsuperscript{7} and

\textsuperscript{a}That a decree for execution is not an inherent part of any judgment, see Fidelity Nat'l Bank and Trust Co. v. Swope, (1927) 274 U. S. 123, 47 Sup. Ct. 511, 71 L. Ed. 959; Old Colony Trust Co. v. Commissioner of Internal Revenue, (1929) 279 U. S. 716, 49 Sup. Ct. 499, 73 L. Ed. 918; Nashville, Chattanooga & St. Louis Ry. v. Wallace, (1933) 288 U. S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730.

\textsuperscript{4}Order XXV, Rule 5, 1883, reads: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not." This rule has been adopted in most British jurisdictions.

\textsuperscript{5}A few interesting Minnesota declaratory judgments may be mentioned. In Porten v. Peterson, (1918) 139 Minn. 152, 166 N. W. 183, a vendee not yet entitled to specific performance because all the instalments of the purchase price had not yet been paid sued the vendor, who had repudiated the contract by refusing to receive further instalments, for a judgment declaring his equitable title. In Slingerland v. Slingerland, (1910) 109 Minn. 407, 410, 124 N. W. 19, a woman sued her husband for a judgment that a contract for the release of her dower was void because obtained by fraud. In Deaver v. Napier, (1918) 139 Minn. 219, 166 N. W. 187, plaintiff holder of a fee title asked judgment under statutory provisions settling the adverse claims of defendant, who held a tax title.


\textsuperscript{7}Washington-Detroit Theatre Co. v. Moore, (1930) 249 Mich. 673, 229 N. W. 618.
the oblique dicta of the United States Supreme Court,\(^8\) now overruled unanimously in *Nashville, Chattanooga & St. Louis Ry. v. Wallace.*\(^9\) The issue of constitutionality should never have been raised, for it never had a legitimate foundation. If considered at all, it should have been settled by the remark of Judge Rodenbeck that it was "not open to question."\(^{10}\) The doubt unjustifiably created by erroneous assumptions as to the nature of declaratory judgments nevertheless hampered the ready adoption of the procedure, a wider appreciation of its practical utility, and the enactment up to the present moment of the bill authorizing the federal courts to render declaratory judgments.\(^{11}\)

**AN ALTERNATIVE REMEDY.** But while the power to render judgments without an appended coercive decree is not essentially novel, its general recognition as a procedural institution has opened the door to the adjudication of innumerable complaints and controversies either (a) not theretofore capable of judicial relief or (b) not theretofore prosecuted except for coercive relief. In this second type of declaratory action, where "further relief," i. e., execution by way of injunction, damages, specific performance, mandamus, *could* have been but is not claimed, the prayer for a declaratory judgment alone evidences the fact that the plaintiff is content with an adjudication of the disputed right, being satisfied that the defendant will not require the state's coercion to carry out the judgment. Should he refuse, however, section 8 of the Uniform Act\(^{12}\) enables the plaintiff on petition to obtain the neces-


\(^{9}\) (1933) 288 U. S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730. On the constitutionality of the declaratory judgment, with a discussion of the state and federal cases down to 1931, see Borchard in (1931) 31 Col. L. Rev. 561. Since the fourteen state decisions upholding the constitutionality of the act, there mentioned, the act has been sustained in Lynn v. Kearney County, (1931) 121 Neb. 122, 236 N. W. 192; Faulkner v. City of Keene, (1931) 85 N. H. 147, 155 Atl. 195; Holly Sugar Co. v. Fritzler, (1931) 42 Wyo. 446, 296 Pac. 206; San Luis Water Co. v. Trujillo, (Colo. 1933) (1933) 26 P. (2d) 537; Whiteside v. Merchants Nat'l Bank, (Mass. 1933) 187 N. E. 706. See also Ellingwood in (1933) 28 Ill. L. Rev. 74.


\(^{11}\) The federal act has passed the House three times, but has been held in the judiciary committee of the Senate, notwithstanding the favorable report of a subcommittee. Early enactment now seems likely. See Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 70th Cong., 1st sess., on H. R. 5623 (1928).

\(^{12}\) "Further relief based on a declaratory judgment or decree may
sary decree, for the judgment is res judicata. The declaratory procedure in this case is an alternative remedy, and the occasional suggestion in Pennsylvania, Hawaii, Michigan and elsewhere that a declaratory judgment will not be rendered because another remedy was available is an error of law and a flat contradiction of the express words of the statute, which contemplates that a declaratory judgment may be sought notwithstanding the fact that an executory decree might have been prayed for. The words "whether or not further relief is or could be claimed" should have made that clear. While it is true that a declaratory judgment is usually denied where a specific statutory remedy for a special type of case has been provided, and while this limitation was recognized by the Pennsylvania Supreme Court in Kariher's Petition, a leading case, the Pennsylvania court subsequently, without realization of the mistake, misquoted its own words to the effect that the declaration will be denied where "another statutory remedy has been specially provided for the character of case in hand" to make them read "another equally serviceable rem-

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." Uniform Act, sec. 8.

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edy,” which in later cases evolved into the term “another established remedy.” Thus, the declaratory judgment is mistakenly characterized as if it were an extraordinary remedy, not to be employed where another remedy is available, a conclusion which cannot be too firmly repudiated as in conflict with the statutes and with the history and practice in England and the United States generally. Were further evidence of the error required, it will be found in the fact that it is common practice to combine the prayer for a declaration with one for injunction or other coercive relief, a practice which has the advantage of enabling the court to issue the declaration while denying for any variety of reasons the injunction, a denial which under traditional practice would result in a failure to decide the substantive issue and thus leave the whole litigation abortive. Indeed, the court itself, in British jurisdictions, finding that injunction, damages, specific performance, or other coercive relief requested cannot be given, often sua sponte grants instead a declaration of rights, thus enabling the substantive issues to be decided and the case terminated. That practice, in the light of the growing flexibility of procedure, is worthy of emulation in the United States.

These declaratory actions, in which a coercive remedy might have been sought but was not, ought to be encouraged, for they

19Leafgreen v. La Bar, (1928) 293 Pa. St. 263, 142 Atl. 224.
22In Hurley v. Kincaid, (1932) 285 U. S. 95, 52 Sup. Ct. 267, 269, 76 L. Ed. 637, an injunction was sought against administrative officers to determine whether they were privileged to endanger the plaintiff’s land by overflow; this required five separate and inconclusive court arguments before the Supreme Court—without passing on the substantive issues—decided that he was not entitled to an injunction. It is hardly conceivable that in England or in any other jurisdiction enjoying declaratory judgment procedure such an exhibition of judicial circuity would have been possible. See Jennings, Declaratory Judgments against Public Authorities in England, (1932) 41 Yale L. J. 407.
manifest the important social function of deciding controversies at their inception—thus avoiding embittered relations and perhaps irretrievable losses—and enable a plaintiff to seek a mild rather than a drastic remedy with all its consequences. They assume that the operative facts, such as breach or other overt "wrong," which condition the traditional remedy, have actually occurred. Yet they recognize the value of an option in the prayers for relief. They recognize that the prayer for relief does not condition or determine the cause of action and that the plaintiff, in the absence of some public reason, should have a free choice of remedies. They recognize that the same state of facts may give rise to a variety of legal interests, justifying a variety of relief, and that it is not a judicial function to force upon the claimant a drastic remedy when a mild one will suffice. A procedure for adjudicating conflicting claims of right which leaves the parties amicable and the social and economic relations unimpaired seems preferable to a requirement of violence, acrimonious hostility, and perhaps permanently sundered relations.

**WHEN EXCLUSIVE.** It is, however, the more spectacular uses of the declaratory judgment, designed to negative a claim or cloud emanating from the defendant, or to assert the plaintiff's privilege or immunity or the defendant's no-right or disability to impair the plaintiff's interests, that have attracted more striking attention. Here the declaratory judgment is an exclusive remedy, for there is no other way in which the plaintiff's interests can be judicially protected, unless the defendant proceeds so far, by threat or violence, as to lay the foundation for an injunction or damages. Opportunity for judicial relief in these cases enables a plaintiff to try a disputed issue before a breach or overt "wrong" has occurred, and enables him to look before he leaps and thus escape peril, insecurity, and dilemma. In this classification may be included the many cases in which a plaintiff seeks a declaration that he is not liable, as claimed, or that he is privileged to act, for example, to build a structure, notwithstanding a purported but disputed restriction in a covenant; that he is released from the obligations of a contract because of changed conditions by natural or human events, such as war or fire; that a plaintiff is free to assign, notwithstanding a threat of forfeiture or breach if he does so, thus permitting adjudication to precede rather than follow an overt act, possibly mistaken; cases in which plaintiff debtors sue their
creditors for a declaration of their non-liability or limited liability only; in which a plaintiff claims privileges, such as that of sale, mortgage, easement, etc., free from the contrary claims of the defendant; in which plaintiffs seek privileges or immunities against the Government, such as immunity from taxation, especially where injunction is impossible, or immunity from license, zoning requirement, other governmental restriction, or even criminal prosecution; in which administrative officials seek a declaration of their privilege to act, without incurring liability either to private parties or the government, thereby enabling public acts to be undertaken free from the cloud of illegality and penalty. Claims of validity by the one challenged are as justiciable as claims of invalidity by the challenger. As the United States Supreme Court remarked in a case in which a city brought an action for the declaration of the validity of certain improvement bonds it was about to issue:

"[The issue] cannot be deemed any the less so [a case or controversy] because through a modified procedure the parties are reversed and the same issues raised are finally determined at the behest of the city."

It is this type of case, in which the plaintiff often seeks a declaration to the effect that he is under no duty to the defendant, that accounts for the clause in section 1 of the Uniform Act that the declaration may be given in "affirmative" or "negative" form, for there is as much legal interest in disclaiming an asserted liability as in invoking one. This type of case also accounts for the special provision of section 3 of the Uniform Act to the effect that "a contract may be construed either before or after there has been a breach thereof." The opportunity of deciding a dispute as to the construction or interpretation of a contract before either party has taken the drastic and possibly fatal step of purported breach serves to stabilize contractual relations, makes breach unnecessary as a condition of adjudication of the dispute, and preserves the status quo and the legal structure from impairment or

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24This was the fact situation in Nashville, Chattanooga & St. Louis Ry. v. Wallace, (1933) 288 U. S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730.
25An extensive description and analysis of the many types of cases illustrating this need of declaratory adjudication will be found in the article, Borchard, Judicial Relief for Peril and Insecurity, (1932) 45 Harv. L. Rev. 793, 845, and in its successor, Borchard, Judicial Relief for Insecurity, (1933) 33 Col. L. Rev. 648.
ruin, while interpreting it when dispute arises. Here we find the new types of legal interest which now receive judicial protection. Equity grew in usefulness by recognizing such new interests; the declaratory action is an exemplification of the same process. There is no less justiciability in the construction of a contract or other instrument than there is in the construction of a will; and it ought to be generally recognized that the vindication of assailed or challenged rights, the clarification and stabilization of unsettled legal relations, the removal of legal clouds which create peril, insecurity, fears, and doubts—in short, the establishment of social peace in the community, without the necessity for prior violence, is the primary social function. The destruction of the status quo is no longer a necessary condition of a justiciable issue.

**JURISDICTION AND PROCEDURE**

The Uniform Act provides that "courts of record within their respective jurisdictions shall have power to declare rights," etc. This language was intended to indicate, first, that existing jurisdiction over parties and subject-matter was not meant to be altered, and secondly, that only a "new" procedural device or vehicle of relief was afforded. As already observed, the procedure is not really novel, for, without mentioning its identifying name as declaratory relief, it has long been used by courts of equity; the statute is, in effect, merely a direction to use a long-existing and often exerted power.

That the action for a declaration affects exclusively "matters of practice, pleadings, and forms and modes of procedure" has been stated so often as hardly to require iteration. The procedure should, therefore, have been admitted in the federal courts without federal statute in law cases under the Conformity Act and in equity cases under traditional practice. While the declaratory action has its historical source in equity procedure, de-
claratory relief is neither essentially equitable nor legal in character, but is special and sui generis, applicable in any court. But because of the requirement that proceedings for declarations must be brought in courts having "jurisdiction," the courts of states like New Jersey, where equity and law are administered in separate courts, have been very strict in refusing to declare a legal right in a court of equity or an equitable right in a court of law. This effective denial of justice is a result of a historical division of jurisdiction which no longer has a sound justification in efficient administration and, apart from the frequent intermingling of the two classes of rights, often requires an unusual prescience in forecasting distinctions that the court may draw. The New Jersey difficulty could have been overcome by adopting the sound view that declaratory relief is inherently neither legal nor equitable, but sui generis.

But for the case of Liberty Warehouse Co. v. Grannis, now overruled in its suggestion that a declaratory judgment was an advisory opinion, it was possibly not necessary to propose a special statute enabling the federal courts to render declaratory judgments, at least in law cases arising in those states whose courts have power to render such judgments. In equity cases, the federal courts might have exercised their traditional powers. But in view of the turn of events, it may be necessary, even in those states that authorize declaratory judgments, to await the enactment of the pending federal bill before such actions can be safely brought in the federal courts, unless in cases at law the Supreme Court were to overrule, as it should, the assumption of the Grannis Case that an action for a declaration of rights is not a matter of "practice, pleadings, and forms and modes of procedure," and in equity the federal courts were to apply their inherent power to


31 See the New Jersey cases discussed in (1932) 1 Mercer Beasley Law Rev. 1 et seq., and Yuras v. Muscowic, (1933) 114 N. J. Eq. 126, 168 Atl. 657.

32 (1927) 273 U. S. 70, 47 Sup. Ct. 282, 71 L. Ed. 541.

render declaratory judgments. The same considerations probably apply to the removal of causes from state to federal courts. So far as concerns the power of the federal Supreme Court to review state declaratory judgments, that question has been affirmatively settled by the recent decision in *Nashville, Chattanooga & St. Louis Ry. v. Wallace*.

The action for a declaration follows the procedure in civil cases generally. The fact that the issue usually involves one of law only and that the procedure is uniformly simple and expeditious probably accounts for the fact that in the statutes of California, Kentucky, and Michigan the action for a declaratory judgment is given a preferred place on the calendar. The frequent need for prompt adjudication to avoid danger and dilemma and the simplification of issues necessarily involved dictate the desirability of rules in all states designed to insure the expediting of trials for a declaration of rights. Lawyers do well to frame their prayers for relief as a request or requests for specific findings of fact or law, in order to avoid any possibility of a court's concluding that a non-adversary proceeding for an advisory opinion is involved, although the British courts with their long experience are never misled by a prayer asking them to decide "whether" the plaintiff or the defendant is correct in his contention. The judgment is res judicata and reviewable, as any other judgment is. Appeal is subject to the regular periods under conventional rules, except where, as in Kentucky, the period has been shortened because the action is deemed an instrument of summary or speedy

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34 In Harr v. Pioneer Mechanical Corp. (C.C.A. 2nd Cir. 1933) 65 F. (2d) 332, an action for declaratory judgment and injunction removed from a New York state to a federal court, denied injunction but retained jurisdiction to declare rights of parties. Cf. (1933) 12 N. C. L. Rev. 57. The common source of the procedure for declarations of right in English law and practice made it seem desirable that the practice and construction in American jurisdictions should be uniform. Hence the numerous sections of the act, expressing much of the law and practice in statutory form, and the provision of section 15, aiming at uniformity of interpretation throughout the states and harmony with federal laws and regulations on the subject.

35 The New York rules (rule 210) provide that the declaratory action "in matters of procedure shall follow the forms and practice prescribed in the civil practice act and rules for other actions in [the supreme] court." Connecticut, Practice Book, sec. 64 (a): Newsum v. Interstate Realty Co., (1925) 152 Tenn. 302, 278 S. W. 56.

36 See sec. 1 of Uniform Act, supra note 2. Sec. 7 provides that "all orders, judgments, and decrees under this act may be reviewed as [are] other orders, judgments, and decrees."
adjudication. Costs, usually much below the traditional amount, may be awarded.

**Scope of Declaratory Relief**

There is no legal question which cannot become the subject of a declaration, and section 1 of the act indicates the breadth of its scope. Sections 2, 3, and 4 are mainly specifications for the purpose of guidance.

**Written Instruments.** Section 2 of the Uniform Act reads as follows:

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

This section finds its source in Order LIV A of the English Rules of Court of 1893, but is more specific and possibly narrower.

Section 10 of the Uniform Act provides that costs may be awarded "as may seem equitable and just." In Kansas, Kentucky, Hawaii, and Michigan, the act provides that the parties may stipulate in reference to costs. Section 10 leaves the award of costs discretionary with the court, as it generally is in other English-speaking jurisdictions. Thus, in Mullens v. Mullens, (1927) 5 Tenn. App. 235, an action to construe a will and to declare title, costs were decreed against the successful plaintiff. Cf. In re Gore Borough Council, [1909] 29 N. Z. L. R. 192. In England, the declaratory order is frequently not accompanied by costs, which are generally heavier than in the United States, probably because neither party could be deemed delinquent or culpably wrong. Jenkins v. Price, [1907] 2 Ch. 229, 235, 76 L. J. Ch. 507, 23 T. L. R. 608; Evans v. Levy, [1910] 1 Ch. 452, 79 L. J. Ch. 383, 102 L. T. 128. In Rosenberg v. Village of Whitefish Bay, (1929) 199 Wis. 214, 225 N. W. 838, in which plaintiff claimed immunity from a zoning ordinance, the appellate court disallowed costs to either party, on the ground that both were justified in appealing. See discussion of costs under sec. 13 of the New Zealand Act of 1908 in In re Campbell; Peacock v. Ewen, [1930] N. Z. L. R. 713.

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37The appeal period in Kentucky is limited to 60 days from date of judgment. This period is jurisdictional, and cannot be waived by consent. Sec. 5 of Kentucky Declaratory Judgments Act, Kentucky Acts 1922, ch. 83; City of Corbin v. Underwood, (1927) 221 Ky. 413, 298 S. W. 1090; Chicago-Kentucky Coal Co. v. Auxier, (1931) 239 Ky. 442, 39 S. W. (2d) 662.


40Supra note 2.
rower. Whereas the English Order refers to rights derived from a "deed, will, or other written instrument," the Uniform Act speaks of a "deed, will, written contract, or other writings constituting a contract." The English courts very frequently construe statutes and rights derived from statutes, but whether this is done under order 25 or order 54 is not altogether clear. Inasmuch as statutes, ordinances, and public contracts are a major object of judicial challenge in the United States, special mention is made of this type of instrument in the Uniform Act. Construction doubtless includes interpretation or application of the statute to a particular fact situation.

Section 4 of the Uniform Act deals specifically with the construction of wills and trusts, which at first constituted, and possibly still furnishes, the largest proportion of issues determined in the English courts by declaration. Any persons interested in these matters can raise the issue against a qualified adversary; so far as concerns executors, trustees, and others acting in a fiduciary capacity, it merely codifies a well-established branch of equity jurisdiction, while re-enacting a statutory provision common to many states in authorizing the construction of wills and analogous instruments.

originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." This rule is to be found in nearly all British jurisdictions.

Oregon recently added the words "enforceable oral contract" (Oregon, Laws 1931 ch. 8) to the scope of declaratory relief. The California court has refused to declare rights under an oral contract. Transport Oil Co. v. Bush, (1931) 114 Cal. App. 152, 1 P. (2d) 1060; but this decision may be deemed overruled by Herrlein v. Tocchini, (1933) 128 Cal. App. 612, 18 P. (2d) 73. Section 1 of the Uniform Act is sufficiently broad to include oral contracts.

Order 54 is merely a more detailed expression of the general powers conferred by order 25, rule 5. So, section 2 of the Uniform Act bears an identical relation to section 1.

Some of the cases in the United States in which statutes and ordinances have been construed and interpreted are discussed in the comment in (1932) 41 Yale L. J. 1195.

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

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the
To remove all doubt as to the effect of the enumeration in sections 2, 3, and 4 of the Uniform Act on matters within the scope of declaratory relief, section 5 provides that the enumeration "does not limit or restrict the exercise of the general powers" conferred by section 1, which extends to any type of controversy concerning legal relations. Section 5 was included by way of precaution against narrow inferences and was hardly essential, because the broader statutes granting general unspecified authority to render declaratory judgments, with the implementing rules of procedure, as in New York, Connecticut, and other states, embrace the powers conferred by section 1 of the Uniform Act, and have been considered as affording an unlimited scope to the application of declaratory relief.

FACTS. The ostensible restriction of the declaratory power to jural relations has given rise to the inference and frequent statement that facts cannot be declared. Yet an examination of the decisions will show that the refusal to declare facts in a particular case was based upon the inconvenience and impropriety of determining complicated issues of fact by a declaratory action in a particular case, either at all or without a jury trial, which had not been arranged for. The dismissal is based, therefore, not on principle, but on convenience, a matter within judicial discretion, for it is true that the declaration, as a summary method of trying an issue, is in the main employed where the facts are not in dispute or where they are not complicated. Where they are very much involved and the taking of testimony would necessarily be time-consuming, the declaratory procedure is not the most adaptable, and it is for that reason that declarations have often been refused, even though the ground may have been stated more broadly. It is not convenient for a court to declare summarily estate or trust, including questions of construction of wills and other writings. Uniform Act, sec. 4.


47See infra p. 261.

whether a particular establishment is a nuisance and quite impossible to say whether a building not yet constructed will be a nuisance. So, a court may readily conclude within its discretion not to pass on the disputed terms or nature of an oral contract, or decide whether the insured committed suicide, or whether a certain consignment of potatoes to plaintiff was in lieu of interest or constituted a gift, or whether the plaintiff had properly been divorced by defendant and the nature of defendant's relations with another woman, and in some cases, that the issues should be tried by a jury, as permitted by the statute.

It is manifest that, even before the enactment of general statutes authorizing declarations, courts in western countries made declarations of fact, such as declarations of death, paternity, legitimacy, insanity. It is, of course, not always easy to define the nature of a fact as such, and to distinguish clearly the conclusion which depends on testimony from that which is derived exclusively from legal reasoning, a difficulty which often provokes the label "mixed question" of law and fact. Yet in whichever category the issue falls, whether testimony needs to be taken or not, there can be no doubt that both narrow questions, such as the identity or nationality of a particular person or the character or geographical location of a building or property, and broad ques-

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53 Beamish v. Whitney, [1908] 1 Ir. R. 38.
56 Mackintosh v. Smith & Lowe, (1865) 4 Macq. (Scot.) 913.
tions in a more complex setting, can be determined by declaration.

**Facts as Incidental to Legal Conclusions.** But whatever supposed disinclination there may be in England to declare bare facts apart from their legal consequences, there can be no question that the courts continually determine facts as incidental to legal conclusions. Thus, in the construction of a will and the validity of a power of appointment thereunder, it became necessary to determine the domicil of the testatrix, and whether her will had been executed in accordance with the lex domicilii and purported to execute the power. So in *Chapman v. Michaelson,* in establishing the invalidity of a certain mortgage, the court had to determine that the mortgagee entered into the mortgage as a money-lender and that he was not in fact registered.

In the United States there can be little doubt about the power

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59Hess v. Country Club Park, (1931) 213 Cal. 613, 2 P. (2d) 782 (change of neighborhood, so as to release from restrictive covenant); R. G. Hamilton Corp. v. Corum, (Cal. 1933) 21 P. (2d) 413 (dispute under trust agreement); Tolle v. Struve, (1932) 124 Cal. App. 263, 12 P. (2d) 61 (faulty construction of building, justifying release from contract); Herrlein v. Tocchini, (1933) 128 Cal. App. 612, 18 P. (2d) 73 (contract for sale of stock, disputed); Sigal v. Wise, (1932) 114 Conn. 297, 158 Atl. 891 (that defendant had taken steps to defeat plaintiff's right to have lease renewed after restoration of burned building); Morecroft v. Taylor, (1929) 225 App. Div. 562, 234 N. Y. S. 2 (plaintiff claimed she was illegitimate daughter of defendant); Morris v. Morris, (1930) 13 D. & C. (Pa.) 634 (trustee's petition to determine interest taken by devisee under facts, and whether conditions violated); Swank Motor Sales Co. v. Decker, (1932) 4 Cambria Co. R. (Pa.) 28 (whether car delivered in damaged condition); Elsdon v. Hampstead Corp., (1905) 2 Ch. 633, 75 L. J. Ch. 27, 93 L. T. 335, 54 W. R. 43 (special assessment; whether certain property benefited); Attorney-General v. Roe, (1915) 1 Ch. 235, 84 L. J. Ch. 322, 112 L. T. 581, 79 J. P. 263 (existence of nuisance determined in proceeding to abate); MacDonald v. Great Western Ry. Co., (1930) 1 Ch. 364, 371, 99 L. J. Ch. 164, 142 L. T. 460 (that plaintiff employees' claims for losses under a certain statute, submitted to defendant, had not been determined by the defendant within the meaning of the statute. By Maugham, J.: "The matter involved is mainly a question of fact: but there is also involved in it something which, I think, requires a consideration of the statutes as a result of which the claims were made"); Nicholls v. Nicholls, (1899) 81 L. T. R. 811 (whether road was way of necessity); Smith v. Attorney-General for Ontario, (1923) 53 Ont. L. R. 572 (truth of legislative resolution); Murphy v. Lawler, (1918) N. Z. L. R. 605 (testator's testamentary capacity).

60In re Wilkinson's Settlement; Butler v. Wilkinson, (1917) 1 Ch. 620, 86 L. J. Ch. 511, 117 L. T. 81, 33 T. L. R. 267; see also In re Price; Tomlin v. Latter, (1900) 1 Ch. 442, 447, 69 L. J. Ch. 225, 82 L. T. 79, 48 W. R. 373, 16 T. L. R. 189.

61[1908] 2 Ch. 612, aff'd, [1909] 1 Ch. 238. In India, a declaration was made that certain fixtures were erected before a certain date. Azeeza J. S. Joseph v. Corporation of Calcutta, (1916) 24 Calcutta L. J. 498.
of the court to determine facts when necessary or incidental to the declaration of legal relations. It is even probable that under the provision that "no action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for" declarations of a pure fact may be granted. For example, it should have been possible under the New York Civil Practice Act, had it then been in force, for Theodore Dreiser to obtain a declaration against the John Lane Co. that "The Genius" was not obscene, after the latter had refused to publish it because of threats of criminal prosecution by the Society for the Suppression of Vice, and thus to establish whether or not the publisher was, as claimed by Dreiser, violating the contract by refusing to publish.\(^6\)

**JURY TRIAL.** Section 9 of the Uniform Act provides:

"When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."\(^4\)

The question has arisen whether this provision requires a jury trial in every case, or whether such trial depends upon whether the issue is legal or equitable.\(^6\) It may be said that the draftsmen of the Uniform Act included the provision with the sole purpose of refuting any constitutional doubt on the point; it was not intended

\(^{62}\)Uniform Act, sec. 1.

\(^{63}\)Dreiser v. John Lane Co., (1918) 183 App. Div. 773, 171 N. Y. S. 605. The parties agreed to submit the question of violation of contract on an agreed statement of facts. The only point in issue was the question whether the book was obscene. It was held that as this was a question of fact it was not a proper question for judicial determination on voluntary submission. The only method then left to the plaintiff would have been to sue for damages for loss of royalty—not easy to prove—and thus enable a jury to determine whether the book was obscene. This compulsory show of hostilities is probably now unnecessary, under sec. 473, C. P. A., and rule 213.

\(^{64}\)The Kansas Act (Laws 1921, ch. 168, sec. 4) provides that "when a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not." See Hawaii, Rev. Laws 1925, sec. 2921; Ky. Codes (Carroll, 1927) secs. 639a-7; Michigan, Acts 1929, no. 36 Comp. Laws 1929, sec. 13906, which adds "and such interrogatories and answers shall constitute a part of the record of the case." See also New York Rule 213, and Connecticut, Practice Book 1922, sec. 64 (f).

Sec. 4 (a) of the Uniform Act confers on executors, trustees, etc., the privilege of ascertaining "any class of creditors, devisees, legatees, heirs, next of kin, or others" and (c) "to determine any question arising in the administration of the estate or trust."

\(^{65}\)Gavit, Procedure Under the Uniform Declaratory Judgment Act, (1933) 8 Ind. L. J. 409 at 418 et seq.
to indicate that the declaratory action is either equitable or legal or to indicate that jury trial is necessary in any case. Declaratory relief is neither strictly equitable nor legal, although, as has been observed, its historical sources are almost exclusively equitable. Where the two systems are still separately administered, as in New Jersey, courts of equity have occasionally refused to consider a common law question, not on the ground that it required a jury trial but on the jurisdictional clause of the statute. Where the two systems are not independently administered, the courts are left to determine under local practice whether a jury trial must or can be demanded, whether, if demanded, it must be granted, and whether silence is a waiver. There is no mention of jury trial in the declaratory judgment statutes of California, Connecticut, Florida, New Hampshire, New York, or South Carolina; yet it is not to be doubted that the usual constitutional provisions for jury trial prevail.69 There was no necessity for mention of jury trial in the Uniform Act except to give an assurance that the matter had not been overlooked and that the usual rules adopted by the state for the classification of civil issues and their trial were not intended to be interfered with. Jury trial for issues of fact need not be claimed; it may be claimed. If it is, the procedure shall follow that adopted in the case of other civil actions in that court. Kansas and a few other states provide for reference of the issue to the jury on interrogatories. There was no intention to break new ground or to strengthen or weaken jury trial. In practice, almost uniformly, issues of fact have been tried by the court alone, as in equity. Where this seemed not feasible, either because the facts were too complicated to warrant trial and findings by declaratory procedure or because the court considered a jury trial necessary under the circumstances, the declaration has in the court's discretion been refused,67 although the court in the latter case might have retained jurisdiction pending reference to a jury if properly claimed. The provisions for a jury trial are a safeguard against the definite dismissal of the case when issues of fact arise the jury trial of which may be and is properly claimed, and an assurance to possible doubters that constitutional guaranties have not been overlooked.

68Cf. Faulkner v. City of Keene. (1931) 85 N. H. 147, 155 Atl. 195, 197, 200. New York and Connecticut by Rules of Court assimilate the practice to that prevailing in other actions. In New York, the court may direct the submission of facts to a jury (Rule 213). In Connecticut, they "may be submitted to the jury as in other actions."

69Infra p. 261.
Future Interests. Not a little confusion has been created by occasional rulings or dicta to the effect that a court will not declare "future rights." The statement is ambiguous and calls for analysis and clarification. Courts appropriately decline to pass upon the effect of remote contingencies which may never happen. If they did, they would constitute themselves academic advisers and disposers of hypothetical issues, a function clearly not judicial. On the other hand, not every event which may happen in the future forecloses present interest in its legal effects. The construction of wills frequently necessitates the determination of the effect of a future death on interests in realty. If the operative event is about to occur or practically certain to occur, and it serves a present clarifying and stabilizing purpose to establish its effect (provided all parties in interest are heard), there is no reason why the courts should refuse their aid in adjudicating conflicting claims depending upon the certain event. Distinction must therefore be made between the effect of events fairly certain to occur and of events remote, speculative, and conjectural. The early indisposition of the English courts to pass upon the interests of remaindermen and reversioners produced a certain conservatism in passing upon or deciding questions which involved operative facts which could only arise or effects which could only take place in the future. But the development of commerce, the need for adjudicating present claims to future benefits or in disavowal of future liabilities, the lifting of the restrictions upon the interpretation of the Chancery Procedure Act of 1852 by Order XXV, rule 5, the search for the "legal interest" of the parties—an expanding conception—as a criterion of the right to a decision, the growing realization of the utility of the declaratory judgment as an instrument of preventive justice, quieting title and guiding future conduct—all served to liberate the courts from the fetters of ancient maxims which had but little relation to current demands for judicial relief from uncertainty and insecurity. It is in fact in its operation in futuro as a stabilizer of legal relations and an authoritative warning against untoward and misguided conduct that the declaration performs possibly its major function. A plaintiff demonstrating a sufficient interest is entitled to a determination of his present and future legal relations to the defendant, provided always that the operative facts are so definite and practically certain that the
court runs no risk of deciding academic, abstract, hypothetical, purely contingent, or speculative questions.\textsuperscript{68}

**PURPOSE**

The essential purposes of the declaratory judgment may be said to be

(1) to afford a speedy and inexpensive method of adjudicating legal disputes;\textsuperscript{69}

(2) to narrow the issues and, by so doing, to dispose of disputes in their initial stages, before they have become full-grown battles with their accumulation of bitterness and impaired relations;\textsuperscript{70}

(3) to make it unnecessary to destroy the status quo, as a condition of bringing a contested issue or adverse claims to litigation, thus enabling written instruments, including contracts and statutes, to be construed without the necessity for prior breach, thereby preventing future litigation;\textsuperscript{71}

(4) to make it unnecessary for a plaintiff to act upon his own interpretation of his rights and at his peril as a condition of judicial action, or to forbear from a contemplated but challenged step for fear of incurring loss, thus avoiding the dangerous neces-


\textsuperscript{69}Welfare Inv. Co. v. Stowell, (Cal. App. 1933) 22 P. (2d) 529; Brown v. Levin, (1929) 295 Pa. St. 530, 145 Atl. 593; City of Chester v. Woodward, (1929) 13 D. & C. (Pa.) 201; Swank Motor Sales Co. v. Decker, (1932) 4 Cambria Co. R. (Pa.) 28; St. James's Hall, Ltd. v. London County Council, (1900) 83 L. T. R. 98, [1901] 2 K. B. 250, 70 L. J. K. B. 610, 84 L. T. 568, 49 W. R. 572; In re Robert Grew; Cannaway v. Cannaway, (1903) 29 Victorian L. R. 324, (1904) 29 Victorian L. R. 628; The statement made in List's Estate, (1925) 283 Pa. St. 255, 257, 129 Atl. 64, 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 re Cryan's Estate, (1930) 301 Pa. St. 386, 152 Atl. 675] that this was its "obvious purpose" is unwarranted. While this is one of its purposes, it is by no means its only purpose. Equally questionable is the statement in Miller v. Currie, (1932) 208 Wis. 199, 205, 242 N. W. 570, 572, quoted in Schmidt v. La Salle Fire Ins. Co., (1932) 209 Wis. 576, 580, 245 N. W. 702, 703, that "the declaratory judgments act is an effort to provide a tribunal in which controversies may be determined which could not otherwise be presented for determination to a court having jurisdiction."

\textsuperscript{70}Kariher's Petition (No. 1), (1925) 284 Pa. St. 455, 131 Atl. 265.

sity for leaps in the dark or the alternative surrender of legitimate claims;\textsuperscript{72}

(5) to remove uncertainty and insecurity from legal relations, and thus to clarify, quiet, and stabilize them before irretrievable acts have been undertaken;\textsuperscript{73}

(6) to enable an issue of questioned status or facts on which a whole complex of rights may depend to be expeditiously determined;\textsuperscript{74}

(7) to enable interdependent rights involving numerous parties to be settled in a single proceeding;\textsuperscript{75}


Said Judge Cardozo: "I have been impressed on numerous occasions with the belief that it has supplied a useful expedient to litigants who would otherwise have acted at their peril, or at best would have been exposed to harrowing delay." Letter, April 20, 1928, Hearings. U. S. Senate, on H. R. 5623, April 27, 1928, p. 55.

"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." Butler, J., for the Supreme Court in Terrace v. Thompson, (1923) 263 U. S. 197, 216, 44 Sup. Ct. 15, 18, 68 L. Ed. 255.

\textsuperscript{73}The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." James v. Alderton Dock Yards, (1931) 256 N. Y. 298, 305, 176 N. E. 401, 404.

"Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over 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." Kansas Laws 1921, ch. 168, sec. 6, Rev. Stat. Ann. 1923, ch. 60, sec. 3132; ibid. Hawaii Laws 1921, ch. 162, Rev. Laws 1925, sec. 2923; and to like effect, Kentucky Laws 1922, ch. 83, Codes (Carroll, 1927) secs. 639a-10.

See also Wingate, Surrogate, v. Flynn, Sec of State, (1931) 139 Misc. Rep. 779, 781, 249 N. Y. S. 351, 354 (to determine length of term of elective office, necessary to determine power of defendant to designate office as open to another election. Said the court: "Future confusion and possible litigation will be avoided by a present determination of the question here involved. Public officers should have the right to have their legal duties judicially determined. In this way only can the disastrous results of well-intentioned but illegal acts be avoided with certainty"); Wardrop Co. v. Fairfield Gardens, (1933) 237 App. Div. 605, 262 N. Y. S. 95; Girard Trust Co. v. Tremblay Motor Co., (1928) 291 Pa. St. 507, 140 Atl. 506; Taylor v. Haverford Township, (1930) 299 Pa. St. 402, 149 Atl. 639, and opinion below, (1928) 18 Del. Co. R. 537.


(8) to enable trustees, executors, receivers, and others acting in a fiduciary capacity to obtain authoritative guidance and protection against liability in the administration of their trusts;\textsuperscript{76}

(9) to enable a creditor or claimant whose interests are jeopardized by attack, challenge, act, or new event, to establish his claim, and by vindicating his right, to prevent future injury or disadvantage;\textsuperscript{77}

(10) to enable a debtor or person charged with duty, liability, disability, danger, risk, or forfeiture, to disavow the burden, charge, or risk, and thus remove the cloud on his rights;\textsuperscript{78}

(11) to enable an obligor or contractor who maintains that time or circumstance have entitled him to release from his obligation to sue the obligee for a declaration of release, complete or partial;\textsuperscript{79}

(12) to enable a person claiming his own privilege or immunity or his adversary's duty or liability to secure a judicial recognition of these claims, without proceeding to enforcement or execution, an opportunity as helpful to the pacification of legal relations in the private as in the public sphere;\textsuperscript{80}


\textsuperscript{80}Fidelity Nat'l Bank & Trust Co. v. Swope, (1927) 274 U. S. 123, 47 Sup. Ct. 511, 71 L. Ed. 959; Nashville, Chattanooga & St. Louis Ry. v. Wallace, (1933) 288 U. S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730; Colo-
(13) to enable public duties and powers to be established without the cumbersome and technical prerequisites of mandamus, certiorari, injunction, prohibition, or habeas corpus;\(^6\)

(14) to enable a claimant to choose a mild but adequate form of relief by declaration in place of drastic and harsh coercion which he does not desire or need.\(^7\)

But the declaratory judgment is not intended as a sedative to enable fearsome people to "sleep o' nights,"\(^8\) or to enable or permit the courts to decide abstract, hypothetical, or academic questions. The court must be alert to establish the fact that the issue is contested, that the parties have an adverse legal interest in its


As illustration of the pacifying functions of the declaration, see Knight v. Bolton, [1924] N. Z. L. R. 806, 1043 (action for injunction requiring defendant to remove from plaintiff's land soil which defendant had allowed to escape and to prevent further escapes). Said Salmond, J. (at 812): "I do not propose, however, at the present stage either to grant an injunction or to assess damages. I think that the better course is merely to make a declaration as to the rights of the parties, thereby affording them an opportunity of mutual agreement as to the proper steps to be taken . . . for the purpose of putting the boundary between these two properties into a safe and satisfactory condition. If the parties cannot so agree, damages will be assessed and an injunction granted on further consideration." Cf. opinion of Cozens-Hardy, M. R. (reviewing opinion of Warrington, J.) in Earl of Dysart v. Hamerton & Co., [1914] 1 Ch. 822. See also Hasselbring v. Koeppke, (1933) 263 Mich. 466, 248 N. W. 867, where the court, while denying an injunction to restrain infringement of unused easement of light, nevertheless sua sponte granted a declaratory judgment determining the rights of the parties.


\(^7\)Supra p. 244.

adjudication, and that by the decision a practical end in clarifying, quieting, and stabilizing the legal position will be subserved. This purpose may not appear on the face of the pleadings, but it is the duty of the judge to call for sufficient facts to enable him to determine the intent and objectives of the suit and to satisfy himself that a useful purpose is served by making a declaration of rights.

**DISCRETION**

The Uniform Act provides:

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

One or two other states add:

"or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances."

These rules merely embody the established Anglo-American practice in all jurisdictions and indicate both the practical and the remedial scope and limitations of the relief. Yet the discretion granted, however wide and unlimited in appearance, is a judicial discretion, hardened by experience into rule, and its exercise is subject to appellate review. It is not proper for a court to refuse a declaration without stating the grounds upon which it acts, for those very grounds are a matter for appellate cognizance. It may be serviceable to attempt to indicate the considerations which have been advanced to justify the grant or refusal of a declaration.

During the nineteenth century dicta were occasionally uttered to the effect that the declaratory judgment would be issued with caution only. But that policy was announced at a time when the function of the declaratory judgment was little known. With the greater use of the declaratory action which marks the twentieth century and with the ever-growing conviction of its practical util-

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84Uniform Act, sec. 6.
85Kentucky, Laws 1922, ch. 83, Carroll’s Codes (1927) secs. 639a-6; Philippines: (ter.) 26 Public Laws 46, Act No. 3736, Nov. 22, 1930, sec. 3.
87Whether based on jurisdictional or substantive grounds, the reasons for dismissing a petition should be stated. Where the petition is dismissed on the merits, the judgment should constitute a declaration of rights of the parties, nevertheless. Northwestern Nat’l Ins. Co. v. Freedy, (1930) 201 Wis. 51, 227 N. W. 952.
ity in the solution of legal issues, the policy has changed from one of conservatism to liberality. The Uniform Act, like most of the other state statutes, provides:

“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.”

WHEN FAVORABLY EXERCISED. The cases rarely indicate the special grounds upon which the court’s discretion is exercised in favor of a declaratory judgment. When it is so exercised, it may be assumed first that all the jurisdictional and procedural prerequisites of justiciability are present. In addition, the court must have concluded that its judgment will “terminate the uncertainty or controversy giving rise to the proceeding” and that it will serve a useful purpose in stabilizing legal relations. The wide discretion of the court in moulding the declaration to the needs of the occasion, unhampered by the issues joined or the claims of counsel, enables it to respond effectively to those practical requirements. It was an empirical demonstration of the practical utility of the declaration that diverted attention from early form and formula to substance and policy, so that we find convenience, expediency, need, desirability, public interest.

88Section 12. Some state statutes add, “with a view to making the courts more serviceable to the people.” Kansas, Laws 1921, ch. 168, sec. 6; Hawaii, Laws 1921, ch. 162, Revised Laws 1925, sec. 2923; Michigan, Acts 1929, No. 36, p. 68, Comp. Laws 1929, sec. 13909; Virginia, Laws 1922, ch. 517, p. 902 Annotated Code 1930, sec. 6140 h. There is an occasional variation in the phraseology. See Carolina Power & Light Co. v. Isley, (1930) 203 N. C. 811, 167 S. E. 56; a “liberal construction of the Act, to the end that its purpose may be accomplished, is manifestly desirable.”

89Stueck v. G. C. Murphy Co., (1928) 107 Conn. 656, 142 Atl. 301.
93See Cozens-Hardy, M. R., in West v. Gwynne, [1911] 2 Ch. 1, 80 L. J. Ch. 578, 104 L. T. R. 759, 761, 27 T. L. R. 444: “I cannot imagine an instance of a more beneficial exercise of the jurisdiction to make a declaratory order than has been done in this case.” And almost the same language in Young v. Ashley Gardens Properties, Ltd., [1903] 2 Ch. 112, 72 L. J. Ch. 520, 88 L. T. 541.
94In re Freeholders of Hudson County, (1928) 105 N. J. L. 57, 143.
or policy the common criteria of the grant of the declaration.

Necessary Parties. Aside from the necessity for proper parties plaintiff and defendant having conflicting legal interest in the controversy to be adjudicated, the procedure for a declaratory judgment vests in the court a wide discretion to insist upon joining and impleading all parties it deems interested or likely to be affected by the decision, and to dismiss, usually without prejudice, a declaratory proceeding instituted without the presence of, or service upon, all such interested persons. The justification for such discretion is the fact that the declaratory judgment is designed to terminate the controversy or uncertainty sub judice; and if interested parties are not served or present, it would be likely to fail of that essential purpose. The court occasionally does give judgment, notwithstanding the absence of some designated party defendant, but explains that his interests are not affected by the decision or that his presence would have added nothing of importance which the court needed to take into consideration. More often, however, the court dismisses the proceeding, on the ground that some designated necessary party or parties should have


Section 11 of the Uniform Act provides, in part: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Nearly all the state statutes contain a similar provision.

The Connecticut, Rules of Practice, sec. 63 (d), provide that no declaration will be rendered "unless all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof."

See City of Salem v. Oregon-Washington Water Co., (Ore. 1933) 23 P. (2d) 539 (plaintiff city asked declaration of the validity of its statutory authorization to construct and operate its own water system, citing as defendants the existing water company, the attorney-general, and two taxpayers. Upon demurrer that there was a defect of parties defendant, the court expressly ruled that taxpayers were not necessary parties).


been heard, not only for the information of the court but because such a party might be affected by, even though not bound by, the decision; and in so conclusive a proceeding it would be neither just nor proper to render a judgment without hearing and binding such interested person. Any suggestion, of course, that interested parties could be bound by a judgment in a proceeding to which they were not parties served, with opportunity to be heard, would encounter constitutional objections; but although this is conceded, courts properly decline to make declarations between parties when others, not bound, might later raise the identical issue and possibly deprive the declaration of that conclusive and tranquillizing effect it is calculated to produce. Yet occasionally a court does render a decision between two parties, notwithstanding that it does affect a third person, on the theory that such a person is in effect a stakeholder, and, while interested, would not be adversely or deleteriously affected, and that hence there is no harm in proceeding to judgment without him. Not a little acumen is some-


In challenges to statutes and ordinances, the Attorney-General or law officer must be served and, if the court thinks desirable, heard. Section 11 of the Uniform Act, with similar requirement in other states, provides: "In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard."


tions evidenced in distinguishing cases which require from those
which do not require service upon such interested third person.

WHEN UNFAVORABLY EXERCISED. The two principal criteria
guiding the policy of rendering declaratory judgments are (1)
when the judgment will serve a useful purpose in clarifying and
settling the legal relations in issue, and (2) when it will terminate
and afford relief from the uncertainty, insecurity, and controversy
giving rise to the proceeding. It follows that when neither of
these results can be accomplished, the court should decline to
render the declaration prayed. In addition, and perhaps as in-
dicating when a useful purpose will not be served, statute and
practice have established the rule that the judgment may be re-
fused when it is "not necessary or proper at the time under all
the circumstances."

These criteria of discretion are too general to afford much help
to judges, but precedent and practice have given them definition
and have hardened the discretion into rule, reviewable as such.
Some specification of the grounds advanced for refusing declara-
tions under the discretionary power may therefore be appropriate.

The uncertainty would not be terminated where the proceed-
ings indicate the absence or failure to join necessary parties in
interest who ought to be heard or bound,103 or where there are
not proper adversary parties,104 or where the proceedings require
allegation and proof of facts not before the court.105 It is per-
haps superfluous to add that the want of any of the jurisdictional
or procedural requisites of justiciability bars the grant of the peti-
tion on technical rather than discretionary grounds. This would
embrace the refusal of courts to decide hypothetical or abstract
questions, on the ground that such a decision would not serve a
practical function in stabilizing relations, and even as advice, which
is not grantable, would not be binding.106

103Continental Mut. Ins. Co. v. Cochrane, State Com'r of Insurance,
(1931) 89 Colo. 462, 4 P. (2d) 308; Dobson v. Ocean Accident & Guar-
antee Corp., (Neb. 1933) 247 N. W. 789, and cases cited supra notes
96, 98 and 99.
104Loughlin’s Estate, (1931) 103 Pa. Super. Ct. 409, 157 Atl. 494,
aff’g (1931) 14 D. & C. (Pa.) 670.
105Supreme Tent of Knights of Maccabees v. Dupriest, (1930) 235
Ky. 46, 29 S. W. (2d) 599; Wardrop Co. v. Fairfield Gardens, (1933) 237
Newsum v. Interstate Realty Co., (1925) 152 Tenn. 302, 278 S. W. 56.
106Mulcahey v. Johnson, (1927) 80 Colo. 499, 252 Pac. 816; Wardrop
Co. v. Fairfield Gardens, (1933) 237 App. Div. 605, 262 N. Y. S. 95;
On the ground that the uncertainty would not be terminated, the courts usually refuse to make declarations where they consider that further proceedings are necessary to enable the plaintiff to obtain the relief he needs or to make the judgment effective. On discretionary grounds, courts occasionally decline to render declaratory judgments when, in a case which might require consequential relief, they feel that they have no jurisdiction or power to grant such supplemental relief, either because the property involved is beyond the physical boundaries of the state or because the court has no power in the premises.

The declaration will be refused where in the court's opinion it is inexpedient, for some reason outside the record, such as public policy, or where the question might be raised again in some other way or where it would be embarrassing in the operations of government. It may also be refused where by laches or default or inequity the plaintiff has weakened his claim to relief.


or where it would result in possible injustice to third persons. It will be refused where it would be futile or useless under the circumstances, for example, where the one against whom it is made is privileged to escape its effects by some action within his own discretion. As already observed, it will be refused where it is unnecessary, or where it is not practical for the court to reach a conclusion, e.g., the effect of a prospective structure, or where it will serve no practical purpose in terminating uncertainty or insecurity. Thus, it will not be made "in the air," or in the abstract, i.e., without definite concrete application to a particular state of facts which the court can by the declaration control and relieve.

All these cases are but illustrations of the general rule that the declaration is an instrument of practical relief and will not be issued where it does not serve a useful purpose. The courts necessarily have a considerable judicial discretion in determining when such a useful purpose will be subserved, a discretion now more frequently invoked since the courts' emancipation from the older maxims which confined the declaration almost within the narrow limits of an extraordinary remedy to be administered with caution and reluctance. Now that liberal construction is enjoined upon

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the courts by statute, and that practice has, with rare exceptions, established the declaration as an optional and alternative remedy, the principal business of the court is to determine whether in a particular case it will or will not serve a useful purpose.

**CONCLUSION**

Since the formal adoption of declaratory judgment statutes in the United States after the war, some twelve hundred reported cases have been decided in the United States. They exemplify an extraordinary range of judicial relief in fact situations of the greatest variety. In the light of a fifty-year development in Great Britain, its dominions and possessions and a longer history on the continent, practitioners and the courts have at their disposal a wealth of experience rarely associated with a so-called law reform. In the protection of diverse legal interests not heretofore safeguarded, in the determination of issues at their inception or in narrow compass, thereby averting the full-panoplied battle with its accumulated bitterness and damage, to which simple issues often lead, in the adjudication of disputes without the requirement of prior violence or breach, in the removal of uncertainty and clouds from legal relations, and in the supply of a milder for a drastic remedy, the declaratory judgment has demonstrated its utility as an instrument of preventive justice and as a valuable exemplification of judicial therapeutics.