

THE CONSTITUTIONALITY OF DECLARATORY JUDGMENTS

It is not uncommon in the United States for opponents of statutory reform, or even defendants against unwelcome suits, to advance the objection of unconstitutionality. Declaratory judgment statutes have not escaped this custom. Although it will strike an informed student as strange that the procedure for the rendering of declaratory judgments should be attacked as unconstitutional, the fact is that the issue has been raised in a number of American cases, though never in any other country. The special ground asserted has been that the declaratory judgment imposes on the courts powers non-judicial in character and that it requires them to decide cases that are moot or to render advisory opinions, or, in some instances, even, that judgments that carry no execution are unconstitutional. Fourteen state courts have considered these arguments and have unanimously concluded that they are unsound, because they proceed from a misconception as to the nature of a declaratory judgment. After some earlier hesitation, the United States Supreme Court has now held that a decree of execution is no essential part of a valid and final judgment.¹ The fact that the highest courts in fourteen states have expressly held, after one early misstep in Michigan,² that the declaratory judgment is in every respect constitutional,³ and that the courts of twelve other states have assumed its constitutionality,⁴ would ordinarily relieve a commentator from spending much time or space on the question of constitutionality.⁵

¹ *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123, 47 Sup. Ct. 511 (1927); *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 49 Sup. Ct. 499 (1929).

² *Anway v. Grand Rapids Railway Co.*, 211 Mich. 592, 179 N. W. 350 (1920).

³ *Arizona*: *Morton v. Pacific Constr. Co.*, 283 Pac. 281 (Ariz. 1929); *California*: *Blakeslee v. Wilson*, 190 Cal. 479, 213 Pac. 495 (1923); *Connecticut*: *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150, 152 (1923); *Florida*: *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930); *Indiana*: *Zoercher v. Agler*, 172 N. E. 186 (Ind. 1930); *Kansas*: *State ex rel. Hopkins v. Grove*, 109 Kan. 619, 201 Pac. 82 (1922); *Kentucky*: *Black v. Elkhorn Coal Corp.*, 233 Ky. 588, 26 S. W. (2d) 481 (1930); *Michigan*: *Washington-Detroit Theater Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930); *New Jersey*: *McCrory Stores Corp. v. S. M. Braunstein, Inc.*, 102 N. J. L. 590, 134 Atl. 752 (1926); *New York*: *Board of Education v. Van Zandt*, 119 Misc. 124, 195 N. Y. Supp. 297 (Sup. Ct. 1922), *aff'd*, 234 N. Y. 644, 138 N. E. 481 (1923); *Pennsylvania*: *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925); *Tennessee*: *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924); *Virginia*: *Patterson's Ex'rs v. Patterson*, 144 Va. 113, 131 S. E. 217 (1926); *Wisconsin*: *City of Milwaukee v. Chicago & N. W. Ry.*, 230 N. W. 626 (Wis. 1930).

⁴ *Colorado*, *Hawaii* (ter.), *Massachusetts*, *Nebraska*, *Nevada*, *North Dakota*, *Oregon*, *Rhode Island*, *South Carolina*, *South Dakota*, *Utah*, and *Wyoming*.

⁵ See the statement of Rodenbeck, J., in *Board of Education v. Van Zandt*, *supra* note 3, 119 Misc. at 127, 195 N. Y. Supp. at 300: "The constitutionality of such a proceeding as this one for a declaratory judgment, where an actual controversy exists involving only a question of law, and the power of the Supreme Court to authorize such a procedure in such a case is not open to question."

Unfortunately, however, the matter cannot be so lightly dismissed, because no less an authority than the United States Supreme Court, although never having had occasion to apply or construe a declaratory judgment act, has undertaken in several *dicta* to express the opinion that the declaratory judgment is unconstitutional, because it is not a judgment in "cases" or "controversies," to which the federal judicial power is confined.⁶ In so concluding, the court has fallen into the same line of reasoning which distinguished the now overruled opinion of the Michigan Supreme Court in the *Anway* case,⁷ namely, that an action for a declaratory judgment required or implied or permitted the decision of a moot case or the rendering of an advisory opinion—functions which, it is admitted, are not judicial, because not deciding "cases" or "controversies." For this reason, and because this attitude of the United States Supreme Court has blocked the final enactment of a statute by Congress authorizing the federal courts to render declaratory judgments, it is necessary to examine the history of the question of constitutionality as it has been presented in the record of American cases.

State Courts

Aside from the little used and narrow statutes granting a limited power of rendering declaratory judgments in Rhode Island (1876), Maryland (1888), Connecticut (1893, 1915), and New Jersey (1915), the first broad statute in this country was enacted in Michigan in 1919.⁸ It provided that:

⁶ *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 47 Sup. Ct. 282 (1927); *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n*, 276 U. S. 71, 89, 48 Sup. Ct. 291, 294 (1928); *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 48 Sup. Ct. 507 (1928).

⁷ *Supra* note 2.

⁸ Public Acts 1919, Act 150. The proposed federal Act provides:

"AN ACT To amend the Judicial Code by adding a new section, to be numbered 274D.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Judicial Code approved March 3, 1911, is hereby amended by adding after section 274C thereof a new section to be numbered 274D, as follows:

"Sec. 274D. (1) In cases of actual controversy in which the courts of the United States would have jurisdiction, the said courts upon petition shall have jurisdiction to declare rights and other legal relations on request of any interested party for such declarations whether or not further relief is or could be prayed, and such declarations shall have the force of a final judgment and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application 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 declaration, to show cause why further relief should not be granted forthwith.

"(3) 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 is-

"No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not."

As so often happens in the United States, the facts of the first case which draws into issue the constitutionality of a statute are likely to have vital influence upon the views of the court. Those familiar with the declaratory judgment in England would not have found the *Anway* case difficult; but to a court that had never heard of it, the case may have seemed novel and unusual, not because its facts would not have presented a justiciable issue, but because the parties to the record had no adverse interests. The adverse parties were intervenors and others outside the court.⁹ The statute of Michigan forbade street railway companies to "require" motormen and conductors to work more than six days per week, except in certain emergencies. The plaintiff was a non-union conductor employed by the company and wished to work more than six days a week. He therefore brought an action against the company as defendant for a declaration or determination that he was privileged to work more than six days if both he and the company were willing. A labor union of street railway employees intervened and contended that the statute should be construed to prevent the plaintiff from working more than six days a week. They, with the state or the attorney-general, had the adverse interest. From a decision in favor of the plaintiff, the intervening union appealed to the supreme court. That court invited the attorney-general, Professor Sunderland, and others to file briefs on the constitutionality of the declaratory judgment statute. The majority of the court, by Fellows, J., held that the statute imposed on the court "non-judicial" functions. The minority, by Sharpe,

sues 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.

"(4) The Supreme Court may adopt rules and regulations for carrying out the provisions of this section."

⁹ An almost identical situation was presented to the United States Supreme Court and deemed a justiciable issue under customary procedure in *Kentucky v. Indiana*, 281 U. S. 163, 50 Sup. Ct. 275 (1930). In that case, Kentucky and Indiana had entered into a contract for the construction of a bridge across the Ohio River. Certain taxpayers in Indiana had brought a suit to restrain Indiana from performing the contract, as unauthorized by Indiana law. Indiana wished to perform, believed it was entitled to perform, and stated it was ready to perform, but by the suit was placed in doubt. Thereupon Kentucky sued Indiana in the Supreme Court for specific performance, joining the Indiana taxpayers. The taxpayers, the only parties taking a position adverse to the plaintiff, were dismissed as having insufficient interest. Both Kentucky and Indiana wanted the same judgment, namely, that the contract was valid and performable; they were in no sense adverse parties. Indiana's pleadings admitted the correctness of Kentucky's allegations. The Supreme Court issued the decree sought, without raising the question that the only legitimate parties to the record had no adverse interests.

J., held otherwise, but concluded that the declaration should not have been granted in the instant case.

As already observed, there was no issue between the plaintiff and the defendant. The issue lay between these parties on the one hand, and the state or the attorney-general (and the labor union) on the other, for the plaintiff claimed that he and the defendant were privileged to enter into a contract for a seven-day working week; the party in interest opposed to this contention was not the defendant railway, but the labor union and the state, which by its statute impliedly threatened prosecution of parties to such a contract. Unless the state were joined, a judgment in favor of the plaintiff and against the defendant would obviously have had no binding force upon the state or the attorney-general in a suit for prosecution. When, therefore, the court says that the plaintiff has no contract with the defendant, claims no breach of any contract, does not allege that the defendant has committed or threatened to commit any wrong upon him, or that he has any claim, present or prospective, for any damages from the defendant, it states grounds why, in the absence of additional parties, a declaratory judgment might conceivably have been refused in that case—though by no means necessarily so—but no ground supporting the unconstitutionality of a declaratory judgment in all cases.

It therefore becomes necessary to examine the grounds upon which the court reached its conclusion that the power given it to render declaratory judgments was non-judicial. The first ground is that the traditional constitutional separation of powers of government confines the functions of the court to those judicial in character, and that the duty of giving "advisory opinions" is not judicial.

Relying on the unfortunate form in which the plaintiff framed his prayer for a declaration "as to whether the said defendant (railway company) may lawfully permit plaintiff and its other employees who so desire to work more than six days in any one week," and upon the title of an article, "The courts as authorized legal advisers of the people," the court says, "It at once becomes apparent that by the act the courts of this state are made the legal advisers of all seeking such advice," and concludes that this duty is "non-judicial." In a slightly hysterical outburst the court adds that the belief "that it is the duty of the state through its courts to furnish advice to its citizens" adopts the view that

"the state is everything, the individual nothing. Under our government the state does not till our farms, manufacture our automobiles, conduct our great department stores, or do our law business for us. The unfortunate people of one country are at present trying such experiment in government."

These extracts may indicate the prejudice which the declaratory judgment aroused among the majority members of the court. That the decision in the *Anway* case rested upon a major premise or assumption that the Act required or even permitted the court to render advisory opinions or decide moot cases is apparent. Why such an assumption should have been indulged, has never been explained. In the light of that error, the court failed adequately to analyze and distinguish from the declaratory judgment such federal cases as *Gordon v. United States*,¹⁰ in which the court's judgment would not have been final, *Muskrat v. United States*,¹¹ in which there were no adverse parties or a *res* before the court, and others again to be referred to in the discussion of *Liberty Warehouse Co. v. Grannis*¹² in the United States Supreme Court. Suffice it to say that Justice Sharpe, for the minority of the Michigan court, pointed out the majority's error; and inasmuch as the minority opinion has now been strikingly vindicated by the Michigan Supreme Court in its recent decision in *Washington-Detroit Theater Co. v. Moore*,¹³ in effect overruling the *Anway* case, it may be not inappropriate to quote from Justice Sharpe's opinion the following paragraph:

"Herein lies the distinction between declaratory judgments and moot cases or advisory opinions. The declaratory judgment is a final one, forever binding on the parties on the issues presented; the decision of a moot case is mere dictum, as no rights are affected thereby; while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between interested persons."

The comments which the *Anway* decision aroused—all of them unfavorable to the opinion of the majority¹⁴—may have influenced

¹⁰ See the unofficial opinion of Taney, C. J., 117 U. S. 697 (1864, printed 1885); the case is officially reported, without opinion, in 69 U. S. 561 (1864).

¹¹ 219 U. S. 346, 31 Sup. Ct. 250 (1911).

¹² *Supra* note 6.

¹³ 249 Mich. 673, 229 N. W. 618 (1930); see annotation (1930) 68 A. L. R. 105. It should be added that the court in this decision relies upon an Amendment to the 1919 Michigan statute expressly providing that the Act applies only to "cases of actual controversies" (*sic*) and an additional paragraph reading, "Declarations of right made under this Act shall have the effect of final judgments." It is submitted that the original Act of 1919 necessarily contained the implication of both these Amendments, as other courts, for example, those of Connecticut, Florida, New Jersey, New York, and Pennsylvania, have held. See cases *supra* note 3.

¹⁴ The Michigan decision in the *Anway* case received the condemnation of practically all the commentators who discussed it: Dodd, *Michigan Declaratory Judgment Decision* (1920) 6 A. B. A. J. 145; O'Donnell, *Michigan Declaratory Judgment Decision* (1921) 7 A. B. A. J. 141; Note (1921) 21 COLUMBIA LAW REV. 168; Note (1922) 7 CORN. L. Q. 255; Note (1922) 4 ILL. L. Q. 126; Note (1920) 19 MICH. L. REV. 86; Schoonmaker, *Declaratory Judgments* (1921) 5 MINN. L. REV. 172; Rice, *The Constitutionality of the Declaratory Judgment* (1921) 28 W. VA. L. Q. 1; Note (1920) 30 YALE L. J. 161.

other courts to avoid similar errors. A re-examination of the scope of the function known as "judicial power" was doubtless useful. Needless to say, all the state courts which have since had occasion to pass upon a declaratory judgment statute and all the comments upon the subject have concluded that an action for a declaratory judgment, like any other action between adversary parties involving contested issues and a *res* or right which is conclusively affected, presents a case or controversy or suit whose determination is of the very essence of judicial power. Perhaps the thousands of such judgments rendered in the past half century in nearly every English-speaking jurisdiction and on the continent of Europe should have carried some assurance of that fact.

To avoid any possibility of a misconception of the function to be performed by a declaratory judgment, the Kansas and California statutes of 1921, and the Virginia and Kentucky statutes of 1922, with the *Anway* decision presumably in mind, were supplied with the clause "in cases of actual controversy," and in Kansas and Virginia, with the further clause, "actual antagonistic assertion and denial of right."¹⁵ That these words are unnecessary is evidenced by the fact that the statutes not containing these words have been held constitutional in other states, on the assumption, inescapable in fact, that only such cases could be appropriately presented for declaratory judgment.¹⁶ The danger in the words "actual controversy" lies in the fact that courts hostile to this procedural reform may attempt to suggest that a controversy concerning legal rights arising before physical damage is done or a purported right exercised, is not "actual." Were the controversy not genuine or ripe for judicial decision, with a plaintiff and defendant having actually or potentially opposing interests, with a *res* or other legal interest definitely affected by the judgment rendered and the judgment a final determination of the issue, it would fail to present a justiciable dispute—not because it seeks a declaratory judgment, but because it lacks the elements essential to invoke a judgment from judicial courts.

The first case following that of *Anway v. Grand Rapids Railway*, in which the constitutionality of the declaratory judgment was raised, was the Kansas case of *State ex rel. Hopkins v. Grove*.¹⁷ In that case, Grove, an employee of the Missouri Pacific Railroad Co., had been elected to the office of City Commissioner of Wichita. A Kansas statute

¹⁵ *Kansas*: Laws 1921, c. 168, § 1; KAN. REV. STAT. ANN. (1923) §§ 60-3127. *California*: Stat. 1921, c. 463, p. 689; CAL. CODES OF CIV. PROC. (Deering, 1923) § 1060. *Virginia*: Acts 1922, p. 902; VA. CODE ANN. (1930) § 6140a. *Kentucky*: Acts 1922, c. 83, §§ 1, 2; KENTUCKY CODES (Carroll, 1927) §§ 639a-1, 2.

¹⁶ *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923); *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924).

¹⁷ 109 Kan. 619, 201 Pac. 82 (1922).

forbade under penalty an employee of a railroad operating under a franchise from or having a contract with a city, from holding office in that city. Before Grove took office, the attorney-general of the state brought an action against him for a declaratory judgment that Grove was ineligible to the office of City Commissioner, because the railroad held a franchise from the city; and after hearings the court so held. Instead of taking office first and incurring a criminal penalty, the question was appropriately tested by a preliminary preventive action. The issue might possibly have been presented, certainly after taking office, by a regular proceeding in *quo warranto*, by an injunction, or by a criminal prosecution; all these were rendered unnecessary, however, by the action for a "binding adjudication," and the court expressly holds that an injunction becomes unnecessary when a conclusive judgment establishes the rights of the parties.¹⁸ The Kansas Supreme Court, relying ostensibly upon the difference between the Kansas and the Michigan statutes in the employment by Kansas of the phrase "cases of actual controversy," but actually disapproving of the reasoning of the majority in the *Anway* case, comes to the conclusion that there is nothing unusual about the declaratory judgment except the fact that it carries no execution and that it does not require (although it admits of) the "actual commission of a wrong" before action may be brought.¹⁹

The Kansas court also points out that the federal cases upon which the Michigan court relied in the *Anway* case merely discountenance the giving of judgments not final or the decision of moot cases or the rendering of advisory opinions, phenomena which have nothing to do with the declaratory judgment. Indeed, the court points out that the federal Supreme Court has rendered declaratory judgments without so denomi-

¹⁸ In the fact that Kansas substituted for "declaration of right" the term "adjudications of right," as Massachusetts substitutes "determinations," it becomes apparent that the term "declaration" or "declaratory judgment" is the equivalent of decision, holding, determination, finding, ruling, judgment, or adjudication.

¹⁹ 109 Kan. at 622, 201 Pac. at 84: "Actions to quiet title and to construe wills are recognized methods of invoking judicial action which do not originate in the actual commission of a wrong nor terminate in a judgment inflicting a penalty, granting compensation or injunction, or otherwise giving 'consequential relief'; the declaration of rights being all that is necessary to fit the requirements of the case. The decree in an action to quiet title is sometimes so drawn as to order the setting aside or cancellation of a deed. A declaration that the instrument is void and without effect amounts to the same thing. The judgment does not change the condition of the title, but simply declares where it is vested. It gives the only relief that is necessary to settle the controversy—the determination of the ownership of the property. Why the Legislature cannot authorize similar procedure in like situations to meet like needs is not apparent. It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law, whatever it may be determined to be, from obtaining an adjudication of their controversy in the courts without one or the other first doing something that is illegal (in the case of the present defendant criminal) if he is mistaken in his view of the law."

nating them.²⁰ They conclude that the action for an "adjudication" in the *Grove* case was a useful and speedy method of preventing unnecessary complications by avoiding the necessity of Grove's assuming office and incurring a criminal penalty.

The Kansas decision in the *Grove* case became the beacon for all subsequent state cases dealing with the constitutionality of the declaratory judgment.²¹ The Supreme Court of California in 1923 in *Blakeslee v. Wilson*,²² reversing a lower court which had held the California act²³ unconstitutional, relied upon the *Grove* case and upon earlier decisions of the California courts to hold the Act constitutional. The *Blakeslee* case involved the interpretation of a disputed contract for the employment on a contingency basis of Blakeslee, a lawyer, to conduct certain patent litigation for Wilson. Wilson declined to pay the contingent fee, maintaining that the contract of employment had been changed to a new basis. Although Blakeslee could have sued for his contingent fee, he preferred to sue for the milder declaratory judgment that he was entitled to the fee. In overruling a demurrer to the com-

²⁰ This topic will receive more detailed mention in a subsequent portion of this paper.

It is not conclusive that the Kansas court relied upon *State v. Allen*, 107 Kan. 407, 191 Pac. 476 (1920), in which the correctness of an instruction in a criminal appeal was passed upon, though the jury had disagreed and been discharged. The Supreme Court of the United States and of Arizona [*United States v. Evans*, 213 U. S. 297, 29 Sup. Ct. 507 (1909); *State v. Miller*, 14 Ariz. 440, 130 Pac. 891 (1913)] have held such appeals moot and, therefore, beyond judicial power. In Arkansas, Indiana, Iowa, Kentucky, Ohio, and Oklahoma, as well as Kansas, statutes permitting such appeals have been sustained. They are objectionable, because they do not concretely affect legal interests presently at stake.

²¹ See e.g., *Board of Education v. Van Zandt*, *supra* note 3, citing *Report, Board of Statutory Consolidation, 1915*, v. I, § 57, n. 54.

²² 190 Cal. 479, 213 Pac. 495 (1923).

²³ Section 1060. "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

Section 1061. "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

Section 1062. "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." Stats. 1921, c. 463, p. 689; CAL. CODES OF CIV. PROC. (Deering, 1923).

plaint, the Supreme Court holds that the Act empowering the court to render declaratory judgments did not impose non-judicial duties on the court, and that the Act necessarily can only be invoked, as the California statute specifically prescribes, "in cases of actual controversy," and that under such circumstances the court's judgment is necessarily a conclusive determination of issues between adversary parties. In declining to follow the reasoning of the *Anway* case, the California court, like the Kansas court in the *Grove* case, calls attention to the difference between the Michigan and the California statutes, and to the fact that the California courts had overruled similar objections in two previous cases—one involving an act to provide for the establishment and quieting of title in case of loss or destruction of public records,²⁴ the other an act establishing a Torrens system for the certification of land titles and the simplification of transfers of real estate.²⁵ The court emphatically denies that the Act requires or empowers the court to decide most cases or render advisory opinions.

Connecticut was the next state to deal with the question of constitutionality. In *Braman v. Babcock*,²⁶ Albert R. Braman brought an action against the executrix of a decedent's estate for a declaratory judgment that he was the devisee, designated as ". . . Braman" in the decedent's will, of certain real estate situated in Rhode Island. This involved a question of fact which the court considered itself empowered to decide; but they declined to render the judgment in the exercise of their discretion, on the ground that, inasmuch as the property was in Rhode Island, they were not in a position "to settle finally the dispute or uncertainty." In rejecting the argument that the power to render declaratory judgments involved the exercise of non-judicial powers, the court says:

"Could it be claimed with any pretense of reason that the function was legislative or executive? The answer is obvious. We must then conclude that the function is judicial or that it falls outside the three functions described as legislative, executive, or judicial. It would be a travesty to hold that this method of remedial justice could find no place in our system of Government unless a place was made for it by an Amendment to the Constitution."²⁷

²⁴ Title and Document Restoration Co. v. Kerrigan, 150 Cal. 289, 318, 88 Pac. 356 (1906).

²⁵ Robinson v. Kerrigan, 151 Cal. 40, 47, 48, 90 Pac. 129 (1907). The court also refers to the articles of Professor Maurice Harrison, *The Declaratory Judgment in California* (1920) 8 CALIF. L. REV. 133; *California Legislation in 1921 Providing Declaratory Relief* (1921) 9 CALIF. L. REV. 359.

²⁶ 98 Conn. 549, 120 Atl. 150 (1923).

²⁷ 98 Conn. at 556, 120 Atl. at 152. This statement was approved in *Washington-Detroit Theater Co. v. Moore*, *supra* note 13.

The court points out that the Rules adopted to carry the Act of 1921²⁸ into effect²⁹ require that the plaintiff have "an interest, legal or equitable, by reason of danger of loss or of uncertainty as to his rights," that there be "an actual *bona fide* and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties," that all interested persons be made parties, and that the decision of the court be a final judgment. The court points out that the claim set up by the defendant "may be adverse, although no attempt has been made to enforce it," and that "to set it up . . . is treated as of itself a sufficient injury to justify suit." This shows insight. The court points out that it has heretofore rendered declaratory judgments within limited fields in actions to quiet title to property under statutes permitting adverse claimants to interests in property, real or personal, to try the title or interest in an action leading to a conclusive judgment not requiring execution.³⁰ They consider the Declaratory Judgments Act merely to extend the same judicial power to other classes of rights, the action for a declaratory judgment constituting merely a form of judicial procedure; and they sustain the power of the legislature to "enlarge our methods of remedial justice by authorizing our courts to protect rights by the rendering of declaratory judgments." To consider the method unconstitutional, they remark, would be "to close the door to the use in this state of a method of judicial procedure which for more than a half century has been used to the great benefit" of the English people. They add,

"To hold that the judicial power in this state is confined to the consideration of cases where consequential relief only is sought would be enforcing a limitation upon the judicial power in accord with custom rather than with reason and logic."

The "custom," however, is not without exception, for courts in the Anglo-American world have in many types of cases long rendered judgments which carry no coercive relief, and which hence are nothing

²⁸ Section 1. "The superior court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment."

Section 2. "The judges of the superior court shall make such orders and rules as they may deem necessary and proper to carry into effect the provisions of this act." (Public Acts of 1921, c. 258.)

²⁹ Practice Act 1922, at 255. The Connecticut Rules present a sound outline of the law of declaratory judgments and should dissipate any doubt as to the strictly judicial character of such a judgment.

³⁰ *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55 (1896); *Dawson v. Orange*, 78 Conn. 96, 61 Atl. 101 (1905).

but declaratory of existing rights. Unfortunately the Connecticut court, in disapproving the *Anway* decision and approving the *Grove* decision, felt called upon to make a remark about the federal *Muskrat* case by suggesting that the Connecticut constitution does not limit the judicial power to "cases and controversies". (*sic*) as does the federal Constitution³¹—a concession unnecessary and irrelevant, it is submitted, because the *Muskrat* case would have been a moot case in Connecticut or in any other state and because the conditions placed by the Connecticut Rules upon the exercise of the power to render declaratory judgments describe a litigated case within the narrowest conceivable construction of the term "cases" or "controversies." Even the United States Supreme Court has decided many cases in which a breach or wrong has not been physically perpetrated or coercive relief demanded, without suggesting that the issue was not a "case" or "controversy."³²

In 1924, the constitutionality of the Uniform Act on declaratory judgments first came up for consideration in a Tennessee case, *Miller v. Miller*.³³ The action was brought by a widow against children of the testator requesting the court to find and declare that under her husband's will she had the privilege and power, whenever she deemed it necessary, to sell the real estate and convey a good title. It appears that she had several times contracted to sell portions of the estate, but on examining the title the purchasers had declined to take, on the ground that under the will the children's interest in the property barred the widow's unqualified privilege of selling. The children denied the plaintiff's construction of the will, yet the court suggests—and in this they must not be misunderstood—that there is "no present controversy in the sense of a threatened litigation as to the widow's right to sell." What is present is a potential claim of the children, now by the suit and pleadings ripened into an actual claim, impairing the widow's freedom of sale and constituting in fact a cloud upon her title. Her action was thus in effect a suit to quiet title, consequent on her own "doubts" and the "fears" of rejecting purchasers, and to declare the alleged cloud non-existent; and inasmuch as her claim was contested, it was in every respect a justiciable issue. The court so held. In overruling objections of unconstitutionality, the court analyzes the *Anway* case and adopts as a sound rule of law Justice Sharpe's dissenting opinion, emphasizing the fact that "to adjudicate upon and protect rights and interests of individual citizens and to that end to

³¹ U. S. CONST., art. III, § 2.

³² *Infra*, notes 98 *et seq.*

³³ 149 Tenn. 463, 261 S. W. 965 (1924). See comments on this case in Note (1926) 4 TENN. L. REV. 104; (1925) 3 TEX. L. REV. 483; (1925) 73 U. OF PA. L. REV. 100; Note (1925) 11 VA. L. REV. 473.

construe and apply the laws, is a peculiar province of the judicial department," and that declaratory judgments were not expected to be rendered except where there is "an actual concrete controversy, a *bona fide* contest over asserted existing legal rights." The court adopts, as the conditions of a declaratory judgment, the criteria laid down in *Scotland* and reiterated in numerous cases in England and elsewhere,³⁴

"that the question must be a real and not a theoretical question; that the person raising it must be able to secure a proper contradicter, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

Judge Hall, for the Tennessee court, like a number of other state judges, apparently somewhat uncertain how to deal with the federal cases which seem to bear some relation to the subject, makes unnecessary concessions to the inhibitory clauses of the federal Constitution by suggesting, without adequate analysis, that the federal limitations upon "cases" and "controversies" are not "controlling" in Tennessee. He might have considered them entirely controlling and yet not have varied in the least his conclusion in the *Miller* case.³⁵

Perhaps the most exhaustive opinion on the constitutionality of the declaratory judgment has been that announced by the Pennsylvania Supreme Court in *In re Kariher's Petition*.³⁶ In that case three lessors claiming to be absolute owners of certain land negotiated a lease for quarrying the sub-surface limestone. The proposed lessee declined to take, alleging that one of the lessors had only a life interest under a certain will and not a fee. The challenged lessor thereupon brought this action against the lessee and all persons in interest under the will, demanding a judgment declaring him the owner of a fee. The necessity of removing this cloud upon his right, much as in the *Miller* case, and the fact that the defendants contested his claim, impressed the court not only with the genuineness and actuality of the controversy, but with the important function that the court subserved by deciding the disputed issue. The court draws up a considerable list of cases in which Pennsylvania and other courts have passed upon disputes with respect to legal rights before a physical injury or purported invasion has taken place, and without granting coercive relief. Chief Justice von Moschzisker, for the court, says:

³⁴ See *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A. C. 438; *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925).

³⁵ The court points out that the *Muskrat* case presented no "controversy."

³⁶ 284 Pa. 455, 131 Atl. 265 (1925).

"No doubt many other instances could be cited where we in Pennsylvania are today, and have been for many years, indulging in declaratory judgments; the present legislation simply makes that practice more extensive. When this latter fact is realized, the whole argument as to the act's imposing on the courts something new, in the nature of a non-judicial function, fails; for the statute before us merely presents the extension of a long and well established judicial function, previously enjoyed to a considerable extent in this state, of declaring the law which governs a given condition of facts so as to make the controversy covered by these facts res judicata, albeit in many cases no execution may be called for, and even though the action was started before damages were actually inflicted or before danger thereof was imminent."

The Pennsylvania court has little compunction in saying that the Michigan court in the *Anway* case labored under the erroneous impression that the Act required them to decide moot cases or give advisory opinions, from both of which the declaratory judgment differs in fundamental respects, and that they were mistaken in the belief that decisions of the United States Supreme Court in cases where by statute the court's judgment was made not final or where there was no controversy between adverse parties, required them to hold the Michigan Act unconstitutional. The Pennsylvania court observes that Justice Day's remark in the *Muskrat* case,³⁷ that "judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction," fully described the conditions of a declaratory judgment. The procedure had all the elements of due process of law, a conclusion reached also by the Connecticut and Tennessee courts. The action for a declaratory judgment was a mere change or modification in procedure; it offers but "another method by which a party can call on the courts to adjudicate his rights." The Pennsylvania court adds, "The legislature has power to change methods of procedure," and with respect to the power to render declaratory judgments, a court will not exercise it unless it is

"satisfied that an actual controversy, or the ripening seeds of one, exists between parties, all of whom are sui juris and before the court, and that the declaration sought will be of practical help in ending the controversy."

Chief Justice von Moschzisker includes another paragraph, in analysis of the scope of the judicial power, which has been quoted by a number of other courts. He says:

"When adverse litigants are present in court and there is a real controversy between them, a final decision rendered in any form of proceeding of which the court has jurisdiction is a judgment in the proper sense of that

³⁷ 219 U. S. 346, 362, 31 Sup. Ct. 250, 256 (1911).

term, and the giving of it is a judicial function, whether or not execution may follow thereon. For instance, the ordinary judgment for defendant is merely a declaration that, on the evidence offered, the plaintiff has no case; though, as a matter of fact, it may be entered in an action or proceeding which was instituted by the plaintiff with the idea, or hope, of securing an executory judgment; but, like all other declaratory judgments, a judgment for defendant has the effect of making the issues at stake *res judicata*, and, in this important sense, such judgments are forever enforceable—which, more than the fact that execution may or may not be issued thereon, gives them the character of judgments.”³³

In 1926, the Virginia Supreme Court had occasion in *Patterson's Executors v. Patterson* to pass upon the constitutionality of the Virginia Act of 1922, which followed to some extent the wording of the Kansas Act considered in the *Grove* case.³⁹ In the *Patterson* case, executors under a will had sold certain property. The children of one of the heirs later claimed that the executors had mistakenly assumed that they had such power to sell and challenged the title of the purchasers. Thereupon the executors and the purchasers brought an action against the contesting children for a declaration that the power of sale had been validly exercised, and that the purchasers had received a good title. In addition to declaratory relief, they prayed that the children be required to join in the deed of sale. The court held that the executors actually had no power to sell, but that the children's deceased father had approved the sale and received the benefits thereof, hence that they were estopped from contesting its validity. This again was an action to quiet a title already ostensibly conveyed, a failure to decide which would have left rights in suspense and uncertainty and made it difficult to dispose of the property. After calling attention to the previously discussed conditions of a valid exercise of the judicial power, which differ in no respect whether directed toward a declaratory or any other judgment, the court adopts the reasoning of the *Grove* and other cases holding a declaratory judgment statute constitutional; and, while disapproving the *Anway* case, holds it not controlling in view of the difference between the Michigan and Virginia statutes, although they again point out that there is no warrant for the belief that a declaratory judgment statute empowers the court to decide moot cases or render advisory opinions.

In 1926, the New Jersey Court of Errors and Appeals upheld the constitutionality of the New Jersey Uniform Act of 1924 in *Mc-*

³³ 284 Pa. at 469, 131 Atl. at 270.

³⁹ 144 Va. 113, 131 S. E. 217 (1926). The Virginia Act also includes the phrases “in cases of actual controversy” and “actual antagonistic assertion and denial of right.”

*Crory Stores Corp. v. S. M. Braunstein, Inc.*⁴⁰ The 1915 New Jersey Act,⁴¹ which, like the Florida Act of 1919 and the Massachusetts Act of 1929, was confined exclusively to the construction of written instruments and the declaration of rights thereunder, had been assumed to be constitutional. In the *McCrory* case, a lessee sued his lessor to have the court declare that a clause in a long-term lease which required the lessee to pay all increases in taxes "on and after October 27, 1920," gave the lessee immunity from the payment of the excess of 1920 taxes over those of 1919, and that the obligation began only with the excess over the 1920 assessment. The lessor contended that the clause covered increases over the 1919 assessment. In affirming judgment for the lessee, Chief Justice Gummere, with the concurrence of thirteen associate justices and judges, held that the Act did not violate any constitutional requirements in supposedly imposing non-judicial duties on the court, nor did it infringe upon any of the elements essential to the proper exercise of judicial power. The court makes the telling point that the function of construing a contract or deed is no different from that of construing a will, and adds that the reasoning of the courts of Kansas, New York, California, Connecticut, Tennessee, and Pennsylvania above mentioned is "convincing of the soundness" of their conclusion that declaratory judgment statutes are constitutionally unchallengeable. The court goes further, however, and argues that the "underlying principle" has been upheld in a previous decision in New Jersey, *In re Public Utility Board*.⁴² This was an unfortunate analogy, for in that case a statute of 1873 had authorized the attorney-general to bring a proceeding in the Supreme Court for the investigation and determination of the question whether a particular statute had been constitutionally passed and if not, to declare it null and void. No litigation *inter partes* was necessary and no *res* was necessarily affected by the decision. It was, therefore, much like the *Muskrat* case, which presented no justiciable controversy and is no authority whatever for the action for a declaratory judgment, which demands litigating parties, a *res* or right definitely affected, and a final judgment. It is difficult to believe that the Kansas, Connecticut, Pennsylvania, and Tennessee decisions could have been carefully read if the conclusion can be reached that the proceeding in *In re Public Utility Board* is an analogy for the radically different action for a declaratory judgment. Perhaps this inappropriate analogy accounts for Judge

⁴⁰ 102 N. J. L. 590, 134 Atl. 752 (1926).

⁴¹ N. J. COMP. STAT. (1915) c. 116, § 7; *In re Ungaro's Will*, 88 N. J. Eq. 25, 102 Atl. 244 (1917).

⁴² 83 N. J. L. 303, 84 Atl. 706 (1912).

Kalisch's lone dissent. But however misconceived the analogy, the New Jersey court is in full accord with the earlier state cases upholding declaratory judgment statutes.

In 1929 the Arizona Supreme Court sustained the constitutionality of the Uniform Act in that state.⁴³ In *Morton v. Pacific Construction Co.*, a paving company had entered into a contract with the city of Phoenix, Arizona, for the paving of Second Street in that city, the cost constituting a lien against abutting property. Certain property owners affected had, in suits against the city and otherwise, challenged the validity of the company's contract. Thereupon the company brought this action against certain property owners "to settle and afford relief from uncertainty and insecurity" with respect to its contract. A demurrer on the ground that the action presented no *bona fide* controversy, that there was no cause of action, and that there was another action pending, was overruled, though it was ultimately sustained on the ground that there were insufficient parties defendant. But on the constitutional propriety of the exercise of judicial power by way of declaratory judgment, the court had no doubt. The *Anway* case, said the court, was useful as authority for the proposition that the court will not render advisory opinions in a case not involving an actual controversy between adversary parties, but not as authority for refusing to render declaratory judgments. They explained away the federal *dicta* by remarking that the federal courts were limited by the terms "cases" and "controversies," not stopping further to analyze these words or their application in *bona fide* controversies seeking declaratory judgments. As will be shown presently, the suggestion that these terms limit the power to render declaratory judgments in the federal or any other courts must be founded upon a misconception as to the nature of declaratory judgments. The Arizona court then relies upon the reasoning of the *Kariher* case in Pennsylvania and the *Miller* case in Tennessee to sustain the constitutionality of the Arizona Act. They suggest that, in the exercise of their discretion, they might not have rendered a declaratory judgment in the *Morton* case, because it would not have terminated the controversy.⁴⁴

In the recent case of *Washington-Detroit Theater Co. v. Moore*,⁴⁵

⁴³ *Morton v. Pacific Constr. Co.*, 283 Pac. 281 (Ariz. 1929). It is interesting to note that the Arizona court had earlier refused to render an advisory opinion to the legislature in a case mistakenly brought for a declaratory judgment. *Crawford v. Favour*, 34 Ariz. 13, 267 Pac. 412 (1928).

⁴⁴ This is a common ground for declining, in the exercise of the court's discretion, to render a declaratory judgment in a particular case. See the cases cited of *Ezzell v. Exall*, 207 Ky. 615, 269 S. W. 752 (1925); *Coke v. Shanks*, 209 Ky. 723, 273 S. W. 552 (1925); *H. C. Heller & Co. v. Hunt-Forbes Constr. Co.*, 222 Ky. 564, 1 S. W. (2d) 970 (1928).

⁴⁵ 249 Mich. 673, 229 N. W. 618 (1930).

the Michigan Supreme Court, after the repassage in 1929 of the Michigan Act of 1919 with the added phrase "in cases of actual controversies" (*sic*) and the specific provision that the declaration of right shall have the effect of a final judgment, overruled its much criticized majority decision and opinion in the *Anway* case and held the amended Michigan Act constitutional. In so doing, they adopted fully the reasoning of Justice Sharpe in his dissenting opinion in the *Anway* case. In the *Washington-Detroit Theater Co.* case, a lessee under a 99-year lease claimed the privilege under the lease to demolish the building on the leased property and to use a new proposed structure for other than theater purposes. After discussion of the matter, the lessor defendant denied the plaintiff's construction of the lease and threatened forfeiture if plaintiff commenced destruction of the building or used it otherwise than for a theater. As the present use involved great loss to the lessee, he brought an action against the lessor for a declaration that he was privileged to demolish the building and use a new one for other than theater purposes, to which he joined a prayer for an injunction restraining the lessor from interfering with the destruction of the building or attempting to forfeit the lease. After asserting the view that the new Act precluded any possibility of the *Anway* construction, namely, that the court was empowered to decide "moot cases," render "advisory opinions," or give "advice," the court remarks:

"When an actual controversy exists between parties, it is submitted in formal proceedings to a court, the decision of the court is binding upon the parties and their privies and is *res adjudicata* of the issue in any other proceeding in the court in which it may be involved, what else can the decision be but the exercise of judicial power?"

The court then quotes with approval certain paragraphs from the opinions of the Supreme Courts of Connecticut, Pennsylvania, and Kansas, set out above, and adds, in answer to the objection that execution is part of a judicial judgment:

"In many cases of ordinary actions the mere determination of rights by judgment or decree ends the controversy. An execution or order of enforcement is issued at the instance of a party only where such determination does not suffice. The court itself does not, of its own motion, enforce its judgments. The situation is little different as to a declaratory judgment. Like an ordinary one, it is self-enforcing to the extent of being final and constituting *res adjudicata*. Section 3 of the act provides that if further relief be necessary or proper, it may be had on application of a party. Whether consequential relief be granted upon the original or a subsequent petition, and whether an order of enforcement be had of course or on appli-

cation, go merely to the practice, not to the power of the court. In many equity proceedings the decree is merely declaratory and enforcement is had only on subsequent application for an order in contempt or otherwise."⁴⁰

In answer to the objection that the federal Supreme Court had held that "a proceeding for a declaratory judgment is not a 'case' or 'controversy' to which the judicial power of the federal judiciary can attach," the Michigan court points out that the federal court had never passed on the constitutionality of an Act; that, while the facts of the *Chicago Auditorium* case were "substantially identical" with those in the *Washington-Detroit Theater Co.* case, there was in the Chicago case "merely a casual disagreement upon the legal right to tear down the building instead of definite negotiations to that end and actual controversy over the right." In actual fact, the *Chicago Auditorium* case involved a bitter contest, and no "casual disagreement," as Justice Brandeis perhaps inadvertently indicated; but if it was an academic difference of opinion only, then it presented a moot case, which has nothing to do with the declaratory judgment. After quoting Justice Brandeis' remark that "no defendant has wronged the plaintiff or has threatened to do so"—a condition which, if true, prevailed in the *Washington-Detroit Theater* case—and that "resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution, and for more than half a century thereafter," a conclusion which is hardly sustained by the traditional equitable bills of *quia timet*, removing of clouds from title, interpleader, and other proceedings, the Michigan court seeks, without material warrant, to distinguish the federal from the state judicial power, by remarking:

"This historical argument, however much it may circumscribe a government of granted powers, is not applicable to a sovereign state whose inherent

⁴⁰ The court states certain conditions incidental to the practice of rendering declaratory judgments taken from 12, 19 and 50 A. L. R. Unfortunately, those statements are not always accurate, nor are they sustained by all the authorities cited in A. L. R. For example, a number of the cases cited were not actions for a declaratory judgment at all. [*E.g.*, *Holt v. Custer County*, 75 Mont. 328, 243 Pac. 811 (1926); *Burton v. Durham Realty & Ins. Co.*, 188 N. C. 473, 125 S. E. 3 (1924); *Stinson v. Graham*, 286 S. W. 264 (Tex. Civ. App. 1926), which are cited for the obviously correct proposition that "there must be an actual and *bona fide* controversy as to which the judgment will be *res judicata*. Such a case requires that all the interested parties shall be before the court."] Nor is it absolutely, though it is generally, true that "a declaration cannot be had in respect of a cause which, it is merely apprehended or feared, the defendant may assert, where he has made no claim against the plaintiff thereon, although he refuses to waive any rights thereunder." Occasionally clouds upon title arise out of documents or records or facts which involve no personally asserted claim, though usually it will be found that a defendant has advanced a claim which endangers or challenges or questions the plaintiff's rights to an extent warranting judicial protection.

powers enable it to attempt the solution of any social problems arising from current conditions, and which may adventure into experiment for the public welfare."

This apology or explanation for disregarding the federal cases was unnecessary; the fact is that the federal *dicta* were not, it is respectfully submitted, well considered, made an inadequate investigation of the subject with which they dealt, and have unnecessarily and without substantial ground retarded the development of a highly useful procedure.

In 1930, also, the Florida Supreme Court, in *Sheldon v. Powell*,⁴⁷ upheld the constitutionality of the Florida Act of 1919, which limited the power to render declaratory judgments to the construction of written instruments. In the *Sheldon* case, an executor had refused to release a legacy to the trustees of the Young Memorial Library, legatee under a will, unless they executed a bond for his protection. This, the trustees of the library refused and brought an action against the executor for a declaratory judgment that they were entitled to the legacy without bond. They might have employed another remedy, a legatee's suit authorized by section 3735 of the Revised General Statutes of 1920; but the court held that they had the option of pursuing the alternative remedy by declaratory judgment if they chose.⁴⁸ The court, not then knowing that the Michigan court had practically overruled the *Anway* case, concluded that the *Anway* construction of the statute as supposedly empowering the court to decide "moot cases" and give "advisory opinions," could not be followed. The court further remarks that the *dicta* in federal cases, "if approved and adopted by the federal court when

⁴⁷ 99 Fla. 782, 128 So. 258 (1930), upholding c. 7857 of Acts of 1919, §§ 4953-4954, Compiled Laws of 1927.

⁴⁸ Citing 9 R. C. L. 957 and 964. The Pennsylvania Supreme Court is quite in error in assuming that the declaratory judgment can be employed only when no other "established" remedy is available. *In re Cryan's Estate*, 152 Atl. 675, 677 (Pa. 1930), and Pennsylvania cases cited. There is no authority in England for such a view, and it has not been adopted generally in the American states. The words "whether or not further relief is or could be claimed" mean that a declaratory judgment can be prayed for, *whether or not* damages, an injunction, specific performance, mandamus, or any other coercive relief could have been or is asked. That is, a plaintiff may pray (1) for a declaratory judgment alone, though he might have asked for an injunction or specific performance; or (2) he may pray for a declaratory judgment in combination with a prayer for an injunction. It does not mean merely, as the Pennsylvania Supreme Court suggests, that "such (declaratory) relief may be had even though, for full relief, other and additional legal remedies must be resorted to *after the issues in the declaratory judgment proceedings have been determined*" (italics supplied), if by that the court means that a declaration, plus coercive relief, cannot be asked in one action. If the court means that a declaration may be asked, even though, for full relief, an injunction or decree of specific performance or damages must later be sought, then it *does* admit that a declaration may be obtained, notwithstanding the present possibility of a suit for an injunction, specific performance, or damages; and in that event, it contradicts its own generalization that a declaratory judgment "could not properly be given where another established remedy was available."

squarely presented," are not binding on the Florida courts, because no such words as "cases" or "controversies" are to be found in the Florida constitution. In calling attention to the many state cases in which declaratory judgment statutes had been held constitutional, the court remarks that "the federal case of *Fidelity National Bank & Trust Co. of Kansas City v. Swope*⁴⁹ . . . and cases there cited, may be construed as upholding the principle as announced by the foregoing state courts."⁵⁰ The court thus concludes, correctly, it is submitted, that the United States Supreme Court itself, in spite of its *dicta*, has in practice been rendering declaratory judgments right along. After calling attention to the many types of cases in which Anglo-American courts have traditionally rendered declaratory judgments before rights are invaded and without granting consequential relief, the court adds that "except for the coercive element in the judgment or decree, we understand that there is no difference between a declaratory judgment or decree and any other judgment between opposing parties." The court points out that the English and American courts have treated the rendering of declaratory judgments as a matter "of practice and procedure, rather than one of jurisdiction."⁵¹ In either case, they add, "The legislature had power to pass the Act."

In 1930, the Wisconsin Supreme Court, in *City of Milwaukee v. Chicago & Northwestern Ry.*,⁵² held that its 1927 Act (the Uniform Act) was constitutional. In that case the city brought an action against the railroad for a declaration that its own ordinance of 1902, by which it had undertaken to maintain certain structures, was void, and that by law this duty of maintenance fell upon the defendant railroad. In so holding, the court concedes that the question might have been tried in another form of action, but as it involved an actual controversy as to legal rights, there was no reason why it could not be decided by declaratory judgment.⁵³

⁴⁹ 274 U. S. 123, 47 Sup. Ct. 511 (1927).

⁵⁰ The court also cites *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 49 Sup. Ct. 499 (1929).

⁵¹ See cases cited in note 64, *infra*.

⁵² 230 N. W. 626 (Wis. 1930). An earlier Wisconsin Act of 1919, § 2687m, was repealed in 1923, after several cases had been decided under it, on the fear that, in the light of the *Anway* case, the Act might be held unconstitutional. See (1923) 8 MARQUETTE L. REV. 37 and (1924) 2 WIS. L. REV. 376. The Uniform Act was then passed in 1927.

⁵³ In answer to the defendant's contention of unconstitutionality, on authority of the *Anway* case, the court remarks that the Michigan court had in effect overruled that decision in the *Washington-Detroit Theater Co.* case and that several other states had held similar acts constitutional, that the Wisconsin Supreme Court had *sub silentio* reached the same conclusion in two recent cases [*Nash Sales, Inc. v. City of Milwaukee*, 198 Wis. 281, 224 N. W. 126 (1929); *Rosenberg v. Whitefish Bay*, 199 Wis. 214, 225 N. W. 838 (1929)], and that the Kansas case of *State v. Grove* in a general way expresses the views of the Wisconsin court on the question of constitutionality.

Finally, the Indiana Supreme Court in 1930 upheld the Indiana (Uniform) Act of 1919 in *Zoercher v. Agler*.⁵⁴ In that case, certain taxpayers brought an action for a declaratory judgment against the state board of tax commissioners and the City of South Bend and others, alleging that a statute conferring revisory taxing powers on the state tax board was unconstitutional. The court's attention was confined to the question whether the plaintiff had a sufficiently substantial interest to bring an action, on which an affirmative conclusion was reached. While the plaintiff's rights were mainly "public," they were deemed to be sufficiently affected indirectly to obtain a declaration, although the court thought that usually "private rights" only are thus protected.⁵⁵ On the point of constitutionality, the court merely cites with approval the numerous state cases which had held declaratory judgment statutes constitutional.

United States Supreme Court

In 1927 the United States Supreme Court, in *Liberty Warehouse Co. v. Gramis*,⁵⁶ for the first time had occasion to consider the declaratory judgment procedure. In the light of the ample discussions that had taken place in the state courts, involving every phase of the procedure and putting it to the most rigid tests of conformity to the elementary requirements for the proper exercise of judicial power, it is unfortunate that the Supreme Court, even though only by way of *dictum*, should have ignored all this profound analysis and should have in practical effect adopted the discredited views of the *Anway* case in Michigan and concluded that the declaratory judgment, on the supposed "authority" of the *Gordon* and *Muskrat* cases, required the rendering of advisory opinions or, as later implied, a determination of a moot case. Even the magical words "cases" or "controversies," which, without adequate justification, are deemed to give the judicial function in the federal courts a quite different connotation from that known to state courts, cannot explain so exceptional a conclusion. The fact is that the state courts, in their examination of the declaratory judgment, have used tests of justiciability quite as severe as any employed in a federal "case" or "controversy." Those words, it is believed, have no charm which can justify

⁵⁴ 172 N. E. 186 (Ind. 1930); (1930) 6 INDIANA L. J. 118. In the recent Kentucky case of *Black v. Elkhorn Coal Corp.*, 233 Ky. 588, 26 S. W. (2d) 481 (1930), in which the constitutionality of the Kentucky statute was sustained, a mortgage bondholder sought to declare void a proposed lease of the mortgaged premises by the trustee.

⁵⁵ Actually, it may be inferred that the plaintiffs were deemed to have a sufficient private interest in the establishment of the legal relations they sought to have determined.

⁵⁶ 273 U. S. 70, 47 Sup. Ct. 282 (1927).

what would seem to be misconceptions as to what a declaratory judgment is. For it is submitted that it is probably only on the foundation of such a misunderstanding that a court could reach the conclusion that an action for a declaratory judgment, properly brought, lacks any of the elements essential for the exercise of judicial power, namely, an issue between contesting litigants involving their legal rights and resulting in a final judgment.

The facts of the first *Liberty Warehouse* case were as follows: Kentucky enacted a statute in 1924⁵⁷ requiring tobacco warehousemen who shall receive leaf tobacco for sale at public auction, to post notices stating the name and address of the producer or owner whose tobacco would each day be offered for sale, together with the number of pounds sold and the price received on behalf of each seller, under penalty of a fine of \$50 to \$100 per day for violations. It appears that the statute was instigated by a large tobacco co-operative marketing association to force the independent growers and producers into the association. Certain Kentucky warehousemen at once brought actions in the Kentucky courts under the Kentucky Declaratory Judgment Act,⁵⁸ citing the commonwealth attorneys as defendants, for a declaration that the Warehouse Act was unconstitutional because of improper classification, unwarranted burdens constituting lack of due process, interference with interstate commerce, and violation of the anti-trust law. The Declaratory Judgment Act, as is necessarily implied, even if unexpressed, provided that an "actual controversy" must exist as a condition of the exercise of judicial power.⁵⁹ The Kentucky court, apparently without hesitation, rendered a declaratory judgment holding the Warehouse Act constitutional.⁶⁰ In sustaining the declaratory judgment procedure as appropriate, the Kentucky court would seem to have acted properly.⁶¹

⁵⁷ "An Act regulating the sale of loose leaf tobacco at public auction in this Commonwealth," Acts of 1924, c. 10.

⁵⁸ Acts of 1922, c. 83.

⁵⁹ As to the possibility of misconceptions of the phrase "actual controversy," see Note (1926) 35 YALE L. J. 473, 475-476.

⁶⁰ *Jewell Tobacco Warehouse Co. v. Kempner*, 206 Ky. 667, 268 S. W. 342 (1925).

⁶¹ In the following cases the declaratory judgment procedure was employed to challenge the constitutionality or validity of a statute as applied to the plaintiff. *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927) (cigarette advertising law invalid); *Ware v. Ammon*, 212 Ky. 152, 278 S. W. 593 (1925) (discriminatory dry-cleaning law invalid); *Pathé Exchange v. Cobb*, 202 App. Div. 450, 195 N. Y. Supp. 661 (3d Dept. 1922) (motion picture censorship law valid); *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S. W. 565 (1927) (discriminatory pool-room law invalid); *Utah State Fair Ass'n v. Green*, 68 Utah 254, 249 Pac. 1016 (1926) (parimutuel statute held to abrogate inconsistent ordinances); *Lagoon Jockey Club v. Davis County*, 270 Pac. 543 (Utah 1928) (statute forbidding gambling pools not repealed by later statute). But cf. *Purity Oats Co. v. State*, 125 Kan. 558, 264 Pac. 740 (1928) (declaration as to whether plaintiff was violating trading stamp law refused). See also *Hessick v. Moynihan*, 83 Colo. 43, 262 Pac. 907

Certain non-resident warehousemen, not satisfied with the Kentucky result, then brought an action in the federal district court for Kentucky under the federal Conformity Act⁶² against the commonwealth attorney charged with the duty of enforcing the Warehouse Act and who, it was alleged, had already prepared indictments against the plaintiffs, for a declaratory judgment that the Act was unconstitutional for the reasons above mentioned and that they were not subject to the penalties provided for. The district court declined to exercise jurisdiction under the Conformity Act, and on appeal by direct writ of error to the Supreme Court, that court not only affirmed the decision as to the impropriety of thus using the Conformity Act in a matter, according to the court, not involving a question of "practice, pleading and forms and modes of proceeding," but suggested that the issue presented no "case" or "controversy" within the meaning of article 3, section 2, of the Federal Constitution.⁶³

Although the action for a declaration, known by other names but long used under specific circumstances in the United States, does, it is believed, involve distinctly and exclusively matters of "practice, pleadings and forms and modes of proceeding,"⁶⁴ it is possible that the result

(1927); *City of Wichita v. Wichita Gas Co.*, 126 Kan. 769, 271 Pac. 272 (1928); *Adams v. Slavin*, 225 Ky. 135, 7 S. W. (2d) 836 (1928); *Pettit v. White County*, 152 Tenn. 660, 280 S. W. 688 (1926); *State Board of Examiners v. Standard Engineering Co.*, 157 Tenn. 157, 7 S. W. (2d) 47 (1928).

⁶² 17 STAT. 196 (1872), 28 U. S. C. A. § 724 (1926). The principal clause reads: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit or district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." See *Coffey v. United States*, 117 U. S. 233, 234, 6 Sup. Ct. 717 (1886). An extended account of the history and application of the Conformity Act will be found in 25 C. J. 797 *et seq.* On the ineffectiveness of the Conformity Act, see Note (1927) 36 YALE L. J. 853.

Had the Kentucky declaratory judgment statute been deemed to create a new equitable right of a substantive character, it might have been enforced in a federal court. *Clark v. Smith*, 13 Pet. 195, 203 (U. S. 1839); *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, 498, 43 Sup. Ct. 454 (1923). But if deemed an equitable right of a remedial character, it could not be enforced in a federal court. *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 128, 50 Sup. Ct. 270 (1930).

⁶³ "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority . . . to Controversies . . . between Citizens of different states," etc. The draftsmen of the Constitution hardly purported to expound any new or original conception by the use of the phrase "judicial power," but meant to embody therein the customary meaning which experience of the judicial function had attributed to the words. See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts* (1924) 37 HARV. L. REV. 1010, 1017; THAYER, *LEGAL ESSAYS* (1908) 43; Note (1927) 41 HARV. L. REV. 232.

⁶⁴ See *Guaranty Trust Co. v. Hannay*, [1915] 2 K. B. 536. "But if its only effect is to provide that the court may deal with a matter with which it can already deal, in a different manner under different circumstances, and when brought before it by a different person, it is, in my opinion, only dealing with practice and pro-

reached in the case may be sustained for reasons not referred to by the court. Congress has by section 266 of the Judicial Code surrounded with specific safeguards, such as the provision for three judges, the grant of injunctions by federal courts against the enforcement of state statutes. Hence it may perhaps be proper—although it was only the harsh injunction, and not the power to decide, that was attacked—not to permit these limitations to be avoided by invoking in the federal courts the declaratory judgment procedure under the Conformity Act in those states which authorize their courts to render such judgments. It may also be said that the term “practice, pleading and forms and modes of proceeding” has been confined in practical application to the most technical matters of pleading and practice,⁶⁵ which might justify the result reached, but not the explanation given by the court.

In view of the conclusion that a federal court could not entertain the proceeding, it is perhaps proper to infer that what is said about the nature of an action for a declaratory judgment and its presentation of a “case” or “controversy” is *dictum* only.

The opinion of Justice Sanford states that

“the sole purpose of the petition, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Warehouse Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business.”

This appears to be only a partial statement of the petition, although the plaintiffs doubtless aroused the prejudice of the court by the awkward

cedure and is *intra vires*” (by Pickford, L. J., at 563). “. . . I can not doubt that had the Court of Chancery in those days (before 1852) thought it expedient to make merely declaratory judgments they would have claimed and exercised the right to do so. It is amongst other things to amend the *practice and procedure* of the Court of Chancery in this respect that § 50 of the Act of 1852 was passed. The preamble of the statute makes this clear” (by Bankes, L. J., at 568). Bankes, L. J., quotes Fletcher Moulton, L. J., in saying “that an action thus framed (for a declaration of right) is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions” (*ibid.*, at 569). “The rule relates to procedure only and must be so construed.” Lord Davey, in *Barroughcloff v. Brown*, [1897] A. C. 615, 624.

See editorial comment by F. W. Grinnell, (April, 1928) 13 MASS. L. Q. 50-52; A. C. 615, 624.

See editorial comment by F. J. Grinnell, (April, 1928) 13 MASS. L. Q. 50-52; *Morton v. Pacific Constr. Co.*, 283 Pac. 281 (Ariz. 1929); *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923); *Sheldon v. Powell*, 128 So. 258, 263 (Fla. 1930); *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925). The declaratory judgment is always indexed under such heads as Actions, Practice, Procedure, or Judgments, and is found in Practice Acts, Codes of Civil Procedure, or special statutes regarded as procedural. There seems to be no authority *contra*.

⁶⁵ 3 FOSTER, FEDERAL PRACTICE (6th ed. 1921) § 453; Note (1922) 35 HARV. L. REV. 602. But see *Guffey v. Smith*, 237 U. S. 101, 113, 35 Sup. Ct. 526 (1915).

drafting of the paragraph in question.⁶⁶ This should not, however, have influenced the court. The petition requested a declaration that the Warehouse Act was unconstitutional and invalid, and that the plaintiffs were not subject to the prescribed penalties, the identical prayer that would have accompanied a bill for an injunction, except that injunctive relief was not requested. The language used by the court might convey the impression that the plaintiffs were asking for some strange kind of declaration as to how to run their business, whereas essentially they asked only a declaration that the Act was unconstitutional. The court then goes on to say:

"While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, there is no semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And no relief of any kind is prayed against him, by restraining action on his part or otherwise."

This, then, is the crux of the basis for the court's belief that the issue presented no "case" or "controversy." The reasoning deserves examination. When an injunction is sought against an attorney-general to prevent the enforcement of a statute,⁶⁷ there is no adverse litigation, with him individually, but only in his official capacity as the enforcer of the law. That is what the defendant was in the instant case, and he had, in fact, it appears, prepared indictments against the plaintiffs. It is understood that the plaintiffs were later fined. But even if he had prepared no indictments, the mere existence of the statute was a threat to the plaintiffs' business and gave them a clear right to an in-

⁶⁶ This one paragraph of the petition stated that the plaintiffs were making the application "for the purpose of securing a declaration of their rights and duties under such Acts of 1924, and for the purpose of having this court determine whether in the conduct of their business, it will be necessary for them to comply with the provisions of said Act of 1924, or whether Chapter 10 of the Act of 1924 is invalid in whole or in part, and if so, in what part." This form of petition, while not uncommon in England and the dominions, where they have long been familiar with the procedure for a declaration of rights, is perhaps open to criticism in the United States, for it looks as if the plaintiff is asking for an advisory opinion, and not a judgment. Knowing that courts are frequently hostile to anything which has even the appearance of novelty, lawyers should be careful to frame petitions so as to request a declaration of specific findings or conclusions, and not ask generally for a declaration as to whether they have certain rights, as if seeking merely advice.

⁶⁷ *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7 (1915); *Terrace v. Thompson*, 263 U. S. 197, 44 Sup. Ct. 15 (1923); *Packard v. Banton*, 264 U. S. 140, 44 Sup. Ct. 257 (1924); *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 45 Sup. Ct. 141 (1925); *Tyson & Bro.-United Theatre Ticket Offices v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426 (1927); *Beatrice Creamery Co. v. Cline*, 9 F.(2d) 176 (D. Colo. 1925).

junction, had they sought it. *A fortiori*, they were entitled to the milder relief by declaration of rights, merely a judgment that the Act was unconstitutional. The term "declaration of rights" is a term of art, sanctioned by usage in England since 1852, and in Scotland since the sixteenth century. It should not have aroused judicial hostility. It signifies judgment, decision, holding, determination, ruling, finding, adjudication. Disregarding the fact that the plaintiffs later obtained, it is understood, a temporary injunction against the enforcement of the Act in the federal court, how is it possible that the issue presents a "case" or "controversy" when the prayer is for an injunction, but not a "case" or "controversy" when a mere declaration is sought? That the court seems to have misconceived the nature of a declaratory action, is indicated by the assertion that, evidently to the court's surprise and allegedly supporting its conviction that no "controversy" was involved, "no relief of any kind is prayed against him."⁶⁸ But the declaration of the unconstitutionality of the Warehouse Act and of the plaintiffs' immunity from its penalties, is all the relief they required. Perhaps this seemed novel to the court, but for many years this has been the way in which the validity of statutes and ordinances and of official action under legislative authority has been challenged in England and throughout the British colonies and in those of our states that have enacted a declaratory judgment statute.⁶⁹ It is common parlance to "declare" a statute unconsti-

⁶⁸ In view of the suggestion that coercive relief or execution may be deemed necessary to a final judgment, the Supreme Court has since taken pains to point out that execution is not a necessary adjunct of the judicial function or of a judgment. In *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123, 132, 47 Sup. Ct. 511 (1927), the Supreme Court said: "While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct of the exercise of the judicial function," citing cases. This was amply reaffirmed in *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 725, 49 Sup. Ct. 499 (1929), by Taft, C. J.

⁶⁹ See the numerous cases involving the construction or interpretation of statutes and ordinances or of administrative action under them cited in Borchard, *The Declaratory Judgment* (1918) 28 YALE L. J. 135-136; Note (1926) 35 YALE L. J. 477; Note (1930) 43 HARV. L. REV. 1290; and *supra* note 61.

In *Williams v. Riley*, 280 U. S. 78, 79, 50 Sup. Ct. 63 (1929), the Supreme Court, by McReynolds, J., says: "The prayer is for a decree declaring [the statutes'] invalidity, and for an injunction restraining defendant from attempting to enforce them."

A brief survey of recent Supreme Court reports indicates that the common form for praying immunity from the requirements of a statute, ordinance, or administrative order is to request that the official action be declared invalid, *plus* an injunction against its execution or enforcement. The principal goal is the declaration of invalidity; the injunction is ancillary or incidental and generally is not needed. Justiciability lies in the respective assertion and denial of invalidity (or validity), and is not created by the appended request for an injunction. In the following cases, the prayer for relief is indicated after the citation. *I. Black & White Taxicab, etc., Co. v. Brown & Yellow Taxicab, etc., Co.*, 276 U. S. 518, 48 Sup. Ct. 404 (1928) (declaration that plaintiff's contract is exclusive, *plus* injunction against defendant's violation). Cf. formal declaratory judgments in *Rely-a-Bell*

tutional or constitutional. The extensive literature on the subject is not even mentioned by the court, and there is no evidence that any of it

Burglar Fire Alarm Co. v. Eisler, [1926] 1 Ch. 609; Commonwealth v. Colonial Ammunition Co., 34 C. L. R. 198 (Australia, 1924). 2. John P. King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 48 Sup. Ct. 489 (1928) (declaration that ordinance invalid, plus injunction). 3. Nectow v. City of Cambridge, 277 U. S. 183, 48 Sup. Ct. 447 (1928) (declaration that zoning ordinance invalid, plus mandatory injunction to issue permit to build). Cf. formal declaratory judgments in *In re Forsey and Hollehone's Contract*, [1927] 2 Ch. 378 (town planning scheme as an incumbrance); *Amos v. Wellington City Corp.*, [1921] N. Z. 227; *James v. Waimairi County Council*, [1929] N. Z. 449 (all building permits rejected). 4. Lehigh Valley R. Co. v. Board of Public Utility Com'rs, 278 U. S. 24, 49 Sup. Ct. 69 (1928) (declaration that administrative order unreasonable, plus injunction). Cf. formal declaration in *Ellis v. Chairman, etc., of the Hutt County*, 29 N. Z. 588 (1910). 5. *Herkness v. Irion, Commissioner of Conservation*, 278 U. S. 92, 49 Sup. Ct. 40 (1928) (declaration of plaintiff's privilege to erect carbon black factory, plus injunction to prevent state interference by refusal of license). Cf. formal declaratory judgments in *Committee of Direction of Fruit Marketing v. Collins*, 36 C. L. R. 410 (Australia, 1925); *Hardley v. Mount Roskell Road Board*, [1923] N. Z. 897 (administrative right to refuse approval of building plan). 6. *Hunt, Governor of Arizona, v. United States*, 278 U. S. 96, 49 Sup. Ct. 38 (1928) (declaration that Governor had no right to arrest United States agents, plus injunction restraining such arrest). Cf. formal declaratory judgments in *Mayor, etc., of Wellington v. Attorney-General*, 33 N. Z. 1458 (1914); *Taratahi Dairy Co. et al. v. Attorney-General*, [1917] N. Z. 1. 7. *Louis K. Liggett Co. v. Baldridge, Attorney-General*, 278 U. S. 105, 49 Sup. Ct. 57 (1928) (declaration that statute was invalid, plus injunction). Cf. formal declaratory judgments in *W. & A. McArthur v. State of Queensland*, 28 C. L. R. 530 (Australia, 1920); *Fairfax v. New South Wales*, 39 C. L. R. 139 (Australia, 1927). 8. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 49 Sup. Ct. 50 (1928) (declaration that condition of zoning law requiring consent of two-thirds of property owners was invalid, plus *mandamus* to issue permit). Cf. *James v. Waimairi County Council*, [1929] N. Z. 449. 9. *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 Sup. Ct. 115 (1929) (declaration that statute regulating prices invalid, plus injunction). Cf. formal declaratory judgments in *Jones v. Metropolitan Meat Industry Board*, 37 C. L. R. 252 (Australia, 1925) (regulation of prices); *Taratahi Dairy Co. v. Attorney-General*, [1917] N. Z. 1 (administrative control of exports); *Hackett v. Lauder*, [1917] N. Z. 947 (validity of war regulations against treating). 10. *United States v. Missouri Pacific Ry. Co.*, 278 U. S. 269, 49 Sup. Ct. 133 (1929) (declaration that order of I. C. C. invalid, plus injunction); *United Fuel Gas Co. v. Railroad Comm.*, 278 U. S. 300, 49 Sup. Ct. 150 (1929) (*ibid.*). 11. *Wisconsin v. Illinois*, 278 U. S. 367, 49 Sup. Ct. 163 (1929) (declaration that water diversion invalid, plus injunction). Cf. declaratory judgments in *New South Wales v. Commonwealth*, 38 C. L. R. 74 (Australia, 1926) (right to Garden Is.); *Chairman of Eltham County v. Chairman of Waimate West County*, 29 N. Z. 309 (1909) (apportionment of financial liability); *Mayor of Auckland v. Mayor of Mount Eden*, 33 N. Z. 97 (1913) (apportionment of morgue expenses). 12. *Frost v. Corporation Commission of Okla.*, 278 U. S. 515, 49 Sup. Ct. 235 (1929) (declaration that mandatory license was invalid, plus injunction). Cf. declaratory judgments involving mandatory directions in statutes in *Aotea District Maori Land Board v. Handley*, 32 N. Z. 706 (1913); *Boyd v. Mayor of Wellington*, [1924] N. Z. 1174. 13. *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 49 Sup. Ct. 282 (1929) (declaration that contract rates confiscatory, plus injunction). Cf. declaratory judgment in *Petone Borough v. Lower Hunt Borough*, [1918] N. Z. 844. 14. *Leonard v. Earle*, 279 U. S. 392, 49 Sup. Ct. 372 (1929) (declaration that statute requiring surrender of 10% of oyster shells as condition of license invalid, plus *mandamus* to issue without condition). Cf. declaratory judgments in *Amos v. Wellington City Corp.*, [1921] N. Z. 227 (building condition); *Wharton v. Registrar of Patents*, [1921] N. Z. 817 (patent priority). 15. *St. Louis-San Francisco Ry. Co. v. Alabama Public Service Comm.*, 279 U. S. 560, 49 Sup. Ct. 383 (1929) ("declaration" that statute forbidding abandonment of service invalid, plus

was examined. The state cases are not referred to. In a request for an injunction against the enforcement of an unconstitutional statute aimed at the plaintiffs, it is not usual to allege "that the plaintiffs have done or contemplate doing any of the things forbidden by the Act," notably when relief is sought from newly imposed burdens, nor to allege "that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act." The very fact that they had under penalty to change their mode of doing business, in order to comply with the Act,⁷⁰ is sufficient allegation of injury, and lays the foundation for relief against the enforcement of the statute. Declaratory relief was as effective as coercive relief. In *Village of Euclid v. Ambler Realty Co.*,⁷¹ where the mere enactment of a zoning ordinance, without any attempt to apply it to the plaintiff, was deemed a sufficient basis for injunctive relief, the court said that "the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it." So in *Pierce v. Society of Sisters*,⁷² the court enjoined the enforcement of an

injunction). 16. *Standard Oil Co. v. City of Marysville*, 279 U. S. 582, 49 Sup. Ct. 430 (1929) (declaration that ordinance requiring storage tanks underground invalid, plus injunction). Cf. declarations in *Islington Estate Co. v. Mount Roskill Road Board*, 30 N. Z. 91 (1910); *Boyd v. Mayor of, etc., Onehunga*, 34 N. Z. 993 (1915), [1916] N. Z. 713. 17. *White River Lumber Co. v. Arkansas*, 279 U. S. 692, 49 Sup. Ct. 457 (1929) (declaration that back taxes were due "and declaring them a lien on the land taxed"). Cf. declarations in *Macclesfield Corp. v. Governors of Free Grammar Schools*, [1921] 2 Ch. 189 (charge for street improvements); *Mayor, etc., of Sunderland v. Priestman*, [1927] 2 Ch. 107. 18. *Kirk v. Maumee Valley Electric Co.*, 279 U. S. 797, 49 Sup. Ct. 507 (1929) (declaration that plaintiff was immune from interference with his water rights, plus injunction). Cf. declarations in *Westwood v. Heywood*, [1921] 2 Ch. 130 (water supply); *Long v. Gowlett*, [1923] 2 Ch. 177 (right to pass over river); *Knight v. Bolton*, [1924] N. Z. 806, 1043 (boundary walls changed). 19. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U. S. 1, 50 Sup. Ct. 5 (1929) (declaration that plaintiff entitled to certain appointment, plus direction to appoint). Cf. declarations in *Heywood v. Bishop of Manchester*, 12 Q. B. D. 404 (1884) (right to have cleric appointed); *Welsh v. Bishop of Peterborough*, 15 Q. B. D. 432 (1885) (right to appoint cleric); *Cannel v. Lawther*, [1914] 3 K. B. 1135 (duty to employ as pilot); *Monckton v. Commonwealth*, 27 C. L. R. 149 (Australia, 1920) (right to civil service appointment).

⁷⁰ The statute imposed new duties and forbade nothing, except, by penalty, breach of the new duties. The court should not, it is respectfully submitted, have used the words "before being *advised* by the court as to their rights." (Italics supplied.) The word "advised" seems tendential.

⁷¹ 272 U. S. 365, 47 Sup. Ct. 114 (1926). Cf. *West v. City of Wichita*, 118 Kan. 265, 267, 234 Pac. 978, 979 (1925), where a declaratory judgment to have a zoning law declared invalid was refused, because the plaintiff did not state specifically enough the purpose for which he desired to use his property. In *Terrace v. Thompson*, *supra* note 67, the court says: "The threatened enforcement of the law deters them." In the *Liberty Warehouse* case, indictments had actually been prepared against the plaintiffs, under which they were later fined. Had an injunction been prayed, a three-judge court would have had to be assembled. *Stratton v. St. Louis S. W. Ry. Co.*, 282 U. S. 10, 51 Sup. Ct. 8 (1930).

⁷² 268 U. S. 510, 535, 45 Sup. Ct. 571, 573 (1925). See *Pennsylvania v. West Virginia*, 262 U. S. 553, 591, 593, 43 Sup. Ct. 658 (1923).

Oregon statute two years before it was to come into effect on the ground that the plaintiffs had a present interest to prevent a future interference with their privilege to have pupils enter their parochial schools. Leaving aside the fact that indictments had been prepared, the mere existence of the Kentucky Warehouse Act, with its heavy penalties, was a threat against the plaintiffs' business, more immediate than the injury threatened by the Euclid zoning law or the Oregon school law. Its very existence was a command to the attorney-general to enforce it. No special threat to enforce a statute has heretofore been required as a condition of jurisdiction to issue an injunction. The statute imposing the duty to enforce presents the attorney-general as an "adverse" party and the issue as a "case" or "controversy." Had the plaintiffs prayed an injunction, it is hard to believe, in the light of the cases mentioned, that the court would have declined jurisdiction or would have thought that the issue presented no "controversy."

The fact is that the writ of injunction has been stretched far beyond its original scope for the very purpose of enabling constitutional questions to be presented for decision. The injunction often constitutes only a plausible form of proceeding, a blind, for obtaining from the court a declaratory judgment. It is the respective assertion and denial of rights leading to a determination of rights, and not the ancillary injunction or *mandamus*—usually *pro forma* only—which creates justiciability. When, therefore, a plaintiff honestly asks for the declaration of unconstitutionality which alone he seeks and which will answer all his and the attorney-general's purposes, why should the court deny him this relief? The statute, penal in effect, is aimed directly at him and his business and the attorney-general is lawfully charged with its enforcement. Can any clearer case be imagined of adverse parties presently interested in an issue involving threatened or endangered property rights? ✓

But the declaratory judgment in this connection serves another useful purpose. It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff to his option either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to forego under fear of prosecution the exercise of his claimed rights. Into this dilemma no civilized legal system operating under a constitution should force any person. The court in effect, by refusing an injunction, informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool is to eat it.⁷³ ✓

⁷³ See *Shredded Wheat Co. v. City of Elgin*, 284 Ill. 389, 120 N. E. 248 (1918). If the ordinance was invalid, said the court, the prosecution would fail and the

Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality.⁷⁴

The authorities cited by the Supreme Court in support of its decision in the *Liberty Warehouse* case, like those cited by the Michigan court in the *Anway* case, do not seem, with all respect, to be relevant to the issue before the court. Indeed, the reasoning of the cases cited seems to lead to the opposite result, for the conditions of fact in the *Liberty Warehouse* case meet squarely all the requirements laid down for a "case" or "controversy," and with a federal declaratory judgment statute, it could have been adjudicated in the federal courts. Chief Justice Marshall in *Osborn v. United States Bank* had explained that the judicial "power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law."⁷⁵ In the *Gordon* case the decision of the court would not have been final, because subject to review by the Treasury Department.⁷⁶ Naturally enough, jurisdiction was declined. So appellate jurisdiction from an administrative determination, and not a judgment, cannot be conferred

plaintiff would not be injured; if it was valid, there was no ground on which its enforcement should be enjoined. See *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 140 Atl. 506 (1928). See also *Iowa Motor Vehicle Ass'n v. Board of Railroad Commissioners*, 202 Iowa 85, 209 N. W. 511 (1926); Note (1926) 12 Iowa L. Rev. 62, 65; and see cases cited *supra* note 61.

Representative Gilbert of Kentucky, in speaking to the federal declaratory judgments bill on Jan. 25, 1928, said: "You have the same court, the same jurisdiction, the same procedure, the same parties and the same questions. Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step." 69 CONG. REC. 2108 (1928).

An injunction is often denied, after prolonged litigation, on the ground that there is an adequate remedy at law, *e.g.*, in seeking to restrain the alleged improper collection of taxes, where the court suggests payment and then suit to recover. *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 50 Sup. Ct. 270 (1930). The most efficient way to try such issues is by declaratory judgment.

"The severity of the penalty alone has persuaded the courts on occasion to enjoin the enforcement of statutes until their constitutionality could be judicially determined. *Ex parte Young*, 209 U. S. 123, 147, 28 Sup. Ct. 441 (1908); *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 35 Sup. Ct. 214 (1915).

⁷⁵ 9 Wheat. 738 (U. S. 1824). So in *Cherokee Nation v. Georgia*, 5 Pet. 1, 75 (U. S. 1831): "It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief."

⁷⁶ *Gordon v. United States*, *supra* note 10. Similar lack of finality barred judicial cognizance of cases in *Hayburn's case*, 2 Dall. 409 (1792); *United States v. Ferreira*, 13 How. 40 (1851). When the statute involved in the *Gordon* case was changed, giving the court's decision final and binding force, unreviewable by any other authority, it was sustained. *United States v. Jones*, 119 U. S. 477, 7 Sup. Ct. 283 (1886).

on the Supreme Court.⁷⁷ In the *Muskrat* case,⁷⁸ Congress 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 officer had any adverse interest. The elements of an adversary proceeding involving plaintiffs' or defendants' interests were lacking. The *Muskrat* case has now been so thoroughly explained, that there is no longer any justification for confusing it with an action for a declaratory judgment. In *Fairchild v. Hughes*,⁷⁹ a taxpayer sought to enjoin the proclamation by the Secretary of State of the Nineteenth Amendment; the suit was dismissed because his interest was deemed insufficient and because the issue before the court was not one "for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs."⁸⁰ State courts are much more willing than the fed-

⁷⁷ *Keller v. Potomac Electric Co.*, 261 U. S. 428, 444, 43 Sup. Ct. 445, 449 (1924); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 47 Sup. Ct. 284 (1927); *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 50 Sup. Ct. 389 (1930).

⁷⁸ *Muskrat v. United States*, 219 U. S. 346, 357, 31 Sup. Ct. 250 (1911). The opinion of Hon. Charles E. Hughes, now Chief Justice, to the effect that the *Muskrat* case presented no obstacle to the constitutionality of the declaratory judgment, reported in (1920) 45 A. B. A. REP. 266, (1920) 91 CENT. L. J. 435, and (1921) 53 CHICAGO LEGAL NEWS 205, reads as follows: "It is true that the *Muskrat* case dealt with the validity of an Act of Congress, but the ground of the decision was the fundamental one that the judicial power extended to 'cases and controversies,' that is, that the judicial power was 'the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.' (219 U. S., p. 361.) It was not because the question was the determination of the validity of an Act of Congress, but because this question did not arise in an actual controversy, that the court found itself without power to determine it. Had there been an actual controversy, the question of the validity of an Act of Congress, or any other question properly brought before the court, could have been determined. But in the absence of an actual controversy, neither that question nor any other could properly be determined by the court. . . ."

"I do not think, therefore, that it distinguishes the *Muskrat* case to say that it related to the determination of constitutional questions, for this fails to state the ground upon which the court found itself unable to determine the constitutional question. . . . The point of distinction, it seems to me, should be, and it is sufficient to state, simply that the proposed legislation is intended to deal only with actual controversies and proposes that where there is an actual controversy between litigants, the court may render a declaratory judgment."

⁷⁹ 258 U. S. 126, 129, 42 Sup. Ct. 274 (1922).

⁸⁰ One of the most commonly accepted definitions of the concept "cases" and "controversies" is that given by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. 241, 255 (C. C. N. D. Calif. 1887): "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication." (Italics supplied.)

eral courts to see in a taxpayer a person having sufficient interest to challenge a statute requiring the expenditure of money or official action.⁸¹ In such a case the Supreme Court has said:⁸²

"The party who invokes the judicial power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Certainly the Liberty Warehouse Company met this requirement.

On several occasions states have sought to prevent the enforcement of federal statutes. Leaving aside those in which jurisdiction was refused because the issue raised was political,⁸³ the Supreme Court seems to have leaned back pretty far in avoiding a decision not only where abuse of federal power was alleged in matters of general public interest,⁸⁴ but also where the property rights of the state were most directly involved.⁸⁵ It seems unfortunate that the courts should refuse their aid in settling controversies which involve adverse parties representing the public and which disturb important property interests, until actual damage is done. But when private interests are involved, this is all the more reason why the declaratory action designed to remove or dissipate clouds from the plaintiff's rights should be sustained, if properly before the court in an adversary proceeding.

The *Liberty Warehouse* decision has been uniformly condemned by commentators because of its confused reasoning and of its misconcep-

⁸¹ *Zoercher v. Agler*, 172 N. E. 186 (Ind. 1930).

⁸² *Frothingham v. Mellon*, 262 U. S. 447, 488, 43 Sup. Ct. 597, 601 (1923). See also *Williams v. Riley*, 280 U. S. 78, 50 Sup. Ct. 63 (1929).

⁸³ *Georgia v. Stanton*, 6 Wall. 50 (U. S. 1867); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118, 32 Sup. Ct. 224 (1912); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 (1917). See Weston, *Political Questions* (1925) 38 HARV. L. REV. 296.

⁸⁴ *State of Texas v. Interstate Commerce Commission*, 258 U. S. 158, 162, 42 Sup. Ct. 261, 263 (1922) (effort of state to annul action of Railroad Labor Board in raising wages of railroad employees in the state); *Massachusetts v. Mellon*, 262 U. S. 447, 488, 43 Sup. Ct. 597, 601 (1923) (effort to have Federal Maternity Act declared void, because its purpose was to induce the states to yield their sovereign rights. Jurisdiction was declined because the state was under no obligation to make an appropriation, without which no federal appropriation was possible). As a taxpayer thus cannot bring an action, in the federal courts, the state will, in order to test the Act, have to make an appropriation, and then perhaps a taxpayer may enjoin the state appropriation. Even this attempt might fail.

⁸⁵ See *New Jersey v. Sargent*, 269 U. S. 328, 330, 46 Sup. Ct. 122 (1926), in which the state sought to enjoin the enforcement as unconstitutional of the Federal Water Power Act, on the ground that its proprietary interest in its water resources from which it derived revenue would be impaired. Because federal action to license the taking of water had not yet been undertaken, the court thought the issue an "abstract question." It is hard to believe that so vital and practical a question was "abstract." See Note (1926) 35 YALE L. J. 867. Cf. *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 Sup. Ct. 658 (1923).

tions.⁸⁶ While the language used by Justice Sanford is susceptible of a variety of meanings, the case opened a path in the Supreme Court approximately as unfortunate as that taken by the Michigan Supreme Court in the *Anway* case.

In the second Liberty Warehouse case,⁸⁷ the Burley Tobacco Growers' Co-operative Marketing Association brought an action against the Liberty Warehouse Co. to recover a penalty under the cooperative marketing act for knowingly aiding and inducing a member of the association to violate his contract with the plaintiff association. The defendant counterclaimed, making a separate defense by setting up the unconstitutionality of the cooperative marketing act; in that defense, it asked for a declaratory judgment that the act was unconstitutional on the grounds stated in its original action. The Kentucky court, having already held the cooperative marketing act constitutional, granted a motion to strike this defense from the defendant's counterclaim. The granting of the motion to strike was alleged as a denial of the defendant's federal right to due process.

The United States Supreme Court held the allegations unfounded, on the ground that proceedings in state courts must conform to the reasonable requirements of local law—a matter primarily for those courts to determine, and not presenting a federal question. McReynolds, J., then went on to remark: "Apparently the declaratory judgment statute authorizes plaintiffs only to ask for judgments."⁸⁸ After quoting section 6 of the Act providing that the court may refuse to declare rights when the decision would not terminate the uncertainty or controversy giving rise to the action, or, in any case, where the declaration or construction is not necessary or proper at the time, the court proceeds: "This court has no jurisdiction to review a mere declaratory judgment."

The two quoted sentences in this paragraph seem hard to support. No authority can be cited to show that plaintiffs only may ask for declaratory judgments. On the contrary, innumerable cases in England and the United States demonstrate that defendants in their counterclaims

⁸⁶ See Note (1927) 25 MICH. L. REV. 529; Note (1927) 100 CENT. L. J. 95; Note (1927) 40 HARV. L. REV. 903; Note (1928) 41 HARV. L. REV. 232; Note (1927) 13 VA. L. REV. 644; Note (1927) 36 YALE L. J. 845.

⁸⁷ *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n*, 276 U. S. 71, 89, 48 Sup. Ct. 291, 294 (1928).

⁸⁸ This dictum is believed to be without support, notwithstanding that the judgment must be asked by petition. Defendants frequently request declarations by answer or counterclaim, and no statute undertakes to forbid this. *Mayor and Council of Bayonne v. East Jersey Water Co.*, 108 Atl. 121 (N. J. 1919); *Pathé Exchange v. Cobb*, 202 App. Div. 450, 195 N. Y. Supp. 661, *aff'd*, 236 N. Y. 539, 143 N. E. 274 (1923); *One and Three S. William Street Bldg. Corp. v. Gardens Corp.*, 133 Misc. 790, 233 N. Y. Supp. 473 (Sup. Ct. 1929); *Wirty v. Nestos*, 51 N. D. 463, 200 N. W. 524 (1924); *Aronowitz v. Industrial Utilities Corp.*, 5 D. & C. 633 (Pa. 1924).

may demand a declaratory judgment in their favor. But the second sentence of the *dictum* is even more surprising. Would it really be possible for the United States Supreme Court to refuse to pass upon the constitutionality of a state statute or upon any other issue involving a federal right if the case had been begun in the state court under declaratory-judgment procedure? Adherence to such a position might make the decision of a state court on a federal constitutional question final. The *dictum* has led one commentator to remark that a plaintiff could prevent the removal of his case from a state to a federal court or prevent Supreme Court review by suing in the state court for a declaratory judgment.⁸⁹ Could it present a justiciable federal question if begun by injunction, but no justiciable federal question if begun by declaratory action? In view of the fact that twenty-six states have now adopted the declaratory-judgment procedure, it would seem highly probable that the question will be squarely presented at some time, thus giving the Supreme Court an opportunity to reconsider this *dictum*.

That the Supreme Court appears to attribute to the *Liberty Warehouse* cases, as well as to the case of *Willing v. Chicago Auditorium Association*,⁹⁰ a variety of meanings, none of which has any proper relation to the declaratory judgment, would seem to follow from the fact that these cases are cited in support of the proposition that the court will not render advisory opinions,⁹¹ or decide moot cases,⁹² or pass on conclusions of an administrative body.⁹³ Obviously, it is not a proper exercise of judicial power for a court to render advisory opinions,⁹⁴ and the action

⁸⁹ Note (1927) 100 CENT. L. J. 95.

⁹⁰ 277 U. S. 274, 48 Sup. Ct. 507 (1928).

⁹¹ *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123, 131, 47 Sup. Ct. 511 (1927); *Ex parte Bakelite Corp.*, 279 U. S. 438, 454, 49 Sup. Ct. 411 (1929) ("a duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Art. III"). Said the Pennsylvania Supreme Court in *In re Cryan's Estate*, 152 Atl. 675, 677 (1930): "Showing the extreme view taken by some jurisdictions on the point in hand, all indications to date from the federal courts are that they cannot conceive of declaratory judgments as other than advisory judgments [opinions?] and therefore unconstitutional."

⁹² *Barker Painting Co. v. Local No. 734*, 281 U. S. 462, 50 Sup. Ct. 356 (1930), by Holmes, J., in which it is said, citing the *Willing* case as authority, that a court "cannot be required to go into general propositions or prophetic statements of how it is likely to act upon other possible or even probable issues that have not yet arisen."

⁹³ In *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 50 Sup. Ct. 389 (1930), the Supreme Court (by Van Devanter, J.) cites the *Liberty Warehouse* and the *Willing* cases to the proposition that "the court cannot give decisions which are merely advisory" or exercise "functions which are essentially legislative or administrative."

⁹⁴ See *Pelham v. Rose*, 9 Wall. 103 (1869). By constitution in Massachusetts, Maine, New Hampshire, Rhode Island, Florida, Colorado, and South Dakota, and by legislation in Oklahoma, Vermont, Minnesota, Delaware, and Alabama, the legislature or executive, with various limitations, may request an advisory opinion from the Supreme Court of the State. See Ellingwood, *Departmental Co-operation in State Government*, New York, 1918; Clovis and Updegraff, *Advisory Opinions*, (1928) 13 IOWA L. REV. 188.

for a declaratory judgment cannot be employed to such an end. That would be the result of a purported decision where there is an absence of adverse parties, or insufficiency of necessary parties defendant, or where the plaintiff lacks the necessary interest to sue, or where the controversy is otherwise not ripe for decision.⁹⁵ Nor are abstract, hypothetical, academic, fictitious or dead issues—*i.e.*, moot cases—determinable either by the Supreme Court⁹⁶ or by any other court,⁹⁷ under or outside the procedure for a declaratory judgment.

On the other hand, the Supreme Court has made "binding declarations of right" without further relief, in a considerable number of cases. A common example is the decision determining the location of a disputed but existing boundary in suits between states.⁹⁸ In *La Abra Silver Mining Co. v. United States*,⁹⁹ an action was brought by the United States, under statutory authority, for a judicial declaration that an award made by the Mexican-American Arbitral Tribunal in favor of the La Abra Company, an American corporation, had been obtained by fraud. No consequential relief was asked, and necessarily none could be given, for the money awarded was in the hands of the Secretary of State awaiting distribution. In *United States v. Jones*,¹⁰⁰ the appellate jurisdiction of the court was held to extend to a judgment of the Court of Claims, which was no longer subject to revision by the Secretary of the Treasury, but

⁹⁵ *Hayden Plan Co. v. Friedlander*, 97 Cal. App. 12, 275 Pac. 253 (1929); *Gabriel v. Board of Regents of University of Colorado*, 83 Colo. 582, 267 Pac. 407 (1928); *Denver v. Denver Land Co.*, 85 Colo. 198, 274 Pac. 743 (1929); *Weigand v. Board of Commissioners of Wichita*, 118 Kan. 265, 234 Pac. 978 (1925); *Purity Oats Co. v. State et al.*, 125 Kan. 558, 264 Pac. 740 (1928); *Dietz v. Zimmer*, 231 Ky. 546, 21 S. W. (2d) 999 (1929); *Reese v. Adamson*, 297 Pa. 13, 146 Atl. 262 (1929); *In re City of Pittsburgh's City Charter*, 297 Pa. 502, 147 Atl. 525 (1929).

⁹⁶ *Singer Mfg. Co. v. Wright*, 141 U. S. 696, 12 Sup. Ct. 103 (1891) (suit to restrain collection of taxes which were paid pending appeal); *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132 (1895) (suit to be registered as voter at election which had already been held); *Commercial Cable Co. v. Burleson*, 250 U. S. 360, 39 Sup. Ct. 512 (1919) (suit to restrain taking of cable lines which had been returned at time of appeal); *United States v. Alaska Steamship Co.*, 253 U. S. 113, 40 Sup. Ct. 448 (1920) (subsequent legislation repealed statute which was contested as unconstitutional); *Dakota Coal Co. v. Fraser*, 267 Fed. 130 (C. C. A. 8th, 1920) (suit for coal mines which had already been returned to owner). The ground for declining this jurisdiction is the common law principle that courts do not propound law *in thesi*. See *Atherton Mills v. Johnston*, 259 U. S. 13, 42 Sup. Ct. 422 (1922).

⁹⁷ See especially *Revis v. Daugherty*, 215 Ky. 823, 287 S. W. 28 (1926); *Ladner v. Siegel*, 294 Pa. 368, 144 Atl. 274 (1928); *Wagner v. County of Somerset*, 96 Pa. Super. Ct. 434 (1929); *Duff's Estate*, 4 D. & C. 315 (Pa. 1924); *Brumagin's Petition*, 6 D. & C. 431 (Pa. 1925).

⁹⁸ *Louisiana v. Mississippi*, 202 U. S. 1, 26 Sup. Ct. 408 (1906); *Arkansas v. Tennessee*, 246 U. S. 158, 38 Sup. Ct. 301 (1918); *Georgia v. South Carolina*, 257 U. S. 516, 42 Sup. Ct. 173 (1922); *Oklahoma v. Texas*, 272 U. S. 21, 47 Sup. Ct. 9 (1926) ("original suit brought by Oklahoma against Texas, to establish their boundary on the Red River").

⁹⁹ 175 U. S. 423, 20 Sup. Ct. 168 (1899). It was held that this constituted a "case."

¹⁰⁰ 119 U. S. 477, 7 Sup. Ct. 283 (1886).

was final on the merits, although necessarily the court had no power to enforce its decision by writ of execution. In *Gaines v. Fuentes*,¹⁰¹ a suit was brought to declare void a certain will, as well as to set aside the decree admitting it to probate. In *Smith v. Adams*,¹⁰² a proceeding was brought in the territorial court of Dakota to pass upon an election for and to declare the location of a county seat. In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*,¹⁰³ the legality of an order of the Interstate Commerce Commission was passed upon, although it had expired before the date of judgment, on the ground that important public interests involving the power of the Commission were involved. In *Sharon v. Tucker*,¹⁰⁴ the court sustained a bill to declare valid the title of a holder of real estate by adverse possession against a record holder whose title had become unenforceable by the running of the statute of limitations. In *Fidelity National Bank & Trust Co. v. Swope*,¹⁰⁵ an action was brought by the holder of certificates constituting a lien for public improvements to have the certificates and the statutory proceedings for the improvements declared valid. All these cases were deemed to constitute cases and controversies in a constitutional sense.¹⁰⁶

¹⁰¹ 92 U. S. 10 (1875).

¹⁰² 130 U. S. 167, 9 Sup. Ct. 566 (1889).

¹⁰³ 219 U. S. 498, 515, 31 Sup. Ct. 279, 283 (1911). The case might have been deemed moot, as in the criminal appeal after acquittal [*United States v. Evans*, 213 U. S. 297, 29 Sup. Ct. 507 (1909)], had the court not wished to decide the case. They thought it important to decide the question, as a matter of public interest, hence disregarded the fact that, in the particular case before the court, the Commissioner's order had expired. The court relied on *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 308, 17 Sup. Ct. 540 (1897), and *Boise City Irr. & Land Co. v. Clark*, 131 Fed. 415 (C. C. A. 9th, 1904), and distinguished *Jones v. Montague*, 194 U. S. 147, 24 Sup. Ct. 611 (1904), and *Richardson v. McChesney*, 218 U. S. 487, 31 Sup. Ct. 43 (1910), on the ground that the change of circumstances there would have made any judgment ineffective. The distinction seems not convincing.

¹⁰⁴ 144 U. S. 533, 12 Sup. Ct. 720 (1892). Field, J., for the court, says (at 548): "The flexibility of decrees of a court of equity will enable it to meet every emergency. Here the embarrassment to the complainants in the use and enjoyment of their property are obvious and insuperable except by relief through that court. No existing rights of the defendants will be impaired by granting what is prayed, and the rights of the complainants will be placed in a condition to be available. The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record." Inasmuch as Field, J., stated that the plaintiff's title had not been controverted or assailed by the defendants, the injunction in the decree restraining the defendant from asserting title must be deemed purely perfunctory. It was necessarily ancillary to the adjudication or declaration that he had no title. It is unusual to enjoin acts which have not even been threatened. See also *Bohart v. Chamberlain*, 99 Mo. 622, 631, 13 S. W. 85 (1890); *Hord v. Baugh*, 7 Humph. 576, 578 (Tenn. 1847); *Montgomery v. Kerr*, 6 Cold. 199 (Tenn. 1869).

¹⁰⁵ 274 U. S. 123, 47 Sup. Ct. 511 (1927).

¹⁰⁶ Other recent judgments of the Supreme Court, which are in effect declaratory, are, among others, the following: 1. *Marlin v. Lewallen*, 276 U. S. 58, 48 Sup. Ct. 248 (1928) (action for a judgment declaring that plaintiff as surviving

*Willing v. Chicago Auditorium Association*¹⁰⁷ presented the most interesting case of the four before the Supreme Court. The Chicago Auditorium Association held as lessees valuable 99- and 198-year ground

husband of Creek Indian was entitled to an estate in curtesy in her land. Claim denied). *Cf.* declarations in *Armes v. Russell & Schwartz*, 33 B. C. 303 (Can. 1923); *Mackenzie v. Lady Mary Hanbury*, 8 D. 964 (Scotland, 1846). 2. *Liberty Nat. Bank of Roanoke v. Bear*, 276 U. S. 215, 48 Sup. Ct. 252 (1928) (action by a judgment creditor against trustee in bankruptcy for a judgment declaring that his judgment lien was not annulled by subsequent bankruptcy. So held). *Cf.* declarations in *In re David Allester, Ltd.*, [1922] 2 Ch. 211; *In re Hamilton*, [1924] N. Z. 386; *Sadler v. Auckland Co-op. Society*, [1926] N. Z. 84. 3. *Miller v. Schoene*, 276 U. S. 272, 48 Sup. Ct. 246 (1928) (action for a judgment declaring invalid an order of state entomologist to cut down plaintiff's cedar trees. Order held valid). *Cf.* declaration in *Ellis v. Chairman, etc., of the Hutt County*, 29 N. Z. 588 (1910) (validity of order to remove dam). 4. *Larkin v. Paugh*, 276 U. S. 431, 48 Sup. Ct. 366 (1928) (action for a judgment declaring that plaintiff's title under deed from the heirs was superior to defendant's title under deed from administrator). *Cf.* declarations in *McCormick v. Allen*, 39 C. L. R. 22 (Australia, 1926); *Allen v. Smellie*, 31 N. Z. 305 (1911); *Karepa v. Saunders*, [1930] N. Z. 242. 5. *Jenkins v. National Surety Co.*, 277 U. S. 258, 48 Sup. Ct. 445 (1928) (action by a surety against receiver in bankruptcy for judgment declaring surety entitled to participate in certain surplus funds). *Cf.* declarations in *In re Fraser and Chalmers*, [1919] 2 Ch. 115; *In re Lamplugh Iron Co.*, [1927] 1 Ch. 308. 6. *Kinney-Coastal Oil Co. v. Kieffer*, 277 U. S. 488, 48 Sup. Ct. 580 (1928) (action by lessee of oil and gas lease against patentee of same land under homestead for judgment declaring the platting of lots for sale by latter a violation of leasing rights of former, plus injunction). *Cf.* declarations in *Lloyd Jones v. Clark-Jones*, [1919] 1 Ch. 424; *Commonwealth v. New South Wales*, 33 C. L. R. 1 (Australia, 1923). 7. *Nielsen v. Johnson*, 279 U. S. 47, 49 Sup. Ct. 223 (1929) (action by administrator against state treasurer for judgment declaring that tax assessment on decedent's estate was void as contrary to a treaty. So held). *Cf.* declarations in *Wellington Harbour Board v. Union Steamship Co.*, 32 N. Z. 766 (1913); *Napier Borough v. Hawke's Bay Education Board*, [1924] N. Z. 596. 8. *Flink v. Paladini*, 279 U. S. 59, 49 Sup. Ct. 255 (1929) (proceeding for judgment declaring petitioners subject to limited liability only). *Cf.* declarations in *In re Schneideman Bros.*, [1917] N. Z. 48; *Husheer v. New Zealand Tobacco Co.*, [1921] N. Z. 304. 9. *County of Spokane, Washington v. United States*, 279 U. S. 80, 49 Sup. Ct. 321 (1929) (action by U. S. Commissioner of Internal Revenue against County Treasurer for judgment declaring that United States has priority over County in distribution of insolvent's funds in hands of receiver). *Cf.* declarations in *Burn v. The Company*, [1924] 1 Ch. 550; *Tasman Fruit-Packing Ass'n v. The King*, [1927] N. Z. 518. 10. *Ex parte Worcester County Nat. Bank*, 279 U. S. 347, 49 Sup. Ct. 368 (1929) (petition for a decree declaring plaintiff national bank, as successor to state trust company, privileged to present accounts as executor of decedent's estate. Denied). *Cf.* declaration of succession in *Bodell v. William Cable & Co.*, [1921] N. Z. 211. 11. *United States v. Jackson*, 280 U. S. 183, 50 Sup. Ct. 143 (1930) (action to quiet title to land deeded by Indian allottee to one R. and declaring R. the owner). *Cf.* declarations in *Harris v. Jenkins*, 31 C. L. R. 341 (Australia, 1922); *Maynard v. Goode*, 37 C. L. R. 529 (Australia, 1926). 12. *Wabash Ry. Co. v. Barclay*, 280 U. S. 197, 201, 50 Sup. Ct. 106 (1930) (by Holmes, J.: "This is a bill by holders of first preferred stock . . . to have it declared that holders of such stock are entitled to receive preferential dividends up to five per cent . . . before any dividends are paid upon other stock; and that the company may be enjoined from paying dividends upon . . . stock unless it shall first have paid such preferential dividends. . . ." Preference denied). *Cf.* declarations in *Anglo-French Music Co. v. Nicoll*, [1921] 1 Ch. 386; *First Garden City, Ltd. v. Bonham-Carter*, [1928] 1 Ch. 53. 13. *United States v. Guaranty Trust Co.*, 280 U. S. 478, 50 Sup. Ct. 212 (1930) (action to establish priority of United States over other creditors of insolvent estate. Denied). *Cf.* declarations as to preference and priority *supra*.

¹⁰⁷ *Supra* note 90.

leases. The Auditorium, however, is an antiquated building, whose low rental and unavailability for modern use had prevented payment of dividends to the stockholders. The lessees, therefore, took preliminary steps to tear down the building and put up a great modern structure which would be profitable. Bankers offered to advance the necessary funds if demolition was permissible. The terms of the leases, however, left it uncertain whether the old building could be torn down without the landlords' consent. The landlords, seeing an opportunity to force either a higher rental or a cash bonus or a forfeiture of the ground lease, denied their consent to the destruction of the building,¹⁰⁸ though it might be supposed that ordinarily landlords would be pleased at the substitution of a modern, for an old, building. The lessees believed themselves privileged under the lease to demolish the building without consent, but, fearing the forfeiture of the lease if they acted on their own interpretation of their rights, they brought an action in an Illinois court, which non-resident defendants caused to be transferred to the federal court, for the removal of what they alleged was a cloud on their title created by the landlords' refusal of consent. The landlords filed answers alleging that the destruction of the building would constitute waste, a ground of forfeiture, and a violation of the leases. The United States district court dismissed the bill,¹⁰⁹ but the circuit court of appeals reversed,¹¹⁰ holding that the issue, involving millions, was so important,

¹⁰⁸ An issue was raised as to whether the tenant's claim had in fact been disputed, the lessors' attorneys and even the Supreme Court believing that there had merely been a friendly verbal difference of opinion as to the lessee's rights under the lease. There seems to be some confusion in the Supreme Court's opinion as to the effect of the oral statements. They are deemed not sufficient to constitute a cloud on title, but they apparently may be sufficient to constitute an adverse claim. That should suffice to create a controversy. No discussions were necessary, it is submitted, to create a controversy between the parties. Their hostile controversy is determinable from the record. That the defendants disputed the plaintiff's claim is manifest from their answers (Record 169 and 182): "The present building cannot be removed without a violation of the terms, covenants, and conditions of the leases"; again "the defendants aver that, if plaintiff destroys the present improvement, whether for the purpose of erecting a new one or otherwise, such destruction will constitute waste, and will give the owners of the land . . . the right to re-enter . . . free from any and all claims or rights of plaintiff." The assertion of a claim contrary to that of the plaintiff would seem to create a controverted issue in the clearest sense: *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427 (1906); *Pennsylvania v. West Virginia*, 262 U. S. 553, 591, 43 Sup. Ct. 658 (1923): "The complainant state asserts and the defendant state denies that such a withdrawal [of natural gas under a statute not yet enforced] is an interference with interstate commerce. . . . This is essentially a judicial question. *Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. 441 (C. C. W. D. Ky. 1904); *Vaca Val. & C. L. R. Co. v. Mansfield*, 84 Cal. 560, 24 Pac. 145 (1890); *Brown v. Cox*, 158 Ind. 364, 68 N. E. 568 (1902); 12 Cyc. of Evid. 608.

¹⁰⁹ *Chicago Auditorium Ass'n v. Cramer*, 8 F.(2d) 998 (N. D. Ill. 1925).

¹¹⁰ *Chicago Auditorium Ass'n v. Willing*, 20 F.(2d) 837 (C. C. A. 7th, 1927). The court said: "True, this court cannot make contracts for the parties. It cannot remake leases for competent parties who have contracted. But it can, and does, say that plaintiff's remedy at law is not adequate when it must stake its entire investment—risk loss of its leasehold, perhaps—as a condition upon which it may judicially ascertain its legal rights."

and the necessity of removing the doubt or cloud so great, that they would consider the action a proper proceeding for the removal of a cloud from title.¹¹¹ The commentators approved this conclusion.¹¹²

The United States Supreme Court reversed this judgment on the ground that since the question concerning the plaintiff's right arose only on the face of the leases by which it derived title, was not in legal contemplation a cloud; hence a bill to remove it would not lie—all that it was necessary to say.¹¹³ Justice Brandeis went on to remark, however, that "what the plaintiff seeks is simply a declaratory judgment." Under the Illinois and federal practice, the plaintiff could not as yet demand such a judgment,¹¹⁴ but the Justice added, somewhat ambiguously, "To grant that relief is beyond the power conferred upon the federal judiciary." *Liberty Warehouse Co. v. Grammis* is cited as authority.

Mr. Justice Stone, in a concurring opinion, objected to the propriety of any expression concerning the declaratory judgment or its constitutionality. He said:

"I concur in the result. It suffices to say that the suit is plainly not one within the equity jurisdiction conferred by §§ 24, 28, of the Judicial Code. But it is unnecessary, and I am therefore not prepared, to go further and say anything in support of the view that Congress may not constitutionally confer on the federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this Court is without constitutional power to review such judgments of state courts when they involve a federal question. Compare *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123, 130-134. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U. S. 283, 295. See *Blair v. United States*, 250 U. S. 273, 279; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 177; *Light v. United States*, 220 U. S. 523, 538. There is certainly no 'case or controversy' before us requiring an opinion on the power of Congress to incorporate the declaratory judgment into our federal jurisprudence. And the determination now made seems to me very similar itself to a declaratory¹¹⁵ judgment to the effect that we could not constitutionally be authorized to give such judg-

¹¹¹ A similar liberal view, doubtless forced by the necessity of deciding an otherwise undeterminable question and relieving an intolerable situation, was taken in *McArthur v. Hood Co.*, 221 Mass. 372, 109 N. E. 162 (1915); and *Rector v. Rector*, 201 N. Y. 1, 94 N. E. 191 (1911).

¹¹² (1927) 1 CYN. L. REV. 488; Note (1927) 13 CORN. L. Q. 117; (1927) 41 HARV. L. REV. 104; (1928) 26 MICH. L. REV. 426; (1927) 76 U. OF PA. L. REV. 217.

¹¹³ 277 U. S. at 288, 48 Sup. Ct. at 509. Prof. Langmaid thinks the court has itself departed from the test, that there is no cloud when the invalidity is apparent on the face of the instrument; see Langmaid (1929) 23 ILL. L. REV. 595, 597, 598.

¹¹⁴ Illinois has not passed a declaratory judgment statute. A proposed federal Act passed the House of Representatives Jan. 25, 1928 (H. R. 5623, 70th Cong., 1st sess.). It has not yet passed the Senate, though extensive hearings have been held. See Hearings on H. R. 5623, 70th Cong., 1st sess., April 27 and May 18, 1928, Judiciary Committee. 81 pp.

¹¹⁵ Probably "moot" or "advisory" or "dictum" would have been preferable.

ments—but is, in addition, prospective, unasked, and unauthorized under any statute.”¹¹⁶

The issue before the court required no discussion of the declaratory judgment, nor did that form of procedure receive special attention in argument.¹¹⁷ Any discussion of its constitutionality was irrelevant to the case. If the court meant that Congress had not yet conferred the power on the federal courts, the conclusion was correct. If the court meant that the federal courts could not constitutionally be given by Congress the power to render declaratory judgments, it is believed that the conclusion was gratuitous. The decision makes no reference to any of the hundreds of decisions since 1883 in nearly every English-speaking jurisdiction discussing every phase of the declaratory judgment, including the constitutional issues, nor to the voluminous literature on the subject in the United States. Interesting remarks are made as to what the declaratory judgment is and is not. Justice Brandeis points out, for example, that the case is not a moot case or an administrative question; that it would in form come under a familiar head of equity jurisdiction; that a final judgment could be given; that the parties are adverse in interest; that the plaintiff has a substantial, definite, and specific interest in the question; that it does not involve an attempt to secure an abstract determination by the court of the validity of a statute.

It is believed that the court here stated every ground to prove that the issue constituted a “case” or “controversy” between adverse parties, and that it could have been decided in an authorized action for a declaratory judgment.¹¹⁸ Why, then, was not this a “case” or “controversy”? Because, it is alleged, “the plaintiff’s desires are thwarted by its own doubts or by the fears of others”; because, “in the course of an informal friendly private conversation,” Willing had advised the lessee

¹¹⁶ The commentators seems to agree that, so far as concerns the remarks on a declaratory judgment’s not constituting a “case” or “controversy,” the majority are wrong and Justice Stone correct. Grinnell, *op. cit. supra* note 64; Langmaid, *op. cit. supra* note 113; (1928) 14 A. B. A. J. 633; Note (1928) 41 HARV. L. REV. 232; Note (1930) 43 HARV. L. REV. 1290; Note (1928) 38 YALE L. J. 104.

¹¹⁷ The plaintiffs merely denied they were seeking a declaratory judgment, whereas the defendants maintained that the decree sought could be nothing but that. The defendants’ brief asserts that the grant of plaintiffs’ petition would be “opening the doorway of federal equity jurisprudence to the forbidden declaratory judgment.” Plaintiffs had joined a prayer for an injunction to restrain interference with their demolition of the building, but on this neither side made any argument and the court does not mention it. While equity might have granted the relief sought, as the Circuit Court held, Justice Brandeis is correct in characterizing it as a declaratory judgment. So are most decrees in bills *quia timet*, bills of peace, interpleader, and quieting title.

¹¹⁸ See the almost identical case of Washington-Detroit Theater Co. v. Moore, *supra* note 13, and the analogous cases of Woodward v. Fox West Coast Theaters, 284 Pac. 350 (Ariz. 1930); Girard Trust Co. v. Tremblay Motor Co., 291 Pa. 507, 140 Atl. 506 (1928).

"that the lessee had no right to tear the building down" without the landlord's consent, and because "mere refusal by a landlord to agree with the tenant as to the meaning of a lease, his mere failure to remove obstacles to the fulfillment of the tenant's desires, is not an actionable wrong" and that the defendant

"had done nothing which hampered the full enjoyment of the present use and occupancy of the demised premises. . . . There was neither hostile act nor a threat. There is no evidence of a claim of any kind made by any defendant, except the expression by Willing, in an amicable private conversation, of an opinion on a question of law."

Possibly this is designed to show that there was no contested issue between the parties, but a mere academic difference of opinion on a question of law. But why refer to friendly conversations when the pleadings show a most hostile and adverse position? No preliminary conversation or statement of position would seem to be required by the law as a condition of bringing an action. An order to show cause requires no preliminary consultation with the defendant. Had the cloud consisted of a record independently of the lease itself, the action would doubtless have been deemed a proper proceeding. "Mere refusal" to grant consent under a lease which requires it, would seem to be all the "actionable wrong" that any one could ask, for millions of dollars were placed in jeopardy by that adverse and hostile position. If the law had known an action to compel consent, this would doubtless have constituted a "case" or "controversy." The term "actionable wrong" seems a little antiquated, reverting to a time when the law courts were deemed only an agency to remedy wrong-doing. The equitable growth of the preventive and declaratory functions of judicial power exercised by Anglo-Saxon courts for centuries and referred to above, should not have passed unnoticed. In these cases there is no "hostile act or a threat," but a controversy as to legal rights, which urgently requires settlement.¹¹⁹ What more should any court ask? Why should the Su-

¹¹⁹ In *Terrace v. Thompson*, 263 U. S. 197, 44 Sup. Ct. 15 (1923); *Pierce v. Society of Sisters*, 268 U. S. 510, 45 Sup. Ct. 571 (1925); *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114 (1926), there was no wrong or threat of wrong. A statute or ordinance not yet in force or applied endangered the plaintiff's freedom of action or peace of mind or interests, and the court saw in this danger or uncertainty an adequate ground for an adjudication or declaration of plaintiff's rights, using the injunction proceeding as a bare form. In these cases, the plaintiff's desires to conclude a lease (*Terrace v. Thompson*), to operate a parochial school (*Pierce v. Society of Sisters*), to use its property without zoning restriction (*Village of Euclid v. Ambler Realty Co.*), were "thwarted by its own doubts," for which reason they summoned a contesting defendant into court and thus presented an issue for judicial determination. Said Butler, J., for the court, in *Terrace v. Thompson*, 263 U. S. at 216: "They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure

preme Court ask for more violence as a condition of a justiciable issue than is demanded by the courts of England, Scotland, or other common-

an adjudication of their rights." (It is true that Judge Brandeis dissented in *Terrace v. Thompson* and in *Pennsylvania v. West Virginia*, believing the issue non-justiciable.) Actions brought to establish the validity, hence the marketability of title—including realty, personality, and especially municipal bonds—are cases where "the plaintiff's desires are thwarted by its own doubts or by the fears of others." *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123, 47 Sup. Ct. 511 (1927); *Kentucky v. Indiana*, 281 U. S. 163, 50 Sup. Ct. 275 (1930) (defendant's doubts and fears of others); *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924). In trustees' bills for instructions, in actions to declare invalid transactions (*e.g.*, marriages, divorces, etc.) or instruments (*e.g.*, notes, deeds, wills, etc.), "no defendant has wronged the plaintiff or has threatened to do so." It is a fact, an event, a record which creates uncertainty or jeopardy for the plaintiff, and the law affords judicial protection to the endangered or doubtful right by clarification and preservation. See *Cohen v. New York Mutual L. I. Co.*, 50 N. Y. 610 (1872). The jurisdiction to relieve owners of real property from vexatious claims or even of grounds for possible future claims is inherent in equity. *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720 (1892); *Howard, Bills to Remove Cloud from Title* (1918) 25 W. VA. L. Q. 109. Justice Field has pointed out that in actions to quiet title it was not necessary that such title should have been controverted or assailed. *Sharon v. Tucker*, 144 U. S. at 543, 12 Sup. Ct. at 722. For the very *raison d'être* of such actions has always been to protect the property owner from depreciation in value due to the existence of adverse claims not then being presented in such manner as to furnish ground for an action at law. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495 (1884). Such conditions to the exercise of this jurisdiction as have from time to time been prescribed by the courts [*Devine v. Los Angeles*, 202 U. S. 313, 26 Sup. Ct. at 652 (1906); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 29 Sup. Ct. 426 (1909); but *cf. Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427 (1906)] may be dispensed with by the legislature without thereby enlarging the jurisdiction of equity. *Case of Broderick's Will*, 21 Wall. 503 (U. S. 1874); *Holland v. Challen*, *supra*; *Bardon v. Land & River Impr. Co.*, 157 U. S. 327, 15 Sup. Ct. 650 (1895). Thus the action for the construction of a will has been extended by statute to deeds and other written instruments, where no other relief is given [*In re Ungaro's Will*, 88 N. J. Eq. 25, 102 Atl. 244 (1917)]. The court regards this statute as effecting an extension of the remedy rather than of jurisdiction], and where no questions of trust are involved. *Barton v. Barton*, 283 Ill. 338, 119 N. E. 320 (1918); ILL. REV. STAT. (Cahill, 1927) c. 22, § 50. A Connecticut statute has provided for an action by any claimant of an interest in real or personal property against any adverse claimant to determine such adverse claim and quiet title. *Ackerman v. Union & New Haven Trust Co.*, 91 Conn. 500, 100 Atl. 22 (1917); CONN. GEN. STAT. (1918) § 5113. A Minnesota statute permits the holder of a fee title to bring an action against the holder of a tax title to determine such claim without, as was formerly necessary, paying into court the amount for which the land was sold at the tax sale. *Deaver v. Napier*, 139 Minn. 219, 166 N. W. 187 (1918); MINN. STAT. (Mason, 1927) c. 82, § 9556. There is also the equitable action to establish and confirm title in the case of lost records and under other circumstances. ILL. REV. STAT. (Cahill, 1927) c. 116, § 16. There is the action by which an equitable claimant may obtain a judgment impressing a trust upon the legal title in his favor [*Donahoe v. Rogers*, 168 Cal. 700, 144 Pac. 958 (1914); *Porten v. Peterson*, 139 Minn. 152, 166 N. W. 183 (1918)], and the action to declare a supposed trust invalid. *Scheibner v. Scheibner*, 199 Mich. 630, 165 N. W. 660 (1917). There are actions to affirm the validity of a marriage denied or doubted by the other party. *Kitzman v. Kitman*, 167 Wis. 308, 166 N. W. 789 (1918); WIS. STAT. (1927) § 247.03. Where new equitable rights have been thus created in the states by statutory extensions of existing remedies, the federal courts have occasionally given them effect. *Bardon v. Land & River Impr. Co.*, *supra*. But *cf. Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129 (1894), as to how far such statutes conflict with the constitutional provision entitling parties to a trial by jury. When our

law jurisdictions? In England, the courts demand that an issue presented for decision shall involve a cause of action. It would seem hardly possible that a procedure which in England was established by mere rule of court and has been employed in hundreds of cases constituting "causes of action" is incapable of adoption in the federal courts by congressional legislation, but would require an amendment to the Constitution.

But even if it were true that this was a "friendly" doubt or difference, that would by no means justify the generalizations as to declaratory judgments deduced by Justice Brandeis. The argument seems to be: Cases presenting merely a "friendly" doubt or difference are non-justiciable under the Constitution; every action for a declaratory judgment presents merely a friendly doubt or difference; hence every action for a declaratory judgment is non-justiciable under the Constitution. Mere statement demonstrates, it is believed, the unsustainability of this supposed syllogism. Yet it appears to have escaped criticism from every member of the court except Justice Stone. If the difference were only "friendly" or academic, and thus presumably not ripe for judicial decision, it would have been a moot case,¹²⁰ and on that ground inappropriate for decision, whether by declaratory judgment or any other judgment. It could not have involved a "friendly" doubt without constituting a moot case; yet the court admits that the issue is "not moot." Had it been a "friendly" doubt or academic issue only, it could not have eventuated in a declaratory judgment. By suggesting the declaratory judgment as the plaintiff's goal, the court must necessarily assume an adversary proceeding involving a justiciable issue. Thus the minor premise of the court's implied syllogism contains within itself a contradiction which destroys the validity of the whole reasoning. The fact is, it is respectfully submitted, that the issue was not "friendly" or academic, but a hostile litigation involving important pecuniary rights. Under a resourceful legal system, the plaintiff should have been able to get a judgment on the issue, which, the court correctly concludes, would have been declaratory, like many approved judgments. But there was no warrant for casting unjustifiable aspersions upon the declaratory

courts are daily adjudicating such suits on their merits, can it be questioned that cases or controversies are therein presented? In so far as no other relief is awarded, these are in effect declaratory judgments. The declaratory action is thus merely a new name for a form of remedy long known to English and American practice. See cases cited in *Langmaid, op. cit. supra* note 113, at 603 *et seq.*, in which it is made clear that not merely the redress of wrongs or prevention of threatened wrongs, but the preservation and protection of existing rights is an important function of courts, particularly of equity. Cf. *Terrace v. Thompson, supra*.

¹²⁰ *Jones v. Montague*, 194 U. S. 147, 24 Sup. Ct. 611 (1904); *Richardson v. McChesney*, 218 U. S. 487, 31 Sup. Ct. 43 (1910); *Ex parte Steele*, 162 Fed. 694, 701 (N. D. Ala. 1908).

judgment as a form of procedure, by labelling the issue as "friendly" or as involving a mere doubt or by suggesting that the issue was not justiciable and then implying that declaratory judgments are designed for the decision of non-justiciable issues. It had not occurred to either of the lower courts that the bitter contest involved in the instant case was not a "controversy" involving great stakes.¹²¹ What the Supreme Court, in effect, does is to tell the plaintiff that he must tear down the building at the risk of forfeiting the leases and incurring damages, in order to obtain an adjudication of his right to do so.¹²²

The confession of judicial impotence implied in the court's inability to decide whether the lease did or did not empower the lessee to demolish the Auditorium and erect a new building is of itself, it is submitted, an indictment of a remedial system which necessitates such an awkward, baffling, and anti-social result, and at the same time a convincing argument for the introduction into the federal and every other jurisdiction of the declaratory judgment.

What would seem to have occurred is a confusion between the constitutional jurisdiction of the federal courts and the procedural rule-making power of Congress. A similar question was before the English Court of Appeal in the case of *Guaranty Trust Co. v. Hannay*,¹²³ in which the distinction between jurisdiction and procedure was examined at length by Pickford, L. J.¹²⁴ It seems unfortunate that this

¹²¹ The defendants' brief speaks of "the substance of the controversy," and "what is the controversy." The difference between the declaratory judgment and the moot case is elementary and has been discussed *supra* notes 96 and 97.

¹²² Yet in *Terrace v. Thompson*, *supra*, where the parties were deterred from entering into a proposed lease of agricultural land in Washington by fear of a criminal prosecution, the Supreme Court considered the issue justiciable and recognized the necessity for a judgment, by saying: "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."

¹²³ [1915] 2 K. B. 536. The Guaranty Trust Co. sued for a declaration that it was not liable to repay to Hannay & Co. certain sums which it had received from Hannay on forged bills of lading.

¹²⁴ See note 64, *supra*. The term "jurisdiction" is slightly ambiguous. It commonly means what Pickford, L. J., states. But it may be observed that the action for a declaration may be either an alternative remedy, that is, may lie under circumstances when other actions could also have been brought, or an exclusive remedy, that is, may lie under circumstances where no other action is possible. It was exclusive in *Guaranty Trust Co. v. Hannay*. Many actions for declarations, notably for negative declarations, can thus be brought under circumstances where before the statute or rule authorizing declaratory judgments, no action would have been sustainable. Justiciability in these cases is created at a stage of the dispute prior to that justifying an action for damages. In a sense, jurisdiction is thus extended, but had the term been so narrowly understood, the *Guaranty Trust* case would have been an appropriate vehicle for its expression. Instead, the common interpretation of the term was presented. In either view, however, legislation may confer the power to render declaratory judgments on the federal courts in cases over which federal jurisdiction otherwise extends. POMEROY, *EQUITY JURISPRUDENCE* (4th ed. 1918) speaks of jurisdiction in two senses: (1) in the strict sense, as "the power residing in such court to determine judicially a given action, controversy or ques-

leading case, together with the innumerable cases involving the construction of leases under declaratory-judgment procedure, should have remained unnoticed by Justice Brandeis.

Mr. Grinnell, in his article in the *Massachusetts Law Quarterly* cited above, points out that the Rules of 1883 merely indicated a judicial change of view as to the expediency of rendering declaratory judgments. It in no way affected jurisdiction. If the legislature believes such judgments to be expedient, it would seem hard for a court to say that it interferes with its "jurisdiction." Mr. Grinnell suggests that the situation in England seems to resemble the gradual extension of the remedy of an action of assumpsit by judicial action with the fiction of an implied promise in order that justice might be administered. It would hardly be asserted that reforms in procedure are beyond the constitutional power of Congress.¹²⁵ Justice Brandeis himself has ably pointed out that consequential relief or execution is not a necessarily inherent part of a valid final judgment; and if certain declaratory

tion presented to it for decision" (at 153); (2) as "the power to hear certain kinds and classes of civil cases according to the *principles* of the method and procedure adopted by the Court of Chancery . . ." (at 156).

The use in Article 3 of the Constitution of the word "controversies" in contradistinction to the word "cases," and the omission of the word "all" in respect to controversies, left it to Congress to define the controversies over which the courts it was empowered to create and establish might exercise jurisdiction, and the manner in which this was to be done. *Stevenson v. Fain*, 195 U. S. 165, 25 Sup. Ct. 6 (1904). Thus, Congress possesses the sole right to say what shall be the forms of proceeding in the courts of the United States. *Livingston v. Story*, 9 Pet. 632 (U. S. 1835); *Ex parte New Orleans City Bank*, 3 How. 292 (U. S. 1845). Unless matters of practice and procedure are to be confused with jurisdiction over parties and subject-matter, the soundness of the *dictum* in the Chicago Auditorium case should be gauged exclusively by the scope of the power of judging of the federal courts—that is, the scope of the term "case" and "controversy." The Constitution fixes the limits of federal jurisdiction over parties and subject-matter, and an Act of Congress cannot extend it. *Hodgson v. Bowerbank*, 5 Cranch 303 (U. S. 1809); *Dred Scott v. Sandford*, 19 How. 393 (U. S. 1857).

¹²⁵ The supposed historical argument of Brandeis, J., conveying the inference that only forms of procedure known in 1787 are permissible in the federal courts, even if applicable to the action for a declaratory judgment, seems unsound. Forms of remedy then known have been abolished and new forms authorized. See *Ellis v. Davis*, 109 U. S. 485, 497, 3 Sup. Ct. 327 (1883), where the court said: "It has often been decided by this Court that the terms 'law' and 'equity,' as used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practised at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the States . . . but new forms of remedies to be administered in the courts of the United States, according to the nature of the case . . ." See also *Hurtado v. California*, 110 U. S. 516, 529, 4 Sup. Ct. 111 (1884); *Holden v. Hardy*, 169 U. S. 366, 385, 18 Sup. Ct. 383 (1898); *Twining v. New Jersey*, 211 U. S. 78, 101, 29 Sup. Ct. 14 (1908). By providing an appropriate form of proceeding Congress may extend the power of the federal courts to any class of cases involving a controversy between citizens of different states. *Railway Co. v. Whitten*, 13 Wall. 270 (U. S. 1871); *Gaines v. Fuentes*, 92 U. S. 10 (1875). Clearly this would cover the proceeding for a declaratory judgment.

actions—as, for example, two of those cited by the Supreme Court,¹²⁶ which involved the repudiated construction of the English act of 1852, declining to decide upon rights to arise in the future, involving parties unknown and not before the court—are not maintainable, that can hardly mean that no declaratory action is maintainable. Because an injunction is refused in certain cases, it does not follow that no action for an injunction is constitutional. Surely we are not permanently restricted to the forms of procedure known in England in 1787.¹²⁷ Is there any evidence that it was intended to exclude a procedure known as declarator in Scotland for 300 years? The fact is that actions resulting in declaratory judgments have been known to the English and American courts of equity for centuries, and that the proposed federal act, like those in the states, merely extends this form of procedure to new situations. No new procedure is involved; merely the extension of an old procedure to new facts.

Equity jurisdiction has been defined as “the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision.” Can it be said that a court having the power to render declaratory judgments could not have conclusively decided whether the landlords in the Auditorium case were, under the lease, under a duty to give their consent, or whether they were privileged to withhold it?¹²⁸ Justice Brandeis concedes that a final judgment could have been given. Determination of that question would have settled the issue between the parties. “Cases” and “controversies”

¹²⁶ The court, instead of citing any of the American cases or the English declaratory judgment cases arising under the Rules of 1883, cites one American case not involving a declaratory judgment and three English cases arising under the repudiated construction of the Chancery Procedure Act of 1852, sec. 50, reading: “No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief.” The four citations which Justice Brandeis introduces by the word “compare” are *Cross v. De Valle*, 1 Wall. 1, 14 (U. S. 1863); *Jackson v. Turnley*, 1 Drew. 617, 627 (1853); *Rooke v. Lord Kensington*, 2 K. & J. 753, 760 (1856); *Lady Langdale v. Briggs*, 8 De G. M. & G. 391, 427 (1856). Just what relation these cases bear to *Willing v. Chicago Auditorium Association*, it is difficult for the writer to fathom. Two of them dealt with future rights dependent on an uncertain contingency, issues which courts commonly refuse to decide. (*Cross v. De Valle*; *Lady Langdale v. Briggs*.) Judicial construction narrowed the Act of 1852 so that a declaration was given only when the plaintiff *could* have sought consequential relief, which he chose not to request. (*Jackson v. Turnley*; *Rooke v. Lord Kensington*.) Thus a negative declaration that plaintiff was not bound to the defendant or that the defendant had no just claim against him could not be granted (*Jackson v. Turnley*). This narrow construction was changed by the Rules of 1883, so that the English cases cited, except as to contingent or future rights, which are inapplicable, have been repudiated. See Borchard, *The Declaratory Judgment* (1918) 28 YALE L. J. 1, at 26, 27.

¹²⁷ *Supra* notes 124 and 125.

¹²⁸ Borchard, *The Declaratory Judgment* (1918) 28 YALE L. J. 105, at 130; Note (1929) 38 YALE L. J. 241.

would seem intentionally to have been left broad terms, enabling Congress to define the controversies over which the lower federal courts might exercise jurisdiction, and the manner in which this was to be done.¹²⁹ Congress has been held the proper body to determine the forms of proceeding in the federal courts.¹³⁰ If an issue is submitted to the court "by a party who asserts his rights in the form prescribed by law,"¹³¹ it would seem that the judicial power "is capable of acting" upon the issue and deciding it.

In this connection, it is proper to remark that the Supreme Court on three separate occasions uttered *dicta* to the effect that a person born in the United States of foreign parents was not a citizen of the United States,¹³² and lawyers so advised their clients; yet, when the question was squarely presented to the Supreme Court in *Wong Kim Ark v. United States*,¹³³ they reached a different conclusion. It may be hoped and believed that when the declaratory action, as a form of procedure, is squarely presented to the Supreme Court for decision—if and when the federal bill is passed—that the court will examine the subject with the thoroughness it customarily gives to constitutional issues and reach the conclusion arrived at in England and elsewhere—that the declaratory action involves a mere matter of practice and procedure, and that it in no way enlarges the jurisdiction of the federal courts under the Constitution.

In *Piedmont & Northern Railway v. United States*,¹³⁴ the Supreme Court again took occasion to mention the declaratory judgment. In remarking that such a remedy was "not within either the statutory or the equity jurisdiction of federal courts," they came closer to a sustainable conclusion than in the three cases discussed above. Constitutionality is left unmentioned. It is true that no federal statute has yet been passed, but as already observed—regardless of the correctness of the decision in the *Piedmont* case—courts of equity have for centuries rendered declaratory judgments. In the *Piedmont* case an electric railway company was about to build an extension of its lines. The Interstate Commerce Commission, learning of this proposal, notified the company that it was

¹²⁹ *Stevenson v. Fain*, 195 U. S. 165, 25 Sup. Ct. 6 (1904).

¹³⁰ *Livingston v. Story*, 9 Pet. 632 (U. S. 1835); *Ex parte New Orleans City Bank*, 3 How. 292 (U. S. 1845).

¹³¹ *Marshall, C. J.*, in *Osborn v. United States Bank*, 9 Wheat. 738 (U. S. 1824); also *Cherokee Nation v. Georgia*, 5 Pet. 1, 75 (U. S. 1831).

¹³² *Slaughter House Cases*, 16 Wall. 36, 73 (1872); *Minor v. Happersett*, 21 Wall. 162, 167 (1874); *Elk v. Wilkins*, 112 U. S. 94, 102, 5 Sup. Ct. 41 (1884). MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES (1891) 279.

¹³³ 169 U. S. 649, 18 Sup. Ct. 456 (1898). In *Washington v. W. C. Dawson & Co.*, 264 U. S. 219, 238, n. 21, 44 Sup. Ct. 302 (1924), Justice Brandeis lists a series of cases in which the Supreme Court has overruled earlier decisions.

¹³⁴ 280 U. S. 469, 477, 50 Sup. Ct. 192 (1930).

expected, as an interstate railroad under paragraph 18, section 1, of the Act, to apply for a certificate of public necessity and convenience; otherwise, if it proceeded without a certificate, it might be subject to severe penalties. The company thereupon made the application, while denying the Commission's jurisdiction, claiming that it was an interurban railway under paragraph 22 and, hence, exempt from the requirement of the certificate. The Commission assumed jurisdiction and denied the application on the merits. The company then brought suit to set aside the order, and the Supreme Court, reversing the District Court,¹³⁵ held that, if the Commission had jurisdiction under paragraph 18, its order, negative in substance and form, denied no right of the railway and was not subject to judicial review; whereas, if the Commission had no jurisdiction, under paragraph 22, its order was nugatory and hence unreviewable. The court states that the company's complaint is not correctly directed against the Commission's order, but is really directed against the statute, seeking a determination that the company is an interurban railway and hence covered by the exemption from certificate provided by paragraph 22, and not an interstate railroad, subject to the certificate under paragraph 18. This, the court suggests, is a declaratory judgment, outside the statutory or equitable powers of the federal courts.

While it may be true that the attack upon the Commission's order was misconceived, the Piedmont Railway is in effect told that the only way in which it can establish whether it is within or outside the exemption of paragraph 22 is to build the track without certificate and then, in a defense to a criminal prosecution, assert its alleged immunity, and, if in error, incur the penalties and other loss necessarily entailed. Unless some third party brings an injunction against the company to prevent an extension of track without a prior certificate¹³⁶ or unless the Commission proceeds against the company by an order to cease and desist, the company can obtain no adjudication upon its right to build, and is left in the awkward dilemma of having to risk a direct and expensive violation of a criminal statute in order to find out whether it was or was not required to obtain a certificate. This no civilized legal system should require.¹³⁷ As social engineering, the non-justiciability of such an issue, provided adversary parties can be found, is deplorable. In view of the Commission's opposition to the company's proposal to build, there seems no good reason why the company should not be afforded a judicial

¹³⁵ 30 F.(2d) 421 (W. D. S. C. 1929).

¹³⁶ *Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 272, 46 Sup. Ct. 263 (1926).

¹³⁷ This the Supreme Court seemed to appreciate in *Terrace v. Thompson*, quoted *supra* note 122.

opportunity to sue the Commission and require it as an announced adversary in interest, to show cause why the company should not be deemed immune from the requirement of a certificate. Justiciability should not depend upon whether the Commission or the company initiates the action.¹³⁸ The case illustrates, like *Willing v. Chicago Auditorium Association*, the need for a procedure by action for a declaration, enabling such aggrieved and endangered persons as the Piedmont Railway to test and adjudicate concrete, challenged, and contested rights without incurring as a condition precedent enormous risk and expense and ultimate irreparable loss. The English and other legal systems have long since made that discovery.

Just why the Supreme Court should have taken so hostile a view of the declaratory judgment, it is difficult to surmise. With the certainty that by virtue of that procedure, they are not required to render advisory opinions or decide moot or non-justiciable disputes, the objection must rest upon unmentioned fears. It has been suggested that they believed the federal courts might be overwhelmed with cases. The experience of state courts warrants no such fear. It has been said that they object to the determination in this fashion of constitutional questions. But as every element of a justiciable controversy must be present, it can make little difference whether the judgment sought, by which a statute is "declared" valid or not, is supplemented by a coercive decree of injunction or stands alone as a final adjudication of contested rights.¹³⁹ In the light of the decisions of some fourteen state courts, embracing approximately seventy-five judges, which have expressly concluded that the procedure meets every conceivable test of justiciability, judicial power, and constitutionality, and of the decisions of twelve state courts in which these conclusions were implied, it is believed to be incumbent upon the Supreme Court to re-examine the question, should opportunity present, in the light of the American cases and of the experience of the rest of the civilized world. To decide a constitutional question before it is presented, to decide inferentially that a statute is void before it is passed, is of doubtful propriety; and the conclusions reached on the declaratory judgment, out of harmony with every other court, exhibit the wisdom of the court's supposedly established rule

¹³⁸ *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123, 131, 134, 47 Sup. Ct. 511 (1927). Said Stone, J.: "[The issues] cannot be any the less [a case or controversy] because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city."

¹³⁹ In *Williams v. Riley*, 280 U. S. 78, 79, 50 Sup. Ct. 63 (1929), the court, by McReynolds, J., says: "The prayer is for a decree declaring [the statutes'] invalidity, and for an injunction restraining defendant from attempting to enforce them." See also the cases cited *supra* notes 69 and 106.

that it will not pass upon a constitutional question until it becomes essential to the decision of a case.¹⁴⁰

Justiciability

Perhaps a brief analysis of the concept of justiciability will not be amiss. It is that which the term "case" or "controversy" is designed to insure, and the Supreme Court has had frequent occasion to consider the matter.¹⁴¹ So have the courts of foreign countries.¹⁴² What then

¹⁴⁰ *Burton v. United States*, 196 U. S. 283, 295, 25 Sup. Ct. 243 (1905); *Light v. United States*, 220 U. S. 523, 538, 31 Sup. Ct. 485 (1911); *Blair v. United States*, 250 U. S. 273, 279, 39 Sup. Ct. 468 (1919). Nor will the court decide important constitutional questions unnecessarily or hypothetically. *Liverpool, N. J. & Phila. S. S. Co. v. Commissioners*, 113 U. S. 33, 39, 5 Sup. Ct. 352 (1885); *Siler v. L. & N. R. R.*, 213 U. S. 175, 191, 193, 29 Sup. Ct. 451 (1909); *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407, 29 Sup. Ct. 527 (1909); *Cincinnati v. Vester*, 281 U. S. 439, 50 Sup. Ct. 360 (1930).

¹⁴¹ See *Chisholm v. Georgia*, 2 Dall. 431 (1793); *Osborn v. United States Bank*, 9 Wheat. 738 (U. S. 1824); *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876 (1893); *Massachusetts v. Mellon*, 262 U. S. 447, 43 Sup. Ct. 597 (1923); *New Jersey v. Sargent*, 269 U. S. 328, 46 Sup. Ct. 122 (1926); *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 49 Sup. Ct. 499 (1929), and other cases cited *supra*.

¹⁴² In the following jurisdictions, constitution or statute confers on the federal courts jurisdiction to decide "cases" or "controversies" or "matters." They are interpreted generally, except as noted below, as contemplating a justiciable issue. In *Australia*, the word "matters," substituted in 1891 for "cases" and "controversies," was intentionally made wide enough to include every kind of case which could arise for judicial determination, as distinct from advisory opinion. See Arts. 75, 76 of Commonwealth Constitution, 1909. KERR, *LAW OF THE AUSTRALIAN CONSTITUTION* (Melbourne, 1925) 238; MOORE, *CONSTITUTION* (Melbourne 1910) 208; QUICK & CARRAN, *ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* (Melbourne, 1901) 767-8. *Dominion of Canada v. Province of Ontario*, [1910] A. C. 637, 645; *State of South Australia v. State of Victoria*, 12 C. L. R. 667, 675, 708 (Australia, 1911); *In re Judiciary Acts 1903-1920 and the Navigation Acts 1912-1920*, 29 C. L. R. 257, 265, 272 (Australia, 1921). In *Canada*, the original jurisdiction of the Supreme Court may include the rendering of advisory opinions. *Attorney-General for British Columbia v. Attorney-General for Dominion of Canada*, [1914] A. C. 153, 162; Art. 101 of *Brit. North America Act*, 1867; *In re Reference by Governor-General in Council*, 43 Can. L. R. 536, 563 (1910); *In re Roberts*, [1923] Can. L. R. 152. The appellate jurisdiction of the Canadian Supreme Court, by the term "judicial proceeding," seems to be limited to "any action, cause, matter or other proceeding in disposing of which the court appealed from has not exercised merely a regulative, administrative or executive jurisdiction," i.e., a justiciable controversy, or "matter in controversy." SUPREME COURT ACT, sec. 2(e), REV. STAT. 1927, I, 639. The earlier statute permitted appeal upon "a judgment . . . in any action, suit, case, matter or judicial proceeding, in the nature of a suit or proceeding in equity." REV. STAT. 1887, II, 1761. *Svensson v. Bateman*, 42 Can. L. R. 146, 154 (1909); *Bateman v. Scott*, 53 Can. L. R. 145, 149 (1916). In *South Africa*, original jurisdiction is given to the Supreme Court "in all matters" in which the Union is a party or in which provincial legislation is challenged. *South Africa Act* of 1909, sec. 98(3). Appellate jurisdiction is granted over "judgments" (sec. 103). The Supreme Court Act of *New Zealand*, 1883, sec. 2, contains definitions of "cause," "action," and "matter" analogous to those in the corresponding Canadian statute.

In the *Argentina*, the Supreme Court has jurisdiction over a *caso judicial* only, i.e., a litigated issue in an actual controversy, and not over abstract questions. It is pointed out that only in a concrete litigation can courts pronounce judgments. Constitution, Art. 100, Art. 67 (closely analogous to United States Constitution,

are the "necessary features" of justiciability?¹⁴³ While state courts occasionally assume legislative and executive functions which could not be imposed on federal courts, the power to determine contested rights is a traditional function of all judicial courts in the western world.¹⁴⁴ Expediency and the relative danger of conflict with other departments of the government have induced a refusal to decide major political questions¹⁴⁵ or review mere administrative findings.¹⁴⁶ Expediency and a desire not to function in the abstract, but to decide only concrete contested issues conclusively affecting adversary parties in interest, have induced a refusal to render advisory opinions or decide moot cases. Actions or opinions are denominated "advisory," when there is an insufficient interest in the plaintiff or defendant to justify judicial determination, where the judgment sought would not constitute specific relief to a litigant or affect legal relations or where, by reason of inadequacy of

Art. III, sec. 2); BAS, *EL DERECHO FEDERAL ARGENTINO* (B. A., 1927) I, 340; in *JURISPRUDENCIA ARGENTINA*, edited by T. Jofré and L. Anastasi, see following cases: *Urlicie*, 1919, 3:1080; *Saenz Valientz v. Provincia de Corrientes*, 1921, 7:80; *Cordero v. Barnetache*, 1921, 7:159. See also COLINA, *DERECHO Y LEGISLACIÓN PROCESAL* (B. A., 2d ed. 1916) I, 299; GONZALES CALDERÓN, *DERECHO CONSTITUCIONAL ARGENTINO* (B. A., 1923) I, 437; RODRIGUEZ, *COMENTARIO AL CODIGO DE PROCEDIMIENTO* (Barcelona, 2d ed. 1914) I, 114.

In *Brasil*, where federal jurisdiction is analogous to that in the United States, the constitution speaks of *causas e conflictos* (cases and controversies) and *litigios* and *reclamações* (litigations and claims). It appears that judgment cannot be pronounced except in litigated cases involving genuine controversies between parties having a justiciable interest in a decision. Constitution Arts. 59, 60. LESSA, *EL PODER JUDICIARIO* (Rio de Janeiro, 1915) I, 52; MAXIMILIAN, *COMENTARIOS A CONSTITUÇÃO BRASILEIRA* (Rio, 1918) 586; MILTON, *A CONSTITUÇÃO DO BRASIL* (Rio, 1898) 286, 287, 300. In *Colombia*, the same view is taken of the words, *causa*, *pleito*, *juicio* (of equivalent meaning, Judicial Code, secs. 254, 255) and of *litigio*, *altercado*, *disputa*, *controversia*. CODIGO JUDICIAL (Bogota, 5th ed. 1917). GARAVITO, *JURISPRUDENCIA DE LOS TRIBUNALES* (Bogota, 1908) No. 1199, 3233; GARAVITO, *JURISPRUDENCIA DE LA CORTE SUPREMA*, 1914-19 (Bogota, 1921) No. 2139 (Sentencia 30 Oct., 1924). The same view prevails in *Peru*, ROMERO, *ESTUDIOS DE LEGISLACIÓN PROCESAL* (Lima, 1914) II, 6, 11-13; SAMANAMU, *PRONTUARIO DE PROCEDIMIENTOS CIVILES* (Lima, 1917) 9, 12, and in other South American countries. SAMANAMU, *op. cit.*, at 9, n. 2. For *Venezuela*, see CODIGO DE PROCEDIMIENTO CIVIL, 1916 (Caracas, ed. oficial 1917) §§ 11, 14, 234, 235.

¹⁴³ *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 49 Sup. Ct. 499 (1929), in which the court held, by Taft, C. J., that an appeal from the Federal Tax Board sustaining certain assessments on a taxpayer, was judicially reviewable.

¹⁴⁴ Under the doctrine of separation of powers, it is universally admitted that the decision of actual controversies involving legal rights is a function of the judiciary, and not of any other department. *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925). On judicial power, see also Carpenter, *Separation of Powers in the Eighteenth Century* (1928) 22 AM. POL. SCI. REV. 32; Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338; Sunderland, *The Scope of Judicial Review*, (1929) 27 MICH. L. REV. 416.

¹⁴⁵ *Supra* note 83.

¹⁴⁶ *Supra* note 77. The Supreme Court is careful to ascertain which orders are findings of fact or unreviewable. *United States v. Los Angeles, & S. L. R.*, 273 U. S. 299, 313, 47 Sup. Ct. 413 (1927); *Piedmont & Northern Ry. v. United States*, 280 U. S. 469, 50 Sup. Ct. 192 (1930). Pillsbury, *Administrative Tribunals* (1923) 36 HARV. L. REV. 405, 583.

parties defendant, the judgment could not be sufficiently conclusive.¹⁴⁷ Actions or opinions are described as "moot" when they are or have become fictitious, colorable, hypothetical, academic, or dead.¹⁴⁸ The distinguishing characteristic of such issues is that they involve no actual, genuine, live controversy, the decision of which can definitely affect existing legal relations. The issue is either not yet ripe for determination, because no opposing claim or right has yet been asserted or advanced or has arisen and hence no actual or potential conflict can be established, or else the issue has ceased to be live or practical, because the facts have changed, either by settlement of the controversy or by alteration in the circumstances of the parties or subject-matter, so as to make the judgment not decisive or controlling of actual and contested rights, but a pronouncement having academic interest only. Such issues cannot be determined by declaratory judgment any more than by another judgment. "The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others"¹⁴⁹ may or may not describe a hypothetical or moot case, depending on the circumstances. In bills of peace, *quia timet*, to quiet title, of interpleader, and other equitable proceedings, in actions to declare transactions (such as marriages) or instruments (such as bonds or deeds or titles) or privileges and powers (such as sale) valid or void, the plaintiff's action may be motivated by his own doubts or the denial or fears of third parties as to his right or title, but there is no justiciable issue until he translates his doubt into a claim of right and asserts it against a defendant having an interest in contesting it. When that happens, it is a justiciable controversy, regardless of its origin in the plaintiff's own doubts or the fears of others,¹⁵⁰ and regardless of the form of action, declaratory or executory, in which the issue is presented. The question is, whether the plaintiff has a sufficient in-

¹⁴⁷ *Gordon v. United States*, 117 U. S. 697 (1864); *Garden City News v. Hurst*, 129 Kan. 365, 282 Pac. 720 (1929); *Axton v. Goodman*, 205 Ky. 382, 265 S. W. 806 (1924); *Kelly v. Jackson*, 206 Ky. 815, 268 S. W. 539 (1925); *Dietz v. Zimmer*, 231 Ky. 546, 21 S. W. (2d) 999 (1929).

¹⁴⁸ "A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy." *Ex parte Steele*, 162 Fed. 694, 701 (N. D. Ala. 1908). See *Lord v. Veazie*, 8 How. 251 (U. S. 1849); *Bartemeyer v. Iowa*, 18 Wall. 129 (U. S. 1873); *Singer v. Wright*, 141 U. S. 696, 12 Sup. Ct. 103 (1891); *United States v. Evans*, 213 U. S. 297, 29 Sup. Ct. 507 (1909); *Richardson v. McChesney*, 218 U. S. 487, 31 Sup. Ct. 43 (1910); *United States v. Hamburg-American Line*, 239 U. S. 466, 36 Sup. Ct. 212 (1915).

¹⁴⁹ *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 289, 48 Sup. Ct. 507 (1928). Judge Brandeis thought such a fact "does not confer a cause of action"; but see cases cited *supra* note 119.

¹⁵⁰ *Woodward v. Fox West Coast Theaters*, 284 Pac. 350 (Ariz. 1930); *Washington-Detroit Theater Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930); *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 140 Atl. 506 (1928).

terest to warrant judicial protection, and whether the conditions essential to any judgment are present, namely, the competence or jurisdiction of the court over parties and subject-matter, the capacity of the parties to sue and be sued, the adoption of the usual forms for conducting judicial proceedings, the existence of operative facts justifying the judicial declaration of the legal consequences, the assertion against an interested party of rights capable of judicial protection, and a sufficient legal interest in the moving party to entitle him to invoke a judgment. Although a decree of execution is not an essential part of a judgment, a court may decline to render judgment when it would be ineffective or inoperative.¹⁵¹ The declaratory judgment in a sense partakes of the character of equitable decrees and in flexibility exceeds them, in that the court has wide discretion in declining to give a declaration of rights if it does not believe a useful purpose, in terminating the controversy, will thereby be served.

The "necessary features" of justiciability which afford the greatest difficulty in analysis are the requirements of "interested" parties asserting "adverse" claims. When has the plaintiff a sufficient "interest" to warrant judicial protection? When are claims "adverse"?

To be "interested," some legal relation of the plaintiff must be capable of being affected by the decision; but besides that, the "interest" must be "substantial." Courts differ in their views as to what is "substantial," a difference especially notable in actions by taxpayers designed to determine the validity of public action under statute or administrative order. State courts, when they think the public issue important, are disposed to find a taxpayer's interest, however trifling, as adequate to sustain the justiciability of the action.¹⁵² Federal courts are more inclined carefully to scrutinize the nature of the interest of the plaintiff in the public issue presented, and to require that it be "substantial" to the plaintiff personally.¹⁵³ The factors giving "substance" to an interest

¹⁵¹ *E.g.*, because the land affected is in another state. *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923); *Westchester Mortgage Co. v. Grand Rapids R. R.*, 246 N. Y. 194, 158 N. E. 70 (1927).

¹⁵² See *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1 (1912), where the taxpayer's interest in the public action challenged was three cents; *Zoercher v. Agler*, 172 N. E. 186 (Ind. 1930). In *Massachusetts v. Mellon*, 262 U. S. 447, 486-7, 43 Sup. Ct. 597 (1923), the Supreme Court, by Sutherland, J., admitted that "the interest of a taxpayer of a municipality in the application of its moneys is direct and immediate," warranting the use of the injunction, *Crampton v. Zabriskie*, 101 U. S. 601, 609 (1879), but held that, in relation to the federal government, the interest of the taxpayer was "comparatively minute and indeterminable," justifying a denial of an injunction to a taxpayer against the alleged improper expenditure of federal funds.

¹⁵³ *Stearns v. Woods*, 236 U. S. 75, 35 Sup. Ct. 229 (1915); *Massachusetts v. Mellon*, 262 U. S. 447, 43 Sup. Ct. 597 (1923); *New Jersey v. Sargent*, 269 U. S. 328, 46 Sup. Ct. 122 (1926); *Williams v. Riley*, 280 U. S. 78, 50 Sup. Ct. 63 (1929).

appear to be the importance of the legal relation, the value of the property, the immediacy of the interest to be affected by the decision. And yet it is not easy to define these factors quantitatively. The interest must be present, and not contingent, though it may be presently affected or jeopardized by a future event certain to occur, such as the future enforcement of an existing statute¹⁵⁴ or the death of a life-tenant, in the case of remaindermen or reversioners, or the future expiration of a contract or lease, in the case of disputes as to the privilege of renewal, or the privilege of exercising future powers or rights under written instruments, including contracts.¹⁵⁵

What is necessary to make a claim "adverse" is not too clearly inferable from the precedents. "Controversy" is a broad term and has been defined as a dispute, a litigated question, a lawsuit, a suit at law or in equity, a civil action or proceeding, and is sometimes distinguished from "case," which would include a criminal proceeding.¹⁵⁶ An "adverse" claim is usually associated with hostility, though this is not necessarily so. The mere fact that the defendant's interest is potentially adverse justifies summoning him to defend; and the mere fact that he admits his liability¹⁵⁷ or consents to be sued¹⁵⁸ or even, under certain circumstances of so-called "friendly suits," that he is interested in the same judgment as the plaintiff,¹⁵⁹ is not necessarily a bar to an ordinary exec-

¹⁵⁴ *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114 (1926), where the mere passage of a zoning statute was deemed deleteriously to affect the value of plaintiff's land without proof of prospective use. *Cf.* *West v. City of Wichita*, 118 Kan. 265, 234 Pac. 978 (1925), where proof of use was deemed a condition precedent to justiciability of the validity of the ordinance. See also *Pierce v. Society of Sisters*, 268 U. S. 510, 45 Sup. Ct. 571 (1925). In *City of Denver v. Denver Land Co.*, 85 Colo. 998, 274 Pac. 743 (1929), a judgment was properly refused, because the city had not yet enacted a proposed ordinance creating an improvement assessment district and because opposing parties in interest were not present.

¹⁵⁵ *Stueck v. G. C. Murphy Co.*, 107 Conn. 656, 142 Atl. 301 (1928); *Miller v. E. & M. Theater Corp.*, 134 Misc. 634, 235 N. Y. Supp. 595 (Sup. Ct. 1929); *Brokaw v. Fairchild*, 135 Misc. 70, 237 N. Y. Supp. 6 (Sup. Ct. 1929); *Post v. Metropolitan Casualty Ins. Co.*, 227 App. Div. 156, 237 N. Y. Supp. 64 (4th Dept. 1929); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924); *Tennessee Eastern Elec. Co. v. Hannah*, 157 Tenn. 582, 12 S. W. (2d) 372 (1929).

¹⁵⁶ *Rhode Island v. Massachusetts*, 12 Pet. 657, 723 (U. S. 1838); 1 C. J. 940.

¹⁵⁷ *Kentucky v. Indiana*, 281 U. S. 163, 50 Sup. Ct. 275 (1930); *Gavit* in 30 COLUMBIA LAW REV. 802, 810 (1930).

¹⁵⁸ *Lord v. Veazie*, 8 How. 251, 255 (U. S. 1849). The action is brought amicably, though the issue is contested. *Payette-Bois Water Users v. Fairchild*, 35 Idaho 97, 205 Pac. 258 (1922); *Aalfo Co. v. Kinney*, 105 N. J. L. 345, 144 Atl. 715 (1929).

¹⁵⁹ *Cotting v. Goddard*, 183 U. S. 79, 22 Sup. Ct. 30 (1901); *Kentucky v. Indiana*, 281 U. S. 163, 50 Sup. Ct. 275 (1930); *Parker v. State*, 132 Ind. 419, 31 N. E. 1114 (1892). Indeed, the courts will be less prone under such circumstances to grant declarations, which are not usually issued on admissions or consent. "Friendly" creditors' suits in the reorganization of a business, if not a fraud on other creditors [*Coliseum v. Interstate Lumber Co.*, 123 Ala. 512, 26 S. W. 122 (1898)], and actions by stockholders against their corporation to prevent a payment of taxes are not uncommon.

utory action. Rights are often asserted and denied for the purpose of making a test case,¹⁶⁰ and the agreed statement of facts or case stated¹⁶¹ is a common phenomenon. The court must merely be alert to distinguish the fictitious or collusive suit, where only information or opinion is sought, from those in which rights are placed in issue with the purpose of a binding determination.¹⁶² In actions for a declaration, far more evidence of conflicting interest is usually required than in some of these cases. Just as in equitable actions to quiet title or *quia timet*, no wrong need be proved, but merely the existence of a claim or record which disturbs the title, peace, or freedom of the plaintiff, so any claims, assertions, records, or adverse interests, which by casting doubt, insecurity, and uncertainty upon the plaintiff's rights or status, impair his pecuniary or material interests, establish a condition of justiciability.¹⁶³ Equity has already demonstrated that wrong or threatened wrong is not a condition of justiciability. Adverse interests endangering or disturbing vested rights may suffice to enable a person to invoke judicial relief. While actions for declaratory judgments may be brought either after wrong done or threatened, or prior thereto, the fact that the court must be convinced that its judgment will settle the controversy and quiet the disputed or endangered rights is an assurance against abuse of a remedy which has admirably served a considerable part of the civilized world. In the thousands of decided cases, we find every element of justiciability in the most technical sense. Each case must stand on its own facts. Should any case lack any of the "necessary features" of justiciability, it will be dismissed; but a generalization that all actions for declaratory judgments lack the "necessary elements" of justiciability is, in the light of the record in England and elsewhere, an unsustainable conclusion. It

¹⁶⁰ *Hylton's Case*, 3 Dall. 171 (U. S. 1796); *State v. Dolley*, 82 KAN. 533, 537, 108 Pac. 846 (1910); 1 C. J. 974.

¹⁶¹ *Union & New Haven Trust Co. v. Watrous*, 109 Conn. 268, 146 Atl. 727 (1929); *Burton v. Durham Realty & Ins. Co.*, 188 N. C. 473, 125 S. E. 3 (1924). In Australia it is called a special case for the opinion of the court. *HIGH COURT RULES*, Order xxxii, r. 1, sec. 1. This differs from the question certified by a judicial or administrative tribunal for the opinion of a higher court. *Federated Engine-Drivers, etc., Ass'n v. Broken Hill Proprietary Co.*, 16 C. L. R. 245 (1912); *Merchant Service Guild v. Newcastle Hunter River Steamship Co.*, 16 C. L. R. 591 (1913); *Australian Commonwealth Shipping Board v. Federated Seamen's Union*, 36 C. L. R. 442 (1925).

¹⁶² *Lord v. Veazie*, 8 How. 251 (U. S. 1849); *Bell & Howell Co. v. Bliss*, 262 Fed. 131 (C. C. A. 7th, 1919); *Smith v. Junction Ry. Co.*, 29 Ind. 546 (1868). The distinction is not always simple. When courts wish to decide an issue, they are likely to disregard the fact that it is a "made" case, as in *Hylton's Case*, 3 Dall. 171 (U. S. 1796), involving the federal tax on carriages, or that the ostensible parties to the record may not be the real parties in interest or those mainly interested.

¹⁶³ *Guthery v. Ball*, 206 Mo. App. 570, 228 S. W. 887 (1921); *Reed v. Reed*, 106 Misc. 85, 175 N. Y. Supp. 264 (Sup. Ct. 1919); *Morecroft v. Taylor*, 225 App. Div. 562, 234 N. Y. Supp. 2 (1st Dept. 1929).

may be hoped, therefore, that the United States Supreme Court will soon modify its unfortunate *dicta* and join the rest of the world in concluding that a proper action for a declaratory judgment presents every "necessary feature" of justiciability and of a "case" or "controversy."

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