

DECLARATORY JUDGMENTS*

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Germany

Coming now to the non-English speaking countries which expressly authorize the general action for a declaratory judgment in their codes of procedure, as, for example, Germany and Austria, it is interesting to note the extent to which, in addition, they specifically provide for declaratory judgments with respect to particular legal relations. It will suffice here to refer to the provisions of German law. In addition to the broad Articles 256 and 280 of the Code of Procedure authorizing the general action for declaratory judgments, and the interlocutory declaratory decree, respectively,⁷² the German Code of Procedure authorizes interventions by third persons in the form of a declaratory judgment against the plaintiff in an action,⁷³ declarations of the existence or nonexistence of a marriage or of the relation of parent and child or of paternal power,⁷⁴ and the creditor's action against his fellow creditors protesting the distribution of assets in execution proceedings.⁷⁵ Actions the character of which is somewhat more doubtful are those asserting the right to a writ of execution,⁷⁶ the debtor's attack upon the right underlying an execution,⁷⁷ the action of a third person denying the validity of the execution,⁷⁸ and the intervention of a third person excepting to the seizure of pledged property.⁷⁹

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⁷²Articles 256 and 280 are discussed *infra* p. 395.

⁷³Sec. 64; see Goldschmidt, *Zivilprozessrecht* (Berlin, 1929) 174; Stein-Jonas, *Kommentar zum Zivilprozessrecht* (Berlin, 1926) I, 295.

⁷⁴Arts. 606, 633, 638, 640, Z. P. O.

⁷⁵Art. 878, Z. P. O. This is akin to the similar declaration in bankruptcy proceedings. *Konkursordnung*, § 146. Stein-Jonas, *op. cit. supra* note 73, II at p. 826. There is some dispute among writers as to the declaratory character of this action.

⁷⁶Art. 731, Z. P. O. Rosenberg, *Lehrbuch des deutschen Zivilprozessrechts* (2d ed. Berlin, 1929) 584, considers this a declaratory action, whereas Stein-Jonas, *op. cit. supra* note 73, I, at p. 470, considers it constitutive (*Gestaltungsklage*).

⁷⁷Art. 767, Z. P. O. Stein, *Grundriss des Zivilprozessrechts* (2d ed. Tübingen, 1924) 21, considers the nature of this action doubtful. Stein-Jonas, *op. cit. supra* note 73, II, at p. 528, regards it as constitutive.

⁷⁸Art. 771, Z. P. O. Stein, *op. cit. supra* note 77, also deems this doubtful. Rosenberg, *op. cit. supra* note 76, at p. 620, and Stein-Jonas, *op. cit. supra* note 73, II, at p. 842, consider it not as a declaration upon the invalidity of the execution, but a constitutive judgment.

⁷⁹Art. 805, Z. P. O. Stein, *op. cit. supra* note 77, places this in the

Other codes and statutes also provide for declaratory judgments. The Code of Criminal Procedure provides that, when the question as to whether an act is punishable depends upon the determination of a legal relationship, this issue shall be decided by the criminal court.⁸⁰ The law of noncontentious jurisdiction provides that the Court of Registration (*Registergericht*) may postpone an order of registration which depends upon the determination of a disputed legal relationship until that dispute has been decided by declaration.⁸¹ Judgments upon disputed claims in bankruptcy⁸² and in execution proceedings⁸³ are declaratory. By the law of associations, a member may sue for a declaration as to the proportionate share of each member in making up a deficit in case of bankruptcy, and a creditor, in a similar case, may establish his disputed claim against the board of directors.⁸⁴ By the law of social insurance, if the dependents' claims depend upon the existence of a relationship to the deceased or among themselves, the claimant may be required to obtain a declaratory judgment.⁸⁵ Statutes also provide for the determination by declaration of conflicting claims concerning patent, trademark, and design privileges, and for the determination by a court of what is equitable under various circumstances where the parties fail to agree.⁸⁶

One of the most important customary uses of the declara-

doubtful category. Stein-Jonas, *op. cit. supra* note 73, II, at p. 627, considers it constitutive.

⁸⁰Strafprozessordnung, § 262. A similar provision is contained in Article 311 of the Code of Military Criminal Procedure.

⁸¹See § 127. By § 159 this provision is extended to the registration of associations (*Vereine*), and by § 161 to the registration of matrimonial property.

⁸²Art. 146, Bankruptcy Code.

⁸³Vollstreckungsordnung, §§ 115, 116. Stein-Jonas, *op. cit. supra* note 73, I, at p. 609.

⁸⁴Genossenschaftsgesetz, §§ 111-115. Parisiuns-Krüger, Genossenschaftsgesetz (19th ed. Berlin, 1928) 172, 175; Stein-Jonas, *op. cit. supra* note 73, I, at p. 109. The rule of § 111 is applied to the law of private insurance companies, § 52.

⁸⁵Reichsversicherungsordnung, § 1654. See also *ibid.*, §§ 1665, 1679, 1698, 1701. Somewhat similar provisions are contained in other insurance laws, *e. g.*, the employee's insurance law, § 272; the industrial accident insurance law, § 77; the agricultural accident insurance law, § 83; the building accident insurance law, § 18; the marine accident insurance law, § 81; the employee's association law (*Reichsknappschaftsgesetz*), § 161.

⁸⁶These miscellaneous cases are fully set out in the following commentaries: 1 Gaupp-Stein, Kommentar zur Zivilprozessordnung (10th ed. Leipzig, 1913) 578; 2 *ibid.*, 618; 1 Hellwig, System des deutschen Zivilprozessrechts (Leipzig, 1912) 280 *et seq.*; 1 Petersen, Die Zivilprozessordnung (5th ed. Lahr, 1904-1906) 492 *et seq.*; Seuffert, Kommentar zur Zivilprozessordnung (7th ed. München, 1910-1911) 307 *et seq.*; Wach, Handbuch des Zivilprozessrechts (Berlin, 1885) 13, 52.

tory judgment in Germany, a use which has only been enhanced by the direct authorization accorded by Article 256 of the Code of Civil Procedure, lies in the field of administrative law. With the realization that governmental authorities, in their disputes with citizens and with each other, require no compulsion to induce the execution of final decisions, practice has steadily enlarged the scope of the declaratory judgment in determining issues arising out of the administration of the poor law, road taxes, school and church burdens, water laws and the duties of maintenance in streams, the boundaries of communal districts, the joint use of public institutions, and many related questions.⁸⁷ Under the new Constitution of 1919, numerous conflicts between the German states and between the states and the federal government are to be determined by the *Staatsgerichtshof*, the highest constitutional court, by what is in effect a pure declaratory judgment.⁸⁸

Anglo-American Law

In the field of status, the common law has long been familiar with the declaration of the nullity of void marriages and the formal establishment of family relationships, such as legitimacy, illegitimacy, fraternity, heirship, and mental or physical states, such as insanity and death. By statutes in some American states, the validity of a questioned marriage may be established. Judgments of adoption, divorce, changing name, naturalization, partition, forfeiture, foreclosure, establishing school districts, drains, irrigation canals, highways and their improvements, appointing guardians, receivers, admitting a will to probate, *et cetera*, while not followed by execution, are, nevertheless, not declaratory in the proper sense, because they do not merely establish the prior existence of a legal relation, but create a new one, and for that reason are characterized as constitutive or investitive.

The declaratory judgment in substance, although not in name, has proved particularly effective for the determination of disputed or doubtful questions of title to realty. In England and some other countries, since the abolition of real

⁸⁷Jellinek, *Verwaltungsrecht* (Berlin, 1928) 290; Seidel, *Die Feststellungsklage in Civil-und Verwaltungsprozess* (Göttingen, 1893) 37; Vossen, *Die Feststellungsklage im Verwaltungsprozess*, 24 *Archiv für Offentl. Recht* 202 (1909).

⁸⁸Anschütz, *Die Verfassung des deutschen Reiches* (3d rev. Berlin, 1929) Art. 18, pp. 142 *et seq.*; Triepel, *Streitigkeiten zwischen Reich und Ländern*, in *Festgabe für Wilhelm Kahl*, 19 April 1923 (Tübingen, 1923) 52, 111.

actions, this has become the regular method of trying title. We have long been familiar with the equitable action for the removal of a cloud from title, and this action, so far as it does not demand the destruction of instruments, but merely a declaration of the plaintiff's title, is in effect declaratory. Statutes have removed some of the artificial restrictions with which the equitable remedy was encumbered. Proceedings brought by a person in adverse possession of property for the statutory period against a person claiming under the record title for the declaration of the plaintiff's title are declaratory. The fact is that the power to quiet the title to and remove clouds from title by declaration is but a single illustration of the general power of courts of equity to quiet disputed or endangered rights generally; so far as concerns equitable interests, the English Court of Appeal in *Guaranty Trust Co. v. Hannay*⁸⁹ was entirely correct in asserting that the Court of Chancery always had the power to issue declarations but saw fit to exercise it within narrow limits only. Actions determining the location of disputed boundary lines and the existence of rights of way or easements are merely declaratory in nature and effect. Even the trial of adverse claims to personal property is authorized in some American states by statute.

Actions are not uncommon by which a plaintiff seeks a declaration that the defendant holds property in trust or that a supposed trust is invalid. The trustee's or fiduciary's action for instructions, when adversary in character, is an exemplification of a declaratory judgment. So, also, are creditors' or receivers' actions placing in issue the priority of claims in bankruptcy. The equitable bill of interpleader, by which a stakeholder seeks to determine which of several claimants to a disputed fund is the proper claimant, is an ancient illustration of a declaratory action.

Long before the passage of statutes authorizing the declaratory judgment, actions for the construction of wills were so authorized. As an incident to the power over trusts, courts of equity exercised this power long prior to the statutes. Naturally the facts were not to be contingent or uncertain. Actions are occasionally brought for the declaration of the nullity of instruments obtained by fraud, such as insurance policies, and while the courts do not favor the anticipation of defenses or forcing plaintiffs into court, a declaration has

⁸⁹ L. R. [1915] 2 K. B. 536.

been granted where equity seems to require a determination on the validity of instruments before liability accrues. We need not dwell upon actions proving the tenor of lost or spoliated instruments or the validity of instruments to be recorded, nor the statutory proceedings in several American states to establish the validity of bond issues for public works.⁹⁰

Development of the General Declaratory Judgment in Legislation and Practice

Roman Law. The affirmative declaratory judgment is said to find its origin in the Roman law. In the Roman law of procedure, as in modern law generally, the action at law usually led to an executory judgment (*condemnatio*). However, it often proved necessary to decide in a preliminary way certain questions of law or of fact which the parties themselves, by agreement, or the magistrate or *praetor*, at the request of one of the parties, might submit to the *judex* for decision. This decision was merely a declaration of the *judex* in response to the question submitted. Instead of commanding the performance of some act, his decision constituted merely the affirmation of an existing state of facts or of law. Being merely incidental or preliminary to an ordinary executory action, it was known as *prae-judicium*. It ended in a *pronuntiatio*, not in a *condemnatio*. This procedure proved so useful that it was ultimately extended to independent actions where no executory judgment (*condemnatio*) was required or desired. The actions then received the name *actiones praejudiciales*, the dignity of *actiones* having theretofore been denied them.⁹¹ In application, they were limited to certain

⁹⁰The Permanent Court of International Justice has also asserted its inherent power to render declaratory judgments. See Judgments Nos. 7 and 13, and Advisory Opinion No. 11. Also Arts. 36 and 63 of the Statute of the Court, and Special Report of Dr. Caloyanni.

⁹¹Some authorities assert that they are still merely interlocutory judgments. While of course it was always possible to follow them with an executory action, this was so frequently not done that their independent status came to be recognized. Gaius is our principal source of knowledge on the subject of the *actiones praejudiciales*.

A vast amount of learning in the literature of the Roman law has been devoted to the elucidation of the *actiones praejudiciales*. Of that examined, the following may be recommended as the most useful: 4 Gaius (Poste's 3d ed. Oxford, 1890) § 44; Baron, Pandekten (9th ed. Leipzig, 1896) § 80, p. 161; 1 Bekker, Die Aktionen des römischen Privatrechts (Berlin, 1871) 283 *et seq.*; 2 Bethmann-Hollweg, Der römische Civilprozess (Bonn, 1865) § 97; Pissard, Les questions préjudicielles en droit romain (1907) § 219; Wenger, Institutionen des römischen Zivilprozessrechts (1925) §§ 133 ff., 160 ff.; Windscheid, Lehrbuch des Pandektenrechts (5th ed. Frankfurt, 1882) § 45, pp. 111-112; *ibid.*, §

classes of cases, principally questions of status and of certain property rights and relations incidental to status, such as the amount of a wife's dowry which had to be returned to her on the termination of the marriage, and, less frequently, questions of the validity of legal instruments.

It is interesting to observe that in the development of the declaratory judgment during the Middle Ages and after the "reception" of Roman law in continental Europe in 1495, questions of status, of property rights connected therewith, and of the validity or invalidity of wills and other legal instruments, constitute the principal subjects of declaratory actions. The classical Roman law hardly knew the negative declaratory judgment at all, except with respect to the *actio negatoria utilis*, to protect a possessor or pledgee against claims conflicting with the exercise of his rights, *et cetera*, in property. In the Code of Justinian,⁹² the first mention is to be found of the so-called *Lex Diffamari*, embodying a rescript of one of the emperors to a certain Cresceus whose status some one had disparaged by asserting that he was not free-born. The passage authorized the person slandered to cite the adverse party, and, if the latter failed to prove his assertion, he was to be ordered to keep silent. Primarily this involved both a declaration of privilege and of a right, followed by an executory injunction. The real development of this form of relief by action is to be found in the Roman civil law of the Middle Ages, notably in Italy. Among the several forms of protection against the assertion of unfounded claims which grew up at that period, four received extended application: (1) the *provocatio ex lege diffamari*, which affords the broadest foundation for the modern negative declaratory action, and the *provocatio ad agendum ex lege si contendat*,⁹³ (2) the so-called *querela nullitatis*,⁹⁴ upon which the modern

122, pp. 360-361; and the valuable monograph by Degenkolb, *op. cit. supra* note 14, at pp. 96, 131, 146-168, 187 *et seq.* Degenkolb, at p. 188, points out certain remedies of the Roman law which are in the nature of declaratory actions, all of which are directed to the security of the plaintiff, *e. g.*, the *interrogationes in jure*, the action arising out of non-delivery of a receipt, the demand for a bond (*cautio*), and the *liberationis condictio*, or release from a possibly existing obligation (but not the establishment of a *non debet*).

⁹²C.7.14.5. A translation of the passage is to be found in DeVillier's edition of Voet's Commentary on the Pandects (Cape Town, 1900) Book XLVII, Tit. 10, p. 143.

⁹³By this proceeding, the surety could require the creditor to bring his action against the principal debtor, under penalty of discharging the surety from all further liability. Baron, *op. cit. supra* note 91, at p. 480.

⁹⁴Baron, *op. cit. supra* note 91, at p. 124; Windscheid, *op. cit. supra* note 91, at p. 223, n. 6.

civil-law actions declaring the nullity of legal transactions are founded;⁹⁵ (3) the so-called *liberationis condictio*; and (4) the *actio negatoria utilis*.⁹⁶ There were of course certain additional remedies to assure protection against unfounded claims, but these were usually incidental to some coercive relief which was prayed. These are the protection of possession against the *turbatio verbis* through the assertion of false claims, and the flexible *imploratio iudicis* for the determination of privilege or non-liability.⁹⁷

This variety of measures for the protection of security would indicate that society during the Middle Ages was more sensitive than were the Romans to the social and individual danger of insecurity arising out of uncertainty of legal relations. This is traceable in two well-known legal phenomena of that period: (a) that it was a personal injury in the nature of slander to have an unfounded action brought against one; and (b) that society had an interest in the protection of the *status quo*. While an action is a method of restoring a disturbed legal equilibrium and therefore an aid to ordered community life, it nevertheless constitutes a disturbance of the peace of the person threatened with it; for him it is a vacillation between war and peace. Owing to this dual conception, and to the theory that by awaiting a time unfavorable to the defendant for bringing suit the plaintiff was in fact abusing his privilege of resorting to the courts—a kind of slander by way of action—the procedure was invented of enabling the prospective defendant to appear as plaintiff with the power to compel his opponent to come forward with his claim, prove it, or ever after remain silent (*poena perpetui silentii*). In this *provocatio ex lege diffamari* lies the origin of the negative declaratory action. Confined at first to a remedy against the untimely institution of a suit against the plaintiff, it soon developed into a remedy against the institution of an unmeritorious or unfounded suit, by compelling the defendant to bring his threatened claim to action at once or be thereafter barred from asserting it.⁹⁸

⁹⁵Probably most legal systems provide for a judicial declaration that a void act is void.

⁹⁶For the protection of privileges and immunities with respect to property.

⁹⁷Degenkolb, *op. cit. supra* note 14, at pp. 203, 204.

⁹⁸The general *provocatio* was a proceeding in the nature of a suit to quiet title directing all persons adverse to come forward with their claims or be barred. Degenkolb, *op. cit. supra* note 14, at p. 207; Weismann, *Die Feststellungsklage* (Bonn, 1879) c. 1, c. 2. There is, of course, a close relation between this development of the *provocatio diffamari* and

Just as the *provocatio ex lege diffamari* was extended to substantive claims of all kinds, so the *provocatio ex lege si contendat* was extended beyond the surety's action to protect himself from liability to other actions in which the plaintiff alleged that a defense now available to him might be lost by the defendant's delay in instituting against him an action to which he had a valid defense. Both proceedings, which tended to become interchangeable, looked to the assertion of the plaintiff's privilege as against unfounded claims of the defendant.

Germany and Austria

It is not unnatural that the declaratory judgment was taken up by the German law of procedure, since the institution found its way into the Italian Roman law of the Middle Ages from the Germanic law. A number of the German states made provision for the declaratory judgment in their local codes, whence the institution found its way into the German Code of Civil Procedure of 1877. Since that time, both doctrine and jurisprudence have developed the institution to a high degree of refinement. An enormous German literature deals with the declaratory judgment with characteristic profundity.⁹⁹

Article 231 of the 1877 Code (Article 256 of the 1898 revision) reads as follows:

An action may be brought for the declaration of the existence or nonexistence of a legal relation (*Rechtsverhältnis*) or for the declaration of the genuineness or spuriousness of a legal instrument, provided the plaintiff has a legal interest in having the legal relation or the genuineness or spuriousness of the instrument determined by a judicial decision.

Article 280 of the Code of Procedure of 1898 provides for the interlocutory decree as follows:

Until the conclusion of the verbal proceedings leading to a final judgment, the plaintiff, by widening

the slander of title, against which the old Roman law had provided a remedy. But this required more than the threat of an action.

⁹⁹1 Gaupp-Stein, *op. cit. supra* note 86; Goldschmidt, *Zivilprozessrecht* (Berlin, 1929) § 14; Hellwig, *Anspruch und Klagerecht* (2d ed. Leipzig, 1910) 399-442; *ibid.*, *op. cit. supra* note 86; Kisch, *op. cit. supra* note 2; Langheineken, *op. cit. supra* note 2; 1 Petersen, *op. cit. supra* note 86; Plósz, *Beiträge zur Theorie des Klagerechts* (Leipzig, 1880); Rosenberg, *op. cit. supra* note 76, § 85; Seidel, *op. cit. supra* note 87; Seuffert, *op. cit. supra* note 86; Wach, *Der Feststellungsanspruch* (Leipzig, 1899); *ibid.*, *op. cit. supra* note 86.

the complaint, or the defendant by instituting a counter-claim, may ask that a legal relation which in the course of the proceedings became the subject of dispute and upon whose existence or nonexistence the decision of the case depends in whole or in part shall be determined judicially.

These provisions are substantially repeated in Articles 228 and 236 of the Austrian Code of Procedure of 1895, except that after the words "legal relation" of the German Article 256, the Austrian Code interpolates the words "or rights."¹⁰⁰

It will be observed that Article 256 provides for both the affirmative and the negative declaratory judgment. The term "legal relation" which is the subject of declaration is used in the Savignyan sense of "the relation determined by law of one person to another person or group or to things."¹⁰¹ The relation may be personal, with or without reference to property, *e. g.*, a question of family status or membership in a club,¹⁰² or real, *e. g.*, A's right to an easement over B's land.¹⁰³ It extends to all jural relations, whether rights, privileges, powers, or immunities.¹⁰⁴ The relation need not be a direct one, *e. g.*, between creditor and debtor. Thus, it has been held that two creditors of the same debtor have the necessary "legal relation" to determine their respective claims to a given fund of the debtor; or a creditor and a third person (partnership), for the creditor to obtain a declaration against the partnership of his debtor's interest in the partnership.¹⁰⁵

The legal relation may thus involve personal status, an obligation, or a power; for example, the power to give notice to

¹⁰⁰Fürstl, *Die österreichische Civilprozessgesetze, mit Erläuterungen* (Wien, 1898) 353; Neumann, *Commentar zu den Civilprozessgesetzen vom 1. August, 1895* (Wien, 1898) 535 *et seq.*; Ott, *Die Feststellungsklage* (reprint from *Allg. Oester. Gerichtszeitung*, Wien, 1899) 23; Sternberg, *Die Feststellungsklage nach der neuen Civilprozessordnung* (Wien, Leipzig, 1901) 23. An exhaustive description of the declaratory judgment in Austrian law has been supplied to the Congress of Comparative Law by Professor Petschek of Vienna.

¹⁰¹Savigny, *System of Modern Roman Law* (Madras, 1867) 6 *et seq.*; Windscheid, *op. cit. supra* note 91, § 37. It seems preferable to substitute for the word "relation," in its present Savignyan connotation of *vinculum juris*, the word "association" or "bond" and to confine legal relations to relations between persons, although the relations may arise out of or with respect to things.

¹⁰²8 R. G. 3 (1882); 14 R. G. 90 (1884).

¹⁰³Petersen, *op. cit. supra* note 86, at p. 499.

¹⁰⁴Arts. 194, 209, B. G. B. Gaupp-Stein, *op. cit. supra* note 86, at p. 607.

¹⁰⁵27 R. G. 345 (1890); Gaupp-Stein, *op. cit. supra* note 86, at p. 608; or that a certain right is or is not vested in a third person; or that the defendant has or has not a right against a third person. 41 R. G. 345 (1898). See also Bähr, *Entscheidungen des Reichsgerichts, mit Besprechungen* (München, 1883) 160.

terminate. It may involve the entire relationship or merely a single aspect or term thereof. It must involve a present relationship, but, by exception, a dispute of present interest may involve a past relationship. So it may involve a legal right to be exercised in the future, such as the right to renew a lease which is the subject of a present dispute, or the validity of a contract signed but not to come into force until a later date.

The "legal interest" on the part of the plaintiff which is required as a condition precedent to the making of a declaration may in general terms be described as such an interest as is to be found in the danger of loss or of uncertainty of his rights or other jural relations by a failure of the court to make the declaration. Before the danger has accrued—and the existence of this condition is for the court to determine—the plaintiff's "interest" in the declaration is considered insufficient; in other words, the action is either unfounded or premature. Thus, there can be no declaration of right or privilege against a person who does not dispute it, a principle common to all legal systems; a prospective heir cannot during the lifetime of a testator sue for a declaration of the validity or invalidity of the will.¹⁰⁶ The German courts likewise assert a lack of "interest" in the declaration if the legal right to be established is ascertainable in some other form,¹⁰⁷ a conclusion which the English courts also reach when a special proceeding has been provided by statute for the determination of the particular jural relations in question.¹⁰⁸ On the other hand, a sufficient "interest" is to be found in the dispute of the plaintiff's rights, *et cetera*, by one in a position to endanger them should his claims be upheld; even the dispute of present or existing rights, *et cetera*, though their enjoyment is to be postponed to the future, dependent on the happening of a condition or the mere lapse of time, will sup-

¹⁰⁶Thus, the interest is lacking when the dispute of the plaintiff's rights or an assertion of a conflicting claim emanates from a person whose conduct can have no practical bearing on the legal position of the plaintiff. 24 R. G. 405 (1889); 49 R. G. 372 (1901). Gaupp-Stein, *op. cit. supra* note 86, at p. 609. So a partner before the termination of the liquidation proceedings cannot sue for a declaration of disputed claims; nor can a registered association sue dropped or resigned members for the declaration of a possible liability to share in taxes. 8 R. G. 72, 74 (1882); Petersen, *op. cit. supra* note 86, at p. 505. See to the same effect the Scotch decisions, *infra* notes 140-141.

¹⁰⁷Gaupp-Stein, *op. cit. supra* note 86, at pp. 612, 613, and cases there cited in notes 90-92.

¹⁰⁸*Barraclough v. Brown*, L. R. [1897] A. C. 615, 623. See also *Magistrates of Rothesay v. The Officers of State* (June 22, 1820, Scotland) Fac. Coll., quoted in 41 Law Magazine 179 (1849).

port a declaration. A sufficient "interest" in a negative declaration is involved in the danger of a criminal prosecution or the liability to a penalty,¹⁰⁹ or in the desire to stop the running of the statute of limitations.¹¹⁰

The declaration with respect to the genuineness or spuriousness of a legal instrument, an institution adopted from the French law, goes merely to the determination of its intrinsic genuineness. If its validity or meaning depends upon proof of extrinsic facts, its interpretation and construction will come under the head of disputed or uncertain "legal relations." The declaration of its genuine or spurious character is, therefore, of evidential value only, but it binds the parties and their privies and has thus, as *res judicata*, an advantage over the proceeding to perpetuate testimony.¹¹¹ The action applies to any kind of legal instrument capable of affording evidence of a private jural relation, and the plaintiff must, as in all declaratory judgments, show his "interest" in the declaration requested.

The provision of Article 256, with respect to the genuineness or spuriousness of legal instruments, has been dropped from the 1931 draft of the proposed Code of Civil Procedure, partly, it is understood, because it was rarely invoked. That Article as drafted reads: "The court may declare the existence or nonexistence of legal relations only if the plaintiff has a legal interest in an immediate declaration." The jurisprudence of the courts has exhaustively interpreted these words and phrases.

Notwithstanding the wide scope for the declaratory action which is opened by Article 256 of the German Code of Civil Procedure, it is worthy of note that probably less than five per cent of the decisions of the Supreme Court are merely declaratory. This may be due in part to an early decision of the Supreme Court in 1881, which held that a plaintiff could not in effect take "two bites at the cherry"—if he had available an executory action (*Leistungsklage*), he could not first sue for a declaration of his right (*Feststellungsklage*) and then bring further actions for coercive relief. This would

¹⁰⁹16 R. G. 390 (1886); 31 R. G. 30 (1893); 70 R. G. 371 (1909) and *ibid.*, 397. See also *Burghis v. Attorney General*, L. R. [1911] 2 Ch. 139; *Dyson v. Attorney General*, L. R. [1911] 1 K. B. 410; *China Mutual Steam Navigation Co. v. Maclay*, L. R. [1918] 1 K. B. 33.

¹¹⁰23 R. G. 346, 348 (1889); 61 R. G. 164, 168 (1905).

¹¹¹*Petersen, op. cit. supra* note 86, at pp. 497, 498; *Seuffert, op. cit. supra* note 86, at pp. 312, 313.

invite a multiplicity of suits. This decision and a few others like it were so severely criticized by Dr. Bähr, one of the draftsmen of the Code, as contrary to the intent of the statute, that the Supreme Court later reversed its position. Experience has shown that after a right has been declared, rarely, if ever, will an action to enforce compliance therewith be necessary. Yet the practice appears to have been considerably influenced by these early decisions, so that a declaratory action is rarely brought if an executory action is available. In tort claims, a declaration of duty or liability is occasionally sued for where the amount of damage is unascertainable, a proceeding especially appropriate to prevent the running of the statute of limitations. Certain recent decisions, moreover, while admitting that the requests for a declaration and for coercive relief might be combined in one action, have taken the view that the declaration must be directed to a different end than the executory decree, and that a plaintiff should not request a declaration at all—on the ground that he has no “legal interest” in it—if he might have requested an executory judgment.¹¹² This now has an additional reason, for the amended Code of 1898 provides a form of action for executory judgments with respect to obligations to become due in the future, such, for example, as periodically recurring payments of rent. While such a judgment was formerly declaratory in its nature, requiring a new action, if necessary, upon the former judgment to obtain execution on the due day, it is now an executory judgment on which a writ of execution can immediately issue on the due day. The result is that for the most part, the declaratory action in Germany is in practice confined to demands for the enforcement of which an executory action has not yet accrued, and to actions for a negative declaration. The interesting thing to note is that the only case under the English Act of 1852 in which a declaration could be made—namely, where it might, if requested, have been followed by coercive relief—is the particular case in which it could not be sued for in Germany.

¹¹²Inasmuch as the decision has the force of law only on the point decided, it is sometimes important to obtain a declaration on the legal relation underlying the point decided, which relation, unless specially declared, might not have the effect of *res judicata*. For example, a suit for an installment of money due an illegitimate child from his father would be conclusive only as to the amount due, but not a conclusive determination of paternity unless expressly so declared. Paternity could be questioned again in a later suit for another installment, unless it were declared.

Hungary and Czechoslovakia

Hungary. Article 130 of the Code of Civil Procedure,¹¹³ reads as follows:

Suit may be brought for the judicial declaration of the existence or nonexistence of a legal relation or right as well as of the genuineness or spuriousness of a legal instrument, if the declaration appears necessary for the security of the legal position of the plaintiff.

Suit may be brought to declare the duty to render an account, and both creditor and debtor may bring suit to declare the accuracy of an account. In the former, the plaintiff may submit his own account, if the defendant does not submit one.

An amendment of the complaint is in principle not permitted, but a demand for a declaration instead of performance or performance instead of declaration is not regarded as an amendment, under the authority of Article 188. By Article 189, the interlocutory declaratory judgment may be demanded by either party, as in the case of German and Austrian law. The Hungarian judicature, aside from the special provision in paragraph (2) of Article 130, appears to follow closely the German and Austrian model, whence it was derived.¹¹⁴

Czechoslovakia. The Succession States of the old Austro-Hungarian Empire, like Czechoslovakia, in 1919 took over Article 228 of the Austrian Code of Civil Procedure of August 1, 1895. In Slovakia and Carpathian Russia, Article 130 of the Hungarian Code of Civil Procedure has been put in force.

Norway and Poland

Norway. Article 54 of the Norwegian Code of Civil Procedure of August 13, 1915, provides:

If the plaintiff has a legal interest in having a judgment declare the existence or nonexistence of a legal relation or the genuineness or spuriousness of a legal instrument, he may claim a declaration, even though he cannot yet sue for performance (an executory judgment).

¹¹³Law No. 1 of January 15, 1911.

¹¹⁴The Hungarian literature is as follows: Jancsó, *A magyar polgári perrendtartás rendszeres kézikönyve* (Systematic handbook of the Hungarian Code of Civil Procedure) (3 vols. Budapest, Athenaeum, 1912-15). See 3 *ibid.*, at pp. 378-384. Térffy, *Az új polgári perrendtartás zsebkönyve* (Pocket edition of the new Code of Civil Procedure) (Budapest, Grill K. 1927); Térffy, *Polgári perrendtartás* (Code of Civil Procedure) (2 vols. 7th ed. Budapest, Grill K. 1927). See 1 *ibid.*, pp. 343-8, 418-9, 426.

A legal interest is admitted whenever the plaintiff could have sued for a coercive judgment, a conclusion somewhat different from the German theory. The uncertainty or insecurity of the legal relation appears to be the usual factor indicating legal interest. Norway seems otherwise to have followed closely the German practice, from which it derived the declaratory judgment.¹¹⁵ Special types of declaratory action, *e. g.*, the existence of a marriage and the declaration of death, are provided for by special statute.

Poland. The Russian Code of Civil Procedure of November 20, 1864, Article 1801, admitted the declaratory judgment, but this was in force only in Livland, Esthonia, and Kurland. Nevertheless, the Civil Cassation Department of the Russian Senate rendered numerous declaratory judgments in the last half of the nineteenth century.¹¹⁶ By Article 7 of the transition law of July 18, 1917, for the application of the Russian Code of Civil Procedure, Poland admitted the declaratory judgment. Article 7 provides, in accordance with the German Code, from which it was taken:

Aside from the disputes mentioned in Article 1 of the Code of Civil Procedure, the jurisdiction of the courts extends to disputes for the declaration of the existence or nonexistence of a legal relation, if the plaintiff has a legal interest therein. That court is competent which would have had jurisdiction if the object of the suit had involved a completed violation of the disputed right; if the value in dispute cannot be estimated, the District Court is competent.

In the interpretation of this Article, the earlier Russian decisions are invoked.¹¹⁷

Bulgaria

Article 84 of the new Code of Civil Procedure¹¹⁸ of January 23, 1930, provides: "Suit may be brought for the declara-

¹¹⁵Skeie, *Den Norske civilprocess* (Oslo, 1929) I, 473.

¹¹⁶Gordon, *Iski o priznanii* (Suits for recognition of rights) (1906).

¹¹⁷Among these are the decisions of the Russian Senate, Civil Cassation, of May 5, 1882; January 20, 1893; December 5, 1895; January 27, 1899; and the following decisions of the Supreme Court of Poland: *Zbior orzeczen* (1922), No. 19, cited in Miszewski, *Ustawa postepowania sadowego cywilnego* (2d ed. 1926) Art. 7, note f.; *ibid.*, No. 59; *Orzecznictwo sadow polskich* (1923) No. 140 (Feb. 1, 1922); *ibid.*, No. 535 (Aug. 5, 1922); *ibid.*, No. 612 (Jan. 22, 1923); *Zbior orzeczen* (1926), No. 109 (Aug. 1, 1926); *ibid.* (1927), No. 177 (Dec. 14, 1928); *ibid.* (1928), No. 15 (Jan. 25, 1928); *ibid.*, No. 172 (Oct. 31 and Nov. 14, 1928).

¹¹⁸*Durzaven Vestnik* (1930) No. 248. This same provision was contained in Article 192 (2) of the Code of Civil Procedure of 1891, as amended March 1, 1907.

tion of the existence or nonexistence of a right or a duty, and of the genuineness or spuriousness of a legal instrument, if the plaintiff has an interest in establishing it by judicial declaration."

The Germanic origin of the declaratory judgment in the countries of Central Europe is apparent. In interpretation, these countries appear to have followed closely the views of the courts of Germany and Austria, except that in some countries a more liberal view is taken of what constitutes "legal interest." The mere possibility of obtaining an executory judgment does not necessarily exclude a legal interest in a declaration. The fact that so many countries have expressly authorized their courts to render declaratory judgments has doubtless also influenced other countries, such as Holland, Sweden, Finland, Roumania, and Jugoslavia, to admit that the rendering of declaratory judgments is inherent in courts, provided the plaintiff indicates a need therefor and presents the factual conditions of insecurity or uncertainty which warrant the court in issuing a declaration on the disputed or challenged right.

Scotland

The connecting link between the declaratory action of the Middle Ages and modern English law is to be found in the law of Scotland. Just when the declaratory action was adopted in Scotland is difficult to say. The modern works on Scotch practice disclose no statute or rule of court which expressly authorizes or recognizes the so-called "action of declarator." Inferences as to its origin in Scotland have been indulged. Lord Stair states¹¹⁹ that "declarators of right proceeded of old by brieve of right which is now out of use." A writer in the Law Magazine¹²⁰ points out that the brieve was replaced by the summons in 1532, when the Scotch Court of Session was established. That court was approved by the Scotch parliament in 1537, and Morrison's Dictionary discloses several cases of "declarator," the earliest of which is dated July 16, 1541.¹²¹ The institution has had a history in Scotland, therefore, of nearly four hundred years. As to its sources, it has been suggested that these are to be found (1) in the brieve of right, which was worded like the summons of declarator; (2) in the forms adopted by the old Episcopal

¹¹⁹4 Institutions of the Law of Scotland (More's ed. 1832) I, 4.

¹²⁰41 Law Magazine 179 (1849).

¹²¹*Ibid.*, at p. 179.

courts for the administration of the ecclesiastical law, notably the declarations of legitimacy, marriage, and other matters of status—the form of their judgment ran “*pronunciamus decernimus et declaramus*”; and (3) in the forms of the French law, according to which the Court of Session originally administered justice, and which probably contributed, by way of example, to the employment of the declaratory action.¹²² The declaratory action is defined by Scotch institutional writers to be one “in which the right of the pursuer (plaintiff) is craved to be declared, but nothing is claimed to be done by the defender (defendant).”¹²³ Lord Stair informs us, further, that “such actions may be pursued for instructing or clearing any kind of right relating to liberty, dominion or obligation,” and that “there is no right but is capable of declarator.”¹²⁴

Among the numerous forms of declarator, which may be either affirmative or negative, disclosed by the Scotch forms,¹²⁵ are declarations of marriage and of nullity of marriage,¹²⁶ of legitimacy, of bastardy,¹²⁷ and of putting to silence, the common form of negative declaratory action, by which the defendant is by summons given a limited time to bring forward his action or have a decree of perpetual silence pronounced against him;¹²⁸ of property interests of all kinds, including title, easements, and servitudes, liens and burdens on the land;¹²⁹ of the so-called “non-entry duties”;¹³⁰ of the so-called “expiry of the legal” term of redemption;¹³¹ of the for-

¹²²*Ibid.*, at p. 180.

¹²³4 Stair, *Institutions of the Laws of Scotland* (Edinburgh, 1693; More's ed. 1832); 4 Erskine, *Principles of the Law of Scotland* (20th ed. Edinburgh, 1903) I, at pp. 25, 46. See also Mackay, *Manual of Practice in the Court of Session* (Edinburgh, 1893) 175.

¹²⁴4 Stair *ibid.*, at pp. 3, 47; *ibid.*, at pp. 39, 15.

¹²⁵See 4 Scots Style Book, s. V, Declarator.

¹²⁶Fraser, *Husband and Wife* (2d ed. Edinburgh, 1876-1878) 1238, 1244.

¹²⁷The action to declare a child a bastard cannot be brought in English law. *Yool v. Ewing*, [1904] Irish Ch. 434, 445.

¹²⁸This procedure is also well known in Roman-Dutch law as practiced in South Africa. See De Villiers, *The Roman and Roman-Dutch Law of Injuries* (Cape Town, 1899) 143; Morice, *English and Roman-Dutch Law* (2d ed. London, 1905) 377; 4 Nathan, *Common Law of South Africa* (Grahamstown, 1907) c. XVIII; Voet, *Commentaries on the Pandects* (Cape Town, 1899) Bk. XLVII, Tit. 10. On the Scotch action of putting to silence, see Fraser, *op. cit. supra* note 124, at p. 1244.

¹²⁹1 Bell, *Commentaries on the Law of Scotland* (McLaren's 7th ed.) 785.

¹³⁰Declaration of the landlord's “right” of re-entry for failure to pay rent or other dues. It is a technical action described in 1 Bell, *op. cit. supra* note 127, at p. 22.

¹³¹This is the action by which a creditor who holds security in the form of an interest in land may ask the court to declare that, ten years

feiture of rights;¹³² of property in or right of succession to movables; of trust, validity of trust-deed, power to revoke a trust-deed, or that trust instruments are *ultra vires*;¹³³ of partnership;¹³⁴ of proving the tenor;¹³⁵ and other miscellaneous actions, including those rescissory actions which merely declare a deed or other instrument null and void, without any declaration or judgment against the defendant.¹³⁶

The Scotch law recognizes three forms of the declaratory action: (1) the pure declarator alone, (2) the declarator with prayer for possessory or petitory relief ("conclusions"), and (3) the "declaratory adjudication." The first is confined purely to the declaration of jural relations. The law of Scotland, instead of making such declaration optional, makes it in certain cases a condition precedent before an action for coercive relief can follow. So in cases of statutory forfeitures, proving the tenor of a lost instrument, foreclosing the equity of redemption, relying on title based upon prescriptive possession, seeking to show that facts and circumstances prove or disprove a marriage or legitimacy where that conclusion is denied, partition of heritable property among heirs, and in other cases, the request for a declaration must precede the request for further relief.¹³⁷ It is common practice, as in England, to combine the request for affirmative relief with one for a declaration, and often where the former is denied, the latter may still be granted. The commentators assert that "wherever a right upon which an action is to be founded is not clear as to its existence or extent, a declarator is proper, and sometimes necessary, before an action can proceed to enforce the right."¹³⁸ The "declaratory adjudication" is a method of

having expired since the due date of the debt, he is entitled to an irredeemable title to the property, the debtor having allowed the ten years to expire during which he had a legal power of redemption. The creditor calls on the debtor to exercise his power of redemption, otherwise to have it judicially declared as foreclosed. This is one of the cases in which the declarator is essential—not merely optional—to the acquisition of an irredeemable title by the creditor. See *Ormiston v. Hill*, (1809, Scot.) Fac. Coll. 155, and 1 Bell, *op. cit. supra* note 127, at p. 743.

¹³²Mackay, *op. cit. supra* note 121, at pp. 79, 378. The declaration of the forfeiture of a lease is known as a declaration of "irritancy." See *Wylie v. Heritable Securities Invest. Assn.*, 10 M. 253 (1871).

¹³³2 Bell, *op. cit. supra* note 127, at p. 386, note 3.

¹³⁴2 Bell, *op. cit. supra* note 127, at p. 562, and cases there cited.

¹³⁵That is, proving the tenor of lost or destroyed instruments by which a jural relation is required to be established. See *Lord v. Fraser*, 8 D. 316 (1845); *Erschine, op. cit. supra* note 121, at pp. 542-544.

¹³⁶Bell, *Dictionary and Digest of the Law of Scotland* (Watson's 7th ed.) 291; *Erschine, op. cit. supra* note 121, at p. 542.

¹³⁷Mackay, *op. cit. supra* note 121, at pp. 78, 79, 374-379.

¹³⁸Bell, *Principles of the Law of Scotland* (6th ed. Edinburgh, 1872) § 1995; Mackay, *op. cit. supra* note 121, at p. 378.

vesting a legal title in the person who has the beneficial interest.¹³⁹ Closer analysis of the numerous actions which in Scotland are called declaratory, reveals that many of them fall within the class of what we would call investitive, and the conclusion cannot be avoided that it is only in the unlimited scope given to the negative declaratory action, in the willingness to declare facts and "future interests," and in such special proceedings as the declaration of bastardy, that Scotch law affords greater opportunity than the English law of the present day for the declaratory action.

As in other systems of law, the exercise of the power to render a declaratory judgment is discretionary with the court; the plaintiff must show a substantial interest in the declaration, the jural relation he asserts must be disputed,¹⁴⁰ and the declaration of rights, *et cetera*, to be enjoyed in the future must serve some useful purpose in settling disputed or doubtful legal relations, so that it will not be made if it cannot constitute *res judicata*.¹⁴¹ Yet recent decisions show a greater disposition to declare contingent rights by anticipation, provided there is some one to oppose the declaration.¹⁴² While the Scotch courts, like other courts, affirm that they will not declare abstract propositions nor the meaning of statutes¹⁴³ unless directly affecting private jural relations,¹⁴⁴ they are more readily disposed to declare mere facts, when serving some useful purpose, than are the courts of Germany or England.

England

England owes the advantages it enjoys under the declaratory action to the agitation of Lord Brougham, begun in 1828. In a notable speech, delivered on February 7 of that year in the House of Commons, on the state of the courts of common law,¹⁴⁵ he pointed out the great benefits enjoyed by Scotland in enabling persons who apprehend future litigation to proceed by way of a declaratory action to have their rights de-

¹³⁹*Dalziell v. Dalziell*, 16 M. 204 (1756); 1 Bell, *op. cit. supra* note 127, at p. 751.

¹⁴⁰See *Magistrates of Edinburgh v. Warrender*, 1 M. 387 (1863).

¹⁴¹Thus, where a declaration was asked of the power of a plaintiff under a trust deed to give certain sums by will provided he had no issue, the declaration was declined because it would not bind unborn children. *Harvey v. Harvey's Trustees*, 22 D. 1310, 1326 (1860).

¹⁴²*Chaplain's Trustees v. Hoile*, 28 Scot. L. R. 51 (1890); *Falconer Stewart v. Wilkies*, 29 Scot. L. R. 534 (1892).

¹⁴³*Todd v. Higginbotham*, 16 D. 794 (1854).

¹⁴⁴*Leith Police Commissioners v. Campbell*, 5 M. 247 (1866).

¹⁴⁵18 Hansard 127, 179 (2d Ser. 1828).

terminated, and he mentioned its particular application to doubtful or disputed interests in property. He introduced bills for the adoption of the practice in 1843, 1844, 1846, 1854, and again in 1857, the last of which resulted in the Legitimacy Declaration Act of 1858.¹⁴⁶ He obtained a very considerable following, particularly among the judges, and on numerous occasions in the House of Lords, successive chancellors, including Lord Thurlow, Lord Loughborough, Lord Eldon, and others among their successors, called attention to the merits of the Scotch action of *declarator*. Speaking with reference to the negative declaratory action where the plaintiff has no affirmative cause of action, a proceeding not possible in England until 1883, Lord Brougham in 1846, in delivering his opinion in the House of Lords in the case of *Earl of Mansfield v. Stewart*,¹⁴⁷ said:

I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy, under it, the security and the various facilities and conveniences which they have from that most beneficial and most admirably contrived form of proceeding called a declaratory action. Here, you must wait till a party chooses to bring you into court; here, you must wait till possibly your evidence is gone; here, you have no means whatever, in ninety-nine cases out of a hundred, of obtaining the great benefit of this proceeding.¹⁴⁸

Lord Brougham lived to see his proposed reform partially adopted in an amendment to the Chancery Procedure Act of 1852, and in the Legitimacy Declaration Act of 1858.

By the Chancery Act of 1850,¹⁴⁹ persons interested in questions cognizable in the Court of Chancery were enabled to state special cases for the opinion of the court as to "the construction of any Act of parliament, will, deed, or other instrument in writing, or any article, clause, matter or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold or otherwise dealt with"; and the court was enabled

to determine the questions raised therein or any of them, and by decree to declare its opinion thereon,

¹⁴⁶21 and 22 Vict., c. 93 (1858).

¹⁴⁷5 Bell 139, 160.

¹⁴⁸The object of this suit was to obtain a declaration that the vendor could convey a good title to Lord Mansfield, the vendee, who threatened to withhold payment on the ground that the title was in doubt.

¹⁴⁹13 and 14 Vict., c. 35, §§ 1, 14 (1850).

and so far as the case shall admit of the same, upon the right involved therein, without proceeding to administer any relief consequent upon such declaration; and that every such declaration of the said Court contained in any such decree shall have the same force and effect as such declaration would have had . . . if contained in a decree made in a suit between the same parties instituted by bill; Provided . . . that if the Court shall be of opinion that the questions raised . . . cannot properly be decided upon such case, the said Court may refuse to decide the same.

As an incident to regular actions, the Court of Chancery had occasionally made declarations, notably in the construction of wills and trust settlements. This power was apparently vastly enlarged by the Chancery Procedure Act of 1852, Section 50, which provided that:

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*.

Judicial construction, however, greatly narrowed these important grants of power. Vice-Chancellor Wood, in 1853, confined the authority given by these Acts practically to cases "where it should appear to be necessary for the administration of an estate or as incidental to coercive relief";¹⁵⁰ and Chancellor Turner in 1856 stated that Section 50 did not extend the

cases in which declarations of right may be made, but merely enables the Court to declare rights without following up the declaration by the directions which, under the old practice, have been necessarily consequent upon them.¹⁵¹

The section was further restricted by the traditional aversion of the courts to making findings as to the enjoyment of rights in the future or as to those which depend upon contingency.¹⁵² The power was further narrowed by the construction that the courts could make a declaration only as an incident to coercive relief or where there was a "right" to consequential relief

¹⁵⁰Garlick v. Lawson, 10 Hare, App. I. xii, 68 Eng. Rep. R. 1121 (1853).

¹⁵¹Lady Langdale v. Briggs, 8 De G. M. & G. 391, 427, 44 Eng. Rep. R. 441, 455 (1856).

¹⁵²Lady Langdale v. Briggs, *supra* note 151; Bright v. Tyndell, 4 Ch. D. 189, 196 (1876).

for which the plaintiff had merely chosen not to ask. Where there was no "right" to consequential relief, no declaration would be made.¹⁵³

But with the reforms instituted by the Judicature Act of 1873, the ground was laid for the adoption of new rules of court. Order XXV, Rule 5, of the Supreme Court Rules of 1883¹⁵⁴ paved the way for a wide application of the declaratory judgment. It provided:

No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not.

Although this language would seem to make it clear that the plaintiff need no longer have a cause of action entitling him to affirmative relief—the only purpose which appears to have been intended by the insertion of the words "or not"—it was, nevertheless, only in 1915¹⁵⁵ that the Court of Appeal fully admitted that a plaintiff may ask the court not only affirmatively to declare his right or power, but also negatively to declare the "no-right" or disability of his opponent defendant (*i. e.*, the privilege or immunity of the plaintiff). As late as 1906, the court had expressed the opinion¹⁵⁶ that only a plaintiff who had an affirmative cause of action could request a declaration. It is also to be noted that the power to make declarations under Order XXV, Rule 5, is most freely exercised in the Chancery Division, much less frequently in the King's Bench Division, and not at all in the Probate Division, to which it has been held not to apply.¹⁵⁷

Furthermore, the amended rules of 1893 have introduced Order LIV, A:¹⁵⁸

In any Division of the High Court, any person claiming to be interested under a deed, will or other

¹⁵³*Rooke v. Lord Kensington*, 2 K. & J. 753, 760, 69 Eng. Rep. R. 986, 989 (1856).

¹⁵⁴Statutory Rules and Orders 54 (1883).

¹⁵⁵*Guaranty Trust Co. v. Hannay*, L. R. [1915] 2 K. B. 536 (the decision was by two judges against one); *Russian and Commercial Industrial Bank v. British Bank for Foreign Trade*, L. R. [1921] 2 A. C. 438; *Ruislip-Northwood Urban District Council v. Lee*, 145 L. T. R. 208 (1931).

¹⁵⁶See *North Eastern Marine Engineering Co. v. Leeds Forge Co.*, L. R. [1906] 1 Ch. 324, L. R. [1906] 2 Ch. 498.

¹⁵⁷*De Gasquet James v. Duke of Mecklenburg-Schwerin*, [1914] P. 53, 71.

¹⁵⁸Statutory Rules and Orders, 552 (1893).

instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.

The exercise of the power is expressly made discretionary. This is in addition to the power long exercised by courts of equity in advising and directing trustees in their powers, duties, and responsibilities, and the determination of any question arising in the administration of a trust "affecting the rights or interests of the persons claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust" or affecting other matters.¹⁵⁹

It will have been observed that Order LIV, A, covers the construction of wills, deeds, contracts, and other written instruments; and the reports of the Chancery Division indicate that more than half the declaratory judgments rendered arise in the construction of wills or deeds of trust under this Order. The simplicity of the new procedure when contrasted with the old tedious and expensive litigation which any dissatisfied member of a family could render necessary may be envied. Since the "forms of action" have been abolished in England, and a plaintiff needs now in his writ or pleadings merely to state the facts on which he relies, the declaration of "rights" under Order XXV, Rule 5, and LIV, A, is obtainable without technicality and inexpensively. So successful in improving the administration of justice has the declaratory action been that Order XXV has been adopted *verbatim* in the codes of procedure or rules of court of Australia, Queensland, Victoria, Tasmania, New South Wales, and other Australian states; of New Zealand; of Canada and the Canadian provinces; and of Ireland, India, and Ceylon.¹⁶⁰

¹⁵⁹Order LV, 7 Statutory Rules and Orders Revised 126 (1883).

¹⁶⁰The New Zealand Declaratory Judgments Act, 8 Edw. VII, No. 220 (1908), provides:

1. This Act may be cited as the Declaratory Judgments Act, 1908.
2. No action or proceeding in the Supreme Court shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.
3. When any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor in Council under statutory authority, or any by-law made by a local authority, or any deed, will or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or

Where any person claims to have acquired any right under any such

India

In India, where the declaratory action has been extensively used, Act VIII of 1859, Section 15, embodied the provisions of Section 50 of the Chancery Act of 1852. This Section was repealed by Chapter VI of the Specific Relief Act of 1877, which, while making it unnecessary for the plaintiff to be entitled to any coercive relief, hence admitting the negative declaratory action, bars the courts from making declaratory decrees *only* in cases where the plaintiff, being able to seek coercive relief, omits to request it. This legislation, therefore, adopts the early construction of the German Supreme Court

statute, regulation, by-law, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any manner interested in the construction or validity thereof,—

Such person may apply to the Supreme Court by originating summons returnable in the said Court for a declaratory order determining any question as to the construction or validity of such statute, regulation, by-law, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

4. Any declaration so made on any such originating summons shall have the same effect as the like declaration in a judgment in an action, and shall be binding on the person making the application and on all persons on whom the summons has been served, and on all other persons who would have been bound by the said declaration if the proceedings wherein the declaration is made had been an action.

5. The Supreme Court or a Judge thereof may direct that any such originating summons shall be served on such persons as the said Court or Judge thinks fit, and such direction may be given at the time when the summons is issued or subsequently.

6. Subject to the provisions of this Act and to any Rules of Court hereafter made in accordance with the Judicature Act, 1908, any such originating summons shall be subject to the Rules of Court which are for the time being in force with respect to an originating summons taken out by trustees for the interpretation of a deed or instrument creating a trust.

7. Any such originating summons may be removed into the Court of Appeals in the same manner as the matters specified in section sixty-four of the Judicature Act, 1908, are removable, and the provisions of sections sixty-four and sixty-five of the said Act shall apply to any originating summons so removed accordingly.

8. An appeal shall lie to the Court of Appeal from any judgment or order given or made in pursuance of this Act, in the same manner as in the case of a final judgment of the Supreme Court.

9. Any declaratory judgment or order given or made in pursuance of this Act may be given or made by way of anticipation with respect to any act not yet done or any event which has not yet happened, and in such case the said judgment or order shall have the same binding effect with respect to the future act or event, and the rights or liabilities to arise therefrom, as if that act or event had already been done or had already happened before the said judgment or order was given or made.

10. The jurisdiction hereby conferred upon the Supreme Court to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

11. The jurisdiction hereby conferred upon the Supreme Court to give or make any declaratory judgment or order shall not be excluded by the fact that the said Court has no power to give relief in the matter

and the present German practice requiring a plaintiff to seek his strongest remedy, and overlooks the advantages which a friendly suit enjoys over a hostile litigation in determining one's legal position. In his valuable commentary on the Specific Relief Act, Collett mentions¹⁶¹ as the prerequisites of the declaratory decree: (1) There must be a present existing interest, however distant the actual enjoyment may be. (2) There must be some present danger or detriment to be averted by the declaration. (3) A man entitled to sue for an executory decree cannot seek only a declaratory decree.¹⁶² Article 283 of the Civil Procedure Code of 1882 also enables a person claiming an interest in property attached under an execution of judgment to institute a suit to establish his interest in the property, which suit acts as a stay of execution. A similar proceeding is provided in Ceylon.¹⁶³

United States

Although a declaratory judgment statute was enacted in Rhode Island in 1876 and in Maryland in 1888, the first effective statute appears to be that of New Jersey, enacted in 1915, permitting a declaration of equitable rights when they arise out of the construction of written instruments. The Section provides:

Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will or other written instrument, may apply for the determi-

to which the judgment or order relates, or that such matter, would, independently of this Act, be within the exclusive jurisdiction of any other Court.

12. Subject to any decision of the Privy Council, any decision of the Court of Appeal under this Act shall be binding as a precedent in all other Courts in New Zealand.

13. The costs of any action, summons, or appeal under this Act shall be in the discretion of the Court, and the Court may in the exercise of that discretion order the whole or any part of those costs to be paid by any party, although successful in the action, summons, or appeal, and may in any case direct that the costs awarded to any party shall be taxed either as between party and party or as between solicitor and party.

¹⁶¹Collett, *The Law of Specific Relief in India* (Calcutta, 1882) 224.

¹⁶²On the Indian practice in making declaratory decrees see Broughton, *Notes of Cases Decided Upon Points of Civil Procedure* (Calcutta, 1884) 93; Sarkar, *The Civil Procedure Code* (Act XIV of 1882) §§ 11, 283, and the cases there digested; Sarkar, *The Specific Relief Act* (4th ed. Calcutta, 1922), c. VI, pp. 169-223; Rao Sahib, *The Specific Relief Act* (Madras, 1923) 163-231; 1 Stokes, *Anglo-Indian Codes* (Oxford, 1892) 934. Under the proviso that the executory decree must be claimed if feasible, the court will not deny the declaratory action unless "satisfied beyond all doubt" that the plaintiff ought to seek "further relief and yet has not done so." *Aisa Siddika v. Bidhu Sekhar Banerjee*, 17 Calcutta L. Jour. 675 (1913).

¹⁶³1 Pereira, *Institutes of the Laws of Ceylon* (Colombo, 1901) 339.

nation thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested.¹⁶⁴

After 1918, however, following the publication of a number of articles in American legal periodicals, the legislative movement spread rapidly throughout the United States, until by 1932 some thirty-two American states and territories had enacted a statute authorizing the courts to render declaratory judgments.¹⁶⁵ The Uniform Declaratory Judgments Act adopted and recommended by the Conference of Commissioners on Uniform State Laws has been adopted in seventeen of these thirty-two jurisdictions.¹⁶⁶

The American experience began somewhat unfortunately in

¹⁶⁴N. J. Laws of 1915, c. 116, § 7, p. 185.

¹⁶⁵California, Stats. of 1921, c. 463, p. 689; Connecticut, Acts of 1921, c. 258; Florida, Laws of 1919, c. 7857; Hawaii, Rev. Laws (1925) §§ 2918-2923; Kansas, Laws of 1921, c. 168; Kentucky, Acts of 1923, c. 83; Massachusetts, Acts of 1929, c. 186; Michigan, Acts of 1929, No. 36; New Hampshire, Laws of 1929, c. 86; New York, Civil Practice Act, § 473 (1921); Ohio, Prob. Code (1931) § 10505; Philippines, Law of Nov. 8, 1930; Rhode Island, Gen. Laws (1923) c. 339, §§ 18-20, 22, 35; South Carolina, Acts of 1922, No. 542; Virginia, Acts of 1922, c. 517. Those States which have adopted the Uniform Declaratory Judgments Act are listed *infra*, note 166.

See Note, 24 Col. L. Rev. 416-422 (1924); Borchard, The Uniform Act on Declaratory Judgments, 34 Harv. L. Rev. 697 (1921). See also Note, 12 A. L. R. 63 (1921); Note, 19 A. L. R. 1124 (1922); Note, 50 A. L. R. 42 (1927); Borchard, The Declaratory Judgment—A Needed Procedural Reform, 28 Yale L. Jour. 1, 105 (1929); Borchard, The Constitutionality of Declaratory Judgments, 31 Col. L. Rev. 561 (1931); Borchard, Judicial Relief for Peril and Insecurity, 45 Harv. L. Rev. 793 (1932); Note, 15 Va. L. Rev. 79 (1928); Cooper, Locking the Stable Door Before the Horse Is Stolen, 16 Ill. L. Rev. 436 (1922); 3 Freeman on Judgments (5th ed. 1925) 2780, 1353; Gates, Proceedings of the Tennessee Bar Association (1920) 41-51; Hale, Wanted—A Declaratory Judgment Act in Oregon, 3 Ore. L. Rev. 232 (1924); Harrison, California Legislation of 1921 Providing For Declaratory Relief, 9 Calif. L. Rev. 359 (1921); Comment, 4 Ill. L. Quar. 126 (1921); Kerr, Declaration of Rights Without Consequential Relief, 53 Am. L. Rev. 161 (1919); Levi, The Declaratory Judgment, 94 Cent. L. Jour. 75 (1922); Schoonmaker, Declaratory Judgment, 5 Minn. L. Rev. 32, 172 (1920-21); Sunderland, The Declaratory Judgment, 16 Mich. L. Rev. 69 (1917); Sunderland, The Courts as Authorized Legal Advisors of the People, 54 Am. L. Rev. 161 (1920).

¹⁶⁶Arizona Laws of 1927, c. 10; Colorado Laws of 1923, c. 98; Indiana Acts of 1927, c. 81; Nebraska Laws of 1929, c. 75; Nevada Stats. of 1929, c. 22; New Jersey Laws of 1924, c. 140; North Carolina Pub. Laws of 1931, c. 102; North Dakota Laws of 1923, c. 237; Oregon Laws of 1927, c. 300; Pennsylvania Laws of 1923, No. 321; Porto Rico Laws of 1931, No. 47; South Dakota Laws of 1925, c. 214; Tennessee Acts of 1923, c. 29; Utah Laws of 1925, c. 24; Vermont Laws of 1931, No. 37; Wisconsin Laws of 1927, c. 212; Wyoming Laws of 1923, c. 50.

In the states other than those having the Uniform Act, the statute and rules follow closely the English Order XXV, Rule 5, of 1883, with the exception of Florida and Massachusetts, which confine the power of the courts to the declaration of rights under a written instrument. Fla. Laws of 1919, c. 7857; Mass. Acts of 1929, c. 186.

the fact that the question of constitutionality was immediately raised, and the first court passing upon the new statute—the Michigan Supreme Court—held the act unconstitutional, because it read it in the sense of authorizing the courts to render advisory opinions or decide moot cases, a gratuitous assumption having no basis in fact.¹⁶⁷ Other state courts, however, refused to follow the Michigan Supreme Court in its erroneous interpretation, and have held the statutes constitutional on every test of judicial power. Finally, in 1930, the Michigan Supreme Court overruled its earlier decision,¹⁶⁸ so that now eighteen state courts stand unanimous on the issue of constitutionality, an issue that never should have been raised. The United States Supreme Court, after several *dicta* indicating that it did not believe that an action for a declaratory judgment presented a “case” or “controversy” within the meaning of Article III of the Constitution,¹⁶⁹ felt obliged to change its mind when it was squarely faced with the necessity of deciding the question. In the recent case of *Nashville, Chattanooga & St. Louis Ry. v. Wallace*,¹⁷⁰ decided February 6, 1933, the Supreme Court unanimously decided that, when the issue was “real and substantial” between adversary parties and susceptible of decision by a court—the only type of issue ever suggested as appropriate to judicial determination—the form or label given to the procedure was immaterial, and that the action for a declaratory judgment in such a setting responded to all the traditional tests of the judicial power. In the light of the seven hundred decisions of American state courts since 1919 and of the thousands of decisions in England and elsewhere, any other conclusion would have been unusual. An Act of Congress authorizing the federal courts to render declaratory judgments, although having twice passed the House of Representatives, has not yet been enacted.

In the construction of the statutes, the American courts have been disposed to follow the English view, namely, to give to the declaratory judgment the widest scope. They have, therefore, preferred to take the view that a plaintiff can seek

¹⁶⁷*Anway v. Grand Rapids Ry.*, 211 Mich. 592, 179 N. W. 350, 12 A. L. R. 26 (1919).

¹⁶⁸*Washington-Detroit Theater Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930).

¹⁶⁹*Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 47 Sup. Ct. 282, 71 L. Ed. 541 (1927); *Willing v. Chicago Auditorium Assn.*, 277 U. S. 274, 48 Sup. Ct. 507, 72 L. Ed. 880 (1928).

¹⁷⁰53 Sup. Ct. 345 (U. S. 1933); see Borchard, *The Constitutionality of Declaratory Judgments*, 31 Col. L. Rev. 561 (1931).

such remedy as he chooses, and need not show in a petition for a declaration of rights that he could have obtained relief by executory judgment. The declaratory judgment, therefore, is an alternative, and not an exclusive, remedy. Inasmuch, however, as the grant of such a judgment is discretionary, a few cases are to be found in which the court has stated that the declaration ought to be declined, since the plaintiff had available an established remedy. These cases represent, however, a trifling minority and are subject to criticism.¹⁷¹

It is not uncommon in the United States, as in England, to combine the request for a declaration with a request for an injunction or other coercive relief, and both are often granted. Inasmuch as the injunction, particularly, is conditioned upon proof of a threat of immediate and irreparable injury, not otherwise remediable, the injunction often fails, whereas the declaration is rendered. This, as a rule, adequately serves the purposes of the plaintiff, for it declares the rights that have been placed in issue. English and American courts have declined to render a declaratory judgment where they believe it will not terminate the controversy or serve a useful purpose. By segregating the issue in dispute and causing it to be determined at an early stage of the controversy, the declaratory judgment, as admitted by many courts, has contributed greatly to the establishment of social peace and to the prevention of extended litigation. It has been employed to a considerable extent in cases where no other form of relief was known or available to the common law, such as cases in which a plaintiff, thrown into doubt, insecurity, and uncertainty by adverse claims or by new conditions which have arisen by sudden catastrophe or the passage of time, seeks from the court against an adverse defendant a declaration of his release from obligations theretofore contracted or from claims of private persons or public authorities. It has been employed in the declaration of rights arising out of the changed conditions occasioned by the late European war, by which many contracts were seriously affected. The effect of changing conditions upon status and property rights has also been the subject of construction by declaration, as in the case of the claim that a plaintiff has by time or circumstance become released from building or other contractual

¹⁷¹Miller v. Siden, 259 Mich. 19, 242 N. W. 823 (1932); cf. Borchard, The Declaratory Judgment as an Exclusive or Alternative Remedy, 31 Mich. L. Rev. 180 (1932).

restrictions upon the use of his land. The effect of time and governmental regulation on long-term leases and other contracts has occasioned the necessity of resort to judicial declaration as an alternative to action upon one's own view of his rights and the risks entailed thereby. Debtors have frequently brought suit against creditors to contest the validity, amount, or term of a claim, and receivers and trustees have frequently had occasion to question and settle the rank or priority of claims upon a trust or bankrupt estate by instituting a proceeding for a judgment declaring the priorities. In the construction of wills, it has proved especially efficacious. In the light of the growth of the police power and the continuing interference of government with private privileges, the necessity for questioning the validity of the governmental interference frequently arises. The declaratory judgment has afforded a simple and expeditious means of obtaining a judicial determination of the line between private privilege and public restraint at the earliest stage of the controversy, and before either party has taken irretrievable action.¹⁷²

¹⁷²See cases discussed in Borchard, *Judicial Relief for Peril and Insecurity*, 45 Harv. L. Rev. 793 (1932). The function of the declaratory judgment in quieting or stabilizing an uncertain or disputed jural relation was picturesquely described in 1928, on the occasion of the passage by the House of Representatives of the federal Declaratory Judgment Act (it has not yet passed the Senate), as: "Under the present law you take a step in the dark and then turn on the light to see if you have stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step." 69 Cong. Rec. 2108 (1928).