

JUDICIAL RELIEF FOR PERIL AND INSECURITY

IN the United States, we are not accustomed to consider the theory of procedure as of profound importance. Possibly the extraordinary technicality of American procedure by reason of which substantive issues are so often relegated to practical oblivion by procedural tactics is in part responsible. At all events, the unsystematic and empirical method of embarking upon and concluding litigation seems to have developed a frame of mind somewhat indifferent to the theoretical function of the judicial process. For example, down to very recent days Justices of the United States Supreme Court gave expression to the view, now happily repudiated, that the award of execution was an essential element of a judicial judgment.¹ Notwithstanding the fact that judicial precedents and opinions have greater weight in the complex structure of American law than they do in any other system — utterances good, bad, and indifferent being seized upon with equal avidity by an indiscriminating bar and bench — the fact is that the theory of the judicial function and of judgments has been largely neglected, in striking contrast with experience abroad. Defective theory, in turn, impairs practice. It is submitted that the inadequate analysis of such fundamental concepts as justiciability, judicial power, and cause of action is largely responsible for misconceptions prevailing in important circles concerning the nature of judgments, and in particular of declaratory judgments. The somewhat antiquated view of Blackstone that the “redress of private injuries” is the sole function of courts of justice is partly accountable for the erroneous view occasionally expressed that the commission of *wrong*, public or private, is an essential condition for invoking the judicial arm of the state.² It is over-

¹ See *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 73 (1927). See repudiation in *Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U. S. 123, 132 (1927); *Old Colony Trust Co. v. Commissioner of Int. Rev.*, 279 U. S. 716, 725 (1929).

² Thus SALMOND, *JURISPRUDENCE* (7th ed. 1924) § 27, says: “Both in civil and in criminal proceedings there is a *wrong* (actual or threatened) complained of. For the law will not enforce a right except as against a person who has already violated it, or who has at the least already shown an intention of doing so. Justice is administered only against wrongdoers, in act or intent.” HOLLAND, *ELEMENTS OF*

looked that the social equilibrium is equally disturbed when rights of property or status are imperilled and made insecure by attack, challenge, or uncertainty, and that equity in Anglo-American law and common law or statute in other countries have long recognized that fact and lent judicial aid to prevent or allay insecurity in legal relations.

I

Wrongs as a legal conception. The view that wrongs condition the right of action and judicial protection is superficial and, by the too colloquial juxtaposition of "rights" and "wrongs," has given a misleading scope to the conception of "wrongs," "threatened wrongs," and judicial power. Some of the more critical students of procedure have realized the error involved in assuming the presence of "delict" or "wrong" in every cause of action.³ In actions for partition, to declare a marriage void, to quiet title or remove a cloud, to perpetuate testimony, and in innumerable others, there is, as a rule, no delict at all.⁴ The occasion of the state's intervention is not a physical infringement of the plaintiff's rights — the conception usually associated with delict or wrong

JURISPRUDENCE (13th ed. 1924) 325: "When the balance of justice is disturbed by *wrong-doing*, or even by a *threat* of it, the law intervenes to restore, as far as possible, the *status quo ante*." (Italics supplied). MARKBY, ELEMENTS OF LAW (6th ed. 1905) § 852: "It is a *general rule* that courts of law will not move unless some duty or obligation is broken." (Italics supplied). POMEROY, CODE REMEDIES (5th ed. 1929) § 347: "Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself."

See other definitions quoted and cited in Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817, 823 *et seq.*; McCaskill, *Actions and Causes of Action* (1925) 34 *id.* 614; *cf.* Reinhold, *Ueber den Begriff einer Rechtsverletzung als Voraussetzung des Klagerechts* (1895) 21 ZEITSCHRIFT FÜR DEUTSCHEN CIVILPROZESS I, 6.

³ Clark, *supra* note 2, at 827; BLISS, CODE PLEADING (3d ed. 1894) § 113: "The wrong may be done by *the denial* of a right; or by the refusal to respond to an obligation; or it may arise from mere neglect in the performance of a duty; or it may be an affirmative injury." (Italics supplied).

⁴ Clark, *supra* note 2, at 827, points out that to find a delict in such cases "forces us to the absurdity suggested by Judge Bliss that the defendant's wrong is *in refusing a remedy to the plaintiff without action*." BLISS, CODE PLEADING § 113, n.1; SIBLEY, THE RIGHT TO, AND CAUSE FOR, ACTION (1902) § 22.

— but the denial or dispute of his right, placing him in danger or jeopardy and causing him detriment or prejudice,⁵ under such circumstances that the plaintiff may properly invoke the court's protection to reestablish, safeguard, and declare his right, and thus restore the social order.⁶

The loose and erroneous conception of the term "wrong" has had its influence also in creating an unusual conception of the word "threat" or "threatened wrong." The inference that some physical damage must be imminent is indelibly associated with the term. Possibly those who use it have had in mind the use of the injunction and wish to indicate a strictly limited exception from the alleged rule that the courts will act only when a "wrong" has been committed — they therefore add "or threatened." Just what Salmond meant by "wrongdoers in act *or in intent*" is not easy to say. If the sense of imminence of injury, associated with the remedy of injunction, were qualified, so that instead of "threat" of injury we assume or posit a *danger* of injury, a *dispute* or *challenge* of the plaintiff's right, we will come much closer

⁵ PHILLIPS, CODE PLEADING (1896) § 31, n.2: "Primarily, an action is not 'for the redress or prevention of a wrong'; it is a proceeding *to protect a right*. The basis of every action is, a right in the plaintiff; and the purpose of the action is, primarily, *to preserve such right*." (Italics supplied). The code cause of action, by which the distinctions between legal and equitable actions are abolished, reads: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the *enforcement or protection of private rights* and the redress of private wrongs, which shall be denominated a civil action. (Italics supplied). POMEROY, CODE REMEDIES (5th ed. 1929) 5; MARKBY, *op. cit. supra* note 2, § 862: "The real object of many suits is not to compel redress, either in the shape of compensation or in the shape of restitution. The real dispute is as to the rights of the respective parties."

POMEROY, EQUITY JURISPRUDENCE (2d ed. 1892) § 1378, n.1: "In a suit to construe a will, estates in specific property are directly established; in suits to quiet title, the very object of the judgment is to *declare and establish* the plaintiff's legal or equitable estate in some specific property. . . . Even in suits to remove a cloud from title, although the relief is often obtained by means of a cancellation, yet from the nature of the whole proceeding, the plaintiff's estate is thereby established, and he is left in its full enjoyment." (Italics supplied). See also Gavit, *The Code Cause of Action: Joinder and Counter Claims* (1930) 30 COL. L. REV. 802, 803 *et seq.*

⁶ "The object of a developed system of law is the conservation, whether by means of the tribunals or of permitted self-help, of the rights which it recognizes as existing." HOLLAND, *loc. cit. supra* note 2. "The plaintiff comes into court seeking judicial recognition of a substantive right." Gavit, *supra* note 5, at 805.

to accuracy in stating the conditions of a right of action.⁷ The law has already recognized, and will increasingly recognize, that the social equilibrium and security of acquisitions are disturbed and endangered not only by an accomplished physical violation of private rights, privileges, powers, or immunities, but by placing these individual advantages in grave doubt and uncertainty. If the status of children as legitimate or illegitimate, or of persons as married or unmarried, or the title to property, is placed in uncertainty, not only the individual concerned but also the state has an interest in removing the uncertainty and settling the legal position. If the privileges of a party to a contract or even of a party in non-contractual relations are disputed; if the legal powers of the government or officials are challenged by the person affected, or if an official or fiduciary is left in dilemma because of doubt and fear of exercising powers which may expose him to personal liability, not only the individual but the state has an interest in removing the doubt *before* disaster has occurred. The state often does remove it, provided the issue can be raised in justiciable form and can be authoritatively settled. The need for security in legal relations is elementary to order and progress in society, and courts respond to this need by a variety of decrees consequent upon appropriate actions. Courts of equity perform their primary function of creating security not by coercive decrees, but in removing uncertainty by establishing and confirming existing rights without necessarily attributing a wrong to anybody. For that reason, we constantly find that the result of litigation is a mere declaration of the rights of the parties. Far from constituting anything new, it is one of the oldest functions of courts of equity.

The assertion of unfounded claims creating jeopardy is cause for action. Apart from the remedy of injunction, and then often theoretically only, no "threat" of wrongdoing or injury is required in these cases to set in motion the judicial machinery. The existence of an instrument on the record, the utterance of a claim, a physical act deemed legally unjustified, the existence of conflicting claims to the same property, the danger of losing testimony —

⁷ That no threat to violate plaintiff's rights is necessary, see *Hopkinson v. Mortimer, Harley & Co. Ltd.*, [1917] 1 Ch. 646. But the rights of the complaining party must be in some danger of attack or challenge. *Toronto Ry. v. City of Toronto*, 13 Ont. L. R. 532 (1906).

these are the operative facts, the cause for action which authorizes the plaintiff's "right of action." Where the mere enactment of an ordinance or statute is complained of as causing damage, the "threat" of imminent injury is often fictitious only, in order to enable the court, through a bill of injunction, to establish and determine the validity or invalidity of the legislation.⁸

The judicial function. The assumption that courts act only after accomplished or threatened wrongdoing is probably responsible for the frequent statement that the judicial power compels or coerces (or penalizes) wrongdoers, "cures" wrongs, or, at most, prevents their imminent commission. Hence also the assumption that the execution or enforcement of a judgment is the essential characteristic of judicial power.

The fact is, it is believed, that the court does not compel or coerce, but decides, determines, establishes, and fixes legal relations between contesting parties. A judgment of a court is an affirmation, by the authorized societal agent of the state, speaking in the name of the law and the state, of the legal consequence attending a proved or admitted state of facts.⁹ It is the determination or sentence of the law that a legal relation does or does not exist.¹⁰ The power to render judgments, the so-called "judicial power," is the power to adjudicate upon contested or adverse legal rights or claims, to interpret the law, and to declare what

⁸ *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925); *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926). See, e.g., the recent suit of a Texas county attorney to enjoin a farmer from violating the new Texas law curtailing cotton acreage. The press reports that it is "a friendly test case" to be decided promptly before the cotton planting season starts in February. N. Y. World-Telegram, Jan. 14, 1932. The proceeding indicates the misuse of injunction to obtain a declaratory judgment which should, however, be conditioned upon proof of a genuine controversy.

⁹ See I BLACK, A TREATISE ON THE LAW OF JUDGMENTS (1891) 1; KISCHE, BEITRÄGE ZUR URTEILSLEHRE (1903) 6 *et seq.*; LANGHEINEKER, DER URTEILSANSPRUCH (1899) §§ 9-12.

¹⁰ *Danner v. Walker-Smith Co.*, 154 S. W. 295, 298 (Tex. Civ. App. 1912); I BLACK, *op. cit. supra* note 9, at 2; HOLLAND, *op. cit. supra* note 2, at 363.

"A judgment upon an issue of pecuniary liability performs its main function when it adjudicates the existence or nonexistence of the liability sought to be established." *Symons v. Eichelberger*, 110 Ohio St. 224, 236, 144 N. E. 279, 282 (1924). A convincing exposition of the fact that courts neither create nor enforce rights, but by their judgments certify the fact that rights existed theretofore, merely converting a right theretofore unenforceable into one now enforceable, will be found in *Gavit*, *supra* note 5, at 807. Cf. ZUMSTEIN, DIE FESTSTELLUNGSKLAGE (1916) 5, 13.

the law is or has been.¹¹ It is the final determination of the rights of the parties in an action¹² which distinguishes the judgment from all other public procedural devices to give effect to legal rights. By so doing, it necessarily confers upon the successful party certain powers and privileges, its recording gives an official certification to a preëxisting legal relation (or establishes a new one on preëxisting grounds),¹³ and it affords authoritative protection and guaranty to challenged, endangered, or contested rights. But it can not be emphasized too strongly that the *execution* of a judgment is a matter independent of the judicial determination and even of the order of the court, and that the enforcement of the order upon the defendant to do or not to do something, if not voluntarily performed, is left to the executive officials of the state, and not to the court itself. The court's function is completely performed by determining and deciding the case in a form binding upon the parties; and it is the judgment, and not the execution, which establishes their rights and constitutes the essence of judicial power.¹⁴ A judgment, as Mr. Black points out,¹⁵ has in general "nothing whatever to do with the means of enforcing the liability which it declares." Its declaratory, determinative, and adjudicatory function is its distinctive characteristic.

The coercion or compulsion exerted by a judgment, while essen-

¹¹ ANDREW, LAW DICTIONARY 79, citing cases. See quotations assembled in *Miller v. Miller*, 149 Tenn. 463, 480, 261 S. W. 965, 970 (1924).

¹² *Conrad v. Lepper*, 13 Wyo. 99, 78 Pac. 1, 2 (1904); (1917) 15 R. C. L. 569, citing cases.

¹³ "Its [a judgment's] rendition is the judicial act by which the court settles and declares the decision of the law upon the matter at issue. Its entry is the ministerial act by which enduring evidence of the judicial act is afforded." *Moore v. Toyah Valley Irr. Co.*, 179 S. W. 550, 552 (Tex. Civ. App. 1915).

¹⁴ "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 . . . and the giving of it is a judicial function, *whether or not execution may follow thereon.*" *Kariher's Petition*, 284 Pa. 455, 469, 131 Atl. 265, 270 (1925); *cf. Fowler v. Fowler*, 61 Okla. 280, 283, 161 Pac. 227, 230 (1917). "The judgment does not enforce the right; it merely enables it to be enforced by the executive." *Gavit*, *supra* note 5, at 808.

¹⁵ *Op. cit. supra* note 9, at 4. Mr. Black adds: "Certain consequences do indeed flow from it, — as the right to issue execution, the attaching of a lien upon land, — but these are no part of the judgment, nor is it concerned with directions for making its sanctions effective. It is, as already stated, a *bare assertion.*"

tial to its effectiveness, is not due to a coercive order to act or refrain, but to the very existence of the judgment, as a determination of legal rights. Many judgments are incapable of, and do not require, physical execution. They irrevocably fix, however, a legal relation or status placed in issue, and that is all that the judgment is expected to do. It is this determination which makes it *res judicata*.

But most judgments do, in fact, command or order the defendant to do or refrain from doing something, and it is this command or order which has attracted undue attention as if it were the essential ingredient of judicial power. It is out of this common feature of judgments that the notion developed that, unless the coercive arm or compulsion of the court were invoked, there was no case for the exercise of judicial power. The determination, not the command, is the essence of judicial power; and in our civilized communities it is the determination, and not the command, which evokes respect, because it is the determination of the societal agent appointed to perform that function, and thus irrevocably to fix legal relations.

Up to the middle of the nineteenth century, when the action for a declaration of rights and the resulting declaratory judgment was adopted in the statutes and judicial procedure of many countries, it had been superficially assumed that the sole purpose of an action was to compel the defendant to do or refrain from doing something. A closer examination of the end and aim of a judgment disclosed that, even in the absence of statutory authority, courts, especially courts of equity, had for generations been rendering judgments which conclusively determined the rights of the parties, in which execution was not demanded or required and for which execution was indeed impossible. These included particularly the determination of status, the determination of rights to property, real or personal, the establishment of certain disputed facts, the construction of written instruments. On the Continent, this discovery and the official authorization of declaratory actions and judgments induced a renewed study of the theory of actions and judgments. A variety of classifications of judgments has thereupon been suggested. Instead of subsuming declaratory and executory judgments under the single rubric of judgments determining or declaring a preëxisting legal relation, as does Kisch,

several authorities, regarding the purpose to be served by the judgment as the criterion of division, distinguish (a) the executory judgment — the most common — and (b) the declaratory judgment.¹⁶ Others, and perhaps the great majority, add to these a third group (c), the constitutive or investitive judgment,¹⁷ which creates a new legal relation. Others still add a fourth class (d), the temporary injunction,¹⁸ which might, however, be deemed interlocutory or possibly procedural in character. These judgments accomplish different purposes and afford varying forms of relief, usually optional with the plaintiff.

Procedure. Procedure is the method established by law for the vindication of the rights of person or property accorded by substantive law.

Under the old common law as under the Roman law, the existence of a cause of action and of the right of action was determined by its recognition and identification in an established procedural writ. The existence of the remedy determined the existence of the right. But even the flexibility of a chancellor or *praetor* in extending the scope of writs and *actios* could not meet the demands of an advancing civilization, so that the complicated legal relations embodied in an expanding substantive law gradually won their independence from procedural criteria.¹⁹ Procedure became rec-

¹⁶ See the citations to Ott, Plósz, Degenkolb and others, in ZUMSTEIN, *op. cit. supra* note 10, at 20.

¹⁷ This Benthamism, whose use may be pardoned, seems more descriptive than the term "titles of right" employed by SALMOND, *op. cit. supra* note 2, at 91. The term "right" here is too uncertain in connotation. The Germans call these judgments "constitutive." Perhaps a more accurate nomenclature might use the term "divestitive" for those judgments, like the annulment of a voidable marriage or dissolution of partnership, which merely terminate an existing status. See Balog, *Über das konstitutive Urteil* (1907) 34 ZEITSCHRIFT FÜR DAS PRIVAT UND ÖFFENTLICHE RECHT DER GEGENWART 123-68; Hölder, *Ueber das Klagrecht* (1904) 46 JHERING'S JAHRBÜCHER 265, 282, 306; Hellman, *Klagrecht, Feststellungsklage und Anspruch* (1892) 31 *id.* 79, 90, 114; HELLWIG, SYSTEM DES DEUTSCHEN ZIVILPROZESSRECHTS (1912) 287; I WACH, HANDBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS (1885) 11-12.

¹⁸ STEIN (with GAUPP), ZIVILPROZESSORDNUNG (14th ed. 1928-29) Introduction to § 253.

¹⁹ The Roman conceptions of the relation between procedure and substantive law lasted well into the Middle Ages and were not effectively dissipated in Europe until the nineteenth century. Windscheid was the pioneer of emancipation: *DE ACTIO DES RÖMISCHEN ZIVILRECHTS, VOM STANDPUNKTE DES HEUTIGEN RECHTS* (1856). But the recognition of the Roman error did not become general until

ognized in all modern systems as a method provided by the state for the assurance, guaranty, and vindication of substantive rights, so that in every private action there are two claims — one against the defendant based on the rules of private law, the other against the state (the courts) for the official confirmation or recognition of the disputed right.²⁰

The purpose of procedure is thus to bring about the public guaranty of the reign of law and the private vindication of legal rights. It is an essential instrument of social peace.

In all modern systems, there are certain conditions and prerequisites for successfully invoking the courts' protection in order officially to confirm and certify private rights, disputed or endangered. These conditions and prerequisites are partly procedural, partly substantive in character. Among the former are (a) the jurisdiction of the court over parties and subject matter, (b) the capacity of the parties to sue and be sued, and (c) the employment of the proper forms for instituting and conducting the action. The lack of any of these requisites disables the court from even considering the case. Among the latter are (a) the soundness and validity of the complaint or cause of action under the rules of substantive law; (b) the subject matter of the complaint must be capable of legal protection, for example, it would exclude passing upon a wager or an intellectual difference of opinion not affecting rights of person or property; and (c) the party seeking legal protection (plaintiff or defendant) must have a sufficient legal interest to invoke the judicial process in his behalf. Of these last three, all of which are essential to every action, the first is factual, the second and third legal in character. The right of action thus arises out of operative facts to which the law attaches legal consequences. The legal interest of the plaintiff is

after Wach's celebrated monograph, *DER FESTSTELLUNGSANSPRUCH: EIN BEITRAG ZUR LEHRE VOM RECHTSSCHUTZANSPRUCH* (1889). Although now almost universal (see the authorities on civil procedure listed by ZUMSTEIN, *op. cit. supra* note 10, at 16), the older conceptions still dominate certain publicists who maintain that the function of procedure is the creation of concrete private rights. See Bülow, *Klage und Urteil* (1903) 31 *ZEITSCHRIFT FÜR DEUTSCHEN CIVILPROZESS* 191, 256; cf. Clark, *Ancient Writs and Modern Causes of Action* (1925) 34 *YALE L. J.* 879; Gavit, *supra* note 5, at 812.

²⁰ DEGENKOLB, *EINLASSUNGSZWANG UND URTEILSNORM* (1877) 1, 9, 26, 32; POMEROY, *op. cit. supra* note 2, § 0: SIBLEY, *op. cit. supra* note 4, at 14.

required throughout the proceeding; the other prerequisites must be established only at the beginning of the action. The defendant is equally entitled to judicial protection, under similar conditions. He has a right as against the state to have the complaint dismissed, by reason of the absence of any of the necessary conditions of the plaintiff's right of action or by reason of adequate affirmative defenses. Theoretically, if the facts are undisputed, the court's judgment ought to be predictable.

But the law or court has no concern with the *motive* of the plaintiff for bringing the action. It may be the desire for protection, relief, freedom, security, compensation, or revenge and it may be induced by doubts or fears, emanating from himself or others. The fear of loss or jeopardy and the desire to avoid and escape it are common motives of action. But to confuse the motives for bringing an action with the legal prerequisites of an action is unjustifiable error.

Judicial protection varies in kind, form, and purpose. The action or proceeding may look to an interlocutory order of attachment, designed to insure execution of a judgment, an order which has prerequisites of its own. It may look to a judgment declaring the rights — preëxisting or newly established — of the parties, for example, with respect to status or property. It may look to the execution of a judgment, by securing money damages or specific performance or an injunction. The demand for judicial protection may possibly seek other objectives.

The cause of action. Much has been written on the nature of the cause of action, especially since the adoption of the codes of procedure which have abolished the distinction between actions at law and in equity. A great variety of definitions has been proposed, some narrow and rigid, some broad and flexible.²¹ One

²¹ Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817, 824; Clark, *Ancient Writs and Modern Causes of Action* (1925) 34 *id.* 879; Gavit, *supra* note 5; Harris, *What is a Cause of Action?* (1928) 16 CALIF. L. REV. 459; McCaskill, *Actions and Causes of Action* (1925) 34 YALE L. J. 614; and the older writers, such as BLISS, CODE PLEADING (3d ed. 1894) § 113; PHILLIPS, CODE PLEADING (1896) § 31; POMEROY, CODE REMEDIES (4th ed. 1904) § 347; SIBLEY, THE RIGHT TO, AND CAUSE FOR, ACTION (1902) 32 *et seq.* See, especially, CLARK, HANDBOOK ON THE LAW OF CODE PLEADING (1928) 75 *et seq.* See also the following: BLEY, KLAGRECHT UND RECHTLICHES INTERESSE (1925) cc. 3, 5; HELLWIG, ANSPRUCH UND KLAGRECHT (1910); LANGHEINEKER, *op. cit. supra* note 9, § 4; PLÓSZ, BEITRÄGE ZUR THEORIE DES KLAGRECHTS (1880) cc. 1, 2.

writer suggests that the concept can better be described than defined.²² The commentators differ on the question whether the cause of action, the ground upon which the judicial arm can be successfully invoked, consists in the defendant's "wrong," in the combination of the plaintiff's "primary right" and the defendant's "delict," in the nature of the relief or remedy sought and obtainable, in the right to sue, or in the aggregate of facts giving ground or occasion to the courts to afford judicial relief.²³

While it is probable that every plaintiff seeks by his action a judicial declaration of his right (in the broad sense) and of the defendant's corresponding duty, it has already been observed that the defendant's "wrong" or "delict" is not an essential element of numerous actions. It may also be added that, while the protection or vindication of private rights is the *raison d'être* of procedure and of the remedies sought by its use, the concept of "primary right" is not so clear as it might seem, or that it is the *cause* of action which gives occasion to the right of action — the privilege to invoke judicial protection for the recognition, and hence enforcement, of existing rights. It seems preferable to adopt the conception of Dean Clark that the *cause* of action consists in that aggregate of operative facts (including the defendant's conduct) affording ground or occasion to obtain or secure judicial relief of some kind.²⁴ This definition is flexible enough to accommodate new substantive rights (and hence relief) which may be granted or recognized by the lawmaking authorities.²⁵ But while the willingness of the courts to grant some relief may be the criterion of the *right* of action,²⁶ a matter of procedure, and hence of the

²² Harris, *supra* note 21.

²³ A criticism of some or all of these views will be found in the articles cited in note 21, *supra*.

²⁴ CODE PLEADING 83; Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817, 829.

²⁵ Among these law-making authorities in practice if not in theory are the courts, who, under changing conditions of economic and social relations, occasionally recognize and give effect to new rights, especially in the law of torts. This does not militate against the truth of the general theory that courts neither create nor enforce rights—they recognize them and thus give them official sanction, making enforceable what prior thereto was not enforceable.

²⁶ One must not misuse this term to embrace the "right" or privilege to commence an action, with or without cause, of which anyone may avail himself if he pays the court fees. The term means a right to sue on a claim recognized by the

existence of a *cause* for action, a matter of substantive law, it can not be too strongly emphasized that the *nature* of the relief granted, or even the nature of the *prayer* for relief, has nothing to do with the question of the existence of the cause of action.²⁷ The same group of operative facts may give rise to different remedies — damages, an injunction, specific performance, a declaratory judgment of the rights of the parties — and actions are often described by the remedy or relief they thus seek. Each of these constitutes a form of relief, optional as a rule with the plaintiff; and the selection of one or the other, or of one or more simultaneously, in no way affects the existence of the cause of action.²⁸ Whether one or another of these remedies shall be granted is often a matter of judicial policy, generally guided by precedents; but that the grant of any one of them would necessarily presuppose a cause of action can hardly be doubted.²⁹

A question has, however, been raised whether the action for a negative declaration, to the effect that the defendant has no valid claim or right against the plaintiff, does not constitute a demand for a judgment that the defendant has no cause of action against the plaintiff rather than an affirmation that the plaintiff has a

courts as valid under substantive law. Cf. HELFWIG, KLAGRECHT UND KLAGMÖGLICHKEIT (1905) 25 *et seq.*

²⁷ Pomeroy, Bliss, Phillips, and Clark eliminate the element of relief sought or obtained as a factor in determining the scope of the cause of action. McCaskill and Harris consider it important. Clark, *supra* note 2, at 829; Harris, *supra* note 21, at 466. The difference lies possibly in the failure to distinguish between the *existence* of relief and the *nature* of the relief, the former only constituting a factor in the cause of action.

²⁸ "Since the demand for relief does not constitute a part of the cause of action, as from the same cause of action there often arise several remedial rights, the singleness of a cause of action cannot be determined by an examination of whether different kinds of relief are prayed for or objects sought." (1906) 23 Cyc. 283.

²⁹ It will later be observed that the policy of courts in various parts of the world varies materially in the matter of issuing declaratory judgments — some making it conditional upon the *possibility* of also obtaining executory or so-called coercive relief (a decree specifically commanding the defendant) (England, before 1873), some making it conditional upon the *impossibility* of obtaining executory relief (India, and Germany, formerly), some being indifferent to such possibilities (England and the United States), and some considering it a matter of *ad hoc* policy in each case. Cf. Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd., [1921] 2 A. C. 438; Gray v. Spyer, [1921] 2 Ch. 549. In the same country, as has happened in England and in Germany, the policy may change at different periods.

cause of action against the defendant.³⁰ Inasmuch as by such an action for a negative declaration the plaintiff obtains the relief³¹ or remedy that he requires, it is not apparent why the court is not implicitly recognizing in the plaintiff a right to be free or an immunity from the defendant's power to sue; and while such a declaration would be issued under unusual circumstances only, it does establish a cause and hence a right of action in the plaintiff. While in these cases no wrong has yet been committed or immediately threatened, a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which

³⁰ *Guaranty Trust Co. v. Hannay & Co.*, [1915] 2 K. B. 536. This case, which will be referred to again, was brought by the Guaranty Trust Co. in England asking for a declaration that they were not under a duty to repay to Hannay & Co. certain moneys that Hannay & Co. had paid on forged bills of lading and attached bills of exchange. It was brought under Order XXV, rule 5, of the Supreme Court Rules of 1883, providing that "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not." The trust company wished the declaration in order to get an authoritative determination of the English law for use in an American court and to stop vexatious proceedings brought against them in the United States by Hannay. The majority of the court, Pickford and Bankes, L. J.J., thought the declaration might be issued, though they argued that the "legal" "cause of action" in "the proper sense" was in the defendant and not in the plaintiff, and hence raised the inference that a plaintiff suing for a negative declaration need not allege a "cause of action" in himself. So the Supreme Court of Pennsylvania suggested that a "cause of action is not essential to the assumption of jurisdiction in this form of procedure." *Kariher's Petition*, 284 Pa. 455, 458, 131 Atl. 265, 268 (1925). This seems erroneous. The conception "cause of action" is too narrowly construed. In dispensing with the necessity for consequential (coercive) relief, the English Court of Appeal was merely giving effect to Order XXV, rule 5. Even though that Order itself speaks of "action or proceeding," it is questionable whether the court was not implicitly recognizing in the (equitable) plaintiff a new (not the traditional) independent cause of action arising out of the assertion by the defendant of allegedly unfounded claims, and hence a right of action to have the defendant's claims declared void. On the other hand, if "cause of action" is understood only in its traditional, though not accurate, sense, which presupposed some form of coercive relief or command, and if this is deemed essential to the issuance of a declaratory judgment (*Viola School District v. Canada Saskatchewan Land Co.*, 3 Sask. L. 498, 499 (1910), following *Offin v. Rochford*, [1906] 1 Ch. 342), the negative declaratory action is practically wiped out and made impossible. *Warrington, J.*, who decided *Offin v. Rochford*, overruled his own views then expressed in *Burghes v. Attorney General*, [1911] 2 Ch. 139; *cf. Guaranty Trust Co. v. Hannay & Co.*, [1915] 2 K. B. 536, 561; *SULZER, DIE NEGATIVE FESTSTELLUNGSKLAGE* (1913) (Diss.) 16 *et seq.*; *ZUMSTEIN, op. cit. supra* note 10, at 15-16.

³¹ See the types of cases discussed in this article.

endangers his peace of mind, his freedom, his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it promotes social peace. The plaintiff asserts his privilege and immunity from the defendant's claim or potential claim and power — that he is not bound or liable in the manner defendant asserts. Substantive law recognizes his privilege and immunity, and procedure affords him an opportunity to vindicate his rights. So long as the courts recognize in the plaintiff an interest for which they will afford him protection by means of an action and a resulting judgment, they necessarily admit that he has a "cause" of action and a "right" of action. The expansion in the forms of equitable relief evidenced the fact that new interests were taken under the protection of the law and that old interests received a protection they did not theretofore enjoy. The action for a so-called negative declaration is simply a broadening of the equitable action for the removal of a cloud from title to cover the removal of clouds from legal relations generally, under circumstances where the courts believe a useful purpose is thereby served. When the issue is clearly a contested one involving legal interests, it seems immaterial whether the legal or the equitable plaintiff (prospective defendant) starts the action. Moreover, the plaintiff can express his claim with equal facility in an affirmative concept, instead of a negative — instead of asserting that he is under no duty, he asserts privilege; instead of asserting that he is not liable, he asserts immunity; or he can urge the defendant's duty not to claim (or no-right) or the defendant's disability. The importance of the power to sue on the part of an endangered or potentially endangered or disputed possessor of rights is that judicial protection may be obtained before the danger has ripened into catastrophe and before the other party has commenced suit to enforce his claims. The mere assertion of the claim may do the plaintiff material harm and entitle him to a judgment establishing the legal truth. Security and certainty in legal relations is a matter of public as well as private interest.

II

The following examples drawn from practice in the United States and elsewhere indicate the types of legal interests that are

protected by the declaratory judgment, enabling a plaintiff moved by doubt and uncertainty in his legal relations to avoid the resulting peril and insecurity by obtaining an authoritative adjudication of his rights, before risking disaster either by acting on his own guess concerning his rights or by not acting because of fear of consequences. The necessity for acting at one's peril should be limited so far as conveniently possible. Citizen and community thereby avoid the danger and disadvantage of irretrievable loss, as well as prejudicial suspense and dilemma.

While by no means the only function of the declaratory judgment, one of its major purposes is to afford relief from uncertainty and insecurity.³² The New York Court of Appeals has remarked that "the general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations."³³ This function was picturesquely described some years ago by Congressman Gilbert of Kentucky: "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."³⁴

The effort to avoid a threatened or impending danger or risk may involve contractual or non-contractual legal relations. Equity is already familiar with numerous types of actions in which the aid of a court is sought and given to remove, by mere declaration, a cloud from the title and to quiet the title to property. The practice of instituting an action for a declaratory judgment has identical purposes in a wider field by quieting challenged and doubtful rights with respect to property or other relations,

³² See Kan. Acts 1921, c. 168, § 6, REV. STAT. ANN. (1923) 60-3132. "Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor." See also Ky. Laws 1922, c. 83, CODES (Carroll, 1927) § 639a-10, and declaratory judgment statutes in other states.

³³ *James v. Alderton Dock Yards, Ltd.*, 256 N. Y. 298, 176 N. E. 401 (1931). Chief Judge Cardozo has said: "I have been impressed on numerous occasions with the belief that it has supplied a useful expedient to litigants who would otherwise have acted at their peril, or at best would have been exposed to harrowing delay." Letter, April 20, 1928, Hearings, United States Senate, on H. R. 5623, to amend the Judicial Code, April 27, 1928, p. 55.

³⁴ 69 CONG. REC. 2108 (1928).

so as to enable business and transactions to proceed with security and without peril. The dispute between the parties as to their respective rights having arisen, the disquieted, threatened, or challenged party, instead of acting first on his own view of his legal right — thereby destroying an established relation and economic fabric — institutes against the adverse party an action, by complaint or, in England, by originating summons, asking for a declaratory judgment in the plaintiff's favor that he is privileged to enjoy the right he claims or to undertake the action he proposes, and that the defendant has no right to interfere. The issue is the same as it would be if the act had been done or the alleged right exercised first, but much social and economic damage is avoided by bringing the suit before doing the act. Naturally, the court is careful to verify the fact that the controversy is a real and genuine one, that the parties have an active and immediate interest in its determination, and that the judgment of the court will finally decide and end the controversy.

While the types of cases which have been presented to the courts are innumerable, there are certain among them which have occurred with sufficient frequency to warrant special attention. Those which arise out of contracts are perhaps the most numerous; the action for a declaratory judgment in these cases serves, as a rule, to avoid, on the plaintiff's part, a breach of contract and the resulting damages, apart from other effects of acting mistakenly and rashly on his own view of his rights.

Contested Contractual Privileges

It frequently happens that a party to a contract contends that he is privileged to act in certain ways under the contract, and is about to do so when his right is challenged, either by another party to the contract or by a third person in interest. The challenge or denial of his claimed privilege constitutes a cloud upon his right to act. He may (1) desist from the proposed act, (2) undertake it notwithstanding the adverse claim, or (3) he may seek to remove the cloud before acting by suing for a declaration of his privilege to act as proposed or of the no-right of the defendant to interfere with, deny, or challenge him. If he undertakes the proposed act without testing the validity of the challenge, both he and the

other parties to the proposed transaction run the risk of breaking contracts, or committing torts, or violating statutes, to the general detriment of all concerned. The sensible procedure, therefore, is for the plaintiff, about to exercise his claimed and challenged privilege, to summon the adverse parties into court as defendants and ask a declaration of his privilege to undertake the act proposed. For the court, this usually involves merely a construction or interpretation of the contract. By a determination of the issue the plaintiff is then certain of his right and can act accordingly, while having avoided the risks of damages, forfeiture, or other untoward consequence which his mistaken action would have entailed. Or instead of waiting to be sued on the contractual claim of another, he may, as equitable plaintiff, ask a declaration that the defendant has no claim against him, so that he may thus breathe freely again. This was the substance of the celebrated case of *Guaranty Trust Co. v. Hannay & Co.*³⁵

Among the more interesting cases of this type are those in which some third person claims that the contracting party is barred from proceeding as he proposes, and thus, hanging to his coat tails, creates doubt and uncertainty for the contractor. To get rid of the challenge, the contractor sues the challenger or the other party to the contract, for a declaration of his privilege to act as he proposes. Thus, a prospective vendor may claim the privilege of making a sale and conveying a good title, without seeking the consent of some challenging legatee, or public authority, or other party claiming an interest.³⁶ Trustees and fiduciaries of all kinds frequently

³⁵ [1915] 2 K. B. 536.

³⁶ *Mendel v. Congregation Adath Israel*, 213 Ky. 371, 281 S. W. 163 (1926) (congregation seeks declaration of its power to convey cemetery to city for park purposes, notwithstanding defendant's objection to removal of remains of her grandfather. Defendant's rights not passed on, only power to convey upheld). Or, seeking to escape the duty to convey, he may claim that he is not required to complete the sale, without the mortgagee's consent, as defendant asserted. *Dillon v. Hills*, 29 N. Z. 355 (1909); *Petroleum Exploration, Inc. v. Superior Oil Corp.*, 232 Ky. 635, 24 S. W.(2d) 259 (1930) (privilege of selling assets in Kentucky, without consent of three-quarters of its shareholders. Proposed purchaser defendant-doubted); *In re Wm. Thomas & Co., Ltd.*, *Thomas v. Sully*, [1915] 1 Ch. 325 (that plaintiff corporation privileged to sell part of its business, free from adverse claims of shareholders); *In re Hone & Parker's Contract*, [1922] 2 Ch. 424 (vendor seeks declaration that consent to sale, as claimed by purchaser, was not necessary); *North British Ry. v. Birrell's Trustees*, [1918] Sess. Cas. 33, 47 (plaintiff obtained a declaration that defendant had no right to object to plaintiff's leasing certain

make use of the declaratory judgment to obtain a determination of their privilege to sell, mortgage, or in other ways to deal with the trust property, notwithstanding the challenge, and free from the claim of an adverse party.

An interesting instance of an effort to secure, in advance of hazardous refusal to perform, an interpretation of a contractual obligation, occurred in *Utica Mut. Ins. Co. v. Glennie*.³⁷ The president of the Falls Equipment Co., having been injured in a company automobile and having sued the company for damages — after refusal of compensation because he was not an employee — requested the plaintiff insurance company to defend the action under the insurance policy. Thereupon the insurance company brought an action for a declaration that they were under no duty to defend under the policy, inasmuch as the president was not an employee. Such a declaration, if granted, would have clarified the legal position for all concerned, the injured president, the company, and the insurer. The declaration was denied on the merits, because, under the policy, the liability of the insurer was deemed to be increased if an officer was injured.

Not widely different is a striking action brought by the receiver of an insured insolvent tortfeasor railroad against an insurer who disclaimed liability under the policy on the ground that it was not liable until the insured railroad had paid at least \$25,000 on judgments against it.³⁸ The railroad had been sued for negligence in several actions, and thus far had suffered a judgment of only \$7,500; but four other negligence actions were pending which might easily carry the liability over the \$25,000 limit. The receiver sought a declaration that the insurer would be liable for amounts in excess of \$25,000, notwithstanding the fact that the railroad was unable to pay the first \$25,000 in judgments. In quoting from an earlier opinion that "the most fruitful field for the use of this form of relief is in the construction of written instruments," the court said:

"It would be difficult to think of a situation wherein the purpose behind section 473 of the Civil Practice Act could find better vindication

lands. Speaking of this negative declaration, Lord Dunedin said: "One great merit of the Scottish action of declarator is its elasticity".

³⁷ 132 Misc. 899, 230 N. Y. Supp. 673 (1928).

³⁸ *Post v. Metropolitan Casualty Ins. Co.*, 227 App. Div. 156, 237 N. Y. Supp. 64 (1929), *aff'd*, 254 N. Y. 541, 173 N. E. 857 (1930).

than the very situation we have here. One plaintiff has already recovered \$7,500. There are left four negligence actions yet to be tried, to be followed, if the plaintiffs succeed in recovering over \$17,500, in the aggregate, by four actions against this defendant pursuant to section 109 of the Insurance Law. At least one of these latter four actions will have to be tried as a test case. That makes five actions to be tried, four of which are of a kind that requires days to try. None of them need be, or likely will be, tried if defendant is vindicated in its claim as to the construction to be given the policy, and this issue is so narrow it can be tried in a few minutes."³⁹

Several claims of contractors, subcontractors, sureties, and others having been made upon a town and property owners, arising out of improvements which had to be paid for by bonds serviced by taxation, the town, uncertain of its obligations, brought an action — on its own and on certain property owners' behalf — against the several claimants in order that it might have its liability determined, levy the necessary taxes, and issue appropriate bonds. Said Judge Rodenbeck: "It seems proper . . . under this practice to determine in this form of action which one of the plaintiffs is liable, if at all, and the extent of such liability, and the rights and liabilities of the defendants among themselves, so that the total expense of the improvement may be determined, the assessment levied, and the bonds issued."⁴⁰

In a case in Germany, a former partner who had agreed not to engage in a competing business for ten years, under a stipulated penalty for breach, sought a declaration against his former partners that he was privileged to work as an employee without paying the penalty.⁴¹

In all these cases it is the plaintiff's doubts or fears, and the doubts or fears of others, as to the legality of the claim of privilege or as to the consequences of the contemplated act, which give the plaintiff that legal interest in a judicial determination which makes the case justiciable.

³⁹ 227 App. Div. at 158-59, 237 N. Y. Supp. at 67.

⁴⁰ *Town of Greece v. Murray*, 130 Misc. 55, 57, 223 N. Y. Supp. 606, 608 (1927). See a multipartite action in *A. E. Joy Co. Inc. v. New Amsterdam Casualty Co.*, 98 Conn. 794, 120 Atl. 684 (1923).

⁴¹ *R. G. Z.* 40, 97 (1897). He also sought a declaration that he was privileged to establish his own business or become a partner in one by paying the stipulated penalty.

Although arising under the construction of a will, the action of *Brokaw v. Fairchild*⁴² might as readily have arisen under a deed. The plaintiff, a life tenant of an old-fashioned New York residence, sued the remaindermen and trustee for a declaratory judgment that he was privileged to demolish the building, which had become outmoded in that neighborhood, and to erect an apartment house which would pay an income for the benefit of all concerned. The defendants contended that such demolition would be waste, that the other members of the family had received residences in the neighborhood, and that it would spoil the plottage value of the property. In denying the declaration sought, the court saved the plaintiff from the danger of acting on his own mistaken view of his rights, and removed all uncertainty from the legal position of all parties.

In numerous cases of construction of contracts, one party, before acting on his own interpretation of his disputed rights and privileges, seeks the prior assurance of a judicial determination. Among these are cases in which the plaintiff asserts that the contract is not binding on him, and that he is privileged, therefore, to do what he proposes,⁴³ or that he is privileged to rescind or terminate it by virtue of the defendant's alleged breach,⁴⁴ or for other reasons.⁴⁵ The plaintiff thereby avoids the risk of first acting on

⁴² 135 Misc. 70, 237 N. Y. Supp. 6 (1929).

⁴³ *Bacchus Marsh Concentrated Milk Co. v. Nathan*, 26 C. L. R. 410 (1919) (that defendant disabled from enforcing certain covenant against plaintiff, and that plaintiff is privileged to do certain things); *Steinberg v. Cohen*, [1930] 2 D. L. R. 916 (that chattel mortgage by plaintiff to defendant is invalid); *Mayor of Feilding v. Feilding Gas Co.*, 30 N. Z. 298 (1911) (whether contract binding and whether plaintiff privileged to establish separate lighting system).

⁴⁴ *Ufa Films, Inc. v. Ufa Eastern Division Distribution, Inc.*, 134 Misc. 129, 234 N. Y. Supp. 147 (1929) (plaintiff's share in contract with defendant was to be 50% of moneys paid by exhibitors, subject to payment of advance royalties. Plaintiff claimed that 50% was in addition to royalties, which defendant denied. Thereupon plaintiff, claiming breach, threatened to terminate, but instead brings action for declaration of privilege to terminate. Held, for defendant); *Tattersall v. Sladen*, [1928] 1 Ch. 318 (that plaintiff was privileged to terminate by defendant's omissions); *Rechtsprechung des Arbeitsrechts (Potthoff)* 1914-27, No. 967 (that defendant had given plaintiff grounds for termination of contract); *Reichsarbeitergericht*, Dec. 18, 1929, *Bensheimer VII*, 512 (that contract of trade associations with employees not binding on plaintiff).

⁴⁵ *Bell v. Scott*, 30 C. L. R. 387 (1922) (plaintiff purchaser's privilege to rescind for defective title); *Toohey v. Gunther*, 41 C. L. R. 181 (1928) (that defendant vendor had no right to rescind and retain deposit, but that plaintiff vendee was so privileged).

his own assumption that he is not bound or is privileged to rescind or terminate, only to find, perhaps, in a subsequent suit for damages brought against him, that he was wrong.

On the other hand, the plaintiff may sue for a declaration that he has not defaulted, thus avoiding the threatened consequences of an alleged breach.⁴⁶

Specific privileges under a contract are frequently claimed before their exercise is attempted. If their exercise is sustained as permissible under the contract, the plaintiff has the assurance that he is not subject to damages or penalties for breach. If their exercise is not sustained, the plaintiff has a warning of the consequences that will follow breach and has avoided the penalties which his ill-advised acts would have entailed. The dispute usually arises out of a difference of interpretation or construction of the terms of a contract, the open or potential breach of which is definitely avoided by a suit on the disputed issue before, rather than after, exercise of the claimed privilege. Apart from the penalties, forfeitures, and sanctions thus averted, the economic fabric of the contract itself has been saved from destruction, for after breach and a suit for damages it is often impossible to patch again and reinstate the sundered relations.

Thus, declarations have been sought that the plaintiff was privileged to work as an employee, notwithstanding an agreement against entering into competing business,⁴⁷ to use a market free from competition,⁴⁸ to raise the price of admission under a lease without the landlord's consent,⁴⁹ to regulate the right of members of an underwriter's association to charge fees and perform services for outsiders,⁵⁰ to change the terms of insurance policies, thereby diminishing and altering the rights of old members of the association,⁵¹ to provide funds for unions other than the plaintiff

⁴⁶ *Bray v. Kuch*, 28 N. Z. 667 (1909) (plaintiff denies default and defendant's exercise of resulting powers).

⁴⁷ R. G. Z. 40, 97 (1897). See also *Wanek v. Thols*, [1928] 1 D. L. R. 873, 2 *id.* 793 (that plaintiff is privileged to enter caveat against defendant's breach of contract to refrain from competing business [*W's* business claimed to be *H's*]).

⁴⁸ *Morpeth Corp. v. Northumberland Farmers' Auction Mart Co.*, [1921] 2 Ch. 154.

⁴⁹ *In re Dott's Lease*, *Miller v. Dott*, [1920] 1 Ch. 281.

⁵⁰ *Buffalo Ass'n of Fire Underwriters v. Noxsel-Dimick Co.*, 141 Misc. 333 (1931).

⁵¹ *United Order of Foresters v. Miller*, 178 Wis. 299, 190 N. W. 198 (1922)

union,⁵² to make different restrictions to different purchasers of land in the same development,⁵³ to remove buildings,⁵⁴ to retain a ship until repair liens are paid,⁵⁵ to inspect books of the defendant union, of which plaintiff is a member,⁵⁶ to repay a debt, free of excessive interest.⁵⁷

On the other hand, the existence or validity of the plaintiff's privileges may be brought to determination in the form of a demand for a negative declaration that the defendant has no right to do some particular act, diminishing or endangering the rights of the plaintiff. This simply reverses the rôles of defendant and plaintiff, in that the prospective defendant anticipates his defense by instituting the action as equitable plaintiff, asserting that the prospective plaintiff, the equitable defendant, has no right to maintain a claim or to do the act done, threatened, or proposed, which would injure the plaintiff. Thus, he may claim that the defendant has no right to demand money or salary,⁵⁸ to reduce the plaintiff's salary,⁵⁹ to discharge the plaintiff from employment,⁶⁰ to interfere

(plaintiff claims the members' rights are not vested). The obverse of this issue occurred in *Grainger v. Order of Canadian Home Circles*, 31 Ont. L. R. 461 (1914), 33 Ont. L. R. 116 (1915), where beneficiary, over 70, seeks declaration that by-law changing his vested benefits is invalid. Declaration issued but injunction denied.

⁵² *In re National Union of Seamen*, [1929] 1 Ch. 216 (the defendants were members of the union who claimed that the proposed act was *ultra vires*).

⁵³ *Bristol v. Woodward*, 251 N. Y. 275, 167 N. E. 441 (1929).

⁵⁴ *Premier Dairies, Ltd. v. Garlick*, [1920] 2 Ch. 17 (lessee claimed benefit of special statutes). ⁵⁵ *The Countess*, [1921] P. 279, [1922] P. 41.

⁵⁶ *Dodd v. Amalgamated Marine Workers' Union*, [1923] 2 Ch. 236, [1924] 1 Ch. 116. ⁵⁷ *Kruse v. Seely*, [1924] 1 Ch. 136.

⁵⁸ *Cloverdale Union High School Dist. v. Peters*, 88 Cal. App. 731, 264 Pac. 273 (1928) (that defendant has no right to claim salary under alleged contract); *Burgis v. Constantine*, [1908] 2 K. B. 484 (that defendants have no claim upon plaintiff's shares of stock, arising out of alleged mortgage created by transferee for limited purpose); *Reichsarbeitergericht*, March 1, 1930, *Bensheimer IX*, R. A. G. 31 (that defendant has no further claim against plaintiff, on account of reduced work); *Soergel*, *Jahrbuch des Verwaltungs.* IV, 653 (no-right to demand reimbursement of costs of street).

⁵⁹ *Schedlich v. Commonwealth*, 38 C. L. R. 518 (1926). In connection with such salary problems, see also *Meek v. Port of London Authority*, [1918] 1 Ch. 415, [1918] 2 Ch. 96 (employer's duty to pay income tax). Employer may use the declaratory judgment to establish the proper basis of computation of salary: *S. J. & E. Fellows, Ltd. v. Corker*, [1918] 1 Ch. 9; *Patent Castings Syndicate, Ltd. v. Etherington*, [1919] 1 Ch. 306, [1919] 2 Ch. 254.

⁶⁰ *R. G. 91*, 27 (1917) (no right to discharge and plaintiff's right to future payments of salary); *Reichsarbeitergericht R. A. G. 99/29*, *Bensheimer VII*, 162.

with the plaintiff in the enjoyment of a franchise,⁶¹ to exclude the plaintiff from drilling on defendant's land,⁶² to rescind a contract of sale,⁶³ or to take other action violative of the plaintiff's rights under a contract.⁶⁴ In many of these cases injunction will not lie, yet it is extremely important that the disputed claim be settled and the plaintiff's rights quieted. In some of these contested claims, the plaintiff demands stabilization or protection for rights endangered by the defendant's claim, rather than escape from any pending or potential liability.

Escape from Contractual Obligations

The hectic pace and rapidity of change in modern life have their influence upon contracts by creating, through the events of nature or statute, new conditions which the parties could not have had in contemplation. In long-term contracts the mere effect of the passage of time is productive of changed conditions which alter the effect or purpose of contractual obligations. Again, acts done by one of the parties may be deemed by the other as effecting a release from the obligation; or it may be claimed that conditions alone justify release, either because the contract was originally void or voidable or has since by circumstance become unenforceable. In all these cases it would be hazardous for the party claiming release to act upon his own assumption of his rights, refuse further to perform, and thereby invite an action for damages. In

⁶¹ *Earl of Dysart v. Hammerton & Co.*, [1914] 1 Ch. 822.

⁶² *Equitable Gas Co. v. Smith*, 13 D. & C. 616 (Pa. 1929).

⁶³ *Buyer sues*: *Proctor v. Pugh*, [1921] 2 Ch. 256 (seller's compliance with statutes); *In re Des Reaux and Setchfield's Contract*, [1926] 1 Ch. 178 (seller's notice of rescission void); *Toohey v. Gunther*, 41 C. L. R. 181 (1928) (seller had not disclosed bond restricting scope of hotel's purchasing powers).

Seller sues: *Hannan v. Wilson*, 101 N. J. Eq. 743, 139 Atl. 165 (1927) (default); *In re Spencer and Hauser's Contract*, [1928] 1 Ch. 598 (seller claimed sufficient answer as to his representative status); *Dillon v. Hills*, 29 N. Z. 355 (1909) (exchange).

⁶⁴ *Piercy v. Louisville & Nashville R. R.*, 198 Ky. 477, 248 S. W. 1042 (1923) (to shift plaintiff from day run to night run); *Hillman v. Commonwealth*, 35 C. L. R. 260 (1924) (employee sues to establish that his hours of work should not exceed a stated number per week without payment of overtime); *Grainger v. Order of Canadian Home Circles*, 33 Ont. L. R. 116 (1915) (to change by-laws of benefit association to plaintiff's disadvantage); *Brylinski v. Inkol*, 55 Ont. L. R. 369 (1924) (to change name and purposes of private society).

the case of long-term contracts, such precipitate action might be a disastrous gamble. To escape from such risks and their painful consequences by obtaining an authoritative determination of one's rights before acting is one of the principal functions of the action for a declaratory judgment.

Such cases had a striking illustration during the World War. English companies bound by long-term contracts to supply raw materials to German firms sought by declaration to determine whether they were still bound to supply the material after the War was over, that is, whether the War had merely suspended the obligation or had terminated it. Upon the answer to that question their plans for post-war business would to a considerable degree be dependent. Parliament had assisted this judicial function by providing in the Legal Proceedings against Enemies Act, 1915, that a British subject or corporation might claim a declaration against an enemy subject or corporation, provision being made for substituted service, "as to the effect of the war on rights or liabilities under a contract entered into before the war." The English courts frequently held that the effect of the War was to terminate the contract, whereupon the plaintiff knew that he was protected against an action for breach and could thereupon make commercial plans accordingly.⁶⁵

The effect of a statute is often to create new conditions which materially alter the position of the parties to a contract and place

⁶⁵ *Contracts terminated by state of war*: Ertel Bieber & Co. v. Rio Tinto Co. Ltd., [1918] A. C. 260; Zinc Corp., Ltd. v. Hirsch, [1916] 1 K. B. 541; Distington Hematite Iron Co. Ltd. v. Possehl & Co., [1916] 1 K. B. 811; Jager v. Tolme & Runge & London Produce Clearing House, Ltd., [1916] 1 K. B. 939 (that the contract incapable of performance by war embargo); Clapham S. S. Co. Ltd. v. Handels-En Transport-Maatschappij Vulcaan of Rotterdam, [1917] 2 K. B. 639; Johnson v. Sargant & Sons, [1918] 1 K. B. 101 (subject matter of contract requisitioned by controller); Central India Mining Co. Ltd. v. Société Coloniale Anversoise, [1920] 1 K. B. 753; Orconera Iron Ore Co., Ltd. v. Fried-Krupp, Aktien-Gesellschaft, 118 L. T. R. 237 (1918).

Partnership terminated by state of war: Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie, [1918] A. C. 239 (partnership declared terminated and right of German partners to share after the war in profits declared).

See also *In re Continental C. & G. Rubber Co. Proprietary, Ltd.*, 27 C. L. R. 194 (1919) (effect of war on contracts shown in claims on winding up under Trading with the Enemy Acts); Leipziger Ztsch. 19, 482, Soergel, 1919, p. 233 (that plaintiff's obligation to deliver after the war is extinguished by complete change of conditions).

them in doubt and uncertainty as to their legal relations. A notable case of this kind occurred in Pennsylvania. The plaintiff trust company had in February, 1923, leased to defendant *P*, who subleased to defendant motor company, a three-story, non-fireproof building used for a garage. A clause in the lease required the lessor, in the event of fire, to abate the rent until the premises were completely rebuilt and placed in tenantable condition. In May, 1923, a statute was enacted prohibiting the erection for garage purposes of any building not of fireproof construction if more than two stories high. In 1927 fire destroyed the old building. The lessor offered to construct a three-story building like the original, or a two-story, fireproof building at the lease rent. The defendant declined the former, as it would not be permitted by law to use it for a garage, and declined the latter unless the rent were reduced. It demanded instead a three-story, fireproof building, which the plaintiff claimed would cost a prohibitive sum and could only be considered on a great increase in rent. The *impasse* was complete. The plaintiff thereupon brought an action for a construction of the lease and a declaratory judgment that by its offers it had complied with its obligation under the lease as a condition necessary to restore the duty to pay rent and that the defendant's refusal to accept operated as a termination and forfeiture of the lease. The Supreme Court of Pennsylvania, in sustaining the position of the plaintiff, said:

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

“ A prime purpose of the Declaratory Judgments Act is to render ‘ practical help ’ in ending controversies such as the one now before us: *Kariher's Petition* (No. 1), 284 Pa. 455, 471. Had defendants, instead of refusing the offers of plaintiff, simply taken the position that,

according to their understanding of the law applicable to the admitted facts, the building tendered would not give them what they were entitled to under the lease, and, on that state of affairs, asked for a declaratory judgment, or joined with plaintiff in asking for such a judgment, their respective rights might have been judicially declared. Then, after such a determination of the governing principles of law as we have here made, plaintiff could either have erected the proposed three-story building, and insisted on payment of rent for the balance of the term named in the contract of lease, or, in place of actually building, plaintiff could have given defendants notice that its offer to build was still open; if, under these circumstances, defendants had persisted in their refusal, plaintiff could have accepted such refusal as an abandonment of the lease. In other words, had the parties seen fit, they could have had the help of a judicial declaration of their respective rights and liabilities before taking a definite stand amounting to ultimatum on each side and asking for a declaratory judgment on that state of fact."⁶⁶

In a Kansas case the plaintiff school district claimed release from a written guaranty to provide school rooms, because the legislature had by the creation of a community high school relieved much property from taxation and by this change of conditions justified the plaintiff's release.⁶⁷ So the obligee under a contract may claim release from performance because of frustration by supervening governmental order.⁶⁸

An interesting group of cases arises out of the effort of one of the parties to a contract to secure a declaration of his release from its obligations, because the other party has taken some action which the petitioner regards as making it void or voidable or no longer binding upon him. The risk of acting upon his own belief that he is discharged from further performance is apparent, for he at once exposes himself to a suit for damages or specific performance, or

⁶⁶ *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 524-25, 140 Atl. 506, 512-13 (1928); *cf.* *Young v. New Zealand Ins. Co.*, 29 N. Z. 50 (1909) (where plaintiff had refused to furnish plans for reconstruction by insurer of destroyed wooden building and then sought declaration of his duty to furnish plans prior to insurer's election to reinstate. The declaration was granted because failure to have a determination on the duty might cause loss of remedy).

⁶⁷ *School Dist. No. 19 of Sheridan County v. Sheridan Community High School*, 130 Kan. 421, 286 Pac. 230 (1930).

⁶⁸ *Direct U. S. Cable Co. v. Western Union Tel. Co.*, [1921] 1 Ch. 370 (that plaintiff was disabled from repairing leased cable, by admiralty prohibition, and hence escaped penalty); *Waiwera Co-op. Dairy Co. Ltd. v. Wright, Stephenson & Co. Ltd.*, [1917] N. Z. 178 (plaintiff released, because Government had requisitioned the material to be supplied).

perhaps to forfeiture or other drastic sanction. By proceeding first to submit the dispute to judicial determination of his rights in the premises, he avoids that hazard and is assured of his rights before acting. A leading case of this kind is the English case, *Société Maritime et Commerciale v. Venus Steam Shipping Co., Ltd.*⁶⁹ Here the plaintiffs had undertaken by contract to load ore on steamers to be furnished by one *L*, the alleged assignor of the defendants, for five years. The plaintiffs contended that there was no valid assignment to the defendants, that *L* was not the defendants' agent, and that there was no novation. As the original contract had over a year still to run, and as plaintiffs did not wish to break it and subject themselves to an action for damages, they availed themselves of the valuable privilege of seeking from the court a declaration that the contract was no longer binding on them. In making the declaration sought, Judge Channell remarked:

"Showing the necessity of a decision upon it, I think they are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to refuse to perform it and then to be liable to heavy damages for not performing it for the space of the next year and a half. If they are wrong, they would be liable for damages down to the time of the judgment of the Court while they are refusing to perform; but upon the Court saying that they were bound, they would then say: — 'We will now go on with it for the remainder of the time.' I think that is a sufficient reason [for making the declaration]." ⁷⁰

So, a plaintiff often claims release from a contract by way of anticipatory defense on the ground that the contract was obtained from him by fraud or misrepresentation,⁷¹ or that it was *ultra vires*

⁶⁹ 9 Com. Cas. 289, 291 (1904).

⁷⁰ See also *West Ham Corp. v. Sharp*, [1907] 1 K. B. 445; *Pedersen v. Had-dock*, [1917] N. Z. 684 (plaintiff employer under a building contract claimed declaration [by special case] that defendant contractor had no-right to compensation thereunder, when, after stopping work because of plaintiff's refusal to make payments, he demanded interest on arrears and compensation).

⁷¹ *Tofts v. Pearl Life Assur. Co. Ltd.*, [1915] 1 K. B. 189 (assured seeks declaration that policies were obtained from him by fraud of defendant's agent, alleging falsely that plaintiff had insurable interest); *Hulton v. Hulton*, [1916] 2 K. B. 642 (declaration sought by married woman that she was not bound by certain contract of separation obtained from her by fraud; to the same effect, *Slingerland v. Slingerland*, 109 Minn. 407, 124 N. W. 19 (1910); *Haskew v. Equity Trustees, etc.*, 27 C. L. R. 231 (1919) (plaintiff seeks declaration that transfer of his property to defendant, for daughter, had been procured by fraud); Attorney General of N. S.

the plaintiff,⁷² or because the debt or obligation was canceled or terminated by the defendant's own act,⁷³ or because the plaintiff's own act had discharged his obligation to the defendant,⁷⁴ or because of a claim by the defendant deemed by the plaintiff to vary the contract,⁷⁵ or because of some change made in the contract relation by the acts of the defendant or others.⁷⁶

Wales v. Peters, 34 C. L. R. 146 (1924) (Government contract alleged obtained by defendant by fraud, and Government relieved from obligation); De Chateau v. Child, [1928] N. Z. 63 (plaintiff sues to establish that mortgage given to defendant, who sought to exercise power of sale, was wrongly obtained); Harris v. Richardson, [1929] N. Z. 668 (that plaintiff's sale to defendant money-lender at low figure was void for undue influence).

In this category are actions by insurance companies to declare the invalidity of policies obtained by fraud, sometimes before any loss has occurred; or by those prospectively liable under negotiable instruments. Commercial Mut. Life Ins. Co. v. McLoon, 14 Allen 351 (Mass. 1867); Globe Mut. Life Ins. Co. v. Reals, 79 N. Y. 202 (1879). In the English cases of Brooking v. Maudslay, Son & Field, 38 Ch. D. 636 (1888), and Honour v. Equitable Life Assur. Soc., [1900] 1 Ch. 852, the declarations were refused, on the ground that the company should not thus anticipate its defense, which it might be in a better position to assert after the beneficiary sues on the policy. The ground is not convincing. To a similar effort to have the policy declared void in equity after the loss had occurred, but before suit by the beneficiary, the Connecticut Supreme Court, reversing the lower court which had sustained the action as valid under the Declaratory Judgments Act, held that it was to be dealt with as the company had elected, and that equitable relief was inappropriate, apparently inferring that it might have been brought under the Declaratory Judgments Act. Aetna Life Ins. Co. v. Richmond, 107 Conn. 117, 139 Atl. 702 (1927).

⁷² Tataurangi Tairuakena v. Carr, [1927] N. Z. 240, 688.

⁷³ Tozer v. Viola, [1918] 1 Ch. 75 (lessee claims declaration that lease was terminated); Tattersall v. Sladen, [1928] 1 Ch. 318 (plaintiff dentist obtained declaration that partnership agreement with defendant was dissolved by defendant's failure to pay dues to Dental Board); Bakker v. Winkler, [1929] 4 D. L. R. 107 (plaintiff claims that contract was terminated and discharged, and that plaintiff was under no duty to grant sublease); R. G. Z. 74, 292 (1910) (purchaser, after his right to cancel had expired, claimed declaration that he does not owe vendor money due, because of breach of warranty of condition); R. G. Z. 95, 260 (1919) (debt claimed cancelled by creditor).

⁷⁴ Mitchell-Henry v. Norwich Union Life Ins. Soc., Ltd., [1918] 2 K. B. 67 (plaintiff claims that by sending money through the mail he had discharged his obligation, though the money was stolen); Paddy v. Clutton, [1920] 2 Ch. 554 (borrower from liquidated insurance company claims release from debt by having offered to offset value of unmatured policy).

⁷⁵ Lion White Lead, Ltd. v. Rogers, 25 C. L. R. 533 (1918) (plaintiff inventor seeks declaration of nullity, that he is not bound to turn over his invention to defendant, because of breach by third person); Crofts v. Stewart's Trustee, [1929] Sess. Cas. 891 (Scotland) (plaintiff vendee claims release from purchase, because defendant vendor claimed right to reserve minerals).

⁷⁶ Hadham Rural Dist. Council v. Crallan, [1914] 2 Ch. 138 (municipal cor-

Release from an asserted obligation or threatened demand may be sought on the ground that there was a defect in form in contracting the obligation,⁷⁷ or that for some other reason it was void or became unenforceable by law.⁷⁸

In *Handover v. Langman*, Judge Long-Innis said:

“ There is no doubt that in the case of a transaction void at law, but where the defect does not appear on the face of the instrument, the party desiring to defeat the instrument is not bound to wait until it is used against him, but may anticipate that danger and institute a suit in equity for an appropriate declaration and to have the instrument delivered up to be cancelled.”⁷⁹

A similar legal situation is involved in cases where a duty is imposed by contract or law and the plaintiff contends that a change in conditions has rendered it inequitable or improper to exact the performance of the duty.⁸⁰

poration claims release from liability to supply water to defendant, because of change of user); *Smith v. Wood*, [1929] 1 Ch. 14 (guarantor claims release from guaranty, because one of several joint guarantors had been released); *Saunders v. Baker*, [1916] N. Z. 1137 (guarantor of interest on mortgage claims that bankruptcy of mortgagor has discharged the guaranty).

⁷⁷ *Rice v. Franklin Loan & Finance Co.*, 82 Colo. 163, 258 Pac. 223 (1927) (that plaintiff's note and chattel mortgage are void because of usurious interest violating statute); *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300 (because promisee was a money-lender not registered); *Chapman v. Michaelson*, [1908] 2 Ch. 612, [1909] 1 Ch. 238; *Schnelle v. Dent*, 35 C. L. R. 494 (1924) (that plaintiff's bills of sale and mortgages were void); *Handover v. Langman*, 29 N. S. W. 435 (1929), *rev'd*, 43 C. L. R. 334 (1929) (claim that mortgages given to money-lender defendant were void).

⁷⁸ *Leonard v. Leonard*, 201 N. Y. Supp. 113 (1922) (that plaintiff's acceptance of notes from defendants was void, because beyond defendants' power to execute. Denied); *York Corp. v. Henry Leatham & Sons, Ltd.*, [1924] 1 Ch. 557 (plaintiff's agreement alleged *ultra vires*); *Barnes v. Cadogan Developments, Ltd.*, [1930] 1 Ch. 479 (that vendee, owing to variations in description and unknown conditions, was privileged to repudiate); *Bacchus Marsh Concentrated Milk Co. v. Nathan*, 26 C. L. R. 410 (1919) (that defendant could not enforce certain covenants against plaintiff); *Life Ins. Co. of Australia Ltd. v. Phillips*, 36 C. L. R. 60 (1925) (that policy void for ambiguity. Denied); *Ball v. Stevenson*, [1925] N. Z. 616 (mortgage and bill of sale invalid for lack of consideration).

⁷⁹ 29 N. S. W. 435, 437, 438 (1929), *rev'd*, 43 C. L. R. 334 (1929), on the ground that the plaintiff must offer to return the amount borrowed, as a condition of having the mortgage declared void.

⁸⁰ *Manchester Corp. v. Audenshaw Urban Dist. Council*, [1928] 1 Ch. 127, 763.

Building and Other Contractual Restrictions on the Use of Land

It is not uncommon that restrictions in deeds or long-term contracts become burdensome and perhaps inappropriate, due to the changes wrought by time and circumstance. The parties to the instruments containing such restrictions can not safely undertake to violate or disregard them, however, without some judicial assurance that their view of the present impropriety or desuetude of such old restrictions is maintainable. Equity will enforce such restrictions, at the behest of the beneficiary, when their violation is threatened, and, in the action for enforcement, will determine whether they are still binding. But equity will not, at the behest of the burdened party, short of his taking positive action to disregard the restriction, determine the validity of the restriction; it thus leaves him in suspense and under the necessity either of observing the restriction or of incurring forfeiture, ejectment, and damages, in order to test his right to release therefrom. This was well brought out in the very recent case of *Hess v. Country Club Park*,⁸¹ in which the California Supreme Court, referring to the earlier case of *Strong v. Shatto*, said:

“The doctrine that equity will not enforce restrictions on the use of property, we think, only applies to cases where it is sought to enforce such restrictions by equitable proceedings, where the reason and justification for them has failed through changed conditions. In other words, under such circumstances a court of equity may deny the relief sought. But the rule does not go to the extent of permitting parties whose land is subject to the legal restraint of such limitations to bring action to quiet their title against such contractual obligations, because of changed conditions. Contractual obligations do not disappear as circumstances change. It is only the granting of equitable relief, and not the binding force of the restrictive covenant, that is affected by a change in the conditions. . . . As there has been no breach of the conditions here, and no attempt to enjoin such a breach or to enforce a forfeiture, we think it premature, at least, to determine the equities of the parties as they might exist at some future time in the event of such breach.”⁸²

But the action for a declaratory judgment has accomplished the important result that it enables a covenantor, without prior

⁸¹ 2 Pac.(2d) 782 (Cal. 1931). See case below, 296 Pac. 300 (1931).

⁸² 45 Cal. App. 29, 37, 38, 187 Pac. 159, 162-63 (1919).

breach of the restriction and the resulting risks, to seek and, if proper, obtain a declaration of his privilege to depart from the restriction, because of a change in circumstances or because it is for any other reason no longer deemed binding. The power of "any person interested under a deed, will, or written instrument, or under a contract, or who desires a declaration of his rights or duties with respect . . . to, in, over, or upon property," in case of actual controversy, to "bring an action . . . for a declaration of his rights and duties in the premises,"⁸³ enables the plaintiff to "proceed thereunder and to have his status declared under the conditions as were then shown to exist, and this, notwithstanding the old rule which required him to be hazardously active in the breach of such restrictions and passive in litigation."⁸⁴

The California Supreme Court expressed its appreciation of the declaratory form of relief in such cases of doubt, fear, dilemma, and controversy, in the following words:

"The pleadings in this case present a practical situation which calls for declaratory relief. The owner of a lot in a tract of land claims that certain restrictive covenants and conditions are no longer enforceable because of a change in the character of the neighborhood. The original grantor and the owners of other lots in the tract claim, on the contrary, that the covenants and conditions are still enforceable, that they constitute easements upon the lot in question, and that their violation will be ground for injunctive relief and the forfeiture of the lot owner's title. If the lot owner can obtain a declaration in his favor, he may safely proceed to improve his property as he wishes. If such a declaration is refused, he is put in the hazardous position of being obliged to violate the terms of the restrictions before he can know whether or not he must suffer the penalties mentioned. It is inconceivable that he must run the risk of forfeiting any further investment, or even his title to the land, in order to obtain an adjudication of his rights. It seems clear that the declaratory relief statute was intended to relieve a party from exactly such a dilemma."⁸⁵

⁸³ This is the wording of the Cal. Act of 1921; § 1060, C. C. P. The Act provides, to make assurance certain, that "such declaration may be had before there has been any breach of the obligation."

⁸⁴ Concurring opinion of Shenk, J., in *Strong v. Hancock*, 201 Cal. 530, 554, 258 Pac. 60, 70 (1927), quoted with approval by Waste, C. J., in *Hess v. Country Club Park*, 2 Pac.(2d) 782, 783 (Cal. 1931).

⁸⁵ 2 Pac.(2d) at 783.

The situation usually arises between grantee and grantor or vendee and vendor, the former desiring either to build on or otherwise to enjoy his land free from the restrictions imposed by the deed or contract. In *Evangelical Lutheran Church v. Sahlem*,⁸⁶ only one of many defendants held out against the claim of the church that it was free to build a church in disregard of a restriction limiting the use of the land to residential purposes. The church had, in fact, begun to break ground on the strength of its belief in the righteousness of its conduct, but, affected by growing doubts, thought it safer to sue the recalcitrant covenantee for a declaration of its privilege. In the court below its claim was sustained. In the Court of Appeals, however, Chief Judge Cardozo for the court, in denying the claim, commended its caution in proceeding first to secure a declaratory judgment before incurring the wasteful and unnecessary expense and damages which the further prosecution of the proposed plan for the church building would have entailed. He added:

“Here is no case of irreparable hardship, shocking to the conscience, as where a mandatory injunction would destroy a finished building to vindicate a doubtful right. . . . Here is a case where the building is yet a plan, the work on it preliminary, the outlay unsubstantial, the act to be absolved still waiting for the doer. His path has been made easy by a judicial declaration that the wrong may go on without annoying interference.”⁸⁷

In the rapid expansion of cities in the twentieth century and the change of neighborhoods from residential to business and of the construction of apartment dwellings for private houses, it is quite common for covenantors to claim the privilege of building structures of a type different from that required in a restrictive covenant. The declaratory judgment has been praised by courts as “the most inexpensive and expeditious method of adjusting the dispute.”⁸⁸

In such cases the plaintiff must usually make the issue concrete

⁸⁶ 254 N. Y. 161, 172 N. E. 455 (1930).

⁸⁷ *Id.* at 169, 172 N. E. at 458.

⁸⁸ *Brown v. Levin*, 295 Pa. 530, 145 Atl. 593 (1929), where the plaintiff, owner of a corner lot, who was restricted against building within 25 feet of the street, successfully sustained his privilege of building within 25 feet of the side street, for otherwise the lot would have been rendered useless to him.

and definite, thus evidencing the actuality of the controversy, by stating in his complaint, and, if necessary, proving, his intention and proposal to build a specific type of building and that such a building escapes, or if he so contends, conforms to, the restrictions contained in the covenant,⁸⁹ or that the covenant itself is void or has become invalid.⁹⁰ A breach of contract, trespass, forfeiture, ejectment, or a stoppage of private or public improvements is thereby avoided.

The action may also arise in the form of a petition by the covenantee for a declaration that the restrictions are valid and that the proposed threat of the defendant to disregard them is unlawful.⁹¹ While injunction might in some of these cases lie, the risk of failing to meet the necessary conditions of an injunction, the

⁸⁹ *One and Three South William Street Bldg. Corp. v. Gardens Corp.*, 133 Misc. 790, 233 N. Y. Supp. 473 (1929), 232 App. Div. 58, 248 N. Y. Supp. 743 (1931); *Garvin & Co., Inc. v. Lancaster County*, 290 Pa. 448, 139 Atl. 154 (1927) (that plaintiff is privileged to build 4- and 6-story buildings on the land, notwithstanding defendant's easement of light and air. Held, for defendant, but plaintiff held privileged to build 2-story building); *Hoffman's Petition*, 7 D. & C. 88 (Pa. 1925), held, for defendant. In *Assets Co. v. Ogilvie*, 24 R. 400, 34 S. L. R. 195, 4 S. L. T. 195 (1896), the declaration granted limited the declaration sought by restricting the plaintiff to certain types of houses.

⁹⁰ *Strong v. Hancock*, 201 Cal. 530, 258 Pac. 60 (1927) (purchaser at foreclosure claims declaration that restrictions, breach of which would work forfeiture, were cleared by the foreclosure); *Hess v. Country Club Park*, 2 Pac.(2d) 782 (Cal. 1931); *Village of Grosse Pointe Shores v. Ayres*, 235 N. W. 829 (Mich. 1931) (that conditions imposed by defendant in deed to plaintiff, relating to telegraph poles, water system, etc., were void); *Vogeler v. Alwyn Improvement Corp.*, 247 N. Y. 131, 159 N. E. 886 (1928), *rev'g* 220 App. Div. 829, 222 N. Y. Supp. 918 (1928) (that restrictions in deed creating easement in defendant's favor are not enforceable. Held, for defendant); *McCarter v. New Rochelle Homestead Co.*, 139 Misc. 672, 249 N. Y. Supp. 23 (1931) (that defendant vendor, no longer owning property in neighborhood, has no interest in maintenance of restrictions. So held); *Barmack v. Barwick*, 8 D. & C. 479 (Pa. 1926) (where plaintiff seller relieved his own doubts and the fears of a title guaranty company and the refusal of defendant purchaser to take title without such guaranty, by declaratory judgment that a covenant of 1814 deed restricting building to three-story brick was personal only and did not run with land).

⁹¹ In *Bristol v. Woodward*, 251 N. Y. 275, 167 N. E. 441 (1929), the plaintiff grantor of several plots sold to *A* and *B* restricted their resale by *A* and *B* to 1/2-acre lots, but on a sale to *C* restricted resale to 1/4-acre lots. On *C*'s threat to subdivide accordingly, *B* gave notice of protest and resistance, whereupon the original grantor successfully sued all the grantees for a declaratory judgment that he was privileged to differentiate in the restrictions placed on *A*, *B*, and *C*. In *Ives v. Brown*, [1919] 2 Ch. 314, plaintiff sought a declaration that the defendant had no right to violate building restrictions on the defendant's property.

cost of a bond, and the consequences of broken economic relations are avoided by an action the sole purpose and effect of which is to clarify a doubtful, uncertain, and challenged legal relation and to stabilize it before damage has been done.

Peril in Lease Relations

Among the most common cases of contractual relations in which the declaratory judgment has proved efficacious are those arising out of long-term leases. A common clause in such leases is the restriction of the right of the lessee to assign or sublet without the landlord's consent, which, it is often added, shall not be unreasonably withheld. Whether the word "unreasonably" is included or not, the arbitrary refusal of the landlord to grant consent or the imposition of unusual conditions upon the grant, gives rise to a dispute between the parties as to whether the consent was lawfully withheld or the conditions lawfully imposed. The lessee could, if he thought the consent improperly withheld, make the sublease notwithstanding, thus incurring the risks of two lawsuits — one against himself for forfeiture and damages, and one against the subtenant for trespass and ejectment. It is, moreover, probably doubtful whether a subtenant would care to buy a lawsuit. If the lessee wished to sue the landlord for damages for arbitrary refusal of consent, he would usually have to move out to maintain the action advantageously. The awkwardness of any of these solutions is apparent. A way out of the deadlock is afforded by an action for a declaratory judgment that the plaintiff lessee, having a subtenant willing to take, is privileged to assign or sublet without the consent of the landlord, under the circumstances of the case.⁹² In such cases, the plaintiff

⁹² Mr. Carmody, in his *NEW YORK PRACTICE* (1923) § 304, thus describes a parallel case under the procedure as it existed before the declaratory judgment was available in New York: "Plaintiff, desiring to assign the lease to W and being unable to get the landlord's consent, assigned to W without it, but the sublease was conditioned upon the undisputed and undisturbed possession of W for a period. W went into possession. The landlord gave notice of termination of the lease, rejected W as a tenant and notified W that the supply of steam and hot water would be discontinued. W vacated the premises, the tenant resumed possession. He refused to pay rent. The landlord brought this summary proceeding to recover possession of the premises. The tenant counterclaimed in the summary proceeding

may or may not obtain the exact declaration requested.⁹³ In either case, the cloud on the respective rights of the parties has been removed before the fatal step has been taken of acting on one's own belief or supposition, and the parties may proceed in the assurance that they are within their legal rights, as conclusively determined by a court. The privilege to sublet without consent may be challenged by a sublessee, actual or potential, who questions the privilege or power of his lessor defendant, as in the case of a purchaser of a lease from a bankrupt sublessee.⁹⁴

The validity of a lease may be challenged by third parties before action has been taken under it. This cloud, also, may most appropriately be removed by declaratory judgment. In an interesting Arizona case, the validity of a lease with a city was challenged by a taxpayer and city officials, thus casting a cloud on the lessee's rights and placing in jeopardy extensive improvements about to be made on the leased premises. The Arizona Supreme Court said:

"It would seem, in view of the improvements contemplated [\$300,000], their extent and the cost thereof, that plaintiff should, if possible, be assured that the lease is valid before making improvements. The building proposed to be constructed will become a part of the realty, and, should the lease be void or invalid and voidable, the investment

for damages sustained through the landlord's breach of this covenant of the lease by refusing to give his consent to the subletting. The jury returned a verdict in favor of the tenant in the sum of \$7,045.19." *Broadway and Ninety-fourth Street, Inc., Landlord v. C. & L. Lunch Co., Tenant*, 116 Misc. 440, 190 N. Y. Supp. 563 (1921).

⁹³ *General construction of the right to sublet*: *Marcel, Inc. v. Sol & S. Marcus Co.*, 175 N. E. 83 (Mass. 1931); *Butterick Pub. Co. v. Fulton & Elm Leasing Co., Inc.*, 132 Misc. 366, 229 N. Y. Supp. 86 (1928); *Klein's Rapid Shoe Repair Co., Inc. v. Sheppard Realty Co., Inc.*, 136 Misc. 332, 241 N. Y. Supp. 153 (1929).

No reason for refusal of consent shown: *Cornish v. Boles*, 19 D. L. R. 447, (1914). *Right to sublet not personal*: *Foreman Automobile Co. v. Morris*, 198 Ky. 1, 248 S. W. 486 (1922); *Francis v. Ferguson*, 246 N. Y. 516, 159 N. E. 416 (1927). *Refusal based on the nationality of the sublessee*: *Mills v. Cannon Brewery Co., Ltd.*, [1920] 2 Ch. 38; *Lempriere v. Burghes*, [1921] N. Z. 307.

Effect of lessee's bankruptcy: *In re Farrow's Bank, Ltd.*, [1921] 2 Ch. 164. *Refused by lessor's successor*: *In re Winfrey and Chatterton's Agreement*, [1921] 2 Ch. 7. *Refusal to lose good tenant*: *Houlders Bros. & Co. Ltd. v. Gibbs*, [1925] 1 Ch. 198.

Judgment for the defendant: *In re Robert Stephenson & Co., Ltd.*, [1915] 1 Ch. 802; *In re Connor*, 30 N. Z. 437 (1911).

⁹⁴ *In re Robert Stephenson & Co., Ltd.*, [1915] 1 Ch. 802.

would be a total loss to the plaintiff. When the validity of the lease is challenged on the ground of lack of power in the city to make it, or the incapacity of the plaintiff to make the contract, or any of the other grounds urged, safe and sound business demands that such questions be settled before the expenditure of so large a sum as \$300,000, and such questions should be settled as early as convenient, because the covenant to pay the stipulated monthly rental begins at the commencement of the lease, to wit, July 19, 1929."⁹⁵

The privileges and duties connected with renewal of leases give rise to similar doubts and fears. Before the expiration of a lease, containing an option to renew or purchase, lessor and lessee may find themselves in dispute as to the right to renew or purchase, or to exercise the right under given conditions or at a certain time. The conflict throws into doubt and uncertainty the rights of both parties when later the lease expires or the option becomes exercisable, and it becomes important to know immediately whether the right to renew or purchase exists or not. Present peace of mind and social security often require that future rights under contract be clarified when thrown into doubt. For the dissipation of these clouds, the declaratory judgment has proved an efficacious instrument. In the case of *New Plymouth Borough Council v. Bonner*,⁹⁶ Judge Smith remarked, "where parties to a lease desire to ascertain in advance the proper construction of the right of renewal, an appropriate procedure is the issue of an originating summons for the purpose. . . ." They thereby avoid not only breaches of the lease, but often torts as well. Lessees usually claim, against a lessor who threatens to sell or otherwise to disregard their privilege of renewal or purchase at or before the expiration of the lease, that the privilege still exists and can not be disregarded.⁹⁷

⁹⁵ *Woodward et al. v. Fox West Coast Theaters*, 36 Ariz. 251, 255, 284 Pac. 350, 351 (1930).

⁹⁶ [1929] N. Z. 217, 219.

⁹⁷ *Renewal rights under administrative leases*: *Tinkler v. Public Trustee*, 28 N. Z. 238 (1909) (duties as binding on Public Trustee); *Williamson v. Auckland Hospital & Charitable Aid Board*, 33 N. Z. 1048 (1914) (administrative powers, effect of change of statutes); *St. Leger v. Marsh & Attorney-General*, [1917] N. Z. 365 (effect of change of statutes); *Lethbridge v. Otago Land Board*, [1929] N. Z. 833 (administrative procedure).

Other renewal problems: *Edwards et al. v. Bernstein*, 238 Ky. 38, 21 S. W.(2d) 133 (1929), 36 S. W.(2d) 662 (1931) (rent); *Leibowitz v. Bickford's Lunch Sys-*

On the other hand, the lessor, desiring to sell or reënter — though the lessee has claimed in opposition the privilege of renewal or purchase under option — may himself bring an action for a declaratory judgment that the lessee has no right to exercise the claimed option,⁹⁸ or that he has lost it,⁹⁹ or that he has no right to hold over after expiration of the lease.¹⁰⁰ Or the controversy may turn on the terms and conditions of renewal, such as the period of renewal, the rent to be paid, the method by which the rent is to be fixed or determined.¹⁰¹

tem, 241 N. Y. 489, 150 N. E. 525 (1926) (competing option); Aaron v. Woodcock, 283 Pa. 33, 128 Atl. 665 (1925) (term); Southern Style Shops v. Mann, 157 Tenn. 1, 4 S. W.(2d) 959 (1928) (second lease involved).

Problems of options to buy: Savin v. Delaney, 229 Ky. 226, 16 S. W.(2d) 1039 (1929) (competing option); *In re Leeds & Batley Breweries Ltd.*, and Bradbury's Lease, [1920] 2 Ch. 548 (holding-over tenant claims); Sherwood v. Tucker, [1924] 2 Ch. 42 (continued existence claimed); Southee v. Finnis, [1917] N. Z. 341 (notice given, or continued existence, claimed); Stannard v. Nicholas, [1920] N. Z. 78 (notice of exercise, or continued existence, claimed).

⁹⁸ Renewal problems. *Failure to exercise:* Braun v. Leo G. MacLaughlin, 93 Cal. App. 116, 269 Pac. 191 (1928) (asserted by successor to title); Murray Motor Co. v. Overby, 217 Ky. 198, 289 S. W. 307 (1926) (failure to meet higher rent); Fidelity & Columbia Trust Co. v. Levin, 128 Misc. 838, 221 N. Y. Supp. 269 (1927) (lease to third person, validity of notice); Spector v. Bonwit, Teller & Co., 10 D. & C. 101 (Pa. 1928) (time for notice). See also Budge v. Bayly, 31 N. Z. 97 (1912) (renewal affected by subsequent statutes); Loughnan v. Jamieson, [1928] N. Z. 298 (effect of failure to take required valuation proceedings).

⁹⁹ Renewal problems. *Denial of existence:* Raynolds v. Browning, King & Co., 123 Misc. 367, 205 N. Y. Supp. 748 (1924) (termination of trust asserted by devisees under will); Gray v. Spyer, [1921] 2 Ch. 549, [1922] 2 Ch. 22 (perpetual option to renew denied by grantor's successor).

Option to buy problems. Denial of existence: Ohio-Kentucky Coal Co. v. Auxier, 39 S. W.(2d) 662 (Ky. 1931) (denied by successor in title of alleged grantor); Rider v. Ford, [1923] 1 Ch. 541 (exercise after holding over denied).

¹⁰⁰ *In re Joel's Lease*, Berwick v. Baird, [1930] 2 Ch. 359. Here the lessor denied that the lessee had a "holding" within the meaning of a statute giving special privileges as to holding over.

¹⁰¹ *Term:* Aaron v. Woodcock, 283 Pa. 33, 128 Atl. 665 (1925) (10 years v. year to year); *Re Jackson & Imperial Bank of Canada*, 39 Ont. L. R. 334 (1917) (perpetuity v. 25 years).

Rent questions: Rosenblatt v. Surprise Building Co., 223 App. Div. 426, 228 N. Y. Supp. 369 (1928) (abatement claimed for loss of vault license); New York Business Buildings Corp. v. James McCutcheon & Co., 229 App. Div. 681, 243 N. Y. Supp. 255 (1930), *aff'd*, 257 N. Y. 554 (1931) (liability for rent); Southern Style Shops v. Mann, 157 Tenn. 1, 4 S. W.(2d) 959 (1928) (right to renew on same terms as other lessee had given); Bodega Co., Ltd. v. Read, [1914] 2 Ch. 283, 757 (right to certain reductions under statute); Firth v. Halloran, 38 C. L. R.

So the lessee — seeking to avoid the risk of forfeiture or damages — may claim other privileges under the lease or deny the lessor's right to act as he threatens, or to forfeit the lease. Thus, the lessee, claiming a new or different privilege not mentioned in the lease, may assert — against the opposition of the lessor — the privilege of demolishing the old building without incurring forfeiture,¹⁰² the privilege of taking certain steps under the lease,¹⁰³ or that the lessor has no right to bar the lessee from exercising the claimed privilege¹⁰⁴ or to cancel the lease,¹⁰⁵ or even that

261 (1926) (liability for rent in case of conflicting leases); *Gisborne Harbour Board v. Barker & Barker*, 29 N. Z. 801 (1909) (duty to accept renewal prior to fixing of rent).

Valuation questions: *United Cigar Stores of America v. Norwood*, 124 Misc. 488, 208 N. Y. Supp. 420 (1925) (basis: rent value v. land value); *New Plymouth Borough Council v. Bonner*, [1929] N. Z. 217.

¹⁰² *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930) (lessee claims privilege of demolishing a building and erecting a new one, and of using it for other than theater purposes); *cf. Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274 (1928), in which, under ordinary procedure, the plaintiff was in effect told that he must tear down the building and risk the forfeiture of 99- and 198-year leases, in order to secure a decision on the issue whether he was privileged to demolish and rebuild.

¹⁰³ *Foreman Automobile Co. v. Morris*, 198 Ky. 1, 248 S. W. 486 (1922) (that he was privileged to assign, without forfeiture); *In re Dott's Lease*, [1920] 1 Ch. 281 (that increase in admission price is no breach); *Premier Dairies, Ltd. v. Garlick*, [1920] 2 Ch. 17 (that plaintiff lessee is privileged to remove certain buildings which he had erected); *Cronholm v. Cole*, [1928] 2 D. L. R. 65 (that plaintiff had not breached lease, and was relieved from forfeiture); *R. G. Z. 41*, 345 (1898) (that lessee privileged to hunt).

¹⁰⁴ *Equitable Gas Co. v. Smith*, 13 D. & C. 616 (Pa. 1929) (the plaintiff assignee of a lease of the oil and gas rights sought a declaration that the defendant, who claims the title to the land, had no right to exclude the plaintiff from drilling, because the oil rights were reserved by the original grantor, through whom both parties claim).

McFadden v. Lick Pier Co., 101 Cal. App. 12, 281 Pac. 429 (1929) (that the lessor has no lien upon lessee's furniture brought into the building). Under the old procedure, such a case would develop as follows: The lessor, learning that his tenant is about to move out — claiming that privilege under the lease — seizes the lessee's furniture. The lessee then may bring an action for replevin, furnishing heavy bond, in order to get his furniture. That suit will not determine his right to move out under the lease. A second action will be necessary for that, the two actions consuming, in a city like New York, possibly two years. The expense, the long suspense with the contingent liability of lessee for rent or of lessor for damages, do not commend this action as expedient. *Cf. Bentz v. Barclay*, 294 Pa. 300, 144 Atl. 280 (1928).

¹⁰⁵ *British Columbia Thoroughbred Ass'n, Ltd. v. Brighthouse & Brighthouse Park*,

a past act of his, attacked by the lessor, was lawful, and that the consequent threat of forfeiture is without merit.¹⁰⁶

On the other hand, the lessor, bothered by the lessee's claim of continued rights under the lease, may sue to establish his privilege of letting the premises to a third party under the circumstances,¹⁰⁷ or not to lease to the defendant,¹⁰⁸ or to terminate the lease,¹⁰⁹ or to reënter,¹¹⁰ or to distrain for rent,¹¹¹ or to establish the defendant lessee's no-right to do certain things, such as to cut or sell timber or to remove fixtures.¹¹²

In some of these cases an injunction might have lain, and in the proceedings the rights of the parties might have been determined and declared; in others, an injunction would have been impossible. What the declaratory judgment of the court effected was relief from uncertainty, risks, and insecurity; and by stabilizing the legal relations between the parties, the court made possible the continued execution, in peace and concord, of a contract — a social instrument of value to both parties and to society at large. The contest between them was in these cases just as vigorously

Ltd., 31 B. C. R. 381 (1922) (no-right to cancel the lease and relet to other defendant).

¹⁰⁶ That plaintiff lessee was not subject to forfeiture of lease for non-payment of rent, forced by lessor's re-entry. *Suttie v. Te Winitana Tupotahi*, 33 N. Z. 1216 (1914).

¹⁰⁷ *Murray Motor Co. v. Overby*, 217 Ky. 198, 289 S. W. 507 (1926) (on ground that defendant lessee had refused to pay higher rent [in accordance with lease] when it was obtainable from a third party).

¹⁰⁸ *Bakker v. Winkler*, [1929] 4 D. L. R. 107 (that prospective lessor under no duty to grant lease, inasmuch as contract was discharged); *Bernard Hughes, Ltd. v. Hughes, Dickson & Co., Ltd.*, [1923] 1 Ir. R. 121 (whether, under indenture, plaintiffs were bound to execute lease to defendants).

¹⁰⁹ *Raynolds v. Browning, King & Co.*, 123 Misc. 367, 205 N. Y. Supp. 748 (1924) (that the lease had terminated by expiration of the underlying trust); *In re Lancashire & Yorkshire Bank's Lease v. Davis*, [1914] 1 Ch. 522 (that lessor may terminate lease at date earlier than defendant lessee admits). Conversely, the lessor may sue to establish the invalidity of lessee's notice to terminate. *Simons v. Associated Furnishers, Ltd.*, [1931] 1 Ch. 379.

¹¹⁰ *Kenmont Coal Co. v. Hall*, 40 S. W.(2d) 301 (Ky. 1931); *Fidelity & Columbia Trust Co. v. Levin*, 128 Misc. 838, 221 N. Y. Supp. 269 (1927) (claims right to possession, because defendant has failed to renew lease).

¹¹¹ *In re Wells*, [1929] 2 Ch. 269.

¹¹² *Horlick v. Scully*, [1927] 2 Ch. 150 (lessor sues to fix lessee's duty to maintain grounds); *Speyer v. Phillipson*, [1931] 1 Ch. 183 (lessor sought to establish lessee's no-right to remove antique panels built into an apartment); *In re Rotoiiti*, No. 5B. Block, [1923] N. Z. 619.

conducted before breach as it would have been after breach, but the unhappy results of a breach have been avoided for both parties by a determination of the issue before damage or violence was done.

Debtor v. Creditor

It frequently happens that a debtor, subject to an actual or potential demand of a creditor which he believes unwarranted, wishes and needs to relieve his anxiety and uncertainty by securing a definition of his obligations to his creditor. A useful social service is performed by the courts in the clarification of the doubtful legal relations thus posited, by permitting the debtor to institute the action, either claiming absolution from or a limitation of liability, or seeking a conclusive definition of the terms or conditions of the debt. While he may thus be anticipating a defense to an enforcement proceeding brought by the creditor, it often becomes exceedingly important to clarify the debtor-creditor relation before the debt, if any, becomes due or before the creditor may see fit to institute an action. The law has long been familiar with the admiralty and other actions for the limitation of a debtor's own liability. A common method of achieving that result with respect to all types of claims is by a proceeding for a declaration of limited liability. These cases make it clear that it is immaterial to the question of justiciability whether creditor or debtor commences the action.¹¹³

When several creditors make demand upon a debtor for the same debt, it is natural that he should seek protection from multiple liability by asking for a declaratory judgment. This is the foundation of the equitable interpleader; the desired result is usually obtained more expeditiously by an action for a declaration of rights. Stakeholders, including executors and others, uncertain as to how and to whom funds are to be dispensed, commonly resort to the declaratory judgment for authoritative judicial instruction, determination, and protection. Receivers and others frequently

¹¹³ Said the United States Supreme Court in *Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U. S. 123, 131 (1927): "[The issues] cannot be deemed any the less so [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," the city seeking a declaration that certain improvement bonds were valid.

have occasion to question the rank or priority of claims made upon a trust estate, and settle the issue by instituting a proceeding for a judgment declaring the priorities. By obtaining an authoritative determination of the issue before action upon his own view may have become prejudicial, the plaintiff avoids the breach of a contract or the commission of a tort, and possibly even of a crime. The resolution of his own doubts and the fears of others has quieted an uncertain legal relation and served as an instrument of preventive relief and social appeasement.

Thus, a debtor may sue for a declaration that an alleged creditor has no claim upon him.¹¹⁴ To receivers and fiduciaries dealing with trust funds, distributable in the course of or after the liquidation of claims, this opportunity of determining the validity of claims against the trust estate or the proper beneficiaries of a distribution is indispensable.¹¹⁵ The device applies equally to situations in which not the validity but the amount of the indebtedness is placed in issue.¹¹⁶

¹¹⁴ *Cloverdale Union High School District v. Peters*, 88 Cal. App. 731, 264 Pac. 273 (1928) (that defendant has no right to claim salary under alleged contract); *Redebiaktiebolaget Argonaut v. Hani*, [1918] 2 K. B. 247 (that defendant alleged undisclosed principal has no standing or claim); *St. Catharines v. H. E. P. Commission*, [1928] 1 D. L. R. 598, [1930] 1 D. L. R. 409 (plaintiff city claims declaration of no duty to pay defendant road builders); *Wellington City Corp. v. Compton*, [1916] N. Z. 779 (that plaintiff is not under duty to make compensation to defendant for improvements); *Reicharbeitergericht, March 1, 1930, Bensheimer IX, 31* (employer seeks declaration that defendant employees who have not appeared against him have no further claim against him).

¹¹⁵ *Kendall v. San Pedro Lumber Co.*, 98 Cal. App. 242, 276 Pac. 1042 (1929) (that plaintiff trustee does not owe defendant creditor a certain sum); *In re Francke & Rasch*, [1918] 1 Ch. 470 (custodian seeks declaration of his duty to accept claims against enemy); *In re North Eastern Ins. Co.*, [1919] 1 Ch. 198 (receiver seeks declaration of non-existence of certain claims of debenture holders, because debentures void). See also *In re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466; *R. G. Z.* 116, 368 (1927) (plaintiff receiver asks declaration that defendant State has no claim for taxes, or, in alternative, that it is not a preferred creditor).

¹¹⁶ *Bankers Trust Co. v. Greims*, 110 Conn. 36, 147 Atl. 290 (1929) (executor seeks declaration as to how much of the estate he must set aside by reason of husband's election to take under statute in lieu of will); *In re National Benefit Assur. Co., Ltd.*, [1924] 2 Ch. 339 (receiver of insurance company seeks to establish extent of claim of policyholders who have pledged their policies for advances. He fears future claims against company, hence desires present protection by judgment); *Manley v. Sartori*, [1927] 1 Ch. 157 (executor of one partner sues executor of another to determine latter's rights in profits since dissolution of partnership by death); *In re Aschrott, Clifton v. Strauss*. [1927] 1 Ch. 313 (administrator seeks

In the celebrated case of *Guaranty Trust Co. v. Hannay & Co.*,¹¹⁷ the plaintiffs brought an action for "a declaration that the plaintiffs are not liable to repay to the defendants any sums paid by them."

Actions in which the plaintiff debtor, in contract, quasi-contract, or tort, seeks to limit his liability, whether or not he admits some liability, are well known. In admiralty, after the injured person has instituted an action, the shipowner may by statute in most jurisdictions bring an independent action for the limitation of liability. In England, it is common practice to bring actions for a declaration that the plaintiff is not liable to the defendant beyond a certain sum.¹¹⁸ So, in Germany, a lessee brought an action against his lessor for a declaration that his annual rent was limited to a certain sum.¹¹⁹

Instead of resorting to the somewhat cumbersome action of interpleader, a debtor, receiver, or stakeholder, admittedly owing money but not certain to whom to pay or distribute the fund in his hands, may seek, by declaratory judgment against the conflicting claimants, to determine who is the proper payee or distributee. He is thereby protected against his own possible mistake in paying the wrong person, and he protects the payee against all claims of the other creditors. The simplicity of such multipartite actions is not the least of their advantages. The action may be brought against a small number of named creditors,¹²⁰ or, when brought by

declaration of amount of estate duty due from him on securities of German seized partly in England, South Africa, and United States); *In re Dominion Tar & Chemical Co., Ltd.*, [1929] 2 Ch. 387 (receiver sues preferred shareholders for declaration whether he may deduct income tax before paying them dividends in arrears).

¹¹⁷ [1915] 2 K. B. 536; *cf.* *Prescott Ltd. v. Perpetual Trustee Co. (Ltd.)*, 28 N. S. W. 324 (1928).

¹¹⁸ *The City of Edinburgh*, [1921] P. 70; *The Vigilant*, [1921] P. 312; *The Bristol City*, [1921] P. 444; *Donnelly v. Commissioner of Stamps*, 33 N. Z. 79 (1913) (plaintiff seeks declaration that he is liable only for a 5%, not a 10%, tax).

¹¹⁹ R. G. Z. 126, 18 (1929).

¹²⁰ *Snyder v. Taylor*, 88 N. J. Eq. 513, 103 Atl. 396 (1918) (executor versus three legatees); *In re Biedermann, Best v. Wertheim*, [1922] 1 Ch. 31, [1922] 2 Ch. 771 (whether gift to Austrian was forfeited by Treaty of Peace Order and to whom gift now belonged); *In re Neuburger's Settlement, Foreshew v. Public Trustee*, [1923] 1 Ch. 508 (whether legacy payable to English wife of German or to Custodian of Enemy Property); *London & Lancashire Ins. Co., Ltd. v. Fisher*, [1924] N. Z. 1286 (insured having died after bankruptcy, insurer seeks declaration whether to pay personal representative or official assignee).

a receiver or stakeholder, against classes of creditors or claimants,¹²¹ to determine either how to distribute among conflicting groups a specific fund or to determine the particular rank or preference or priority of a given class of named claimants.¹²² The danger incurred by a receiver who pays out funds without asking the preliminary protection of a declaratory judgment or the instruction of the court is illustrated in *In re Windsor Steam Coal Co., Ltd.*,¹²³ where the receiver was held liable personally for an honest mistake in paying a claim to the wrong person. Lord Hanworth remarked that the receiver had "the opportunity of safeguarding himself" and obtaining protection "by going to the Court" for a declaration of his rights, and hence must bear the responsibility of his mistake. The adjudication of his duty in the premises enables the receiver to avoid the commission of a tort against the other creditors.

Among cases involving the terms and conditions of repayment of a debt, a debtor has sued for a declaration that he is privileged to repay the debt, free from a claim for excessive interest,¹²⁴ or that interest runs from a certain date only,¹²⁵ or that the debtors

¹²¹ *In re Welsh Hospital (Netley) Fund, Thomas v. Atty.-Gen.*, [1921] 1 Ch. 655 (whether surplus of wound-up hospital goes back to subscribers or is to be applied *cy pres*); *In re Madame Tussaud & Sons, Ltd.*, [1927] 1 Ch. 657 (how to distribute surplus after liquidation of company. See also *Collaroy Co., Ltd. v. Giffard*, [1928] 1 Ch. 144); *First Garden City, Ltd. v. Bonham-Carter*, [1928] 1 Ch. 53 (corporation seeks against classes of shareholders to determine how surplus is to be applied to arrears of cumulative dividends); *Long Acre Press, Ltd. v. Odham Press, Ltd.*, [1930] 2 Ch. 196 (correct allocation of a dividend among defendant noteholders).

¹²² *In re National Standard Life Assur. Corp.*, [1918] 1 Ch. 427 (receiver of insurance company seeks to determine whether certain policyholders are entitled to certain rank); *In re Fraser & Chalmers, Ltd.*, [1919] 2 Ch. 114 (receiver seeks to determine rights of preferred as against ordinary shareholders to surplus assets. See also *In re Springbok Agricultural Estates, Ltd.*, [1920] 1 Ch. 563); *Dominion Iron & Steel Co. v. Canadian Bank of Commerce*, [1928] 1 D. L. R. 809 (secured creditor having sold security and realized surplus, debtor sues to establish priority among defendant creditors); *Tasman Fruit-Packing Ass'n Ltd. v. The King*, [1927] N. Z. 518 (whether defendant Crown as mortgage creditor entitled to priority over other defendant creditor, assets being sufficient to pay only one); *In re David A. Hamilton & Co. Ltd.*, in liquidation, [1928] N. Z. 419 (rank of different types of claims of defendant creditors).

¹²³ [1929] 1 Ch. 151, 159.

¹²⁴ *Kruse v. Seeley*, [1924] 1 Ch. 136. See also *Brett v. Barr Smith*. 26 C. L. R. 87 (1919) (rate of interest due).

¹²⁵ *In re Agricultural Wholesale Society, Ltd.*, [1929] 2 Ch. 261.

were privileged to repay in rubles rather than in sterling, and were entitled thereupon to get back the bonds given as security.¹²⁶ The last case was unusual in its facts, for the debtors, while prepared to pay in rubles, preferred not to have the bonds back rather than to pay in sterling, and yet wished the question of the medium of payment to be determined without offering to redeem the pledge. This unusual method of anticipatory relief divided the House of Lords, but by a three to two decision they sustained the legitimacy of the proceeding. Lord Dunedin, casting the deciding vote, said: "It is obvious that it is a matter of real importance to the respondents, as guiding their rule of conduct, to know whether the loan is truly a rouble loan or a sterling loan. In the one case, they will probably redeem; in the other case, they will not."¹²⁷

Non-Contractual Privileges

Privileges which the plaintiff claims and the defendant denies are often derived not from contract, or from statute, but from the common law. The attempt to exercise such privileges might, however, result in trespass or other tort, or in the loss of benefits which would prove costly. To avoid such jeopardy, it is easier to bring the challenged privilege to the test, before attempt to exercise it, by hailing into court the disputing defendant and thus securing an authoritative adjudication upon the merits of the issue. And this has frequently been done. Thus a challenged plaintiff has sought a judicial declaration of his privilege to nominate clerics,¹²⁸ to perform religious services in a certain burial ground,¹²⁹ to exclude members of other religious sects from the privilege of interment in a burial ground,¹³⁰ to enter a city hall as a reporter and have access to government offices at reasonable hours,¹³¹ to

¹²⁶ *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, Ltd.*, [1921] 2 A. C. 438.

¹²⁷ *Id.* at 448. See also *id.* at 449.

¹²⁸ *Welch v. Bishop of Peterborough*, 15 Q. B. D. 432 (1885).

¹²⁹ *Wood v. Burial Board of Headingley-Cum-Burley*, [1892] 1 Q. B. 713; *cf.* 13 *Bombay* 548, to officiate as a priest. *Rao*, *Specific Relief Act*, § 42, *Madras*, 1923, at 179.

¹³⁰ *Preston Corp. v. Pyke*, [1929] 2 Ch. 338.

¹³¹ *Journal Printing Co. v. McVeity*, [1915] 21 D. L. R. 81. See also *Hoskyns-Abrahall v. Paignton Urban Council*, [1928] 1 Ch. 671 (right of access to certain burial vaults).

retain his office,¹³² to remove an employee from one department to another.¹³³

Life-tenants or supposed life-tenants whose claims of privilege are denied have occasionally sought judicial declarations of their status and privileges as life-tenants,¹³⁴ of their power to sell a certain estate in the land¹³⁵ or to mortgage or lease land¹³⁶ or to direct the investment of capital.¹³⁷ The determination of these issues in advance of action upon beliefs and assertions of power or privilege saved many a costly mistake.

The beneficiary of a gift or legacy on condition, performance of the condition being disputed by donor, executor, or trustee, and forfeiture threatened, may seek the protection of a judicial declaration that the condition has been substantially performed, or that by taking certain action he would perform it, or that its non-performance is excusable. He thereby obtains a decision before forfeiture can be invoked against him, and in the event that the decision is adverse to his claim, he may still take such action as may be necessary to avoid the threatened forfeiture. The dispute as to the performance of the condition is placed in issue before rather than after the foreclosure, and when it is still remediable.¹³⁸

Many of these claims of privilege arise out of disputes relating to land and the respective rights in land. Thus, a plaintiff has claimed a declaration of his disputed privilege to erect and main-

¹³² *Le Leu v. Commonwealth*, 29 C. L. R. 305 (1921); *Trower v. Commonwealth*, 32 C. L. R. 585 (1923), 34 *id.* 587 (1924).

¹³³ *Reichsarbeitergericht*, R. A. G. 99 (1929), *Bensheimer VII*, 162.

¹³⁴ *In re Constable's Settled Estates*, [1919] 1 Ch. 178.

¹³⁵ *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925) (plaintiff asserts power of conveying title in fee, defendant that he is only a life tenant. Held, for defendant); *In re Knight's Settled Estates*, [1918] 1 Ch. 211 (to sell certain estate and transfer rent charges); *In re Price*, [1929] 2 Ch. 400 (wishing to sell, he seeks declaration determining in whom title was vested).

¹³⁶ *In re Egerton Settled Estates*, [1926] 1 Ch. 574 (privilege to mortgage in certain way).

¹³⁷ *In re Gladwin's Trust*, [1919] 1 Ch. 232.

¹³⁸ *Austen v. Collins*, 54 L. T. R. 903 (1886) (plaintiff legatee who was required to take a certain name and arms, could not obtain the arms, and seeks declaration of substantial compliance with will and release from forfeiture. See also *In re Cole*, [1919] 1 Ch. 218; *In re Marshall*, [1920] 1 Ch. 284); *In re Wilkinson*, [1926] 1 Ch. 842 (gift was to be terminated when beneficiary ceased to live in certain house. After her marriage, she seeks declaration whether, if she went to live elsewhere with her husband, she would forfeit gift).

tain a boundary fence or gates on his land; ¹³⁹ to redeem land sold for taxes; ¹⁴⁰ to buy in land, as a selling mortgagee; ¹⁴¹ to enter on defendant's property in order to remove buildings or fixtures or to erect structures; ¹⁴² to take property by eminent domain. ¹⁴³

The action may take the form of a negative declaration of the defendant's no-right to commit trespass, ¹⁴⁴ to expropriate the plaintiff's land, ¹⁴⁵ to establish a burial ground near plaintiff's land, ¹⁴⁶ to permit his land to slide on the plaintiff's land, ¹⁴⁷ to use park land to widen a street. ¹⁴⁸

Easements. Disputes arising out of continuing claims to the enjoyment of easements, like continuing claims generally, are peculiarly appropriate to determination by declaratory judgment. Not infrequently the owner of the servient tenement initiates the action to have it declared that the defendant has no easement over the plaintiff's land as he claims ¹⁴⁹ or that the terms and conditions of the easement are limited. ¹⁵⁰

¹³⁹ *Petty v. Parsons*, [1914] 1 Ch. 704, 2 Ch. 653 (to maintain gate and fence). See also *Siple v. Blow*, 8 Ont. L. R. 547 (1904); *Lewis v. Wakeling*, 54 Ont. L. R. 647 (1923).

¹⁴⁰ *Standard Trust Co. v. Municipality of Stewart*, 24 Alberta 56 (1929).

¹⁴¹ *Loyal Marlborough Lodge v. Rogers*, 29 N. Z. 141 (1910).

¹⁴² *East Riding of Yorkshire County Council v. Proprietors of Selby Bridge*, [1925] 1 Ch. 841 (plaintiff, wishing to erect school on land approaching bridge, claims right of access); *Pukuweka Sawmills, Ltd. v. Winger*, [1917] N. Z. 81 (plaintiff, who had built tramway on defendant's land, claims privilege to remove it).

¹⁴³ *In re Bradford City Premises*, [1928] 1 Ch. 138 (right to take "an open space of land").

¹⁴⁴ *Levesque v. Spargo*, [1921] N. Z. 1019 (no right to enter on plaintiff's land and cut trees. Dispute as to boundary fence).

¹⁴⁵ *Jackson v. Knutsford Urban Dist. Council*, [1914] 2 Ch. 686.

¹⁴⁶ *Clegg v. Metcalfe*, [1914] 1 Ch. 808.

¹⁴⁷ *Kennard v. Cory Bros. & Co., Ltd.*, [1921] A. C. 521, [1922] 1 Ch. 265.

¹⁴⁸ *Attorney-General v. Sunderland Corp.*, [1929] 2 Ch. 436.

¹⁴⁹ *Colorado & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 Pac. 864 (1924) (defendant's no-right to a spring on or to cross plaintiff's land. See also *Hansford v. Jago*, [1921] 1 Ch. 322; *Siple v. Blow*, 8 Ont. L. R. 547 (1904); *Reach v. Crosland*, 43 Ont. L. R. 209 (1918)); *Vogeler v. Alwyn Improvement Corp.*, 247 N. Y. 131, 159 N. E. 886 (1928) (plaintiff's freedom from defendant's alleged easement—denied); *Long v. Gowlett*, [1923] 2 Ch. 177 (no right to pass over plaintiff's part of river); *Stevens v. National Mut. Life Ass'n*, 32 N. Z. 1140 (1913) (defendant's no-right to easement of light [denied]).

¹⁵⁰ *Kowalski v. Mather*, 112 Conn. 594, 153 Atl. 168 (1931) (term of defendant's easement under grantor's reservation in deed, twenty years, life, or per-

On the other hand, the alleged owner of an easement may claim a declaration of the existence of his easement and of the defendant servient tenant's no-right to interfere with its enjoyment.¹⁵¹ Inasmuch as these are continuing claims the denial of which readily arouses passions, both trespass and possible breach of the peace are avoided by the opportunity to seek a judicial declaration of rights as an alternative to violent assertion and resistance.

Privileges and Immunities as Against the Government

With the ever-greater interference by government in the affairs of private individuals, it often becomes important to the individual to test the validity of the interference, present or proposed, before it is applied or invoked against him. Statute, ordinance, or administrative regulation, with or without penalties for disobedience, may seriously impair individual freedom of action. In both England and the United States, where the remedy of injunction is subject to conditions and limitations of various kinds,¹⁵² the declaratory judgment has become a convenient method of testing the propriety, validity, or constitutionality of administrative ac-

petuity. Held, life); *Barber v. Mayor of Petone*, 28 N. Z. 609 (1909) (whether plaintiff is bound to let defendant enter for purposes of repair).

¹⁵¹ *Litchfield-Speer v. Queen Anne's Gate Syndicate*, [1919] 1 Ch. 407 (no-right to interfere with plaintiff's light); *Westwood v. Heywood*, [1921] 2 Ch. 130 (defendant landowner's no-right to cut off plaintiff's water supply); *Sack v. Jones*, [1925] 1 Ch. 235 (declaration of servient tenant's duty to furnish lateral support); *Gregg v. Richards*, [1926] 1 Ch. 102 (vendee sues vendor to establish existence of right of way).

¹⁵² In addition to the equitable limitations upon injunctions, the issuance of a preliminary injunction is subject to financial burdens. The court may require conditions, such as the promise to pay all the damages suffered by the defendant in case the injunction is finally denied or it may require a bond or a deposit to secure the defendant against injury. *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 192 Fed. 1009 (C. C. S. D. Cal. 1910) (impounding of rates collected in excess of ordinance *and* bond); *City of Amarillo v. Southwestern Tel. & Tel. Co.*, 253 Fed. 638 (C. C. A. 5th, 1918) (rate case, bond to protect subscribers and a deposit paid into court for the same purpose); *Brotherhood of Railway and Steamship Clerks v. Pennsylvania R. R.*, 296 Fed. 218 (E. D. Pa. 1922) (changes in wage scale, bond required); *HUGH, INJUNCTIONS* (4th ed. 1905) §§ 1619-34a. See also *Caldwell, Injunctions Against Crime* (1931) 26 ILL. L. REV. 259; *Dunbar, Government by Injunction* (1897) 13 L. Q. REV. 347; *Frankfurter and Greene, Labor Injunctions and Federal Legislation* (1929) 42 HARV. L. REV. 766; *Lewis, A Protest Against Administering Criminal Law by Injunction* (1894) 33 AM. L. REG. (N.S.) 879.

tion. As a rule, the mere enactment of a statute or ordinance imposing restraints on an individual and implying enforcement by prosecuting officials threatens and hampers the plaintiff's freedom, peace of mind or interest, and creates that justiciability of the issue which sustains a proceeding for an injunction and, *a fortiori*, for a declaratory judgment.¹⁵³

In some cases, however, a more definite threat of administrative action may be necessary to create justiciability. But in either case, it can hardly be supposed that a government official, the legality of whose act is challenged, requires more than a decision on the disputed question of law, and that injunction to restrain or mandamus to command him is anything more than a mere formality. The decision, not the coercive order, settles the dispute. The idea that it is necessary for one branch of the government forcibly to restrain or punish another branch or instrument of the government, in order to achieve respect for the declared law, is anomalous.¹⁵⁴ The simplest way is the best way to bring to judicial determination the challenged validity of governmental action allegedly violating individual rights; and experience has shown that the declaratory judgment serves that purpose admirably. The disadvantage of not having available such form of procedure and relief is illustrated in such cases as *Shredded Wheat Co. v. City of Elgin*,¹⁵⁵ where the plaintiff sought to enjoin as unconstitutional the enforcement of a municipal ordinance which required it under penalty to pay a heavy license tax as a condition of selling in the city a product coming into the city in interstate commerce. The court refused to pass upon the ordinance until

¹⁵³ *Terrace v. Thompson*, 263 U. S. 197 (1923) (Said Butler, J., for the Supreme Court, *id.* at 216: "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"); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926).

¹⁵⁴ Hughes, C. J., in *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10, 18 (1930): "It is not necessary, however, that formal application should be made for such a writ [mandamus], as the District Judge may now proceed to take the action which the writ, if issued, would require."

. So the German Supreme Court: "In the case of the State as defendant the distinction between a declaratory and an executory action is merely a formal one." R. G. Z. March 30, 1931, *Jur. Wochenschr.* v. 60, at 2483; R. G. Z. May 18, 1931, at 3263.

¹⁵⁵ 284 Ill. 389, 120 N. E. 248 (1918).

the plaintiff had purported to violate it by selling its product without paying the tax and until a prosecution for the penalty had been begun. If invalid, said the court, the prosecution would fail and the plaintiff would not be injured; if valid, there was no ground on which its enforcement should be enjoined. To determine whether the law is a trap, whether the offering is mushroom or toadstool, the bait must first be eaten! So Dreiser was unable to obtain a determination against his publishers, the John Lane Co., whether "the Genius" violated the criminal law, until the publishers had actually issued the book, something they declined to do in the face of a possible criminal penalty.¹⁵⁶

The development of the declaratory judgment in actions against the government to place in issue the validity of administrative action has been a matter of slow growth. It had to make its way in England against the older view that a petition of right was the proper means of challenging the validity of governmental action. But necessity created distinctions. In the famous case of *Dyson v. Attorney General*,¹⁵⁷ Dyson asked a declaratory judgment that certain forms issued by the tax authorities and requiring under penalty detailed information as to his property and business were illegal and unauthorized. Over the protests of the attorney general that the proceeding should have been brought by petition of right, the Court of Appeal held that the declaration was proper to test the validity of administrative action and that the petition of right was confined to the demanded conveyance of property or money claims against the Crown. Cozens-Hardy on the Chancery side added: "It is no light matter for the Commissioners to issue broadcast forms which purport to impose obligations which do not exist and which add a threat of a penalty in case of non-compliance. A general declaration is pre-eminently desirable in these circumstances."¹⁵⁸

Lord Justice Farwell remarked in this case: "It would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the

¹⁵⁶ 183 App. Div. 773, 171 N. Y. Supp. 605 (1918).

¹⁵⁷ [1911] 1 K. B. 410, [1912] 1 Ch. 158. See also remarks of Warrington, L. J., in *Burghes v. Attorney General*, [1911] 2 Ch. 139, 156, [1912] 1 Ch. 173.

¹⁵⁸ [1912] 1 Ch. 158, 166.

public aggrieved, without putting himself in the invidious position of being sued for a penalty."¹⁵⁹

It often becomes useful to ask for both a declaration and an injunction; the fear of forfeiting or jeopardizing threatened rights may warrant both. The special value of the declaration lies in the fact that it may be issued and may conclusively determine the rights of the parties, notwithstanding the fact that an injunction may for some technical or practical reason be refused.¹⁶⁰

A case somewhat similar to the *Dyson* case occurred in Australia, where the court issued a declaration that a certain statute — under which a Royal Commission had under heavy penalty for refusal to answer, asked certain questions and required certain documents as to the operation of the plaintiff's sugar business — was partly invalid. The court said:

"In my opinion the jurisdiction of the Court both to make a declaration of right and to grant an injunction is clearly established in any of the following cases: (1) If the Act itself under which the alleged power is claimed is wholly invalid; (2) If the Government instrumentality is attempting to exert under cover of a valid Act powers which are not capable of being conferred on it by the Commonwealth Parliament; or (3) If it is attempting to exert under cover of the instrument creating it, powers which that instrument does not confer."¹⁶¹

Freedom from any governmental requirement which is believed unlawfully to impair the privileges of the individual may likewise be judicially asked in the form of a suit for a declaration of immunity.¹⁶² The plaintiff thus takes the initiative in putting to the

¹⁵⁹ [1911] 1 K. B. 410, 421.

¹⁶⁰ *Erwin Billiard Parlor v. Buckner, Sheriff*, 156 Tenn. 278, 300 S. W. 565 (1927); *Evans v. Manchester, Sheffield & Lincolnshire Ry.*, 36 Ch. D. 626 (1887); *London Ass'n of Shipowners v. London & India Docks*, [1892] 3 Ch. 242; *Attorney-General v. Merthyr Tydfil Union*, [1900] 1 Ch. 516; *Deep Creek Gold Dredging Co. v. Gympie Quartz Crushing Battery Co.*, 8 Queensland L. J. 131 (1897).

¹⁶¹ *Colonial Sugar Refining Co., Ltd. v. Attorney General*, 15 C. L. R. 182 (1912). *Isaacs and Higgins, JJ.*, dissenting, considered that there was no threat to enforce penalties and that the questions had not yet been asked (pp. 222, 226), hence that the issue was not yet justiciable.

¹⁶² *Criminal liability*: *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927) (privilege to carry cigarette advertisements without penalty); *Pathé Exchange, Inc. v. Cobb*, 202 App. Div. 450, 195 N. Y. Supp. 661 (1922), *aff'd*, 236 N. Y. 539, 143 N. E. 274 (1923) (that plaintiff's "news reel" was not subject to cen-

test a governmental action which threatens him with restrictions and often with a criminal prosecution. One of the commonest forms of this type of action is the claim of immunity from the requirement of a license or fee as a condition of doing business.¹⁶³

sorship); *Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 Pac. 1016 (1926) (privileged to conduct horse racing without danger of prosecution).

Validity of statutory or administrative regulations: (1) *Building regulations:* *Faulkner v. City of Keene*, 155 Atl. 195 (N. H. 1931) (privilege to establish a filling station in building zone); *Rosenberg v. Whitefish Bay*, 199 Wis. 214, 225 N. W. 838 (1929) (that statute prohibiting building does not apply to plaintiff); *Todd & Higginbotham v. Burnett*, 16 D. 794, 26 J. 374 (Scot. 1854) (that plaintiff's already built factory was not subject to building restrictions). (2) *Other regulations concerning land:* *Spring Hill Cemetery Co. v. Lindsey*, 37 S. W.(2d) 111 (Tenn. 1931) (that burdens imposed for beautification could not be imposed on plaintiff because statute unconstitutional). (3) *Business free from regulations:* *Jewell Tobacco Warehouse Co. v. Kemper*, 206 Ky. 667, 268 S. W. 342 (1925) (unsustained claim that statute regulating business of warehousemen was unconstitutional); *Dowdy v. City of Covington*, 237 Ky. 274, 35 S. W.(2d) 304 (1931) (administrative interpretation of ordinance requiring registration of moving van operators, held improper); *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S. W. 565 (1927) (not subject to pool-room regulations, because discriminatory); *Peninsular & Oriental Steam Navigation Co. v. The King*, [1901] 2 K. B. 686 (shipping company claims exemption from statutory duty to provide certain accommodations for lascars); *W. & A. McArthur, Ltd. v. State of Queensland*, 28 C. L. R. 530 (1920) (that anti-profiteering statute did not apply to plaintiff's goods); *Carleton v. Coady*, [1924] 1 Ir. R. 168 (plaintiff's land exempt from rent-fixing statute). (4) *Administrative notices and returns:* *Flint v. Attorney-General*, [1918] 1 Ch. 216, [1918] 2 Ch. 50 (notice of compulsory military service); *Smeeton v. Attorney-General*, [1920] 1 Ch. 85 (exempt from filling out tax return); *Whyte, Ridsdale & Co. Ltd. v. Attorney-General*, [1927] 1 Ch. 548 (notice that artists' supplies were importable only under license claimed *ultra vires*); *R. G. Z.* 36, 210 (1895) (no tax return demandable because inheritance exempt).

Liberty to act: (1) *Plaintiff's privilege:* *Second Nat. Bank of Nashua v. Old Guaranty Savings Bank*, 84 N. H. 342, 150 Atl. 737 (1930) (privileged to liquidate assets of defendant bank and surrender charter); *Northwestern Nat. Ins. Co. v. Freedy*, 227 N. W. 952 (Wis. 1929) (privileged to organize casualty company notwithstanding charter); *Gillow v. Durham County Council*, [1911] 1 K. B. 222 (that plaintiff school managers are privileged, without interference from education authorities, to have school cleaned and charge expense to local authority). (2) *Defendant's no-right:* *Genders v. London County Council*, [1915] 1 Ch. 1 (that not part, but only whole, could be taken under eminent domain); *Hillman v. Commonwealth*, 35 C. L. R. 260 (1924) (that defendant had no right to employ for more than 44 hours per week without pay for overtime); *Boland v. Canadian Nat. Ry.*, 56 Ont. L. R. 653 (1925) (that defendant had no right to expropriate plaintiff's land).

¹⁶³ *American Trust Co. v. McCallister*, 299 Pac. 319 (Ore. 1931) (privileged to sell stock without public permit); *James v. Commonwealth*, 41 C. L. R. 442 (1928) (plaintiff immune from Government's export license on dried fruits);

In the United States this generally involves the issue of constitutionality, and numerous cases in our states attest the growing practice of challenging the validity of statutes or ordinances imposing duties on the individual under the police power by declaratory judgment, instead of by the more cumbersome injunction, which, although accomplishing the same purpose of deciding the issue, is nevertheless conditioned upon the assumption of procedural and substantive burdens. The declaration achieves the identical result while avoiding the difficulties attached to the injunction.

In a Pennsylvania case, an owner of land successfully challenged the constitutionality of a zoning ordinance which, by drawing arbitrary lines, materially impaired the value of his land by confining it to residential purposes, thereby interfering with the execution of a pending contract for its sale. The supreme court of Pennsylvania, in holding the ordinance unconstitutional, relied upon Section 2 of the Uniform Declaratory Judgments Act, which provides that "any person . . . whose rights . . . are affected by a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder."¹⁶⁴

Much has been heard lately of efforts to bring about a consolidation and merger of competing businesses, a practice believed by the promoters to be economically sound and legally privileged, yet which encounters the hazard of possible criminal penalties and dissolution proceedings under the Sherman Anti-Trust Act. Business wishes to obey the law generally, but can not obtain any authoritative determination of its interpretation in a particular case until the merger has been actually effected and then only by

Lawson v. Interior Fruit Committee, 42 Br. Col. 493 (1930) (license); *Western Australian Ins. Co., Ltd. v. Attorney General*, [1926] Ir. R. 57 (plaintiff immune from Government's demand of fresh deposit for doing business); *Hamburgisches Oberverwaltungsgericht I*, No. 49, cited in LASSAR, REICHSVERWALTUNGSGERICHT (1930) 34 (that dentist is not subject to statutory permission to use gold and platinum).

¹⁶⁴ *Taylor v. Haverford Township*, 299 Pa. 402, 149 Atl. 639 (1930); *cf. Liggett Co. v. Baldridge*, 278 U. S. 105 (1928) (statute requiring ownership of drugstores by pharmacists held invalid on injunction) with *Evans v. Baldrige*, 294 Pa. 142, 144 Atl. 97 (1928), and *Pratter v. Lascoff*, 140 Misc. 211, 249 N. Y. Supp. 211 (1931) (declaratory judgment).

being made the object of a prosecution. It is not possible then to unscramble the merged properties without serious losses, and the perpetual sword of Damocles is a deterrent to enterprise. The dilemma has induced legislative proposals that the Federal Trade Commission shall be enabled to give an advisory opinion on the validity of a proposed merger, thus presumably giving some measure of assurance against federal prosecution. The suggestion has manifest weaknesses. In foreign countries having the declaratory judgment procedure, it is not uncommon for a plaintiff thus in danger and dilemma to institute an action against the attorney general or enforcing official by originating summons operating as an order to show cause and to claim that his presently proposed action is privileged under the statute. Three cases in New Zealand may be cited. Section 3 of the New Zealand Declaratory Judgment Act provides: "Where any person desires to do any act the . . . legality . . . of which depends on the construction . . . of any statute . . . such person may apply to the Supreme Court by originating summons . . . for a declaratory order determining any question as to the construction . . . of such statute." In *Smith v. Kairanga County*,¹⁶⁵ the plaintiff owned land which he wished to supply with water. Joining with others having the same desire, he presented to the administration a scheme for the construction of an irrigation district, together with the necessary works. The scheme required the use of iron pipes, however, which was of doubtful legality; but the court sustained the plaintiff's claim for a declaration that such use would not violate the statute. In *Australian Mut. Provident Soc. v. Attorney General*,¹⁶⁶ the company proposed to issue to parents insurance policies on the lives of children which the company believed, contrary to the attorney general, to be within the restrictive terms of the Life Insurance Act, 1908, which closely limited such policies. On an action for a declaration of validity, the court held that while two of the statutory conditions had been met, the third had not, and that hence the policy was illegal. In *Harcourt v. Attorney-General*,¹⁶⁷ certain racing clubs desired to inaugurate a new scheme

¹⁶⁵ [1917] N. Z. 567.

¹⁶⁶ [1916] N. Z. 179. See also *Scales v. Registrar of Companies*, [1920] N. Z. 821 (company held entitled to registration, but bound to increase capital before commencing insurance business).

¹⁶⁷ [1923] N. Z. 686.

for conducting races, inasmuch as they had found the old one productive of accidents. They desired to run off heats, with a prize for each heat, but there was to be no final competition between the respective winners. As racing was an important industry and sport in New Zealand, the clubs sought the protection of a decision before risking a violation of the criminal law. They thereupon sued the attorney general for a declaration that their proposed scheme was lawful under the Gaming Act. The court decided that part of the plan was legal and another part illegal, remarking: "The Declaratory Judgments Act . . . is a statute which authorizes His Majesty's subjects to ascertain by an authoritative pronouncement the precise meaning of the law they are called upon to obey."¹⁶⁸

If, then, a plan of merger is laid before the attorney general and he indicates disapproval, why should it not be possible for the parties in interest to cite him into court to have the issue of legality determined before a possibly mistaken course has been pursued with the resulting expense, loss, and liability to criminal penalty? The suggestion that a dishonest attorney general might connive at a violation of the law is as appropriate to the present statute, which enables him to determine the policy of prosecution. The only objection that occurs to the writer is that the merger plan as presented may not be the plan as carried into execution; but that will simply mean that the old decision is no bar to a new prosecution. If the cards are changed, the deal breaks down. But the usual attack is upon the contract of merger itself, and the validity of that can be passed upon as easily before the merger is concluded as after. The advantage of an authoritative binding judgment of a court over the advisory opinion of the Federal Trade Commission requires no comment.

One of the most common claims of immunity is the immunity from taxation. It is often difficult to challenge the validity of a tax by injunction, and it is hazardous to invite a levy or await enforcement proceedings, with possible penalties. A practice has therefore developed of challenging the validity of a tax law or of an assessment thereunder by an action for a declaration, a speedy method of determination which does not materially hamper the

¹⁶⁸ [1923] N. Z. 690.

taxing power and which insures an authoritative determination on the propriety of the proposed exaction before it has been enforced. This proceeding may take the form of an attack upon the constitutionality or validity of the law,¹⁶⁹ or upon the validity of the assessment thereunder;¹⁷⁰ or the taxpayer may contend that he¹⁷¹ or his property¹⁷² is exempt from taxation, or that the amount of the tax is unduly high or the classification improper.¹⁷³

Privileges of Governmental Authorities

The dangers to which an officer is exposed either in refusing to carry out a statute which he believes unconstitutional or in carrying out a statute which later proves to have been unconstitutional are extraordinary.¹⁷⁴ For refusing to act, the officer exposes him-

¹⁶⁹ *Frazier v. City of Chattanooga*, 156 Tenn. 346, 1 S. W.(2d) 786 (1928) (claim that law permitting assessment on property owners for improvements was repealed; denied); *Universal Film Mfg. Co. v. New South Wales*, 40 C. L. R. 333 (1927); *Mason v. City of Victoria*, 26 Br. Col. 418 (1917).

¹⁷⁰ *Wilcox v. Madison*, 106 Conn. 223, 137 Atl. 742 (1927) (assessment claimed out of proportion to real value of property and that classification wrong. Denied. *Certiorari* denied, 276 U. S. 606 (1927)); *Soergel*, *Jahrbuch d. Verwaltungsr.* II, 499 (Baden, March 23, 1909) (plaintiff could seek declaration against preliminary order on rate of assessment, without waiting for determination of taxable *res* [working capital]).

¹⁷¹ *Parmer v. Lindsey*, 157 Tenn. 29, 3 S. W.(2d) 657 (1928) (plaintiffs claim immunity from privilege tax, not being "general contractors"); *Nash Sales, Inc. v. City of Milwaukee*, 198 Wis. 281, 224 N. W. 127 (1929) (interstate motor companies shipping in original packages claim exemption from state tax); *Vaughn v. Attorney General*, 20 Alberta 424 (1924) (that plaintiff's deceased husband held vendor's deed in escrow only, hence not owner, and exempt).

¹⁷² *City of Louisville v. Cromwell*, *State Treas.*, 233 Ky. 828, 27 S. W.(2d) 377 (1930) (city claims exemption on gasoline to be used in city vehicles); *Peoples Tel. Corp. v. City of Butler*, 99 Pa. Sup. Ct. 256 (1930) (that lot and building necessary for plaintiff's business, hence tax exempt); *Automatic Totalisators Ltd. v. Federal Comm. of Taxation*, 27 C. L. R. 513 (1920) (dividends not cash prize in lottery, hence exempt); *Macrae Mining Co., Ltd. v. Township of Bucke*, 58 Ont. L. R. 453 (1926) (that mining rights not merged with sold surface rights, hence exempt from tax on sale).

¹⁷³ *Cupp Grocery Co. v. Johnstown*, 288 Pa. 43, 135 Atl. 610 (1927) (plaintiff owner of 33 stores claims liability to only one license tax of \$100 as a corporation, not \$915 as assessed); *Incorporated Council of Law Reporting v. Federal Comm. of Taxation*, 34 C. L. R. 580 (1924) (whether plaintiff liable as a person or corporation).

¹⁷⁴ See *Norwood v. Goldsmith*, 168 Ala. 224, 53 So. 84 (1910), where the treasurer of a county refused to pay a warrant that had been drawn for the repayment

self to an action for tort at the behest of a citizen prejudiced or to removal from office, fine, or greater penalty; for acting, he may expose himself to an action for damages or to disciplinary measures. He usually assumes the risks of constitutionality. For taxes collected under an invalid act, the tax collector is personally liable, whether the money has been paid into the state treasury or not; for the destruction of property or interference with personal liberty, he is also personally liable; in executing process under an unconstitutional statute, many states hold him liable.¹⁷⁵ On writ of mandamus, many states deny the officer the privilege of setting up the unconstitutionality of the governing statute as a defense.¹⁷⁶ The unhappy dilemma of officers who must stake their security and imperil their positions by having to guess upon the constitutionality or unconstitutionality of the statute under which they are required to act is described by the Alabama Supreme Court in the case of *Norwood v. Goldsmith*:

“All persons or officers are of necessity required to pass upon the validity of all acts or proposed statutes under which they are required to act or to decline to act. In so acting or declining to act under such proposed statute he must necessarily pass upon it for himself. He may do so with or without advice from attorneys or other sources of information. But courts are the one source from which he can get no information in advance, as to whether he should, in any particular instance, observe or decline to observe the requirements of the proposed act or statute. Every executive officer, or every person as for that matter, is presumed to know the law — a presumption often violent but always necessary. Hence every man is his own constructionist. If two differ as to the construction of a given act, and it is acted upon or declined to be acted upon by the one, to the hurt or injury of the other, and the one is sued in the courts by the other for so acting or declining to act,

of taxes paid under an alleged unconstitutional statute, which the treasurer thought constitutional.

¹⁷⁵ See discussion of the cases in Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Nonaction* (1928) 77 U. OF PA. L. REV. 155; Crocker, *The Tort Liability of Public Officers Who Act Under Unconstitutional Statutes* (1929) 2 SO. CALIF. L. REV. 236.

¹⁷⁶ State *ex rel.* Mueller v. Thompson, 149 Wis. 488, 137 N. W. 20 (1912); *cf.* Golden Gate Bridge and Highway Dist. v. Felt, 5 Pac.(2d) 585 (Cal. 1931); Board of Comm'rs of Newton County v. State, 161 Ind. 616, 69 N. E. 442 (1904). See the cases *pro* and *con* in Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes* (1927) 11 MINN. L. REV. 585.

and in the decision of the cause it becomes necessary to pass upon the validity of the act in order to determine the rights of the parties in that suit, the court will then — but not until then — pass upon the constitutionality of the act; and it is then only passed upon by the court in so far as the rights of these particular parties to the particular suit are concerned. When so decided by the highest court of the land all people, including executive and judicial officers, ought and usually do consider that particular question as settled and binding; but this is only so by the rules of policy, propriety, and common consent, and the credence which the people have in the opinions of such courts.”¹⁷⁷

The question arises whether the issue of constitutionality, often the only issue in the case, can not be decided at the request of the officer, when time permits, *before* he undertakes to act, rather than after, with all its attendant risks of loss, penalty, and dismissal. Even those courts which protect the officer against mistaken action under a warrant allegedly fair on its face, simply throw on the unfortunate victim of the officer’s act the risks and consequences of the mistake. Either party — the officer or the citizen to be affected — should have the opportunity to place in issue the question of constitutionality as soon as the dispute arises. Thus, the light is turned on before rather than after the perhaps fatal leap, which need no longer be made in the dark.

The experience of many jurisdictions with the declaratory judgment shows that it has been frequently employed for the purpose of obtaining a decision on the challenged power of an officer or administrative body under a statute. The issue generally involves either the constitutionality or construction of a statute or ordinance. To enable this question of construction to be determined before the officer acts, is manifestly a public service to every one concerned. Contrast with the case of *Norwood v. Goldsmith*¹⁷⁸ the case of *Graham v. England*,¹⁷⁹ where the comptroller of the state, not knowing whether to pay the salary to a judge whose term had expired but who claimed to hold over during his contest of the election resulting in his apparent defeat, or to a temporary judge appointed by the governor during the pendency of the elec-

¹⁷⁷ *Supra* note 72, at 234-35, 53 So. at 87.

¹⁷⁸ *Ibid.*

¹⁷⁹ 154 Tenn. 435, 288 S. W. 728 (1926); see also *State ex rel. Barham v. Graham*, 161 Tenn. 557, 30 S. W.(2d) 274 (1930).

tion contest, or to the newly elected judge, a decision which depended on the validity of the statute authorizing the appointment of a temporary judge, brought an action for a declaration of his privilege to pay the salary to Judge England, the temporary judge, and also to Judge Barham, the defeated judge. By deciding that the comptroller was authorized to pay the temporary judge and the newly elected judge only, they protected the comptroller against an erroneous payment, and determined the constitutional issue.

Tax collectors, before applying drastic sanctions subjecting themselves to penalty if wrong, may seek the aid of a declaratory judgment against the delinquent taxpayer who challenges the legality of the proposed sanction. Thus, before arresting a taxpayer for non-payment of a school tax, no property having been found, a Pennsylvania collector whose right to levy or arrest had been contested on the ground that the school tax was illegal, sought a declaration that the tax, the levy, and the arrest were legal and that the defendant was subject to them.¹⁸⁰ In a New Zealand case, a registrar of property had sold for taxes two lots out of many belonging to the same delinquent taxpayer, but mortgaged to different mortgagees. Although he had realized sufficient funds for the tax from the sale of the two lots, the registrar desired to make further sales in order not to compel two mortgagees to contribute the whole fund. The owner objecting to further sales and the purchasers demanding title, the registrar sought and obtained a declaration of his powers under the statute, thus avoiding trouble from many directions.¹⁸¹ Officers occasionally wish to alter public records or instruments, but doubt their power and fear the consequences of thus modifying vested rights, seeking, instead, the advance protection of a declaratory judgment against the affected citizens.¹⁸²

Disputes often arise as to the term of office or legal status of

¹⁸⁰ Huber, *Tax Collector v. Weakland*, 7 D. & C. 496 (Pa. 1925).

¹⁸¹ *Mitchell v. Hayes et al.*, [1926] N. Z. 262.

¹⁸² *Mayor, etc., of Karori v. Australian Mut. Provident Society*, 30 N. Z. 438 (1911) (power to change form of debenture bonds of loan authorized to construct public works. Statute construed); *District of Land Registrar v. Thompson*, [1922] N. Z. 627 (power to recognize title of good faith grantee of a certificate of title, grantor's name having been forged by his son, and to compel delivery of certificate for rectification of register).

an elected or appointed officer. Doubt as to the length of the term creates uncertainty not merely for the officer, but for the community and for the administration. Thus, in Philadelphia, one Fox was appointed district attorney upon the resignation of the incumbent. Ross, a taxpayer, sued out mandamus to have a district attorney elected at the next general election, whereupon Fox successfully brought an action for a declaration that his term ran until the expiration of the term of his predecessor, a difference of a year.¹⁸³ The fact that mandamus had been filed did not bar the action for a declaration. Judge Wingate was elected surrogate of Kings County, New York, in 1925. At the same election a constitutional amendment was ratified, which increased the surrogate's term from 6 to 14 years. Whether this amendment applied to surrogates chosen at that election was doubtful, so early in 1931 Surrogate Wingate sued the secretary of state, who lists officers open for election, for a declaration that his term of office ran for 14 years from 1925. In holding that there was an actual controversy, and that the plaintiff's term ran for only six years, the court held that "future confusion and possible litigation will be avoided by a present determination of the question here involved. Public officers should have the right to have their legal duties judicially determined. In this way only can the disastrous results of well-intentioned but illegal acts be avoided with certainty."¹⁸⁴ Whether a state sheriff may under the Pennsylvania constitution accept appointment as a federal prohibition officer¹⁸⁵ or whether under a Kansas statute an employee of a railroad operating under a city franchise may hold office as an elected city commissioner¹⁸⁶ has been decided by declaratory judgment, thus avoiding transgressions of the constitution or criminal penalties.

Cities and administrative boards doubtful of their powers to undertake official action affecting private rights have often found

¹⁸³ Fox, Dist. Atty. v. Ross *et al.*, 7 D. & C. 263 (Pa. 1926).

¹⁸⁴ Wingate v. Flynn, 139 Misc. 779, 249 N. Y. Supp. 351 (1931).

¹⁸⁵ Sterrett's Petition, 9 D. & C. 430 (Pa. 1926). It is doubtful who contested the petition. If there was no contestant, no declaration should have been issued, for it was then only an advisory opinion.

¹⁸⁶ State *ex rel.* Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1921). The successful action for a declaration of ineligibility was brought by the Attorney General after Grove's election but before Grove took office, thus saving a criminal penalty.

it of advantage to secure an authoritative determination of their powers against challengers, announced or notified, thus saving unfortunate and expensive mistakes in the conduct of public business. These actions, involving questions of statutory construction, may be brought against contesting public officials, against the citizen directly affected by the proposed administrative act, or even against a challenging taxpayer.

Many of these questions arise in connection with the proper expenditure of public moneys, including the validity of resulting bond issues. The power to raise loans for certain purposes or under certain circumstances, especially in view of provisions for municipal debt limits, is often put to the test in this way.¹⁸⁷ Naturally, in these cases, the public act in question must be accomplished or imminent, and not merely remotely prospective or contingent. The legal propriety of spending lawfully borrowed money for specific purposes may also be determined by declaration. Thus, in a New Zealand case borrowed funds were found insufficient for all of the eight purposes for which expenditure had been voted at an election, whereupon the city council wisely sought the protection of a declaratory judgment before expending the funds for some only of the designated purposes, for it was held that they were strictly bound by the vote.¹⁸⁸ The power to administer a loan fund¹⁸⁹ or to change the terms of an authorized loan has also been adjudicated by declaration.¹⁹⁰

The question whether the issuance of improvement bonds based on assessments on abutting landowners was incurring or increasing indebtedness within the meaning of a statute requiring the

¹⁸⁷ *Tauranga Borough v. Bank of New Zealand*, [1916] N. Z. 233; *Napier Borough v. Australian Mut. Provident Soc.*, [1917] N. Z. 292 (involved question whether borrowing power exceeded); *Hauraki Drainage Board v. Bank of New Zealand*, [1928] N. Z. 59 (board, having merged two drainage districts, asserts power to carry on separate projects by raising loan).

¹⁸⁸ *In re Wanganui Borough Council Tramways Extension Special Loan*, [1922] N. Z. 500.

¹⁸⁹ *Mayor of Wellington v. Attorney General*, 32 N. Z. 1175 (1913) (whether interest earned on loan fund was part of capital or usable for interest and service charges on loan).

¹⁹⁰ *Gisborne Borough v. Auckland Prov. Patriotic and War Relief Ass'n*, [1916] N. Z. 218 (whether, after getting authority for thirty-year loan, plaintiff could contract for ten-year loan, on which lender insisted).

approval of a mayor was raised by declaration in Pennsylvania. The court in this case said:

“ The legal relations of the parties hereto under the Statute of 1927, *supra*, are disputed, and under the Act of 1923, *supra*, any person interested may obtain a declaration of his rights, status or other legal relations thereunder. A mayor who is advised by his lawfully constituted legal adviser and who, therefore, firmly believes that the act does not apply and that it is not his duty or right to certify, stands in a dangerous position if his adviser and he are wrong. . . . We do not concur in the view that the prayer is purely for an advisory opinion; it is for more; it is, we think, for the speedy determination of a real controversy as to whether or not these improvement bonds come under the provisions of the said Act of 1927 and its supplement.”¹⁹¹

In a Kentucky case, a city had contracted with the defendant for the construction of a water system and its bonds had been authorized. The legislature then passed an act which threw doubt upon the validity of the contract and of the proposed bonds, a doubt which was dissipated by a declaratory judgment that the subsequent act did not prevent the issuance of the bonds as planned.¹⁹² The statutory validity of bonds for relief of the destitute was similarly determined in a recent Michigan case.¹⁹³

It will be recalled that in *Fidelity Nat. Bank v. Swope*¹⁹⁴ the United States Supreme Court sustained the propriety of an action brought by the city for a declaration of the validity of a special assessment for public improvements and of the bonds issued thereunder. Bond validating statutes in California, Florida, Georgia, and Mississippi have long been sustained.

Public authorities have sought by declaration the aid of a judicial determination of validity in support of other powers in advance of their exercise. For example, the liability of a railroad to tax assessments by the plaintiff city for street improvements on land which the railroad had dedicated to the city and on which

¹⁹¹ *City of Chester v. Woodward*, 13 D. & C. 201, 203 (Pa. 1929).

¹⁹² *City of Sturgis v. Christenson Bros. Co.*, 235 Ky. 346, 31 S. W.(2d) 386 (1930).

¹⁹³ *City of Muskegon Heights v. Danigelis*, 235 N. W. 83 (Mich. 1931).

¹⁹⁴ 274 U. S. 123, 131 (1927).

it claimed future tax exemption¹⁹⁵ was determined by declaration, because the contractor had refused to proceed with the improvements until the city's power to levy the assessment had been made clear. The doubts of the city and the fears of the contractor were thus dissipated. In an English case, a municipality claimed a declaration that a certain sewer did not require the defendant board's approval and that the plaintiff was privileged to proceed without it.¹⁹⁶ Cities or administrative boards have sought declarations of their power to sell defendant's land for taxes,¹⁹⁷ to take certain land originally native, without compensation,¹⁹⁸ to purchase land, to erect stores and to mortgage,¹⁹⁹ to construct and lease tramways,²⁰⁰ to transfer a teacher to a different position with the same salary,²⁰¹ to detain a ship until certain charges were paid,²⁰² to permit the defendant corporation to amend its articles of incorporation by issuing no-par stock and using the proceeds in certain ways.²⁰³

This review of the variety of doubts, dilemmas, and uncertainties which the procedure for a declaratory judgment has dissipated and removed will have indicated the social service performed by that method of raising issues. Private and public business with its ever growing complexity needs and should receive the aid of the courts in the construction of contested rights before violence and irretrievable loss have occurred. If this requires closer examination of the theory of causes of action, justiciability, and judgments, it is a task which should be welcomed. It has at its disposal the tested experience of a considerable part of the civilized world.

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¹⁹⁵ *Chesapeake & Ohio R. R. v. City of Morehead*, 223 Ky. 698, 4 S. W.(2d) 726 (1928).

¹⁹⁶ *London County Council v. Port of London Authority*, [1914] 2 Ch. 362.

¹⁹⁷ *Devonport Borough Council v. Quarterly*, [1930] N. Z. 884.

¹⁹⁸ *Smith v. Attorney-General*, 31 N. Z. 509 (1912); *Solicitor-General v. Cave et al.*, 31 N. Z. 614 (1912).

¹⁹⁹ *New Zealand Meat Producers Board v. Attorney General*, [1927] N. Z. 851.

²⁰⁰ *Mayor of Miramar v. The King*, 28 N. Z. 727 (1909).

²⁰¹ *Wanganui Education Board v. Bowater et al.*, [1916] N. Z. 590.

²⁰² *The Countess*, [1921] P. 279, [1922] P. 41; *cf. Ford Shipping Line, Ltd. v. Superintendent of Mercantile Marine*, 29 N. Z. 679 (1910).

²⁰³ *Lewis v. Oscar C. Wright Co.*, 234 Ky. 814, 29 S. W.(2d) 566 (1930).