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DECLARATORY JUDGMENTS IN INDIANA

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I

On March 5, 1927, Indiana adopted the Uniform Act on Declaratory Judgments.[1] Since then this reform in procedure has had in Indiana a somewhat checkered career. Beginning slowly to apply the statute, the Supreme Court upheld its constitutionality by inference in 1930 in a case brought by certain taxpayers against the State Board of Tax Commissioners and the City of South Bend, alleging that a statute conferring revisory taxing powers on the State Board was unconstitutional.[2] Constitutionality was squarely upheld upon allegations of non-justiciability in 1935, when the court upheld the propriety of an action for the construction of a contract for the sale of stock and the application to the purchase price of certain funds.[3] A few judges had stumbled over this hurdle, believing the declaration of rights to be an advisory opinion, a hypothetical case, or for other reasons not to involve a justiciable controversy.

In 1935 the Supreme Court rendered an unfortunate opinion in *Brindley* v. *Meara*,[4] which gave the reform a set-

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1. Acts 1927, Ch. 81, p. 208.
2. Zoercher v. Agler, 202 Ind. 214, 172 N.E. 186 (1930), 6 Ind. L. J. 118, 40 Yale L. J. 129.
3. Rauh v. Fletcher Savings & Trust Co., 207 Ind. 638, 194 N.E. 334 (1935), 10 Ind. L. J. 525.
4. 209 Ind. 144, 198 N.E. 301 (1935); Borchard, An Indiana Declaratory Judgment (1936) 11 Ind. L. J. 376. The Brindley view was expressly repudiated in Morris v. Ellis, 221 Wis. 307, 266 N.W. 921 (1936).

back. In that case, in which members of the Advisory Board of a town sought a declaratory judgment as to the construction of a certain statute, the court reached two unsustainable conclusions: first, contrary to the words of the statute, a dictum that a declaratory judgment was not an alternative remedy, grantable even though other remedies might have been sought, but exclusive, like an extraordinary remedy; and second, that the reference to the possibility of getting "further relief based on a declaratory judgment" meant further *declaratory* relief.

The conclusions involved such serious misconstructions of the statute that fortunately the errors were until lately hardly repeated. After 1935 the declaratory action was applied in some sixty-five cases, and doubtless many more in lower courts, until 1942 and 1943, when for some unexplainable reason, the court reverted to the discredited view of *Brindley* v. *Meara,* and held that if in a particular case any other remedy was available, the declaratory action should be dismissed as inappropriate. This evinces a new hostility to the declaratory action hardly evidenced in the seven years after 1935 and not justified by the directly contrary provisions of the governing statute. Of that statute the court seems unfortunately to have made a curious analysis. Had it inquired into the history of the doctrine in other states, it would have found that only a trifling minority of questionable cases have followed this late Indiana view.[5] To analyze the court's revived misconstruction and to pay tribute to the progressive employment in Indiana of this simplified procedure down to that time, this article is submitted.

II

Types of Grievance Susceptible of Declaratory Relief

The declaratory judgment differs from other judgments only in the fact that it is not followed by a coercive order or decree. It merely declares the pre-existing rights of the parties. But within that framework it permits the institution of a great many actions by parties heretofore incapable of suing, such as debtors *v.* creditors, whereas it also permits

5. This might be compared with the equally unfortunate dictum in a West Virginia case, Crank v. McLaughlin, 23 S.E. (2d) 56 (W. Va. 1942), that unless a coercive remedy is available, the declaration will not be issued.

traditional parties to choose the mild remedy of a declaratory judgment, instead of the drastic remedy of coercion—a mild remedy quite adequate where the defendant is responsible, such as an insurance company, a municipality, a large corporation.

Roughly speaking, the declaratory judgment may be brought in three types of cases: first, where another action could also have been brought; the second and third, where another action would not have been possible. The justification for the first type of case is that the declaratory action affords a less technical, speedier, cheaper and more civilized joinder of issues, in types of cases heretofore associated with hostile combat, the encrusted technicalities of special writs, and irrevocably broken economic relations. The declaratory action proceeds on the assumption that a mild remedy will often satisfy, that responsible defendants do not need more than a declaration of the law to obey it, and that coercive relief under such circumstances is an expensive and usually unnecessary remedy. The best evidence that the declaratory action was expected to be employed in such cases is to be found in the words of the statute itself, authorizing the courts to render declaratory judgments "whether or not further relief is or could be claimed," that is, whether a coercive remedy, like damages, injunction or specific performance 1) is also claimed, 2) is not claimed and could not be claimed, and 3) could be claimed but is not claimed. The unfortunate view of the Indiana Supreme court in *Berman* v. *Druck*,[6] and *Burke* v. *Gardner*[7] thus ignores the plain words of the statute. In the *Burke* case, the plaintiff landowners sued adjoining landowners for a declaration that a building restriction, confining the neighborhood to residential houses, was still valid. The defendants were apparently intending to erect a church on land in a subdivision of the city of Elkhart. On the theory that the plaintiffs could have sought an injunction—relief always speculative—the court denied the declaration, citing with approval *Brindley* v. *Meara* and adding, without justification, that the court has consistently followed it. Even if it were true that plaintiffs could have sought an injunction, this under the statute was no reason

6. 41 N.E. (2d) 837, 839 (Ind. 1942), superseded and aff'd 47 N.E. (2d) 142 (1943).
7. 47 N.E. (2d) 148 (Ind. 1943).

whatever for declining a declaration. Indeed, the declaration is often asked in combination with an injunction, partly because a declaration is likely to be more elaborate, and partly to escape the dilemma that if an injunction is denied on procedural grounds, the substantive rights of the parties may remain undeclared. An injunction also requires, as a rule, the posting of a bond and other technical conditions with which the declaration dispenses.

A similarly unfortunate view was taken in *Barnard* v. *Kruzan*.[8] There the plaintiff taxpayer sued the city and others for the construction of a will. Representing all taxpayers, the plaintiff challenged the validity of a condition in the will that the fund be held for accumulation of interest and sums to be added by the city. He asked specifically that the trust be declared terminated and that the trustee pay over the fund to the city. The court concluded that this asserted an immediate right to possession of the trust fund, and that a demand had been made for termination of the trust. This it held to be a coercive action, and hence not to constitute the subject of a declaratory judgment. Under the law of declaratory judgments this is an unjustifiable view.

In *Thompson* v. *Travis*[9] the plaintiffs, acting for themselves and all members of the Plymouth Manufacturing Company, sued the partners and members of the Board of Control of that company for a declaration that the Board of Control was not authorized to pay unemployment compensation taxes to the state, because plaintiffs were partners in the company and not employees. The State Board of Review of the Unemployment Compensation Division appeared specially and filed a plea in abatement because the action sought to restrain governmental agencies from collecting the tax provided by statute. Although the lower court declared the rights of the parties and enjoined the company Board of Control from paying the tax, the Supreme Court ordered the complainti dismissed for want of jurisdiction, not only because the state agency should have been made a party, but because even if a party, the action for the collection of the tax or to prevent its collection had matured and for that reason

8. 46 N.E. (2d) 238 (Ind. 1943). See also 44 N.E. (2d) 233 (Ind. App. 1942).

9. 46 N.E. (2d) 598 (Ind. 1943). See also 220 Ind. 1, 39 N.E. (2d) 944 (1942).

a declaration would not be issued. In this case *Brindley* v. *Meara* was again invoked as authority.

In *Pitzer* v. *City of East Chicago*[10] the plaintiff firemen sued the city and others for a declaration determining their rights, status and legal relations. They had been appointed December 31, 1938, by the outgoing city adimnistration, effective January 1, 1939. But on that day a new city administration took office. When plaintiffs reported for duty the new administration refused to recognize them as firemen on the ground that the retiring board had no authority to appoint them. The Supreme Court again refused to render a declaration on the alleged ground that the plaintiffs had an action to require the city to recognize them as firemen, or an action for salaries of which they had been deprived. The court is quite wrong in suggesting that a declaratory judgment is appropriate only where there are "ripening seeds" of controversy which have not yet developed into a right of action for executory relief;[11] that they might have to try the action piecemeal, a dilemma hardly possible since the declaration of rights is *res judicata* and implementing coercive relief can be obtained, if necessary, on mere motion. No new trial is then possible. Only where new facts are presented is a new trial required, as in *Brindley* v. *Meara*. The Indiana court in the *Pitzer* case preferred to say that they would determine the rights of the parties only in connection with an action seeking executory relief. The *Brindley*, *Thompson* and *Burke* cases are all cited, so that unless further study is given to this question the court will have entrenched itself in an error depriving the people of Indiana of a useful remedy which undoubtedly the legislature, looking at the experience of many other states, had intended Indiana to enjoy. In the cases to be discussed below, it will appear that, with one exception, the Supreme Court had not in the seven years between 1935 and 1942 declined jurisdiction on the erroneous ground that another remedy was available.

The second type of case in which the declaratory action has proved of value, brings into issue the construction of a written instrument *prior* to the breach. In these cases adjudication had heretofore been predicated on prior violence

10. 51 N.E. (2d) 479 (Ind. 1943).
11. Citing Owen v. Fletcher Savings & Trust Bldg. Co., 99 Ind. App. 365, 189 N.E. 173 (1934).

or destruction of the *status quo*. This is no longer necessary. Section 2 of the Uniform Act provides generally for the construction of written instruments, public and private, including statutes, ordinances and other documents, and Section 3 specifically provides that contracts may be construed before or after their breach, thus presenting an additional negative answer to the court's view in the *Burke* and other cases. This provision for adjudication before breach rests on the assumption that most people observe the law if they can obtain an authoriative interpretation or construction of their obligations, and that to obtain such adjudication it is not necessary to destroy economic and social relations, as is now generally the case. Contracts, such as long-term leases, affected as never before by new events, such as legislation, change of circumstances or party acts, may thus be kept alive while in litigation, instead of requiring a purported breach or repudiation as a condition of judicial cognizance. As contrasted with the *Burke* case, covenantors, bound by a deed containing building restrictions, often sue their covenantees for a declaration that the covenant has become obsolete by the passage of time, and that they are privileged to tear down the old building and erect a new one, thus obtaining an adjudication of their rights before demolishing or injuring the building and incurring the risks attached thereto. As Butler, J. remarked in *Terrace* v. *Thompson,* construing a penal statute:[12]

> "They are not obliged to take risk of prosecution, fines and imprisonment and loss of property, in order to secure an adjudication of their rights."

The third type of issue arises in cases where a party has been challenged, threatened or endangered in the enjoyment of what he claims to be his rights. Thereupon he is enabled to initiate the proceedings against his tormentor or an opponent invoking a challenging event or document and remove the cloud by an authoritative determination of the plaintiff's legal right, privilege and immunity and the defendant's absence of right, duty or disability.[13] Corresponding to an ancient remedy of the Roman law as reflected in the ceremony of matrimony, it compels the challenger to come

12. 263 U.S. 197, 216 (1923).

13. This was the basis of Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), a leading case.

forward, prove his claim, or ever thereafter remain silent. Thrown into jeopardy and danger by the threat or attack, the party charged has a legal interest in removing the cloud on his rights. This type of case, sometimes conveniently called the negative form of declaratory judgment, although expressible in affirmative terms, has attracted the widest attention because of the novelty of the fact situations presented to the courts. This type of claim may also involve the construction of a written instrument under type 2. Both types are designed to remove uncertainty and doubt from disputed legal relations and, by clarifying and stabilizing them, to perform the valuable social function of promoting security.

III

Brindley v. Meara—A Regrettable Mistake

Brindley v. *Meara,* decided in 1935, was the second of two appearances before the Supreme Court of the members of the Advisory Board of North Township, Lake County. They had already successfully brought an action for a declaratory judgment construing a statute which determined that they, and not the defendant township trustee, had the power to select the persons who were to be employed by the trustee as investigators or assistants in discharging duties concerning the relief of the poor.[14] Later on, the trustee, apparently, annoyed the Advisory Board by publishing certain articles attacking their integrity and impartiality, and threatened to harass the Board in the performance of their duties. The Board thereupon petitioned the court "as further relief" for an order enjoining the trustee from "interfering [with] harassing and annoying . . . your petitioners."

The relief was sought under Section 8 of the Uniform Act, which provides that, on motion with notice, the court may grant "further relief based on a declaratory judgment." The petitioners gave no notice, says Judge Fansler, and of course the relief sought was not that specific ancillary judgment which would carry the declaration, if resisted, into coercive effect. The "further relief" was therefore properly denied. But Judge Fansler took occasion to deliver, as

14. Meara, as Trustee, et al. v. Brindley et al., 207 Ind. 657, 194 N.E. 351 (1935).

dictum, a disquisition on the function of the declaratory judgment in relation to executory judgments which is unique in judicial annals as a misconstruction of the Act. Realizing the importance of the opinion in its destructive possibilities, the writer ventured to criticize it in an article published in this Journal in 1936,[15] where a detailed analysis will be found.

Judges are busy men and can not always take the time for a studied investigation of procedural reforms. They also labor under a very old judicial prejudice that for every cause of action there is only one writ. The fact that a petitioner might be given by legislation a choice of two or even more alternative remedies strikes many judges as unusual and erroneous. The new Federal Rules are progressive in that they provide:[16]

> Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Judge Fansler, while endeavoring to acquaint himself with the history of this procedure, which has a background of centuries, nevertheless came to conclusions which distort the entire meaning and purpose of the Act. Perhaps his major premise accounts for many of the minor errors. He concluded that if the Declaratory Judgments Act made any reference to executory relief—already authorized in previous statutes and common law—the body of the Act would be broader than its title and it would therefore be unconstitutional. That executory relief might have to be mentioned in order to coordinate declaratory relief seems to have been ignored. This led him mistakenly to conclude that "further relief" must mean "further declaratory relief." Since the Act states that it is "remedial" and therefore enjoins on the courts a liberal construction, Judge Fansler concludes that it must be considered to fill a gap or supply defects, and since executory remedies are already available where the injury has occurred, the declaration in such cases would fill no gap or supply defects. Hence, in spite of plain words, it could only be used, he said, where no other remedy was available. Thus he easily drifted into the conclusion that Section 3 of the Act, which

15. An Indiana Declaratory Judgment, 11 Ind. L. J. 376.
16. Rule 54 a.

permits a declaration of rights either before or *after* breach of a contract, could not be given effect. The authorization to give declarations "whether or not further relief is or could be claimed," already commented upon, is read as if it said "provided no executory relief is obtainable," the precise opposite of what it actually says and as the courts with almost complete unanimity have construed it. Giving the Act an exceedingly narrow and not sustainable construction, the learned judge makes the following statement, which has been invoked by the Indiana courts in recent cases with the effect of practically repealing the Declaratory Judgments Act:[17]

> The Supreme Courts of Michigan and Pennsylvania have held, concerning statutes substantially identical with ours, that the proceeding is not intended as a substitute or alternative for the common-law actions; that relief is not proper under the statute where another established remedy is available; that any other interpretation would mean the practical abolition of all established forms of action at law and proceedings in equity, which was not intended by the enactment, and that the clause, "whether or not further relief is or could be claimed," was not intended to mean that proceedings by declaratory judgment are available whenever any controversy exists, but rather that such relief may be had even though for complete relief other and additional remedies must later be resorted to.

This statement is a prejudiced construction of an Act intended to serve the people of Indiana. Analyzing the statement, it may be said that practically every sentence in it is vulnerable to attack. Judge Fead in Michigan, in the *Ayres* and *Siden* cases cited in support, did say that the Act was not a substitute for the common law actions. No one ever said that it was, and since most litigants wish coercive relief it could not possibly be. What Judge Fansler overlooked was that (1) Justice Potter dissented vigorously in the *Siden* case from Justice Fead's assumption, as he had, with the approval of the entire country and finally of the Michigan Supreme Court itself, in the *Anway* case;[18] (2) Judge Fead's view has not been sustained by later cases in Michigan, which consider the declaratory judgment as it literally provides, an alternative and not an extraordinary remedy; and

17. 209 Ind. at 152; quoted in Berman v. Druck, 41 N.E. (2d) at 839.
18. Anway v. Grand Rapids Ry. Co., 211 Mich. 592, 179 N.W. 350 (1919).

(3) that when it was uttered it represented a trifling minority in the case law, a minority criticized as mistaken by the very book which Judge Fansler consulted. Pennsylvania, from a splendid beginning, did drift into the unhappy groove which Judge Fansler presents, practically nullifying the Act. At the time he probably did not know that Judge von Moschzisker had an amendment to the Act introduced into the legislature designed to bring the court back to a correct construction, but some one in the legislature tacked an amendment on the von Moschzisker amendment which is so doubtful in meaning that the Pennsylvania court construed the amendment as a justification for adhering to their strange views.[19] Had Judge Fansler written a few years later he might have cited Maryland, which indeed adopted the unsound view that the declaration was to be used only when no other remedy was available,[20] in the face of a special clause in the Maryland Act, borrowed from Federal Rule 57, providing "nor shall the existence of another adequate remedy preclude a judgment for declaratory relief in cases where it is appropriate."[21] The bulk of the courts and cases of the country have not thus misconstrued the words and plain meaning of the statute.

It is not true that "any other interpretation would mean the practical abolition of all established forms of action at law and proceedings in equity," a conclusion not conjectural which an elementary knowledge of what the courts have done in the last twenty-five years would have dissipated. As already observed, most plaintiffs seek and need coercive relief and will not consider declaratory relief as adequate. Not one case in twenty or thirty is brought for declaratory relief only. The fears which prompted the court's statement are entirely unjustified by the facts.

The clause "whether or not further relief is or could be claimed" means exactly what it says, namely, that a declaratory judgment may be sought whether coercive relief is also claimed, is not claimed and could not be claimed, *could be*

19. Borchard, Declaratory Judgments (2d ed. 1941) 318. The stulifying Amendment to the original von Moschzisker Amendment has recently been repealed. Laws 1943, no. 284, P.L. 23.

20. Caroline Street Permanent Building Ass'n v. Sohn, 178 Md. 434, 13 A. (2d) 616 (1940).

21. A criticism of the Maryland construction will be found in an article by Richard W. Case in (1942) 6 Md. L. Rev. 221-238.

claimed but is not claimed—the exact opposite of the court's construction. It is available whenever any justiciable controversy arises involving pre-existing rights, but should not be issued if it will not settle the controversy.

The last clause of the paragraph would seem unconsciously to present a trick solution: if coercive relief is available no declaratory judgment may be obtained. This requires an attorney to guess whether the court in its wisdom will conclude, as in the *Burke* case, that petitioner might have had an injunction now or later. If now, always a speculative matter, he cannot get the declaratory judgment; if later, he may. This obligation to guess whether the court will not find another remedy available is not only contrary to the Act but will discourage attorneys from using the Act. It is not correct to say that the "ripening seeds" of a controversy alone warrant a declaration. In the Pennsylvania opinion from which these words are taken, In re *Kariher's Petition*,[22] Judge von Moschzisker remarked that there must be the ripening seeds of a controversy or a controversy.

This false construction would line up Indiana with Maryland against practically all the rest of the English-speaking world, and would deprive the citizens of the state of a useful remedy, as intended by the legislature. It gives a basis to writers who attack the courts as inflexible and impervious to procedural reforms even when commanded.

IV

Procedure

Before entering upon a discussion of the rules of substantive law, public and private, which the appellate courts of Indiana have declared, certain procedural matters warrant mention.

Section 1 of the Uniform Acts reads: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." The court therefore held, in an original action brought against the state in the Supreme Court by a poor person for a declaration determining the validity of certain statutes,[23] that the original jurisdiction

22. 284 Pa. 455, 131 Atl. 265 (1925).

23. Spence v. State, 48 N.E. (2d) 459 (Ind. 1943), application denied 319 U.S. 729, 63 S. Ct. 1160 (1943).

of the court had not been enlarged by the Declaratory Judgments Act, following in this respect the corresponding view of Chief Justice Marshall in *Marbury* v. *Madison.*

It is a general common law rule that where an administrative remedy is provided, it must be exhausted before judicial review may be demanded. For that reason the declaratory action of the Superintendent of Schools against the School Board of the City of Lafayette for having been discharged in violation of a written contract, was dismissed because of the plaintiff's failure to appear in the proceedings before the School Board.[24]

In *Berman* v. *Druck* the plaintiff claimed the right to possession of certain stock certificates against the administrators of a certain estate. While refusing to order a transfer of the certificates, asserting that the declaration would end the controversy, the court curiously concludes that it has no power to grant coercive relief in the same action, citing in support the deplorable opinion in *Brindley* v. *Meara.* Of course the court could have granted both declaratory and coercive relief in one action, since this was the purpose of the words "whether or not further relief *is* or could be claimed."

In the comparatively early case of *State* ex rel. *Mayr, Sec. of State* v. *Marion Circuit Court,*[25] the plaintiff sought a writ of prohibition against the court's exercising jurisdiction over a pending suit, and an injunction against the publication of a bill claimed by the City of Muncie never to have been legally enacted. While the writ was denied, Judge Treanor, dissenting with another judge, remarged that one department may not be easily prohibited from interfering with another, and the extraordinary remedies of injunction and prohibition should be sparingly used. He added: "The merits of the controversy could be tried out by use of the declaratory judgment statute, admirably designed for such a situation."

In *Hoffman* v. *City of Rochester*[26] certain real estate owners asked a declaration that the proceedings for the improvement of Jefferson Street were insufficient to charge

24. School City of Lafayette v. Highley, 213 Ind. 369, 12 N.E. (2d) 927 (1938).

25. 202 Ind. 501, 176 N.E. 626 (1931).

26. 209 Ind. 529, 198 N.E. 783 (1935).

their property with an assessment therefor. Final contracts had been let for the improvement on the day the complaint was filed. Because the contractor and the other owners of abutting property were not made parties, the court concluded that the judgment would pass only on the regularity of the procedure but could not award the recovery of assessments or contractors' liens. Hence, in its discretion under Section 6, judgment was given for the defendant.

In *Lambert* v. *Smith*[27] the owner of property in the City of Gary brought a declaratory action to review a prior judgment sustaining an order of the State Fire Marshall directing the destruction of the petitioner's house as a fire hazard, and declaring the prior judgment void. Since no appeal lay from that prior judgment, the court properly held that a declaratory action could not lie to effect a collateral attack upon it, even though the petitioner for the first time challenged the constitutionality of the statute removing fire hazards.

An interesting case on the unmentioned question of joinder of parties defendant arose in *Portage Township of St. Joseph County* v. *Clinic, Inc.*[28] There the plaintiff hospital and others sued three townships for a declaratory judgment with respect to the liability for the care and treatment of a minor pauper. The pauper and her parents, all on relief, resided in Portage Township. The minor was injured in an accident in Springfield Township. Since there was no hospital there, she was taken to the plaintiff hospital in Michigan Township, and treated there. A controversy arose as to which township was by statute chargeable with the expense of the treatment. The lower court held Portage Township liable as the locus of residence, whereas the appellate court held Springfield Township, the place of the accident, liable. Very properly, no question was raised as to joinder of parties. This may be compared with the case of *Town of Manchester* v. *Town of Townshend, Westminster and Londonberry,*[29] where the plainiff town alleged that a certain pauper whom it had currently supported was in fact resident or domiciled for three years in one or other of the defendant towns or communities, one of which was under a statutory duty to bear the costs of relief and reimburse the

27. 216 Ind. 226, 23 N.E. (2d) 430 (1939), 15 Ind. L. J. 320.
28. 109 Ind. App. 365, 33 N.E. (2d) 786 (1941).
29. 109 Vt. 65, 192 Atl. 22 (1937).

plaintiff. The Supreme Court of Vermont felt that there had been an improper joinder of parties defendant, that there was no community of interest in questions of law and fact as required in equity pleading, and that hence separate actions would have to be brought against each of the three towns. This was unfortunate, and Chief Justice Powers appropriately dissented. There are numerous cases of this type.

V

Private Substantive Rights

Status is one of the rights most commonly determined by declaratory action. The status of husband and wife, parent and child, member, partner, or other legal relation, not only frequently determines consequent personal and property rights, but itself involves a determination of the validity of a marriage, divorce, agreement, or other operative document or transaction. Indiana has few such cases. In one, *Bowser* v. *Tobin*,[30] the plaintiff brought an unusual action, seeking to have her status declared as the heir of the deceased, and the invalidity of a judgment of divorce obtained from her by the deceased twenty-eight years before, asserting fraud in its procurement. The court properly denied the declaration on the ground that its purpose was not to declare a new legal status but one already in existence, that by this action one could not set aside a prior decree of divorce. The court went further, unnecessarily, and declared there was insufficient evidence of fraud. The plaintiff did not correctly understand the limitations on the use of a declaratory action.

Contracts. Some unique fact situations have been the subject of declaratory action in Indiana. They involve mainly the construction of a contract before breach, to determine the rights of the respective parties, thus avoiding the necessity for severing economic relations or for hostility. Several of these actions were designed to avoid the plaintiff's peril or to establish his security against the defendant.

In one case[31] one brother sued the other as owners of adjoining real estate for a declaration of the rights and status of the parties under their deceased father's agreement

30. 215 Ind. 99, 18 N.E. (2d) 773 (1939).
31. Retter v. Retter, 110 Ind. App. 659, 40 N.E. (2d) 385 (1942).

with his neighbor and under the father's will. It was apparently understood that the predecessor owners would jointly erect a boundary fence between the two farms, maintained by the brothers until 1940. On that date one of the brothers, a life tenant, asserted that there was no evidence of division of the fence by agreement. The adjoining brother, owner of the fee, naming his brother's two sons as parties defendant, successfully contended that there was an agreement for the division of the boundary line fence and for its maintenance.

In *Hamilton* v. *Meiks*[32] the plaintiff's demand involved the construction of a contract of guaranty, appearing on certain preferred stock of the J. B. Hamilton Furniture Company which had been issued to the defendants in return for their assets in a certain company. In 1930 plaintiff had assigned her property in trust to the defendants and to Shelby National Bank for the benefit of creditors. She had reserved for herself certain property as a residence and an annual income of $6,000. The question arose as to what was the substance of her guaranty, whether in reserving $6,000 per year out of the "proceeds," whether "proceeds" included only income from her assets or proceeds from the sale of the principal. In holding that it was the latter, the court construed the extent of her guaranty. She desired to escape the peril attached to an unknown liability, and wished to limit it by construing her agreement. No other action would presumably have been available to her.

A somewhat related type of action arose in *South Bend State Bank* v. *Department of Financial Institutions et al.*[33] The contract in issue was one of liquidation. By it the plaintiff bank had agreed with two defendant banks to transfer to them all its assets, in return for which the defendant banks assumed the obligation to pay the plaintiff's debts. Plaintiff also agreed to hold the defendants harmless against loss, and to that end gave defendants its real estate in trust, agreeing to hold its own stockholders to their statutory liability. Defendants were given three years within which to liquidate the plaintiff's banking business. Unforunately, the depression deepened so that the defendant banks were

32. 210 Ind. 610, 4 N.E. (2d) 536 (1936), rev'g 198 N.E. 833 (Ind. App. 1935).

33. 213 Ind. 396, 11 N.E. (2d) 689 (1938).

forced to the wall, one being taken over by the banking commissioner, the other consolidated with another bank. The liquidation of plaintiff's assets continued, but now at great sacrifice in price. The plaintiff thereupon asked for a declaratory judgment on the basis of the original contract, alleging that the original contract was an outright sale, and that plaintiff had the right to the value of its assets as of that date. The court held the contract was not one of outright sale. The peril to which the plaintiff was exposed and which he sought to avoid by a stabilizing judgment could thus not be averted.

In *Cline* v. *Union Trust Co.*[34] the plaintiff also sought to establish the nature of his contract and to avoid the dissipation of his funds. He sued the trust company for a declaration that a deposit of $40,000 made to guarantee Arthur L. Hubbard as surety on an appeal bond, was in fact a special account and therefore entitled to preferential treatment after the bank went into liquidation. The contract did state that the account was to be kept separate and to bear 4% interest, to be disposed of in a certain way only. The bank placed the funds in its general account. The surety, Hubbard, died insolvent in April 1931. In June the bank went into liquidation, whereupon the plaintiff drew a new bond, demanding the return of the deposited money, which was refused. Thereupon he sued. The court held that the account was not a special account entitled to preferential treatment. No question of alternative remedy was raised.

A somewhat similar claim for a declaration of preferential treatment was brought in *McErlain* v. *Taylor,*[35] in which a creditor, claiming as a "manual or mechanical laborer," sued for the full amount due in an insolvency. The defendant denied the constitutionality of the statute according the preference, but was defeated.

In *Rauh* v. *Fletcher Saving and Trust Co.,*[36] one of the two cases in which the Indiana Declaratory Judgments Act was held constitutional in all respects, the appellant had agreed to sell and the appellee's decedent had agreed to buy certain shares of stock. A question arose as to the correct construction of the contract, and the application to the purchase price

34. 99 Ind. App. 296, 189 N.E. 643 (1934).
35. 207 Ind. 240, 192 N.E. 260 (1934).
36. 207 Ind. 638, 194 N.E. 334 (1935).

of certain salaries received by Rauh and by Kahn, the trustee's deceased. A declaratory action was brought. This was preferable to a drastic action for breach of contract after one or the other party had acted on his own interpretation of his rights. As Senator Walsh of Montana once remarked, if a will can be construed, why not a contract?

An interesting construction of a contract involving the determination of a question of fact occurred in *Rosenbaum Brothers* v. *Nowak Milling Corporation*,[37] recently decided. In that case, the plaintiff was the purchaser of a milling business and sued the seller for a declaratory judgment construing the contract. The plaintiff had agreed to buy the business, the merchandise on hand and certain trade marks for a consideration consisting of cash and certain royalties. The contract provided that if the seller engaged in business in competition with the plaintiff during the first three years following a joint inventory, the plaintiff would not be obliged to pay any further royalties. The defendant had signified its intention to enter in competition before the expiration of the three-year period. The plaintiff obtained an injunction restraining such competition, and then asked a declaratory adjudication that the plaintiff was under no duty to pay any further royalties. All royalties theretofore due had been paid to the defendant. After contest arose, royalties were paid into court. After the trial and before the appeal, an additonal issue arose by which the defendant asked for a declaration that interest was due on the royalties paid into court. The payment into court and the request for a declaration were due to the plaintiff's desire not to be in default on what would be a profitable contract. Holding that the defendant was not competing but had only indicated its intention to compete, the Supreme Court rendered judgment for the defendant.

In *Kipfer* v. *Kipfer*[38] the plaintiff wished to construe three contracts as if they were one. He had entered into three contracts with his mother and father over a period of fourteen years. The defendant executor of the estate of the plaintiff's mother and father denied that the second contract was valid, claiming that the signatures were not genuine.

37. 51 N.E. (2d) 623 (Ind. 1943).
38. 213 Ind. 321, 12 N.E. (2d) 507 (1938).

The Supreme Court so found, again deciding an issue of fact, and held for the defendant.

In *Poston* v. *Taylor*,[39] the plaintiff preferred stockholder brought a suit against other stockholders claiming that their plan for the liquidation of the company and the distribution of the stock was illegal under the preferred stock agreement. He contested an arrangement arrived at by a majority of 75% of the present stockholders. Construing the contract, the court held the plaintiff's case without merit.

In *Blume* v. *Kruckeberg*[40] the plaintiff executor of an estate sued the defendant, son of the testator, to recover on a promissory note executed by the defendant in the testator's favor. The defendant thereupon filed a cross-complaint, seeking a declaratory judgment that the liability on the note had been discharged by provisions of the testator's will. A demurrer to defendant's answer and cross-complaint below was sustained by the lower court but reversed by the Supreme Court. The decision involved the construction of the note, the discharge and the will.

In *School City of Lafayette* v. *Highley*[41] the plaintiff superintendent of schools of the City of Lafayette sued the school board for a declaration that he had been improperly discharged, in violation of a written contract. Reference will be made hereafter under the head of *Administrative Law* to two cases in which the scope or validity of public contracts was construed at the initiative of a city or taxpayer.

In the somewhat complicated case of *City National Bank & Trust Co. of South Bend* v. *American National Bank*,[42] the American Bank, trustee of one fund, sued the City Bank, trustee of another fund, in quasi-contract, for a declaration that it was entitled to be reimbursed for the attorney's fees which it had incurred and which redounded partially to the benefit of the defendant trustee. The court granted the petition for a declaration, apparently not concerning itself with the fact that another form of action might have been brought.

Leases. The reciprocal rights and obligations of lessor

39. 216 Ind. 359, 24 N.E. (2d) 31 (1939).
40. 44 N.E. (2d) 1010 (Ind. 1942).
41. 213 Ind. 369, 12 N.E. (2d) 927 (1938).
42. 217 Ind. 305, 24 N.E. (2d) 558 (1940), dissenting opinion 217 Ind. 312, 27 N.E. (2d) 764 (1940).

and lessee often need construction during the life of the lease. Instead of requiring, as at common law, that one party or the other undertake or purport to break the lease and then on suit discover whether his interpretation was or was not correct, the declaratory judgment enables the issue to be determined without breach of the lease. No leap in the dark is required. The value of this procedure is illustrated in three Indiana cases.

In *Owen* v. *Fletcher Savings & Trust Building Co.*[43] the plaintiff lessee asked a declaration of its duties as to the payment of taxes under the lease. In 1912 defendant had leased the property to Fletcher and Metzger for ninety-nine years. They assigned their interest to the plaintiff, and in 1919 plaintiff sublet the premises for a period of fifteen years. The lease stated that the lessee was to pay city, state and federal taxes on the property, including those which might be assessed on the lessor's right to receive rent. After 1913 there arose a dispute as to the duty to pay the federal income tax, the court holding that of course there was a justiciable controversy and rendering judgment for the plaintiff's construction.

Cassidy v. *Montgomery Ward & Co.*[44] involved the construction of a clause in a lease. Plaintiff had leased to the defendant the first floor and most of the basement, reserving the second floor to himself. But it was provided that the lessee could take this floor under a certain procedure, by which the rental was to be fixed by arbitrators if the parties could not agree. About a year later the defendant sought to exercise the privilege. The plaintiff thereupon claimed it bad for uncertainty and want of mutuality. The case turned on the meaning of the word "election" and the effect of the clause giving the lessee the right to claim it after an appraiser's report. The defendant cross-claimed for immediate possession. The court held the lease valid and gave defendant possession. No doubt was expressed as to the propriety of the action.

In *New Harmony Realty Corp.* v. *Superior Oil Co.*[45] the oil company sued the realty corporation for a declaration of its rights under a lease. The facts were agreed. On June

43. 99 Ind. App. 365, 189 N.E. 173 (1934).
44. 216 Ind. 490, 25 N.E. (2d) 235 (1940).
45. 108 Ind. App. 668, 31 N.E. (2d) 673 (1941).

18, 1938, the defendant leased to the plaintiff certain land for the purpose of drilling for oil and gas. In the event that no well was commenced within one year the lease was to terminate unless plaintiff paid defendant an additional rental to cover the privilege of deferring operations. On March 9, 1939, the defendant served notice on the plaintiff that unless a well were drilled on or before June 18, 1939, the defendants would declare the lease forfeit and would proceed to quiet title. The plaintiff had been making surveys on the land but was not yet willing to spend the funds necessary for drilling. The defendants thereupon contended that the contractual obligation was to explore for oil and gas, an essential part of the agreement, though implied, and that if not performed within a reasonable time the omission would entitle defendants to claim forfeiture. The trial court, affirmed on appeal, declared that the plaintiff had complied with all its obligations under the lease, and that the lease should be deemed continued on payment of additional rental as provided in its terms.

Trusts. It happens frequently that trust deeds require construction, as in the case of other contracts. In the interesting case of *Powell* v. *Madison Safe Deposit & Trust Co.*,[46] a beneficiary life tenant sued the trustee of a trust estate for a declaration that certain dividends accruing to the estate were in fact the property of the plaintiff and not that of the estate. This involved the construction of the trust deed. The court held the action not to be a collateral attack upon the judgment approving the trustee's act, but an independent action for the construction of the trust and the settlement.

In *Novak* v. *Nowak*[47] a plaintiff home owner, unable to read English, sued his sons to have his own conveyance of realty to one son declared fraudulent and void, and to procure a reconveyance of the property to himself. The plaintiff had understood that the property was to be reconveyed to him, a reconveyance which the son refused, later conveying the property to his brother, who knew all the facts. The sons contended that the plaintiff's conveyance was made for the purpose of defrauding his creditors, that the deed was fraudulent, and that since both parties were in pari

46. 208 Ind. 432, 196 N.E. 324 (1935).
47. 216 Ind. 673, 25 N.E. (2d) 993 (1940).

delicto, the deed was valid between them. The trial court, affirmed on the merits, granted judgment for the plaintiff.

Insurance. Insurance companies have derived great benefit from the declaratory judgment, since they may, prior to, simultaneously with or subsequent to a tort action brought by the injured person against their assured, sue independently for a declaration that they are under no contractual duty to defend the action or that their liability for a judgment is limited, a determination often vital also to the injured party. Insurance cases have, however, been rare in Indiana. *Werner* v. *State Life Insurance Co.*[48] was an action in which the beneficiaries of two life insurance policies sued for double indemnity on the ground that their insured had died as a result of gun shot wounds received when his shop was held up. The policy was incontestable after one year. The company contended that the cause of action was within the exception of "murder or suicide" contained in the policy. The case is notable only because Justice Kime, in his dissent, objecting to the company's having been allowed to contest, pointed out that the Declaratory Judgments Act had been passed four years before this policy was issued, and that the insurer had had a chance to have such ambiguous phrases construed, but had preferred to let them stand.

Wills. Wills and clauses of wills are frequently construed by declaration at the initiative of a beneficiary, the executor, or a public official. The cases are usually complicated and admit of an action for the construction of a will, as Justice Swaim stated in the case of *Crawfordsville Trust Co.* v. *Elston Bank & Trust Co.*[49] In that case, the executor sued the trustee and others for a declaration as to the proper distribution of the assets of an estate under his control, and for a declaration of his own duties in the premises. In *Szulkowska* v. *Werwinski*[50] the executor of a will sued the mother (legatee) of the decedent and others to determine who was the disputed beneficiary of a certain bequest contained in one item of the will. This also was a determination of fact.

In *Husted* v. *Sweeney*[51] the trustee under the will sued the beneficiaries of the trust for a declaration of his power

48. 104 Ind. App. 27, 7 N.E. (2d) 209 (1937).
49. 216 Ind. 596, 25 N.E. (2d) 626 (1940).
50. 109 Ind. App. 511, 36 N.E. (2d) 948 (1941).
51. 48 N.E. (2d) 1004 (Ind. App. 1943).

to pay certain claims made by beneficiaries to cover their expenses, and a declaration whether this could be taken out of principal or not. Judge Royse claimed that the beneficiaries were the only proper parties for a determination of the issues raised, because only their rights and interests could or would be affected by the court's decision. He said they would have had the right to file pleadings against each other, and added that Section 4 of the Declaratory Judgments Act, dealing with executors of estates, did not contemplate coercive judgments, citing the unfortunate case of *Brindley* v. *Meara.* Of course the Declaratory Judgments Act contemplated that coercive judgments might be rendered in combination with declarations or to implement declarations if necessary, but did not need to authorize them since they were authorized under other provisions of the code.

In *Hall* v. *Fivecoat*[52] the plaintiff cousin of deceased sued for a declaration that she and five other first cousins were the next of kin and heirs of deceased and entitled exclusively to inherit, against the claim of one of the defendants that he was the acknowledged illegitimate son of one of the sons of the deceased, entitled on his behalf to claim the entire estate. On demurrer to the cross-complaint for a declaration of ownership, the trial court, affirmed on appeal, gave judgment for the plaintiffs.

Title to property. The disputed title to property is one of the common issues determined by declaration. The rights claimed may find their source in a contract, deed, will or other instrument. We have just seen that the conflicting claims to property in an estate may be presented in the form of an action for a declaration construing a will. In *Zonker* v. *Zonker*[53] the disputed claims between the widow and children of one marriage and the widow's child of another marriage found their source in an antenuptial agreement, which required construction.

In *Weppler* v. *Hoffine*[54] the administrator of one of the eight children of Adam Weppler asked for a construction of the will, determining the type of estate in the realty which his decedent's widow had received, on the decedent's quit-

52. 110 Ind. App. 704, 38 N.E. (2d) 905 (1942).
53. 102 Ind. App. 631, 4 N.E. (2d) 593 (1936).
54. 218 Ind. 31, 29 N.E. (2d) 204 (1940), rehearing denied 218 Ind. 35, 30 N.E. (2d) 549 (1940).

claim of his interest in Adam Weppler's estate to the decedent's widow. Holding that the decedent had divested himself of all interest by the quitclaim deed, Judge Shake reversed the judgment below "with directions to restate the conclusions of law to the effect that appellee administrator has no interest in the real estate described in the complaint . . . "

VI

Public Law

Statutes and Ordinances. By Section 2 of the Uniform Declaratory Judgments Act, any person interested under a written instrument, including "statute" or "municipal ordinance," may have determined any question of construction or validity arising under the instrument and obtain a declaration of rights thereunder. Indiana has had a representative number of cases involving various aspects of the validity or construction of statutes and ordinances, including specific powers exercised under them. These actions involve both the formal validity of statutes or ordinances, instituted usually on the initiative of public officials, or their substantive validity—generally, but not exclusively, placed in issue by an aggrieved citizen.

In *Ettinger* v. *Studevent*[55] a candidate for public office sued the County Elections Commissioner for a declaratory judgment that a 1941 statute regulating elections was unconstitutional because it had excepted the city of Indianapolis from its terms, whereas it had repealed a 1933 statute which did regulate such elections. In granting a declaration as sought, the court denied in a parallel consolidated case an injunction against holding an election. Had the latter case been instituted alone, the injunction might have been dissolved on procedural grounds, leaving untouched the substantive issue.

In *Tucker* v. *Muesing*[56] the Secretary of State, harassed by conflicting claims, sued businessmen for a declaratory judgment as to the validity of a 1941 statute governing the licensing and fees payable by the owners of motor vehicles for hire. By the title of the Act it purported to repeal a

55. Consolidated with Hole v. Dice, 219 Ind. 406, 38 N.E. (2d) 1000 (1942).

56. 219 Ind. 527, 39 N.E. (2d) 738 (1942).

1937 statute, which in turn had repealed a 1933 statute. But Section 1 of the 1941 Act purported to amend a section only of the 1937 Act, a fact not indicated in the title, as was thought necessary under the Constitution. The Secretary contended that even if Section 1 was invalid, the other sections stood. It was so held, reversing the trial court. In the absence of the Declaratory Judgments Act, a more cumbersome and drastic coercive remedy would have had to be sought, either by suit of the Secretary of State or of the affected vehicle owners.

In *Perry Civil Township of Marion County* v. *Indianapolis Power & Light Co.*[57] a public utility company sued the township and another for a declaration of the validity and construction of a 1943 statute. The facts were stipulated. Prior to 1933 the plaintiff's property was located in Decatur Township. In that year the County Commissioners changed the boundary line between that township and the one adjoining, Perry, so that plaintiff's property was then located in Perry. In 1943 a statute was adopted providing that no township was to be abolished or its boundary line changed without a petition of a majority of the freeholders in the township affected, and that in the case of townships containing a city of 300,000 or more, where boundary lines had been changed without a prior petition, the old boundary lines were to be restored. The plaintiff, not sure of its rights, asked, besides a declaration on the question of validity, whether the proviso was applicable to the boundary between Decatur and Perry Townships, and, interested in tax liability, in which township its property was located. The defendant township contended that the whole statute was unconstitutional, since it undertook to regulate township business. The trial court upheld the plaintiff's contention, but was reversed by the Supreme Court. Only by indirection could an issue have been framed for a more drastic remedy. The determination of the location of state boundaries by declaratory action is a common source of litigation in the Supreme Court, both before and after 1934, the date of the Federal Declaratory Judgments Act.

In *Conter, County Treasurer et al.* v. *Post,*[58] a city treas-

57. 51 N.E. (2d) 371 (Ind. 1943).

58. 207 Ind. 615, 194 N.E. 153 (1935). The first Brindley case, 207 Ind. 657, 194 N.E. 351 (1935), presented an issue between two public officers as to the plaintiff's statutory powers.

urer sued a county treasurer for a declaration of the validity of an Act of 1933 which provided that certain offices in cities of the second class were to be elective, omitting the office of city treasurer. It transferred the duties of the city treasurer to the county treasurer, without transferring the office itself. The plaintiff, whose office was apparently abolished, claimed that the Act was unconstitutional. It was so held below, but was reversed on appeal. This was an action between two public officers, involving the existence of their office and a redistribution of their duties. Injunction might have been tried, but this would have been rather tenuous.

There are several Indiana cases in which the constitutionality, construction or applicability of a statute or ordinance is challenged by the victim of its impact. In *City of South Bend* v. *Marckle*[59] the plaintiff sought a declaration that a zoning ordinance could not be validly applied to his realty, so as to prevent its use as a filling station. The statute afforded a procedure for changing regulations by the vote of the owners of 50% of the frontage in the neighborhood affected. Another statute allows an appeal to the Board of Zoning Appeals, with certiorari. With neither procedure had the plaintiff complied. Justice Shake, for the Supreme Court, stated that since the whole ordinance was not attacked as unconstitutional, an appeal to the Zoning Appeals Board was the proper procedure, with the Board having discretion to change the boundary for plaintiff's benefit. Since the court below had declared the whole ordinance void and overruled the city's demurrer, it was reversed, Justice Shake suggesting that if a retrial took place it would be well to consider whether a jury could sit in a declaratory action, and if the constitutional issue could be submitted to them as a question of fact. It is believed that on neither point should there be much doubt, since Section 9 of the Uniform Act specifically provides that

> "when a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined

59. 215 Ind. 74, 18 N.E. (2d) 764 (1939). See also Financial Aid Corp. v. Wallace, 216 Ind. 114, 23 N.E. (2d) 472 (1939), where petitioner challenged by declaration the constitutionality of the Small Loans Act.

in other civil actions in the court in which the proceeding is pending."

In Local Union No. 26, National Brotherhood of Operative Potters v. *City of Kokomo*,[60] the union, which had engaged in a strike against a certain pottery company, sought a declaration that the defendant city's anti-picketing ordinance, enacted during the strike, was void as in conflict with an earlier 1933 state statute which had purported to regulate labor troubles. Chief Justice Tremain, directing that the city's demurrer be overruled, sustained the propriety of a declaration.

In *Division of Labor of Department of Commerce and Industries of Indiana* v. *Indianapolis News Publishing Co.*[61] the publishing company sued the Division for a declaration, plus injunction, that a 1929 statute prohibiting minors from working in gainful occupations during school hours, with certain exceptions, did not apply to newsboys under fourteen, to whom plaintiff sold newspapers as distributors and carriers. The trial court rendered an elaborate opinion sustaining the plaintiff's contentions, together with an injunction against enforcement. Even a 1941 statute affirming the validity of such sales did not make the case moot. Had the regrettable view expressed in the later *Burke* case or the *Kroger Grocery* case, *infra*, prevailed, a declaration, a satisfactory and adequate procedure, might after 1942 have been deemed improper.

In *Lutz* v. *Arnold*[62] the plaintiff unsuccessfully sought a declaration that the General Intangible Tax Act of 1933 was unconstitutional. He was the owner of a promissory note on which he had obtained judgment, but could get no execution on it unless he affixed certain stamps in accordance with the Act. He challenged the Act rather than buy the stamps.

In *Pavey* v. *Pavey*[63] the trustees of a police pension fund, which by statute was to be supplemented under certain circumstances from taxes levied on real estate, sued the mayor and other officials for a declaration as to the construction of the statute and particularly when taxes should be levied

60. 211 Ind. 72, 5 N.E. (2d) 624 (1937).
61. 109 Ind. App. 88, 32 N.E. (2d) 722 (1941).
62. Consolidated with Hamer v. Wise, 208 Ind. 480, 193 N.E. 840 (1935).
63. 220 Ind. 289, 42 N.E. (2d) 30 (1942).

and their amount, what should be considered "income" and what funds should be invested. Administrative officers often find the declaration an appropriate method of obtaining a construction of their duties, before acting on their own interpretation.

Administrative Law. With ever greater power vested in administrative officers, both members of the affected public and the officers themselves find occasion to question their powers. This often involves the construction and interpretation of statutes and ordinances. Since these become only indirectly the subject of litigation, the issues are more appropriately dealt with under the head of administrative law.

It is common to claim by declaration exemption from certain administrative regulations or license either because they are alleged to be unauthorized by the governing statute or because administrative discretion was improperly used against the plaintiff.[64] In one case a bank sued the mayor and others to determine which of two rival groups of trustees of a municipal water works had authority to draw checks against an account in the bank's possession.[65] The court goes out of its way to reiterate the erroneous conclusion that the declaratory judgment did not furnish an additional remedy where an adequate remedy previously existed, reviving by name the Indiana blight of *Brindley* v. *Meara.*

In one case a plaintiff who had obtained judgment against a township on certain promissory notes given for highway advances, brought an action against the defendant county commissioners and other public officials to determine their duties in paying highway debts, what tax funds should be used to pay the judgment, and whether a certain claim of a third person should be allowed out of one of these funds.[66]

64. Bennett v. Indiana State Board of Registration and Examination in Optometry, 211 Ind. 678, 7 N.E. (2d) 977 (1937) (that regulations of Optometry Board limiting plaintiff's employment were void); Stiver v. Mayhew, 107 Ind. App. 704, 23 N.E. (2d) 614 (1939) (that haulers of limestone fertilizer to farmers were exempt from registering with the Public Service Commission); Medias v. City of Indianapolis, 216 Ind. 155, 23 N.E. (2d) 590 (1939) (claims exemption from city license for pawnbrokers because in alleged excess of state law).

65. Rogers v. Calumet National Bank, 213 Ind. 576, 12 N.E. (2d) 261 (1938). This revival is an exception to the general practice between 1935 and 1942.

66. Board of Commissioners of Delaware County v. The Farmers State Bank of Eaton, 104 Ind. App. 692, 10 N.E. (2d) 769 (1937).

In another case, an interested taxpayer successfully sued the city for a declaration that a depreciation reserve fund derived from a municipal power plant must be spent in certain ways only.[67] In another case a sheriff sued the county commissioners to determine the exact mileage allowances to which the statute entitled him.[68] In an action by a theater corporation against a city, the corporation challenged the authority of a city fire marshall, contending unsuccessfully that state control of fire hazards in theaters under an Act of 1937 repealed by implication a city ordinance of 1925.[69]

In a recent action the city unsuccessfully sued a truck company, assignee, for a declaration that under its contract with the city the company was under a duty to extend its garbage collection service to cover three new districts added to the city since the contract was made.[70] Since the company's refusal to make the desired collection constituted a breach of contract, if the city's construction was correct, a coercive action would have been ripe. It would have been a denial of justice had the court relied on this alternative and dismissed the declaratory action. Had a coercive action been compelled, the chances are strong that the contract relations would have been severed, a breach made unnecessary by the declaratory action. In another recent case taxpayers sued a publishing company, the higher of two bidders for a public contract to supply stationery to certain county commissioners, for a declaration that the commissioners had violated their duty in accepting the higher bid and for a declaration that the contract was illegal and void and should be set aside.[71] The court seemed to raise no objection, very properly, at this combination of prayers for relief.

Taxation. The incidence of taxation, now heavier than ever, gives rise to numerous questions of construction, which are most easily resolved by declaratory action, making dogmatic assertion unnecessary but presenting to the court is-

67. Wilkins v. Leeds, 216 Ind. 508, 25 N.E. (2d) 442 (1940).
68. Board of Commissioners of Hamilton County v. Baker, 215 Ind. 163, 19 N.E. (2d) 250 (1939).
69. Hollywood Theatre Corp. v. City of Indianapolis, 218 Ind. 556, 34 N.E. (2d) 28 (1941).
70. Municipal City of South Bend v. Blue Lines, 219 Ind. 462, 38 N.E. (2d) 573 (1942), rehearing denied 219 Ind. 471, 39 N.E. (2d) 439 (1942).
71. Haywood Pub. Co. v. West, 110 Ind. App. 568, 39 N.E. (2d) 785 (1942).

sues of taxability, classification, statutory rate, exemption and similar problems. Where these involve matters of administrative discretion, of course, no court should interfere, but where they involve questions of law, generally statutory construction, it seems unnecessary to require the exhaustion of administrative remedies before bringing these legal issues before the courts. A New York statute of 1943[72] requiring the exhaustion of administrative remedies in every case overrules an important body of case law which had expedited the judicial determination of legal issues concerning taxation.

In Indiana a considerable number of tax cases have arisen. Whether or not they were influenced by the important case of *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*,[73] holding that declaratory judgment lay, notwithstanding the untried possibility of paying and suing for refund and a statutory prohibition of injunction, it is hard to say. At all events, several taxpayers have challenged the incidence of taxation in their particular cases. In a recent case an administratrix successfully claimed exemption from inheritance tax under a 1937 statute which exempted estates against which no proceeding to determine tax liability had been brought for ten years after the death.[74] In another case, exemption from the gross income tax for non-profit organizations was unsuccessfully claimed by a corporation dealing in farm supplies which distributed its profits in the form of common stock to its patrons and stockholders.[75] In another case, the issuing corporation successfully brought an action for a declaration that not the issuer but the owner of the bonds only, was subject to the tax on the bonds, a tax on intangibles.[76]

The classification for taxation under the gross income tax of various types of transaction was adjudicated in *Storen* v. *Adams Mfg. Co.*,[77] a case which was carried to the United

72. Laws 1943, Ch. 424, p. 956.
73. 288 U.S. 249 (1933).
74. In re Batt's Estate: State v. Batt, 220 Ind. 193, 41 N.E. (2d) 365 (1942).
75. Storen v. Jasper County Farm Bureau Co-operative Association, 103 Ind. App. 77, 2 N.E. (2d) 432 (1936).
76. It paid the tax, but sought a declaration that the money should be returned to it as not due, Zoercher et al. v. Indiana Associated Telephone Corp., 211 Ind. 447, 7 N.E. (2d) 282 (1937); ibid. Zoercher et al. v. The Indianapolis Union Railway Co., 211 Ind. 703, 7 N.E. (2d) 289 (1937).
77. 212 Ind. 343, 7 N.E. (2d) 941 (1937).

States Supreme Court.[78] In *Department of Treasury* v. *J. P. Michael Co.*,[79] sales by a wholesale grocer to institutional homes for consumption by inmates were deemed sales to ultimate consumers and hence taxable at the highest rate. The court held that the remedy under the Gross Income Tax Act was additional and cumulative and not exclusive, and that the taxpayer was therefore not precluded from suing for a declaration of rights. In *Clark's Laundry & Dry Cleaning Co.* v. *Department of the Treasury*,[80] the plaintiff unsuccessfully claimed a low tax rate as preparing articles "for use" as against a higher rate claimed by defendant from "businesses not enumerated."

In one case a motorbus registration fee statute giving a very low rate to busses operating wholly within "any" city was construed to mean "one" city, as against the claim of a bus line that it meant "all" cities.[81] The tax base, *i.e.*, what is gross income, and whether taxes were due on a tax, was the issue raised in the recent case of *Department of Treasury* v. *Midwest Liquor Dealers*.[82] There wholesale liquor dealers unsuccessfully contended that the stamp tax they were obliged to affix to their products and for which they were reimbursed by their customers was not a part of their gross income on which taxes were payable. In a somewhat similar case fourteen manufacturers and sellers of beer unsuccessfully sued the Tax Division for a declaration that in filing gross income tax returns they were privileged to deduct the amount of the tax they were obliged to pay the federal Government under the Revenue Act of 1918.[83] In both these cases the Supreme Court reversed the decision of the trial court favorable to the taxpayer.

Elections. In recent years the declaratory judgment has come into ever greater use as a vehicle for raising questions as to the regularity of an election, the legality of its conduct, the statutory qualification or eligibility of the candidate or nominee, the term for which he has been elected,

78. 304 U.S. 307 (1938).
79. 105 Ind. App. 255, 11 N.E. (2d) 512 (1937).
80. 103 Ind. App. 359, 5 N.E. (2d) 683 (1937).
81. Chicago & Calumet District Transit Co. v. Mueller, 213 Ind. 530, 12 N.E. (2d) 247 (1938).
82. 48 N.E. (2d) 71 (Ind. 1943).
83. Gross Income Tax Division, Dept. of Treas. v. Indianapolis Brewing Co., 108 Ind. App. 259, 25 N.E. (2d) 653 (1940).

the duty to hold a new election, the computation of the ballots, the right to vote, and other compliance with the election laws. While Indiana does not exhibit as many of such cases as do other states, there have nevertheless been some interesting questions before the Indiana courts. These often turn on the effect of a subsequent statute on an election carried out under the old law. In *Robinson* v. *Moser*,[84] an early case, the petitioning prosecuting attorney, seeking to hold his office, questioned the term of his office which had been placed in doubt by a new statute subsequent to his election.

In *Hay v. White*[85] Hay became the acting mayor of Gary, Indiana, and challenged the eligibility of both White and Johnson, who were candidates to succeed him. Johnson won the election, but Hay sought an injunction, the propriety of which was the question on appeal. The injunction was refused, but a declaration was issued which decided the case. This would not have been possible under the old procedure.[86] In *Enmeier* v. *Blaize*[87] the clerk of a court sought a declaration as to the effect of a new statute which placed in doubt and issue the end of his term and the beginning of the term of his successor, the defendant.

In the recent case of *Harrell* v. *Sullivan*[88] taxpayers and voters successfully sued the election officials for a declaration that the statutory provision for registering voters was invalid. Judge Shake remarked:

> The rule that to enforce private rights the plaintiff must show an injury to his person, property, or reputation is not applicable to an action for the preservation of public or political rights.

Officers. Minor cases turn on the title of a public officer to a given salary or pension under the facts of his case. In *State* ex rel. *Clemens* v. *Kern*[89] the action was one for mandamus to place relator's name on the pension rolls and

84. 203 Ind. 66, 179 N.E. 270 (1931).
85. 201 Ind. 425, 169 N.E. 332 (1930).
86. Cf. with Brindley v. Meara, supra note 4. Hasselbring v. Koepke, 263 Mich. 466, 248 N.W. 869 (1933), where the court, unable to grant coercive relief, sua sponte issued a declaratory judgment. This is approved practice. See comment under Federal Rule 57.
87. 203 Ind. 475, 181 N.E. 1 (1932).
88. 220 Ind. 108, 40 N.E. (2d) 115 (1942), rehearing denied 220 Ind. 125, 41 N.E. (2d) 354 (1942).
89. 215 Ind. 515, 20 N.E. (2d) 514 (1939), rehearing denied 215 Ind. 527, 21 N.E. (2d) 141 (1939).

for the payment of a pension, since he claimed injury in the line of duty, resulting in total disability. Judge Shake pointed out that the successful defendant wanted a ruling to guide future policy on medical examinations, whereas defendant's need was served by mere affirmance of the lower court's rule. Expressing caution against the unnecessary pronouncement of a decision as to future policy, Judge Shake stated that the Declaratory Judgments Act "affords an appropriate procedure for determining anticipated controversies of the character presented by the cross-error."

In *Ralston* v. *Ryan*[90] an office holder unsuccessfully sued the County Auditor for a declaration that because he became a licensed engineer during the term of his office, he became entitled to a higher statutory salary than he was getting. In another recent case[91] a married woman teacher unsuccessfully sought on the merits a declaration that she was a permanent teacher in the defendant's township and entitled to a teacher's contract under the Tenure Act. The defense of laches and contributory fault was sustained.

Civil Adjudication of "Penal" Legislation. Two cases in Indiana illustrate the social advantage of a civil adjudication of the legality of a business practice as against the cruel and inefficient method of a criminal prosecution. Dozens of cases throughout the country have now recognized that a business man, harassed by all types of police power legislation and administrative regulation may, after the state's service of notice of illegality, not followed promptly by prosecution, seek to lift the suspended Sword of Damocles by himself initiating the action for a declaratory judgment as to the validity, construction or applicability of the governmental regulation. Because these regulations often have a penalty attached, they do not necessarily make the delinquent or uncertain business man a criminal, and it seems a rather inefficient administration of justice, not guided by social considerations, which would expose the jeopardized business man to the ignominy of a criminal trial in order to establish the validity, construction or applicability of a law of the meaning of which both parties may be doubtful.

For example, in the recent New York case of *Aerated*

90. 217 Ind. 482, 29 N.E. (2d) 202 (1940).
91. Engel v. Mathley, 46 N.E. (2d) 831 (Ind. 1943), 48 N.E. (2d) 463 (1943).

Products Company of Buffalo v. *Godfrey*,[92] the threatened plaintiff corporation sued the State Commissioner of Health for the determination of the classification of plaintiff's "Instant Whip" as a milk product or not. The product consisted of cream and flavoring, packed with nitrous oxide in metal containers. By opening a valve the cream, thus aerated, came out of a spout in a whipped form. It was thus used with ice cream products to look like whipped cream. The defendant had contended that as a milk product it could be sold only with the consent of local boards of health. Plaintiff claimed that it was a manufactured food product, to be classified as "frozen desserts mix" under the Agricultural and Markets Law, requiring therefore only state and not particular local approval. The classification of the product was a question for experts, not for juries. The trial court held that it was not a milk product, but agreed with the Appellate Division that submission to arrest and criminal trial was not a remedy. The Appellate Division held it to be a milk product. The Court of Appeals reversed, agreeing with the trial court that it was not a milk product. The case exemplifies the public advantage of trying such issues on the civil side instead of compelling the District Attorney to divert his attention to challenging business practices, try them criminally before a jury of laymen in which he has the burden of proving guilt beyond a reasonable doubt, a burden not required in declaratory actions.[93]

The superiority of a civil adjudication in such cases is illustrated by the recent Indiana case of *Department of State* v. *Kroger Grocery & Baking Co.*[94] The Kroger Company had been selling certain vitamin tablets. The Board of Phar-

92. 290 N.Y. 92, 48 N.E. (2d) 275 (1943), rev'g 263 App. Div. 685, 35 N.Y.S. (2d) 124 (1942). See also Dill v. Hamilton, 137 Neb. 723, 726, 291 N.W. 62, 64 (1940) (plaintiffs claimed the privilege of conducting spiritualist seances, contending that they did not constitute the prohibited public exhibition for gain. Said the court, "Plaintiffs, seeking a declaratory judgment, are not required in advance to violate a penal statute as a condition of having it construed or its validity determined). See also Sage-Allen Co. v. Wheeler, 119 Conn. 667, 673, 179 Atl. 195, 197 (1935). An enforcing officer, in doubt as to the meaning of a statute he must enforce, may also initiate the action, Curry v. Woodstock Slag Corp., 242 Ala. 379, 6 So. (2d) 479 (1942).

93. Preponderance of evidence usually suffices.

94. 46 N.E. (2d) 237 (Ind. 1943), superseding 40 N.E. (2d) 375 (Ind. App. 1942). See also 41 N.E. (2d) 952 (1942).

macy, adopting a prohibitory regulation, had contended in reliance on a statute that these were chemicals or drugs, poisonous in nature, constituting a "pharmaceutical specialty" or a "prescription," and therefore salable only in drug stores. The accused Kroger Company thereupon sued the Board of Pharmacy for a declaratory judgment that the proper classification of the disputed article was an "accessory food" product and hence not subject to the sales limitations demanded by the Board of Pharmacy, whose regulation was void. The issue was therefore whether the vitamin tablets constituted foods or drugs. Two lower Indiana courts had, on Kroger's petition, rendered a declaratory judgment in this most appropriate case, raising no question as to the propriety of such an adjudication. It had been made only after both parties had called expert witnesses in their behalf who gave testimony at considerable length.

When the case, however, was appealed to the Indiana Supreme Court, it ordered a dismissal of the action for want of jurisdiction on the ground that only a "criminal prosecution" could decide such an issue, denying in fact the jurisdiction of equity altogether, including power to issue an injunction "to restrain criminal prosecutions" or the "operation of criminal statutes," on the alleged but unconvincing ground that "no property rights are here involved." Even if it were true that a declaratory judgment "would not be a bar to a criminal prosecution," is it conceivable that a district attorney would institute such a prosecution after a civil judgment that the vitamin tablets were foods? Is a lay jury perfunctorily to ratify the testimony of the experts who alone are qualified? Or is it to overrule the experts? It would be hard to conceive of a more inefficient method of determining such an issue than a criminal prosecution, probably against the officers of the Kroger Grocery chain. To deny a declaration in such a case on the ground that a criminal prosecution might have been brought comes close to a denial of justice. Without challenging the wisdom of the writing justice, Shake, who has rendered many valuable opinions, it does seem that the New York method exhibits a more enlightened social policy.[95]

95. See New York Foreign Trade Zone Operators v. State Liquor Authority, 285 N.Y. 272, 34 N.E. (2d) 316 (1941), rev'g 259 App. Div. 993, 20 N.Y.S. (2d) 986 (1940), aff'g 173 Misc. 540, 18 N.Y.S. (2d) 188 (1939), in which the question was whether

In *Doyle, Excise Administrator, et al.* v. *Clark*[96] the plaintiffs, holders of beer dealers' permits, sued the Excise Administrator and others for an injunction against the enforcement of provisions of a statute which purported to make it unlawful for a beer dealer to sell malt beverages which had been artificially cooled, and for a declaratory judgment that such provisions are void. In holding the questioned provisions constitutional, thus denying the injunction, Judge Shake remarked that the Declaratory Judgments Act was broad enough to admit such an action, but that if this was not possible it must be because equity will not ordinarily enjoin the enforcement of a penal statute, a maxim whose value depends upon a strict construction of the word "penal." Applying the maxim broadly, however, he concluded that the rule was subject to an exception in favor of a declaratory proceeding to test the validity of a criminal statute which affects one in his trade, business or occupation, though such an action, he said, will not operate to stay the enforcement of the statute during the pendency of the proceeding. The power of the Beverage Commission to seize and destroy the property condemned by the Act was a factor in his mind in justifying the declaration of rights, although he might not have granted the injunction even if he had held the statute unconstitutional. While the theory that a declaration may be granted as an exception to the maxim prohibiting injunctions is somewhat unusual, it nevertheless recognizes the value of determining substantive rights even where an injunction is ungrantable. It indicates an approach quite different from that evidenced in the *Kroger Grocery* case. Perhaps a better criterion for distinction is between *malum in se* and *malum prohibitum.* Only the former need be safeguarded against equitable adjudication, whether by injunction or declaration.[97] There should be more general recognition of the fact that a business man has a right to obtain a civil adjudication on the validity or meaning of a prohibited

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the mixture of distilled spirits with alcohol constituted or not rectification within the licensing requirements of the State Liquor Authority, as the latter claimed and the plaintiffs denied.

96. 220 Ind. 271, 41 N.E. (2d) 949 (1942), appeal dismissed 317 U.S. 590 (1942).

97. Borchard, Challenging "Penal" Statutes by Declaratory Action (1943) 52 Yale L. J. 445.

business practice,[98] and not be exposed to a criminal prosecution as the only method of adjudication.

VII

Conclusion

In the states surrounding Indiana—Michigan, Ohio, Kentucky and Illinois—the declaratory procedure has had a varied career. Michigan, after the early misstep in the *Anway* case, has since 1929 experienced a notable recovery and, perhaps guided by the farsighted and fully vindicated understanding of Justice Sharpe, has given the Act a wide application. Ohio, in which an intermediate court once held it to be an extraordinary and not an alternative remedy, soon corrected this aberration and now accords the Act full scope. Kentucky applies the Act more extensively than does any other state, and seems contented with this speedy and efficient method of adjudication. Only Illinois, notwithstanding numerous efforts, has failed to enact a Declaratory Judgments Act.[99] Over the country it has been applied in more than 3,000 cases, state and federal, and has given sufficient satisfaction to warrant extension, not limitation, of its scope.[100]

The restrictions recently imposed by the Indiana Supreme Court seem to reflect an excessive inflexibility in regarding procedure as an end in itself instead of a means to an end. Many lawyers have unconsciously considered the technicalities of procedure as of the essence of law, and be-

98. What was said in State ex rel. Egan v. Superior Court of Lake County, 211 Ind. 303, 6 N.E. (2d) 945 (1937), a bill to enjoin a criminal prosecution of a dog race track, followed by the prosecuting attorney's writ of prohibition against application of the injunction and the dictum that the declaratory judgment was not broad enough to permit the validity of the plan of operation to be determined in advance, is not deemed sufficiently relevant to this section to warrant discussion here. Cf. Reed v. Littleton, 275 N.Y. 150, 9 N.E. (2d) 814 (1937), Borchard, Declaratory Judgments, p. 1032.

99. In Illinois the Civil Practice Act of 1934 contained a section authorizing the procedure; on the objection of a prominent legislator it was withdrawn. At the last session a well-drafted bill passed the Senate by an overwhelming majority, but the Speaker of the House refused to let it come to a vote. Illinois is perhaps the most important state having no statute. The others that are out of the fold are Arkansas, Delaware, Georgia, Louisiana, Mississippi and Oklahoma.

100. Cf. Florida Laws of 1943, C. 21820, F.S.A. § 62.09.

yond the possibility of improvement. If the Indiana courts could rid themselves of the apparent obsession that for every cause of action there is only one form of relief, progress could be made. It should make no difference to a court through which door a litigant enters or leaves a court room. The effort to reconcile the Declaratory Judgments Act with the preconceptions incident to executory relief and a "single title"—a view advanced by no other court in this or any other country —flowered in the strange dicta expressed in *Brindley* v. *Meara*. So long as that case was in effect disregarded—between 1935 and 1942—the declaratory action, as we have seen, was usefully applied in Indiana in a great variety of fact situations. As soon as it was revived, in 1942 and 1943, it practically brought to an end any further resort to this simple procedure and its service to the people of Indiana. A re-examination of the subject in the light of history and modern practice, which would overrule *Brindley* v. *Meara* and its stultifying effects, are indispensable to an efficient administration of justice.