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Duke Duvall

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By DUKE DUVALL

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Introduction

The concept of a government of laws and not of men is a highly developed social accomplishment. The function of the judicial branch of government in modern society is a long step from enforcement of an individual's rights by his own might or the later trial by combat. So, too, is the declaratory action a very much more civilized procedure than action for redress of violated rights. Its purpose is to provide a speedy adjudication of the legal rights, duties or status of the respective parties before there has been a breach of rights or a wrong committed.[1] It affords judicial help before the "dishes are broken" rather than providing the cement to patch them after the delict is an accomplished fact. Cutting across the entire field of civil rights jurisprudence, it is an elastic instrumentality for the application of the substantive law, and a most useful tool in the administration of justice. Illustrations of its utility will be pointed out later.

Of the six states comprising the Tenth Circuit, Oklahoma alone remains one of the fast diminishing group of states, now only five in number, which has not incorporated into its statutory law the Uniform Declaratory Judgment Act, or acts patterned after it.[2]

History

Contrary to the wide-spread belief, the declaratory action is not a novel form of procedure. Rooted in the Roman law of antiquity, it spread to continental Europe, and through Scotland, from the declaratory action of the middle ages to modern English law. Through the efforts of Lord Broughan, begun in 1828, England adopted this procedure in 1852, and it is now in extensive use there and in her colonies from India to Canada.[4] Today, sixty per cent of all causes of an equitable nature in Great Britain and its possessions are adjudicated in the form of a declaratory action.[5]

Indeed, in this country, declaratory judgments have been rendered by the courts for many years, prior to the adoption of a formal statutory proceeding. For example, the quiet title action does nothing more than to declare the interest of persons in property. Other forms are interpleader actions

[1] 1 C.J.S., page 1022, "Actions," section 18(3).

[2] All except Arkansas, Delaware, Louisiana, Mississippi and Oklahoma. In 1945 Illinois became the forty-third state to pass such a statute. Historical Note to Illinois Statutes, Anno. ch. 110, sec. 181.1.

[4] Borchard (2d Ed.), "Declaratory Judgments," ch. 3.

[5] Sheldon v. Powell, (Fla.) 128 So. 258.

and actions of fiduciaries for instructions. In the past ten years, the action has really come into its own with the impetus given by the United States Supreme Court in the case of *Aetna Life Insurance Company v. Haworth,* 300 U.S. 227, 81 L. Ed. 617, 108 A.L.R. 1000.

A good point to begin a review of the growth of the modern statutory procedure is with a discussion involving the constitutionality of the declaratory judgment act—*Anway v. Grand Rapids Railway Company,* (1920) 179 N.W. 350, wherein the Supreme Court of Michigan struck down an act adopted by that state in 1919, by holding it unconstitutional on the ground that it called upon the court to perform a non-judicial function. The court failed to take into consideration the distinction between advisory cases and the adjudication of moot cases where the judgment would have not been final (as in *Gordon v. United States,* 117 U.S. 697, appx., 76 L. Ed. 1347), those in which there were no adverse parties (as in *Muskrat v. United States,* 219 U.S. 346, 55 L. Ed. 26), and a real declaratory judgment action involving an actual justiciable controversy.

Fortunately, in 1933, the United States Supreme Court changed the situation in *Nashville, Chattanooga & St. Louis Railway Company v. Wallace,* 288 U.S. 249, 77 L. Ed. 730, by an unanimous opinion in upholding the Uniform Declaratory Act which Tennessee adopted in 1923. The suit was instituted by the railway company to determine its liability or non-liability for a gasoline tax which the state of Tennessee was attempting to exact from it. In the discussion of the constitutional limitation of the judicial function being confined to the decision of "cases" and "controversies", Justice Stone, speaking for the court, said:

> "The judiciary clause of the constitution defined and limited judicial power, not the particular method by which the power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means of presenting a case or controversy otherwise cognizable by the federal courts."

Since this decision there have been no doubts of the declaratory action being a proper exercise of the constitutional judicial function.

The next decision of great importance in this field was that of *Willing v. Chicago Auditorium Association,* 277 U.S. 274, 72 L. Ed. 880, which pointedly showed the need of the declaratory action and was a factor in bringing about adoption of the federal act six years later. A valuable piece of real estate in Chicago had been leased for a long term and the lessees erected a structure called the Auditorium Building. After it had stood for forty years it became unprofitable, and the lessees desired to raze the structure and construct a modern commercial building. The lease was not clear on the lessees' right to demolish the existing building and the lessors refused to consent except upon payment of a higher rent. The banking interests which were going to advance fifteen million dollars for the erection of the new building would not do so under the uncertainties prevailing. Lessees

began an action to remove a cloud upon or quiet their title. But the United States Supreme Court, speaking through Justice Brandeis, held that there was no cloud as no second instrument had been filed of record and that the lessees had no standing in court because:

> "What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary."

The court, in effect, held that it was necessary for the lessees to take the dangerous step of tearing down the building at the peril of guessing wrong and subjecting themselves to a large suit for damages, before they could get a judicial construction of the lease.

The federal act, signed by President Roosevelt in 1934, remedied the lack of power or supposed lack of the national courts to render declaratory judgments. In common with a number of other jurisdictions and the federal courts prior to the adoption of declaratory judgment acts, the conception in Oklahoma of an action which is within the power of the judiciary to entertain and determine is expressed thus by our court:

> "In its legal significance, under our statutes, a cause of action is a wrong for which a remedy is prescribed by law, or afforded in equity. The delict and the remedy are the primary elements—the essential elements. The wrong per se, if it be a wrong for which a remedy is afforded constitutes the cause of action; it is the wrong and the right to redress which unite to constitute the cause of action." *Security Natl. Bank v. Geck*, 96 Okla. 89, 220 Pac. 373.

This is the familiar narrow view that there are three prerequisites to court action: a right, its invasion and a particular type of tradition or remedy to fit it. *(Willing v. Chicago Auditorium Assn., supra.)* Decisions to this effect ignore the fact that such familiar actions as the quiet title suit, interpleader actions, will construction proceedings and the like, are essentially nothing more than declaratory actions. No difficulty is found in them presenting situations appropriate for judicial relief.

The declaratory judgment procedure dispenses with the old conditions precedent, of a right, a wrong and a remedy requisite for a justiciable controversy. It does not require that the plaintiff first suffer a "wrong" as a condition to judicial relief.

Nature, Statutory Provisions and Purposes

The distinctive characteristic of the declaratory judgment is that it merely adjudicates the legal issues between the parties, without providing for the coercive action of execution or performance. Except for the absence in the prayer for coercive relief the petition or complaint differs in no material respect from the form in traditional types of actions.[6]

[6] 16 American Jurisprudence, p. 275; 1 C. J. S., p. 1018; Borchard, p. 25.

There are three principal kinds of judgment: (1) the executory judgment, which provides for execution, specific performance, injunction, etc., which is the most common; (2) the constitutive or investive, which creates a new legal relation, such as judgments of partition, annulment of marriage, dissolution of partnership, or those sanctioning a new relationship, e.g., appointments of receivers, guardians, the admission of will to probate, and the like; (3) the declaratory judgment which only adjudicates or finally determines rights, status or other legal relations.[7]

Although at present Oklahoma barristers have available only the federal act,[8] since it substantially embodies the Uniform Declaratory Judgment Act[9] and is in such highly concentrated form (five sentences, to be exact), it is believed that an examination of the text of the uniform act and particularly, the first four sections, will furnish a more ready understanding of the functions of the procedure.

The first of these provides:

> "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to the objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

These provisions are treated and analyzed in detail *infra*. In furtherance and not in limitation of this general scope of power conferred,[10] it provides specific power of construction of written instruments, including statutes and ordinances, in section two, which is:

> "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or fran-

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[7] Borchard, p. 22, et seq.

[8] U.S.C. 400. A model of legislative draftsmanship in its brevity and simplicity, it provides:

> "(1) In cases of actual controversy (except with respect to federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
>
> "(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.
>
> "(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

[9] Uniform Laws Annotated, vol. 9, p. 215; Borchard, appendix, p. 1039.

[10] Section 5 expressly so states.

chise, may have determined question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

An important function of the procedure, usually available in no other way prior to breach, is found in section 3:

"A contract may be construed either before or after there has been a breach thereof."

The fourth section, which relates to fiduciaries, confers the power upon the court, at the instance of any interested party, to declare rights or legal relations of "any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que trust,* in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent . . ."

The remaining sections relate to the manner of construction, preservation of right of jury trial as in other cases, right of review and the like.

The purpose of the procedure is formally stated in section 12 as being "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." A more colorful epitomization is found in the famous statement of Congressman Gilbert in the congressional debate on the federal act:

"Under the present law you take a step in the dark and then turn on the light to see if you have stepped into a hole. Under the declaratory judgment law you turn on the light and then take a step."

The declaratory judgment is essentially one of construction.[11] The declaratory remedy is cumulative and alternative—not exclusive. This is very important to keep in mind. Although an alternative remedy is available, this does not bar the use of the declaratory action. Federal Rule 57 expressly provides:

"The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

To the same effect is section 1 of the uniform act.

By the same token, this form of relief does not supersede the traditional types of remedy. It is supplementary to and not a substitute for and does not supplant existing remedies.[12]

In this connection, it should be remembered that the declaratory action may be invoked in two types of situations: first, those where no other remedy is available, e.g., where plaintiff seeks a construction of a contract before its breach; second, where an alternate, coercive action is available, e.g., where plaintiff desires a determination of another's right to build a certain type of structure under plat restrictions, he could bring either a declaratory action or one for an injunction.[13]

The declaratory action is a special form of action—*sui generis.* It is neither legal nor equitable, taking on the color of either depending upon the

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[11] Newsum v. Interstate Realty Company, (Tenn.) 278 S.W. 56.

[12] Anderson, "Declaratory Judgments," sec. 48, p. 140; 16 American Jurisprudence, p. 281, note 20.

[13] Borchard, p. 315, et seq.

nature of the particular facts and controversy involved.[14] In view of the abolition in the federal courts and most state courts of the distinction between law and equity actions, exactly the same considerations determine the right to a trial by jury [15] in the declaratory action as in any other type of case.[16]

No substantive rights or jurisdictional factors are within the scope of the declaratory acts, which are entirely procedural. Therefore, the jurisdiction of the courts in actions thereunder is no greater or different than in the coercive form of action.[17]

Essentials

The requisite conditions and precedents which must be shown in order to obtain declaratory relief, in addition to jurisdictional requirements which have been noted to be the same as in other types of actions, are generally stated to be:[18]

1. There must be a justiciable controversy; that is, a controversy "that is appropriate for judicial determination"; one that is not of "hypothetical or abstract character" or that is "academic or moot."
2. The controversy must be between parties whose interests are adverse.
3. There must be a tangible legal interest in the controversy by the party asserting it.
4. The issue presented must be ripe for adjudication.

JUSTICIABLE CONTROVERSY

The authorities give a great deal of consideration to this essential of the procedure. The declaratory statutes are said to have greatly enlarged the scope of this phrase, in that they make appropriate for judicial determination disputes over legal rights before there has been an invasion of such rights or a wrong committed.[19] Prior to the federal act, a "wrong" was held

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[14] Anderson, sec. 56; Borchard, p. 239; Moss v. Moss, (Cal.) 128 Pac. (2d) 526, 141 A.L.R., 1422; Sanders v. L. & N. Railway Company, (6th Cir.) 144 Fed. (2d) 485.

[15] Right of jury trial is expressly prescribed in both the Federal and the Uniform Acts.

[16] Hargrove v. American Cent. Insurance Company, (10th Cir., Okla.) 125 Fed. (2d) 225; Federal Rules 57 and 59; Section 9, Uniform Act: "When a proceeding under this act involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." See, also, 16 American Jurisprudence, p. 337; 1 C.J.S., p. 1031.

[17] Tennessee Coal & Iron Company v. Muscoda Local 123, (3rd Cir.) 137 Fed. (2d) 176, affirmed 321 U.S. 590, 88 L.Ed. 949; Anderson, sec. 24, p. 81; 16 American Jurisprudence, p. 324, sec. 52; Borchard, p. 231.

[18] Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 81 L.Ed. 617, 108 A.L.R., 1000; Anderson, sec. 42, p. 125; Borchard, p. 29; 1 C.J.S., p. 1023, "Actions," sec. 18 (5).

[19] 1 C.J.J., p. 1022, sec. 18 (3). "Some Practical Uses of the Declaratory Judgment Law," Dean C. S. Potts, S. M. U. Law School, 23 Nebraska Law Review, October, 1944, p. 185; "The Next Step Beyond Equity—The Declaratory Action," by Professor Borchard, Chicago Law Review, February, 1946.

to be indispensable to justiciability.[20] Though such reasoning has been criticized, as no "wrong" or "threatened wrong" is necessary to a "cause of action" for partition, quieting title, and the like.[21]

The leading case on this feature is the United States Supreme Court's decision of *Aetna Life Insurance Company v. Haworth*,[22] which vitalized the federal act and gave great impetus to the declaratory procedure. This decision gave a more liberal construction to the term than many courts had been doing, and started a new trend. Therefore, cases decided prior to 1938 must be examined with a critical eye. The importance and great impact of the decision upon this field of procedure justify an examination of its holding.

Haworth had five life policies with plaintiff, which provided for waiver of premiums in event of his permanent total disability. Haworth notified the company he claimed these benefits, and quit paying premiums. Aetna had cause to believe his condition was not such as to entitle the insured to the benefits, but was legally compelled to set up reserves against the policies. It was confronted with the dilemma of waiting until Haworth died (keeping the reserves up meanwhile) and defending a dangerous suit by the widow beneficiary, or to take the initiative in some way itself.

Bringing a declaratory judgment action, Aetna asserted the "no-right" of the defendant Haworth to the benefits of the premium-waiver clause, and that the court adjudicate that the policies had lapsed and declare the Aetna owed no obligation upon them. Trial Judge Otis, giving a narrow construction to the act which would have taken the heart out of it if allowed to stand, as grounds for dismissal of the action, held:

> "There is now only a potential controversy, but no present actual controversy. How can there be a controversy relating to a breach of contract *unless it is initiated by him who asserts the breach* and claims damages therefor?"

The circuit court, adding nails to the coffin of the corpse of the Declaratory Judgment Act, said in affirming the trial court and holding that the action presented no justiciable controversy:

> "It fails in this because the facts averred do not show that any right of the plaintiff is presently being invaded or imminently and prejudicially affected by the alleged acts of the defendants. The judicial power of the federal courts does not extend to such vague and indefinite questions."

In other words, it was held by the two lower courts: (1) that there was no breach—no "wrong"—and therefore no cause of action, i.e., justiciable controversy; and, (2) that an action could be initiated only by a party whose rights had been invaded.

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[20] Willing v. Chicago Auditorium Asso'n., 277 U.S. 274.
[21] Borchard, p. 5.
[22] Supra.

Fortunately, the Supreme Court reversed the lower courts, without dissent, and announced the great principles which gave the breath of life to the declaratory procedure:[23]

1. (a) That the power of the courts under the act extended beyond affirmative rights of the plaintiff to "negative declarations" of non-liability of the plaintiff or the "no-right" of the defendant. Which in effect means—

(b) That there could be an appropriate controversy for declaratory relief without there first being a "wrong" (as that term is ordinarily used) committed against the plaintiff; and

(c) That the act affords a remedy to a challenger of a right (the Aetna) who otherwise would have to wait for an adjudication of his claim and for relief from his insecurity and peril until his adversary took the initiative.

2. That questions of fact as well as law are adjudicable issues under the act.

On the first point, Chief Justice Hughes said:

> "It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."

On the second, he emphatically stated:

> "That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts to determine the legal consequences. That is every day practice."

The valuable preventive function of the procedure is thus firmly established, and that:

> ". . . the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages,"

to use the language of the court.

But there are other considerations making up the requisite justiciable controversy. It must involve real and concrete issues, an adjudication of which will be of binding effect upon the parties. Moot cases or advisory opinions on hypothetical issues are taboo. "Actions or opinions are described as 'moot' when they are or have become fictitious, colorable, hypothetical, academic or dead. The distinguishing characteristic of such issues is that they involve no actual, genuine, live controversy, the decision of which can definitely affect existing legal relations."[24]

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[23] 36 Michigan Law Review, 466; 50 Harvard Law Review, 1317; "The Declaratory Judgment—A Necessary Addition to Georgia Procedure," Georgia Bar Journal, November, 1944.

[24] Moore's Federal Practice, vol. 3, p. 3206, sec. 57:03; Borchard, p. 35; Anderson, sec. 7-11; 16 American Jurisprudence, pp. 282-5; 1 C.J.S., p. 1025, sec. 18 (6); Commercial Standard Insurance Company v. Gilmore, Gardner & Kirk Oil Company, (10th Cir., December, 1946), 157 Fed. (2d) 929; Business Men's Assurance Company v. Sainsbury, (10th Cir.), 110 Fed. (2d) 995.

The action is required to be adversary in character—i.e., between a plaintiff with a real interest in asserting the claim against a defendant interested in opposing it. Otherwise, it is likely to be dismissed as advisory in character.[25]

Closely connected with this requirement and partly overlapping it, is the condition that there be a real controversy, or to use the language of the federal act, an "actual" controversy.[26] In the Haworth case this word was held to be one of emphasis—not of definition. But troublesome borderline problems arise over the questions: "When are parties adverse? What is a controversy?"

The above given rules on the elements of justiciability only generally delineate the frontiers of judicial power. That is about all that can be done. What facts will present a justiciable controversy cannot be abstractly stated. One must look to various types of cases brought for declaratory relief.[27] However, the act is remedial and should be liberally construed, to make it as useful as possible.[28]

With pragmatic and utilitarian objectives as criterions, courts need only be on the lookout for the collusive, fictitious and sham law suits in applying the test of adversary parties in a real controversy for determination of justiciability. This is equally true in considering the plaintiff's "legal" interest in maintaining the claim and defendant's interest in opposing it.

Finally, the case must present a controversy that is sufficiently matured for judicial decision—usually described as being "ripe" for determination. "In a number of cases it has been held and in others intimated that the appearance of 'ripening seeds of controversy' is sufficient."[29] The question "is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test."[30] If there is probability from human experience that danger threatens or legal rights are in jeopardy or insecure, this is sufficient.[31] Indeed, "potential adversaries, regardless of the position they may take," should satisfy the requirement of a ripe and justiciable controversy. The familiar *quia timet* or quiet title action is nothing more than a declaratory action confined to the particular field of settling titles to land. It is every day practice to bring these actions against persons who may be potential disputants over the title, altho there really have been no previous

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[25] Aetna Life Insurance Company v. Haworth, supra; Ohio Casualty Company v. Marr, (10th Cir., Okla.) 98 Fed. (2d) 973; Borchard, pp. 29-32, 38.

[26] Coffman v. Breeze Corporation, 323 U. S. 316, 89 L. Ed. 264.

[27] Moore, op. cit., vol. 3, p. 3207.

[28] Ibid; 16 American Jurisprudence, p. 282; 87 A.L.R., 1211; sec. 12 of the Uniform Act expressly so provides.

[29] 16 American Jurisprudence, p. 284; Anderson, sec. 8, p. 29, et seq.

[30] Maryland Casualty Company v. Pacific Coal & Oil Company, 312 U.S. 270, 85 L. Ed. 826.

[31] Borchard, p. 637.

threats or controversy between plaintiff and defendants prior to the filing of the quiet title action.[32]

Discretion in Granting Declaration

It has been stated in a number of cases that the granting of a declaratory judgment is discretionary with the court. This is too loose and generalized. In the first place, it is not a discretion to entertain the action (which must be done if jurisdictional elements exist), but a discretion to enter or decline to enter the judgment after examining the facts and legal contentions.[33]

Nor is the discretion absolute, as in the case of the granting or denial of new trial motions in the federal court,[34] but it is a judicial discretion reviewable on appeal.[35]

"The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed."[36]

Discretion against declaratory relief will be exercised where another remedy will be more effective or appropriate under the circumstancs.[37] This does *not* mean that mere availability of another remedy is sufficient grounds for refusing relief;[38] but that another form of remedy will be more efficacious. *Utility not necessity is the test for the issuance of the declaration.*[39]

Therefore, courts may exercise discretion against the use of the declaratory actions, for example, to determine only whether negligence did or did not exist, on the ground that the traditional action for damages would be more effective because all the controversies would be settled, the issues would not be tried piecemeal,[40] and that the declaratory action would serve no useful purpose.[41]

The pendency of another action is a factor properly given consideration

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[32] Ibid, p.p. 42, 284.

[33] Anderson, sec. 169.

[34] Order granting or denying motion for new trial in the Federal Courts is not appealable or reviewable in any way. Traders & General Ins. Co. v. Yellow Cab Operating Co., (10th Cir., Okla.) 124 Fed. (2d) 400, and cases therein cited.

[35] Franklin Life Ins. Co. v. Johnson, (10th Cir.) 157 Fed. (2d) 653; Tenn. Coal, Iron & R. Co. v. Muscado Local No. 123, (5th Cir.) 137 Fed. (2d) 136; 16 Amer. Juris., p. 288, sec. 14.

[36] Borchard, p. 299.

[37] Ibid, pp. 302-3.

[38] Franklin Life Ins. Co. v. Johnson, (10th Cir.) supra; Rules 57, R.F.C.P., sec. 1, Uniform Act.

[39] Borchard, p. 307; 16 American Jurisprudence, p. 288, note 20; 68 A.L.R., 113; Moore, vol. 3, p. 3203; 1 C.J.S., p. 1023, "Actions," sec. 18 (5).

[40] Anderson, p. 177, note 86.

[41] Pennsylvania Casualty Co. v. Thornton, 61 F.S. 753.

in the exercise of judicial discretion. In this regard, there are these questions to be answered: (1) Does the other action involve the issues presented in the declaratory action? (2) Can the questions be as well or better presented in the other action? (3) Was the other action filed before the declaratory action?

If these questions are answered in the affirmative, the courts will exercise their discretion to dismiss the declaratory action.[42]

The pendency of a state court action, for example, by an injured party for damages for his personal injuries arising out of an automobile accident, against an insured motorist will not affect the right of the motorist's insurance carrier to maintain a declaratory action on the question of its coverage of the accident. The same is true as to the insured's right to maintain the action. Manifestly, the question of insurance coverage not being involved in the personal injury case, the issues of the declaratory action cannot be settled in it.[43]

Out of a consideration of the autonomy of states, and the harmonious working together of the respective courts of concurrent jurisdiction of the federal and state courts, the federal courts, in the exercise of their discretion in declaratory proceedings, are careful to avoid "gratuitous interference" with state court litigation. However, where the issues of the declaratory action will not be determined in the pending state court suit, (1) as fully, or (2) with equal facility, declaratory relief will not be denied.[44]

In the painstaking opinion by Judge Murrah in one of the Tenth Circuit's most recent decisions in this field, *Franklin Life Insurance Company v. Johnson,* 157 Fed. (2d) 653, the whole question of the effect of the pendency of action upon the discretion to be exercised in entertaining the declaratory action is exhaustively probed, with extensive citation of authority.

A number of important principles are pointed out in this case, e.g.:

(1) "A declaratory action, if otherwise appropriate, should not be dismissed merely because another remedy is available."

(2) "Before dismissing declaratory action because of pending proceedings in state court, federal court must ascertain whether the questions in controversy can better be settled in the state court proceedings, or whether there is such a plain, adequate and speedy remedy afforded in the state court proceedings that the declaratory action will serve no useful purpose."

(3) "If either of two courts is to be deprived of jurisdiction because of pendency of action in the other it must be the court to which application was last made for relief."

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[42] 1 C.J.S., p. 1029; Anderson, sec. 55; "Jurisdiction of Declaratory Judgment Actions as Affected by Pendency of Another Action or Proceeding," Annotation 135 A.L.R., 934; Brillhart v. Excess Insurance Company of America, 316 U.S. 491, 86 L.Ed. 1620.

[43] Annotation, 142 A.L.R., 8, 42.

[44] Ibid; Brillhart v. Excess Ins. Co. of Amer. supra; and citations in footnote 35.

(4) The "safeguards against 'procedural fencing' and races for *res judicata* (see note 51, Yale Law Review, 511, 515) should not deter the courts' full force and effect to the purpose of the Declaratory Judgment Act, 28 U. S. C. A. 400."

(5) It is not basis for discretionary denial of declaratory relief against a party that his interest is dependent upon a contingency.

Every line of this decision breathes the philosophy of our circuit court to make the procedure as utilitarian as possible within its proper realm.

Advantages and Uses

Some of the more important advantages and useful features of the declaratory action are as follows:[45]

(1) Actions at law require that there be first a breach of legal relations, as they give only redress. And one is consequently compelled to take a step at his peril, or, as Borchard colorfully puts it, "to eat the suspect to determine whether it be a mushroom or toadstool." The declaratory action avoids this danger. It acts preventively, adjudicating legal duties and rights *before* a breach or invasion.

(2) Actions in equity likewise require a prerequisite to a "cause of action" that there first be a "wrong" committed or hostile activity (except in cases like quiet title actions which are really declaratory actions). In declaratory proceedings, the existence of an opposing claim or potential adversary, raising doubt, insecurity or peril as to legal rights and relations, suffices.

(3) Equitable actions must fit into a rigid mould of antiquated forms. It none fit—no remedy. But the declaratory action can be applied to every type of issue that can arise.

(4) Equitable relief is subject to and hedged in by numerous highly technical requirements. The declaratory judgment is not.

(5) It is not necessary in a declaratory action sounding in equity to establish absence of adequate remedy at law, as it is in a traditional equitable action. Indeed, it is not required that there be no adequate remedy in equity.

(6) Prospective defendants can initiate proceedings remove uncertainty.

(7) A person is able to challenge the validity or applicability of a criminal or penal statute without first having to subject himself to its penalties. For various reasons the injunctive remedy is frequently not available.

(8) It is speedy as it is given preference or right of advancement on the trial calendar. (Rule 57, F.R.C.P.)

(9) Frequently the facts are stipulated, making for inexpensive trials, as well as expeditious ones.

A comparison of one or two forms of equitable remedies will illustrate the advantages of the declaratory procedure in that field.

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[45] "The Next Step Beyond Equity," Borchard, University of Chicago Law Review, vol. 2 (February, 1946) 145, 155.

Injunction suits require a showing of no adequate legal remedy, irreparable injury, posting of a bond and the satisfying of many other ancient encrusted equitable conditions, and for other reasons may not be practical or available. Declaratory actions require no bond,[46] no showing of absence of adequate legal remedy[47] or threat of irreparable injury,[48] no compliance with the technicalities of equity practice,[49] and can accomplish the same thing when an injunction would not be available; e.g., to avoid a penalty under an ordinance requiring a license, an injunction was denied because ordinarily equity will not enjoin enforcement of a penal law. *Shredded Wheat Company v. City of Elgin,* (Ill.) 120 N.E. 248. A declaratory action would have solved the problem there. The determination of the invalidity of the ordinance was all that was needed. Public officials do not need the coercion of an injunction in such a case, to compel them to obey.

A comparison of other forms of equitable remedies will develop equal advantages of the declaratory procedure. Actions for specific performance require the contract to be clear and free from ambiquity as a condition precedent to enforcement. But a declaratory judgment action to construe does not, and few people would continue to breach the contract in the face of a declaratory judgment as to their duty to perform. Advance construction is much better and more civilized remedy than a suit for damages, with the latter's prerequisite of a rupture of legal relations.

A rapidly growing body of case law furnishes unlimited examples of the utilization of the procedure. Illustrative of its use to settle legal relations where there is a dispute, danger or uncertainty before a breach or disaster occurs, are declaratory actions where plaintiff claims: that she is defendnat's wife which defendant denies;[50] that the defendant lessee demands the erection of a three-story, fire-proof building under a lease (the old one having burned), whereas plaintiff lessor maintains he is privileged to erect a two-story building, the new statutory limit for garages;[51] that a statute requires a heavy license fee of billiard parlors in one county only—alleged to be unconstitutional;[52] lessee in 99-year lease claimed right to tear down old building and erect and sublet a new one, which lessor denied.[53]

In none of these cases was there a wrong or hostile action threatened, but plaintiff's security and freedom of action were impaired by the doubt of his legal rights and relations. The declaratory judgment procedure supplied a great need.

Before and after breach, the construction of contracts of every kind

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[46] Z & F Assets Realization Corporation v. Hull, 311 U.S. 470, 85 L. Ed. 288.
[47] Rule 57, F.R.C.P.
[48] Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, supra.
[49] Tenn. Coal, Iron & R. Co. v. Muscoda Local 123, supra.
[50] Henry v. Henry, (N. J.) 144 Atl. 18; Bauman v. Bauman, 229 N.Y.S. 833 (validity of Mexican divorce).
[51] Girard Trust Co. v. Trembley Motor Co., (Pa.) 140 Atl. 506.
[52] Erwin Billiard Parlor v. Buckner, (Tenn.) 300 S.W. 565.
[53] Washington-Detroit Theatre Co. v. Moore, (Mich.) 229 N.W. 218.

and character has been one of the most prolific and valuable uses of the procedure.[54] Every kind of question imaginable involving insurance policies has been presented for declaration thereon by both insurers and insureds.[55]

Declaratory judgments have adjudicated: whether a contract was formed;[56] whether invalid or voidable, such as for fraud, usury, violative of constitution, statute, ordinance, public policy, or being made without power or authority;[57] the validity or invalidity of bonds and warrants;[58] meaning and effect of terms of contracts, as well as other written instruments such as wills, trusts, etc.[59]

Before violating a statute or ordinance to determine its validity or applicability to one's business or status, the declaratory judgment has been used "to turn on the light" before taking a step at one's peril.[60] For example, the declaratory procedure was used to determine: the constitutionality of the federal act under the interstate commerce clause;[61] the issues as to an electric light company's rights under a franchise ordinance the validity of which was questioned;[62] right to construct a filling station where a zoning statute and ordinance were asserted as prohibiting;[63] actions to determine constitutionality of a statute regulating pharmacies by one denied a license.[64]

Also, "declaratory judgments and orders as to the rights, powers, duties and obligations of public officers, boards and other public authorities have been made in many cases."[65] With the great growth of government by ad-
Anderson, ch. 20, p. 831.
ministrative boards and officials, this is a most helpful function of the procedure. Caution must be used, however, to see that there is a ripened justiciable controversy in this type of declaratory action.[66]

To avoid insecurity, peril, incurring penalties, or otherwise getting into hot water, the procedure has been used to determine tax problems (with the exception of federal taxes expressly excluded in federal act);[67] issues as to

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[54] 162 A.L.R. 756, Annotation on "Application of Declaratory Judgment to Questions in Respect to Contracts or Alleged Contracts."

[55] 142 A.L.R. 8, annotation; 103 A.L.R. 1005, annotation; "Declaratory Judgments in Liability Insurance Cases," Insurance Counsel Journal, (October, 1946) vol. 13, no. 4.

[56] Big Cola Corporation v. World Bottling Co., (6th Cir.) 134 Fed. (2d) 718.

[57] 162 A.L.R. at 763-6.

[58] Ibid, 767-9.

[59] 9 U.L.A. sections 2 and 3, and cases thereunder; "Challenging 'Penal' Statutes by Declaratory Action" (Borchard).

[60] Yale Law Journal, 445; Anderson, ch. 16, p. 783; 16 Amer. Jur., p. 296.

[61] Currin v. Wallace, 306 U.S. 1, 83 L. Ed. 441.

[62] City of Manhattan v. United Power & Light Corp., (Kan.) 283 Pac. 919.

[63] Faulkner v. City of Keene, (N. H.) 155 Atl. 195.

[64] Pratter v. Lascoff, 249 N.Y.S. 211, affirmed 185 N.E. 716, cer. denied 289 U.S. 754; followed in Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 73 L. Ed. 204.

[65] 17 Amer. Juris., p. 318, note 6, citing annotations containing many examples;

[66] 149 A.L.R. 349, Annotation on justiciable controversy as predicable on advice, opinion or ruling of public or administrative officer.

[67] Moore, vol. 3, p. 3216; 16 American Jurisprudence, pp. 322-3; Anderson, ch. 11, p. 669.

patents and infringement thereof;[68] questions of citizenship;[69] and many others illustrating the practical value of the procedure.

Practice and Procedure

The procedural aspects of the declaratory action will present no difficulty, even to one using the action for the first time, because they are the same as in the traditional type of action.[70] Rule 57 F.R.C.P. specifically provides:

> "The procedure for obtaining a declaratory judgment shall be in accordance with these rules."

This puts the action in the same procedural category as any other civil action. The same is true in states operating under state statutes.

The petition or complaint sets up the jurisdictional elements, the facts of the controversy, and the relief claimed. The only difference from other actions is that the prayer asks for a declaration instead of a coercive judgment for money and execution therefor, or for performance; e.g., an action for a declaration that a plat restriction validity prohibited the erection of business building instead of an injunction enjoining construction of such a proposed structure.

A helpful set of annotated forms of declaratory pleadings is given by Anderson in chapter 7, page 311, and may be found in standard form books generally, including the new Oklahoma form book by Kleinschmidt and Highley (1946).

Venue, service of process and jurisdiction are likewise governed by the same rules as in other types of cases.[71]

In the matter of practice and trial, the same familiar rules govern declaratory actions as in other cases, though the declaratory procedure has been found to be much more conducive to stipulation of the facts. The right of a jury trial is determined in the same way as in other actions.[72]

Likewise, in declaratory actions, as in others, consideration will be given the effect of the statute of limitations and laches on the cause of action.[73]
actions.

There may be combined with the prayer for declaratory relief, a request for the traditional applicable type of coercive relief;[74] and this has great advantages. For example, you might not establish a right to the injunction you pray for, where the evidence would be sufficient for a declaratory judgment in your favor. This would be a consideration in other types of actions,

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[68] Borchard, p. 802; Moore, p. 3212; 45 Yale L.J., 1287.
[69] Perkins v. Elg., 307 U.S. 325, 83 L. Ed. 1320.
[70] Moore, vol. 3, p. 3223; Anderson, ch. 6, "Pleading, Practice and Procedure," p. 205; 16 American Jurisprudence, p. 323.
[71] Ibid; also, 149 A.L.R., 1103, annotation.
[72] Discussed ante; 131 A.L.R., 218, Moore, vol. 3, p. 3331.
[73] 151 A.L.R., 1076, annotation—Statute of limitations and laches in declaratory
[74] Annotation, 155 A.L.R., 501.

such as specific performance, reformation, recission, etc. And the declaratory judgment would be sufficient to settle the dispute even though the coercive relief was denied.[75]

Where the declaratory judgment alone does not give sufficient relief or is not obeyed, both the federal and uniform acts provide for application for additional relief; the former states:

> "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper,"

upon application and notice thereof to the opposite parties.

Such supplemental relief is not limited to further declaratory relief, but coercive enforcement provision may be made.[76]

The declaratory judgment is a conclusive determination of the rights of the parties, and carries the same weight as any other judgment under principle of *res judicata.*[77]

The declaratory judgment, being a final judgment, is appealable and reviewable as such. Both the federal and uniform acts expressly so provide. And, as in the case of practice, the same rules of procedure govern as in other types of cases.[78]

When it is said that the principle uses for the declaratory procedure for the settlement of controversies lie in the field of: (1) personal status; (2) the validity and construction of all types of written instruments, including contracts, deeds, leases, mortgages, liens, corporation and partnership documents, insurance policies, statutes, patents and wills; (3) facts, future interests, trusts, titles to property; and (4) administrative duties and powers, elections, public officers, and taxation—there is little left in the field of litigation.

"It serves a most important social function in settling disputed rights at the inception of the controversy, saves from destruction and violence an existing status quo, preserves contracts against threatened breach, holds parties to their contractual and statutory duties and avoids the economic and social damage which breach would entail. It acts as a preventative and conservatory measure, saving existing relationships." Issue is joined while the relationship still exists. Conversely, it enables one to secure an adjudication of his right to take action, to change his status quo, in advance of taking the step at the peril of penalty, damages or forfeiture.

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[75] Annotation—Combining actions for declaratory and coercive relief, 155 A.L.R., 501; Advantages thereof, Borchard, 432.

[76] Anderson, sec. 193, p. 573; 1 C.J.S., p. 1058; Borchard.

[77] Ibid, p. 438, et seq.; 16 American Jurisprudence, pp. 342-4; 101 A.L.R. 694.

[78] Anderson, p. 607; 16 American Jurisprudence, p. 341.