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DECLARATORY JUDGMENTS IN FLORIDA: JURISDICTION AND JUDICIAL DISCRETION

DAVID L. DICKSON*

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I. INTRODUCTION

The circuit courts of Florida have been authorized to render declaratory judgments and decrees in certain cases since 1919.¹ Declaratory judgment statutes were designed to fill a need for protection of legal interests, public and private, which courts were otherwise unable or unwilling to protect. The original Florida statute, passed before the Uniform Declaratory Judgments Act was drafted, was narrowly drawn. However, the scope of the remedy has gradually been enlarged through additional legislation, so that today the courts are at least empowered to protect any substantial legal interest placed in jeopardy.² The fact remains, however, that the remedial purposes intended by the several legislatures which adopted these statutes have not yet been fully achieved.

More than fifty years after the first declaratory judgment statute became effective, the status of the declaratory remedy in Florida is still far from clear, and its usefulness has been correspondingly impaired. Florida courts have said that these statutes are to be liberally and hospitably construed, but some decisions belie these affirmations. Furthermore, contradictory statements as to the fundamentals of jurisdiction

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1. For current legislation see FLA. STAT. §§ 86.011-.111 (1971). For a discussion of prior legislation, see text at notes 11-34 *infra*.

2. Perhaps the most striking social gain of the declaratory action is the widening of the scope of the economic interests—including immunity and release from obligations or claims—now taken under judicial protection, interests which were heretofore left outside judicial cognizance.

Preface to E. BORCHARD, DECLARATORY JUDGMENTS at x (2d ed. 1941) [hereinafter cited as BORCHARD].

persist. To this day, the language of the opinions leaves unclear whether an "actual controversy" is required in order to obtain a declaratory judgment. In addition, courts have not always taken note of the important changes made in declaratory judgment law by new legislative and judicial developments; old cases, decided under narrower statutes or abandoned judicial concepts, are sometimes still cited as authoritative.

There has been no recent general attempt, either in legal journals or in judicial opinions, to resolve the contradictions and clarify the ambiguities.³ The adoption of the new judicial article to the state constitution, effective January 1, 1973,⁴ makes appropriate a reexamination of the judicial power to afford declaratory relief, since declaratory cases sometimes strain that power to its utmost limits. New kinds of legislation and litigation, such as environmental statutes and public interest suits in that field, should, if possible, be integrated into the traditional body of the law. In light of these considerations, a review of Florida declaratory judgment law which seeks to identify what is obsolete or inharmonious and explains the rest is desirable. That is the purpose of this article.

This article will examine the constitutional, statutory, and judge-made requirements for invoking the jurisdiction of Florida courts in declaratory judgment cases. Since the requirements are sometimes cast in terms of judicial power or jurisdiction, and sometimes in terms of judicial discretion, both will be discussed. No attempt will be made to deal with the "practice" or "procedure" aspects of the subject.

II. DEVELOPMENT OF THE DECLARATORY REMEDY

The fundamental difference between the conventional cause of action and the declaratory cause of action is the absence of a prayer for coercive relief in the latter. Every civil complaint necessarily seeks a declaration of the plaintiff's rights, if no more than a finding that he is entitled to a money judgment. The conventional complaint also asks the court to order the defendant to pay money, or to take other action to satisfy plaintiff's claim. The declaratory complaint, in its pure form, requests only a judicial declaration.

If plaintiff is entitled to coercive relief, he will normally ask for it rather than rest contentedly with only a prayer for a declaration. Therefore, the need for the declaratory remedy usually arises when plaintiff is not entitled to ask the court for coercive relief. Plaintiff may be debarred from such relief in a number of familiar legal situations. For example, he may seek to establish his status, such as heirship or legal competency; determine the title to, or an interest in, real or personal property; have a will or other written instrument construed, as a guide to his future action

3. The last general discussion was contained in McCarthy, *Declaratory Judgments*, 3 *MIAMI L.Q.* 365 (1949).

4. *FLA. CONST.* art. V.

or inaction; obtain instructions for himself as trustee concerning the administration of the trust; have bonds issued by plaintiff as a public authority validated; or interplead claimants to a fund in which plaintiff claims no interest. Most of these declaratory causes of action were entertained, even in the absence of a statute, both at law and in equity. Others have been authorized by special legislation, such as the Florida act permitting the circuit courts to declare the validity of government bonds, and the taxes levied for payment thereof.⁵

However, judge-made law and special legislation failed to protect many legal interests placed in jeopardy but not yet actually injured by any act of the potential defendant. In the first place, these traditional declaratory remedies were confined to special types of subject matter, leaving claimants of many other rights, privileges and franchises without legal relief. Secondly, the traditional remedies failed to protect a large class of persons interested in establishing the nonexistence of rights or claims against themselves. Important legal interests were often sacrificed because of the inability to obtain such negative declarations. A conspicuous example was the decision in *Willing v. Chicago Auditorium Association*,⁶ which led to the enactment of the Federal Declaratory Judgments Act. In *Willing*, the holder of a long-term lease on Chicago property desired to raze the existing building and erect a new one, which he anticipated would be more profitable. He believed that he had the right to do so under the lease, but the matter was not free from doubt. The lessor refused to give his consent, and the lease was subject to forfeiture if the lessee razed the building without authority. The United States Supreme Court held that the lessee had no cause of action to establish his right to take the desired action. Unwilling to assume the risk of substantial damages and forfeiture of the lease if his interpretation of the lease was mistaken, the lessee abandoned his plan.

It is true that, in some of these cases, an injunction could be obtained forbidding interference by defendant with plaintiff's action or status. The United States Supreme Court has pointed out that the only difference between a suit for declaration and one for injunction is the absence in the declaratory complaint of allegations of irreparable injury and of a prayer for coercive relief.⁷ Nevertheless, a further practical difference exists. Where a plaintiff's interests are in jeopardy, but defendant has not actually threatened them, it may be difficult to prove danger of irreparable injury, and an equity court will be reluctant to take the drastic step of granting an injunction.⁸ A two-stage procedure, in which the court first declares plaintiff's rights and then, if defendant disregards the declaration, con-

5. Declaratory judgments validating bonds are authorized by FLA. STAT. §§ 75.01-17 (1971). Other special declaratory judgment statutes are cited at notes 36, 38 and 102-06 *infra*. BORCHARD, *supra* note 2, at 137-39 discusses the non-statutory causes of action.

6. 277 U.S. 274 (1928) [hereinafter cited as *Willing*].

7. *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249 (1933).

8. J. POMEROY, EQUITY JURISPRUDENCE § 1350 (4th ed. 1919).

siders whether an injunction or other supplemental relief should be granted, is easier to justify and, therefore, provides a superior protection to the plaintiff. Yet, as the *Willing* case shows, the courts often believed themselves unauthorized to follow this procedure.

The injustices suffered in the absence of any declaratory remedy led to much agitation among legal scholars for broad enactments authorizing declaratory judgments, regardless of both subject matter and of whether the relief sought was positive or negative. Professor Edwin Borchard became one of the leaders in that endeavor, and his authoritative *Declaratory Judgments* sums up the history of the movement.⁹

Michigan enacted the first general statute in 1919.¹⁰ Florida's first statute, enacted the same year, was much more limited in scope, confining the power to render declaratory judgments to the construction of specified written instruments.¹¹ The question of the constitutionality of the Florida legislation did not reach the Supreme Court of Florida until 1930, when the act was sustained in *Sheldon v. Powell*.¹² Since that case has frequently been cited and relied upon to the present day, a discussion of its background and rationale are important to an understanding of the history of declaratory judgments in Florida and of the present power of the courts to render such judgments.

In the years between the enactment of the Florida statute in 1919 and the *Sheldon* opinion in 1930, important decisions in declaratory cases were handed down in Michigan and by the United States Supreme Court. The Supreme Court of Florida felt obligated to distinguish these cases in order to sustain its own statute. In *Anway v. Grand Rapids Railway*,¹³ the Supreme Court of Michigan had held the broad statute of that state unconstitutional on the ground that the legislation imposed on the courts "non-judicial" functions; "it allegedly authorized an "advisory opinion" in a case where plaintiff and defendant agreed that plaintiff was entitled to relief.¹⁴ The Florida court cited, but refused to follow the Michigan case, on the ground that the Florida statute did not authorize courts to

9. BORCHARD, *supra* note 2 at 132-36.

10. Law of May 2, 1919, No. 150, [1919] Pub. Acts Mich. 278-79 (repealed 1929).

11. Section 1. [A]ny person or corporation claiming to be interested under a deed, will, contract in writing, or other instrument in writing, may apply by Bill in Chancery to any Court in this State having equity jurisdiction for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person or corporation interested, whether or not further relief is or could be claimed, and such declaration shall have the force of a final decree in chancery.

Sec. 2. [A]ll proceedings instituted under the provisions of [the preceding section] shall be in conformity with the law and rules of court governing other proceedings in Chancery, as far as the same may be applicable. . . .
Law of June 9, 1919, ch. 7857, §§ 1-2 [1919] Fla. Laws 148 (repealed 1943).

12. 99 Fla. 782, 128 So. 258 (1930) [hereinafter cited as *Sheldon*].

13. 211 Mich. 592, 179 N.W. 350 (1920).

14. The defendant admitted the allegations of the bill of complaint. *Id.* at 593, 179 N.W. at 351. Although neither party questioned the validity of the statute, the court on its own motion held the statute unconstitutional. *Id.* at 597, 179 N.W. at 361.

give such "advisory opinions," and, therefore, confined the court to "judicial" functions, as required by the Florida Constitution.¹⁵ The question remained whether this "judicial" functions requirement implied that Florida courts could only decide "cases" and "controversies." The United States Supreme Court had recently interpreted these terms, as used in Article III of the federal Constitution, as excluding declaratory judgment actions.¹⁶ The Supreme Court of Florida distinguished the United States Supreme Court cases by noting the absence of a "cases" and "controversies" requirement in the Florida Constitution.¹⁷ The court then sustained the Florida Declaratory Judgments Act of 1919.

Thus, the Court in *Sheldon* decided two things: *First*, that the Florida courts were forbidden to render "advisory opinions," because to do so would be a "non-judicial" function and would violate the state constitution. *Second*, that this prohibition did not imply that Florida courts were limited to deciding "cases" and "controversies," as those terms had been defined by the United States Supreme Court (so as to exclude declaratory judgments). The court's opinion, delivered in 1930, did not and could not anticipate that in 1937 the United States Supreme Court would reinterpret the terms "cases" and "controversies" to include declaratory judgments,¹⁸ thereby sustaining the validity of the Federal Declaratory Judgments Act of 1934.¹⁹ The *Sheldon* decision, therefore, does not authorize the conclusion that the "judicial" functions limitation of the state constitution authorizes court action outside the scope of "cases" and "controversies" as those terms were subsequently more broadly interpreted by the United States Supreme Court.

Obviously it would be desirable for the Supreme Court of Florida to reexamine the "judicial powers" limitation on the state courts, especially since subsequent statutes have greatly expanded the declaratory remedy, and the same "judicial powers" limitation has been carried forward to the new constitution, effective in 1973.²⁰ Thus far, the Court has not done so.

15. *Sheldon v. Powell*, 99 Fla. 782, 792, 128 So. 258, 262 (1930). The case was decided on April 8, 1930. Neither the court nor the counsel apparently knew of the case of *Washington-Detroit Theater Co. v. Moore*, 249 Mich. 673, 229 N.W. 618 (1930), decided March 6, 1930, which sustained the new Michigan declaratory judgment statute of 1929. Law of Aug. 28, 1929, No. 36, [1929] Pub. Acts Mich. 68-69 (repealed 1961). That statute was expressly made applicable only to "cases of actual controversy." *Id.* §1.

16. *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70 (1927), and *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274 (1928), *construing* U.S. CONST. art. III, § 2, which limits the judicial power of the United States to "cases" and "controversies."

17. *Sheldon v. Powell*, 99 Fla. 782, 788, 128 So. 258, 261 (1930).

18. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) (district court had jurisdiction to declare whether plaintiff insurance company had to keep a policy in force because of insured's alleged total and permanent disability).

19. Act of June 14, 1934, ch. 512, 48 Stat. 955, *as amended*, 28 U.S.C. §§ 2201-02 (1970). "In a case of actual controversy . . . any court of the United States . . . may declare the rights and other legal relations of any interested party. . ." *Id.* § 2201.

20. "The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." FLA. CONST. art. V, § 1. The provision of FLA. CONST. art. V, § 11 (1885) giving the circuit courts jurisdiction of "such other matters as the

Instead, two lines of cases involving declaratory judgments have emerged, one citing *Sheldon* to the effect that the "judicial powers" extend beyond "cases" and "controversies,"²¹ and the other declaring that a "controversy" must be present in all declaratory judgment cases.²² The resulting confusion has been carried forward into Florida legal texts.²³

However, this apparent contradiction in Florida decisions disappears when we look at the questions actually decided in the cases. Aside from the constitutional exceptions for legislative apportionment and advisory opinions to the governor,²⁴ no case has been found in which jurisdiction to issue a declaration has been sustained by the Florida appellate courts without the presence of a "controversy," in the present federal sense of that term.²⁵ Thus, the recent cases interpreting both the Florida Constitution and the current Florida Declaratory Judgments Act as requiring a "controversy" in declaratory cases appear to correctly state the law.²⁶

The authority to issue declaratory judgments, first granted to Florida courts in 1919, has been broadened by subsequent enactments so that today the statutory jurisdiction extends close to the limits of constitutional power. Only the most important of these developments will be noted at this point.²⁷

The Declaratory Judgments Act of 1943²⁸ was based on the Uni-

legislature may provide," has been omitted, presumably because the supreme court held that it could have reference only to "judicial matters or functions." *Sheldon v. Powell*, 99 Fla. 782, 792, 128 So. 258, 262 (1930).

21. *Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So.2d 445 (Fla. 1952); *Ready v. Safeway Rock Co.*, 157 Fla. 27, 24 So.2d 808 (1946); *Sample v. Ward*, 156 Fla. 210, 23 So.2d 81 (1945).

22. *North Shore Bank v. Town of Surfside*, 72 So.2d 659 (Fla. 1954); *Bryant v. Gray*, 70 So.2d 581 (Fla. 1954); *Ervin v. Taylor*, 66 So.2d 816 (Fla. 1953); *May v. Holley*, 59 So.2d 636 (Fla. 1952); *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 210 So.2d 750 (Fla. 4th Dist. 1968).

23. It is settled as a general rule of law that the judicial power of courts can be exercised only in determining actual controversies In fact, an "actual controversy" is not necessary in declaratory judgment suits. It is clearly established, however, that there must be a bona fide dispute between the contending parties as to a present justiciable question

The test to activate jurisdiction under the act is whether or not the moving party shows that he is in doubt as to the existence or nonexistence of some right, status, immunity, power or privilege, and that he is entitled to have such doubt removed.

9A FLA. JUR. *Declaratory Actions* § 13 (1972 rev.).

In another text the decisions holding that there is no necessity for a controversy are described as "incorrect," but are elsewhere cited as authoritative. THE FLORIDA BAR, CIVIL PRACTICE BEFORE TRIAL, § 22 (2d ed. 1969).

24. FLA. CONST. art. III, § 16; art. IV, § 1.

25. A detailed examination of the present federal meaning of "controversy" is contained in *Dickson, Declaratory Remedies and Constitutional Change*, 24 VAND. L. REV. 257 (1971).

26. The elements of a "controversy," as set forth in Florida decisions, are discussed in Section III *infra*.

27. Further analysis of the Florida statutes is contained in Sections III, A (legal nature of the issues); III, B (ripeness of the case); III, C (adversary character of the proceeding); and III, D (finality of the judgment to be rendered).

28. FLA. STAT. §§ 87.01-13 (1949), as amended FLA. STAT. §§ 86.011-111 (1971) [hereinafter cited as "the 1943 Act" or as "the Florida Declaratory Judgments Act"].

form Declaratory Judgments Act,²⁹ with some significant changes which broadened the scope of the Uniform Act. These were: a more comprehensive description of the subject matters upon which declarations could be issued; more specific authority to issue negative as well as affirmative declarations; a clear grant of power to declare facts or law existing at the time of judgment or arising in the future; and authority to sue to resolve doubts, as well as to establish rights, under instruments in writing.³⁰ While these changes would probably have raised constitutional questions of justiciability under earlier decisions, the cases since 1943 have generally assumed the validity of the 1943 Act.³¹ The statutory language permits the courts to go about as far as the "judicial powers" limitation of the constitution will permit.³²

The 1955 amendments to the 1943 Act were only technical in nature, intended to make it conform to the Florida Rules of Civil Procedure, and need not be noticed here.³³ In 1967, the 1943 Act, as amended, underwent primarily technical amendments again.³⁴ The broad coverage of the 1943 Act was left undisturbed.

The power to render declaratory judgments with reference to specified subject matters is also granted by other sections of the Florida Statutes. The Bond Validation Act authorizes the circuit courts, upon petition of any political division of the state, to declare the authority of such subdivision to incur debt, and the legality of all proceedings in connection therewith, including the levy of taxes.³⁵ The Administrative Procedure Act³⁶ authorizes the circuit courts to issue declarations concerning the validity or interpretation of any rule promulgated by a state agency. Case law permits declaratory proceedings to review agency orders entered

29. UNIFORM DECLARATORY JUDGEMENTS ACT [hereinafter cited as "the Uniform Act"], reported in McCarthy, *Declaratory Judgments*, 3 MIAMI L.Q. 365, 366 (1949).

30. Compare FLA. STAT. §§ 87.01-.04 (1949), as amended FLA. STAT. §§ 86.011-.041 (1971), with UNIFORM DECLARATORY JUDGMENTS ACT §§ 1-4.

31. The only case expressly dealing with the constitutionality of the 1943 Act is *Fraser v. Cohen*, 159 Fla. 253, 31 So.2d 463 (1947), which held that the act did not unconstitutionally abolish the distinction between law and equity. A suit for declaratory relief may be filed either in equity or at law, depending on the subject matter. *Caballero, Herdegen & Knight, Inc. v. Threlkeld*, 142 So.2d 124 (Fla. 3d Dist. 1962).

32. The statement in *deMarigny v. deMarigny*, 43 So.2d 442 (Fla. 1949), that a prior court decree cannot be construed by declaratory decree because decrees are not included in the section 2 enumeration of "deed, will, contract or other article, memorandum or instrument in writing" appears inconsistent with the language of the act and with other decisions construing prior decrees. See text at note 120 *infra*.

33. Law of May 31, 1955, ch. 29738, § 2, [1955] Fla. Laws 157, amending FLA. STAT. §§ 87.01-.13 (1955) (codified at FLA. STAT. §§ 87.01-.13 (1955)). The current codification appears at FLA. STAT. §§ 86.011-.111 (1971).

34. Fla. Laws 1967, ch. 67-254, § 38, amending FLA. STAT. §§ 87.01-.13 (1965) (codified at FLA. STAT. §§ 86.011-.111 (1967)). The current codification appears at FLA. STAT. §§ 86.011-.111 (1971).

35. FLA. STAT. §§ 75.01-.17 (1971).

36. FLA. STAT. § 120.30 (1971).

without a due process hearing.³⁷ There are additional special statutory authorizations for declaratory judgments.³⁸

It is apparent from the foregoing brief discussion that the practitioner should bear in mind two major points in considering constitutional jurisdiction to render declaratory judgments. (1) The extent of constitutional restrictions in this field has not been authoritatively determined. *Sheldon*, and the cases which followed it, relied on an obsolete federal interpretation of "controversy," which is grossly misleading in light of recent United States Supreme Court decisions.³⁹ (2) The broad language of the statute and the inconsistent language in the decisions offer little guidance. The restrictions on judicial power to issue declaratory judgments must be gleaned from the results of the cases rather than from the wording of the opinions. To this task we turn in the next section.

III. LIMITS ON DECLARATORY JURISDICTION

The old Florida Constitution, like the new one, vested in the courts only "judicial power."⁴⁰ In the Anglo-American system of justice, such power can be invoked only when the subject matter before the court is of a legal nature, involving concrete facts, in which opposing interests are afforded an opportunity to be represented, and which is susceptible of disposition by a final judgment or decree.⁴¹ A declaratory action which meets these requirements is also a "controversy" in the present federal sense.⁴² But whether or not one uses the term "controversy" in analyzing the exercise of constitutional judicial power by the Florida courts is simply a question of terminology. In any event, the basic requirements are the same. The opinions, in most Florida cases dealing with the subject, affirmatively support this view. The decisions in all declaratory judgment cases are consistent with it.

37. See text at notes 102 to 110 *infra*.

38. FLA. STAT. § 68.01 (1971) grants chancery courts jurisdiction to invalidate a tax assessment at the suit of a taxpayer. FLA. STAT. § 479.08 (1971) authorizes declaratory judgments concerning the validity of revocation of any sign permit, "as provided by chapter 86."

39. Dickson, *Declaratory Remedies and Constitutional Change*, 24 VAND. L. REV. 257, 272-75 (1971).

40. FLA. CONST. art. V, § 1 (1885); FLA. CONST. art. V, § 1.

41. That the phrases, "cases of actual controversy" and "actual antagonistic assertion and denial of right" are unnecessary is evidenced by the fact that the statutes not containing these words, including the Uniform Act, have been held constitutional in the states, on the assumption, inescapable in fact, that only such cases could be appropriately presented for declaratory judgment. . . . Were the controversy not genuine or ripe for judicial decision, with a plaintiff and defendant having actually or potentially opposing interests, with a *res* or other legal interest definitely affected by the judgment rendered and the judgment a final determination of the issue, it would fail to present a justiciable dispute—not because it seeks a declaratory judgment, but because it lacks the elements essential to invoke any judgment from judicial courts.

BORSHARD, *supra* note 2 at 41-42.

42. See text at notes 18 & 19 *supra*.

A brief review of the facts in those cases which asserted that a "controversy" need not be present in order for judicial action to be taken demonstrates that those cases did not so hold. *Sheldon* was a declaratory action brought by legatees under a will against the executor, seeking to establish their rights to their legacies. Since the facts presented a legal issue of a concrete nature, which the court had the power to determine and with the opposing interests of the legatees and the executor represented, the case easily met the requirements stated above, and a decree for complainants on the merits was affirmed.⁴³

*Sample v. Ward*⁴⁴ was also a claim under a will, and jurisdiction was likewise sustained. It is interesting to note that in *Sample* the supreme court, while denying the necessity of an "actual controversy," went on to say that

[i]f the question raised in such a suit is real and not theoretical, the person raising it has a bona fide interest under the writing, and there is a defender or defenders with a bona fide right to defend, the court . . . will not be held in error in assuming jurisdiction and rendering a declaratory judgment. . . .⁴⁵

Obviously, whatever the name that may be given to it, the court was applying the "controversy" test.⁴⁶

*Ready v. Safeway Rock Co.*⁴⁷ involved a bill to construe a lease from plaintiff's predecessor in title to defendant Safeway, in which the question was whether the lease could be forfeited for defendant's failure to erect a phosphate crushing plant of the capacity specified in the lease. The court affirmed a decree on the merits for the defendant. The majority's rejection of the term "controversy" to designate the issue before it was disapproved of by Justice Brown, concurring specially. He said that article V of the constitution conferred only judicial power, which required an actual controversy, and that such a controversy was present in the case.⁴⁸

*Rosenhouse v. 1950 Spring Term Grand Jury*⁴⁹ held that plaintiff, as a citizen and taxpayer of Dade County, was entitled to a hearing on the merits of his declaratory action to construe a statute appropriating public monies and defining the duties of public officials. An actual controversy was present, provided that plaintiff had standing to sue. The court's decision that plaintiff's interest was sufficient to give him standing supplied the last element necessary for a controversy, and the deci-

43. 99 Fla. 782, 128 So. 258 (Fla. 1930). See text at notes 12-19 *supra*.

44. 156 Fla. 210, 23 So.2d 81 (1945).

45. *Id.* at 215, 23 So.2d at 83.

46. See text at note 41 *supra*.

47. 157 Fla. 27, 24 So.2d 808 (1946).

48. *Id.* at 32, 24 So.2d at 810.

49. 56 So.2d 445 (Fla. 1952).

sion is in line with cases in this state and elsewhere sustaining the power of courts to entertain taxpayer's actions.⁵⁰

Significantly, there have been no recent opinions rejecting the use of "controversy" to define the prerequisites for the exercise of judicial power. In fact, for a number of years, opinions in declaratory cases have expressly adopted the term. *May v. Holley*⁵¹ was a suit by a landowner for a declaration that he had the right to raze defendant's building to the extent that it encroached on his land. The Supreme Court of Florida reversed the trial court's dismissal of the complaint and stated as follows:

Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have or reasonably may have an actual, present, adverse or antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest [*sic*] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional power of the courts.⁵²

In the recent declaratory action of *Hialeah Race Course, Inc. v. Gulfstream Park Racing Association*, the District Court of Appeal, Fourth District, used substantially the same language in affirming the circuit court's refusal to dismiss a declaratory complaint, asserting that "[t]here must be a bona fide controversy."⁵³ In several cases where the court has found an essential element of a "controversy" missing in a declaratory action, the declaration has been refused.⁵⁴

There is no material difference between the elements of a justiciable "controversy," as defined by the Supreme Court of Florida in *Holley*, and the formulations of courts in other jurisdictions and of text writers.⁵⁵

50. See text at notes 111-14 and 182-86 *infra*.

51. 59 So.2d 636 (Fla. 1952) [hereinafter cited as *Holley*].

52. *Id.* at 639.

53. 210 So.2d 750, 752 (Fla. 4th Dist. 1968). A decree for plaintiff on the merits was later affirmed on direct appeal without discussion of this point. *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 245 So.2d 625 (Fla. 1971).

54. *North Shore Bank v. Town of Surfside*, 72 So.2d 659 (Fla. 1954) (case hypothetical); *Bryant v. Gray*, 70 So.2d 581 (Fla. 1954) (case hypothetical); *Ervin v. Taylor*, 66 So.2d 816 (Fla. 1953) (no adverse parties); *Village of Virginia Gardens v. City of Miami Springs*, 171 So.2d 199 (Fla. 3d Dist. 1965) (insufficient facts and no doubt alleged).

55. "The controversy must be *definite and concrete*, touching the *legal relations* of

A justiciable "controversy," whether in a state or the federal system, consists of: (1) a "legal" issue or issues, such as the existence or nonexistence of some immunity, power, privilege or right; (2) which is ripe for judicial decision, *i.e.*, a present controversy; (3) on which adverse positions are represented by parties possessing sufficient interest in the subject matter; and (4) susceptible of a judgment finally disposing of the issues, *i.e.*, not involving the giving of legal advice on issues which are moot or beyond the power of courts to resolve.

We shall consider each of these requirements in turn, as they have been formulated by the legislature and applied by the Florida courts in declaratory judgment cases.

A. *Legal Nature of the Issues*

The first criterion for the justiciability of a dispute is that it be "legal" in nature. If the dispute involves an area over which the public authority has asserted control, the problem of justiciability becomes a problem of separation of powers. The jurisdictional question ordinarily presented to the court is: Whether, by hearing and deciding the case, the court will be intruding on matters reserved to the exclusive discretion of the legislature or the executive? If so, the question is not "legal," but "political," and the acts of the legislature or executive are not subject to judicial review.⁵⁶ A fortiori, they are not subject to declaratory judgment.

The boundary between "political" and "legal" questions has been shifting rapidly in recent years. One of the most striking examples of this change involves the apportionment of legislative districts. In 1946 the United States Supreme Court declared that the judicial branch "ought not to enter this political thicket."⁵⁷ The Court thereafter not only entered the thicket, but made itself at home there. It struck down apportionment plans containing variations in district population of less than four percent from "the mathematical ideal" of absolute equality.⁵⁸ Under the compulsion of these decisions, the amended Florida constitution requires the Supreme Court of Florida to determine by declaratory judgment the validity of each decennial reapportionment of the legislature, or draft the apportionment plan itself if the legislature fails to do so.⁵⁹ No guidelines whatever are contained in the state constitution to aid the

parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character. . . ." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (emphasis added). *Accord*, *Abbott v. Parker*, 249 So.2d 908 (La. 1971); BORCHARD, *supra* note 2 at 195-203.

56. 6A J. MOORE, FEDERAL PRACTICE ¶ 57.14, at 3079 (2d ed. 1966).

57. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

58. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wells v. Rockefeller*, 394 U.S. 542 (1969).

59. FLA. CONST. art. III, § 16. See *In re Apportionment Law*, 263 So.2d 797 (Fla. 1972).

court in finding its way through the "political thicket" that has now become a "legal thicket."

Another issue traditionally classified as "non-judicial" was the revocation of a license or benefit which the legislature and the executive (either directly or through a licensing agency) need not have granted in the first place. Liquor licenses were the most conspicuous of these. Under the so-called "doctrine of privilege," the majority of state courts held that, since the state could entirely forbid all sale of liquor, a license for the sale of liquor was granted subject to an arbitrary right of withdrawal, or (what amounted to the same thing) a withdrawal based on charges which need not be proved in a fair hearing.⁶⁰ The view that, because the original grant of the license or benefit was a "privilege" bestowed on the citizen, and not a right, the withdrawal could be arbitrary, has now been decisively repudiated by the United States Supreme Court.⁶¹ It has also been repudiated by the Supreme Court of Florida in a case arising under the Beverage Control Law, which held that premises could not be "padlocked" against the sale of liquor without a hearing satisfying the requirements of due process.⁶² These decisions mean that, while there is no "right" to retain a "privilege," there is a "right" to the elements of a due process hearing before the government withdraws a "privilege" and, thereby, destroys a livelihood or other property. There are other issues no longer considered "political," but suffice it to say that the number of subjects on which the Florida courts are empowered to declare cannot any longer be narrowly circumscribed.

The present Florida Declaratory Judgments Act is essentially the statute adopted in 1943, since the subsequent amendments were only technical in nature. That statute grants not only all the powers proposed in the Uniform Act, but manifests a legislative intent to grant additional powers. Therefore, it may safely be stated that, in any given case, the Florida courts possess at least the powers granted by the Uniform Act, and may have other powers in addition.

The Florida act grants to the circuit courts of this state the following jurisdiction:

(1) The court has jurisdiction to declare "rights, status and other equitable or legal relations," and the "existence, or nonexistence . . . [o]f any immunity, power, privilege or right; or . . . [o]f any fact upon which the existence or nonexistence of such immunity, power, privilege or right does or may depend . . ."⁶³ Only the first quoted clause appears,

60. *E.g.*, *Walker v. City of Clinton*, 244 Iowa 1099, 59 N.W.2d 785 (1953). Compare K. DAVIS, *ADMINISTRATIVE LAW TEXT* 175-89 (3d ed. 1972).

61. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (procedural due process requires that a pre-termination evidentiary hearing be held for recipients of welfare benefits); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) (denial of application to bar without hearing on charges against applicant is denial of procedural due process).

62. *Keating v. State*, 173 So.2d 673 (Fla. 1965).

63. *FLA. STAT.* § 86.011 (1971).

in slightly different form, in the Uniform Act.⁶⁴ By virtue of the second quoted clause, the Florida Legislature has emphasized that the courts are authorized to protect any legal interest, a "privilege" as well as a "right," and that they may adjudge contested issues of "fact" as well as of "law" in so doing.

(2) "The court's declaration may be either affirmative or negative in form and effect . . ." ⁶⁵ The Uniform Act is substantially similar.⁶⁶ Thus, the court may declare the *nonexistence* of any right, status, power, privilege or other equitable or legal relation claimed by either plaintiff or defendant which is asserted against a "privilege," "immunity" or "power" of the other party.

(3) Out of an abundance of caution, in case the above enumerations should be insufficient to encompass the full range of powers intended to be granted, other sections of the act provide that the plaintiff may obtain a declaration of rights under "a deed, will, contract or other instrument in writing," as well as "a statute," "any regulation made under statutory authority," or a "municipal ordinance."⁶⁷ It is further provided that a contract may be construed either before or after breach;⁶⁸ that declarations may be rendered on all questions concerning estates or trusts, including interests therein or claims against them;⁶⁹ and that the foregoing enumeration "does not limit or restrict the exercise of the general powers" conferred by the first section.⁷⁰ Aside from minor differences in terminology, the corresponding sections of the Uniform Act are the same,⁷¹ with one possibly significant exception; the Florida authorization for a declaration concerning "any regulation made under statutory authority" is not contained in the Uniform Act. Furthermore, the Florida Administrative Procedure Act, which applies to all state agencies unless specifically excepted, expressly authorizes circuit courts to make declarations concerning the validity or interpretation of any rule issued by an administrative agency.⁷² Thus, under Florida law, it is clear that the whole field of administrative rules and regulations is open to declaratory judgments, while there may be some doubt about the extent of that power under the Uniform Act.⁷³

64. "The Courts of Record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." UNIFORM DECLARATORY JUDGMENTS ACT § 1.

65. FLA. STAT. § 86.011 (1971).

66. "The declaration may be either affirmative or negative in form and effect." UNIFORM DECLARATORY JUDGMENTS ACT § 1.

67. FLA. STAT. § 86.021 (1971).

68. FLA. STAT. § 86.031 (1971).

69. FLA. STAT. § 86.041 (1971).

70. FLA. STAT. § 86.051 (1971).

71. UNIFORM DECLARATORY JUDGMENTS ACT §§ 2-5.

72. FLA. STAT. § 120.30 (1971).

73. Case law under the Uniform Act upholds the power of courts to issue declarations with reference to the validity or interpretation of administrative rules. *See e.g.*, *Gibbs v. Cochran*, 281 Ala. 22, 198 So.2d 607 (1967); *King v. Priest*, 357 Mo. 68, 206 S.W.2d 547

The right of trial by jury, in the case of all issues so triable, is specifically preserved in declaratory proceedings.⁷⁴ Thus, there is no attempt to disturb the pre-existing division between law and equity. Since declaratory jurisdiction is granted by statute only to the circuit courts, other courts do not possess such jurisdiction,⁷⁵ and the circuit court itself is without declaratory jurisdiction in cases where the amount claimed is outside its jurisdictional limit.⁷⁶

Under the Florida Declaratory Judgments Act, therefore, legal or equitable declaratory actions may cover the full range of subjects of, and proceed in the same manner as, the ordinary civil action, with only basic distinctions which are inherent in the declaratory proceeding. First, the declaratory cause of action involves the resolution of a doubt or the removal of a peril, rather than redress for an injury already inflicted. Second, since the relief prayed for is declaratory rather than coercive, a cause of action is alleged and proved if plaintiff shows himself entitled to the declaration, whether it be in his favor or in favor of the defendant. The Florida cases reflect these distinctive characteristics of the declaratory action.

The first point appears in those cases which hold that in a declaratory action plaintiff need not allege that his legal theory or his version of the facts has actually been challenged, but only that it is jeopardized by a bona fide doubt as to whether his position or that of the defendant's is correct. Thus, the courts have held complaints sufficient where they alleged that the interpretation of a contract was doubtful;⁷⁷ that a tenant was in doubt as to a landlord's duty under the lease to make repairs;⁷⁸ that the meaning of a stockholders' agreement, although clear on its face, was doubtful due to extrinsic facts;⁷⁹ or that there was doubt as to the obligation to arbitrate a claim for a rate increase under a franchise granted by the city to a waste collector.⁸⁰ On the other hand, where the complaint failed to show the existence of a bona fide doubt, the courts have dismissed complaints asking for a declaration of rights under statutes or ordinances,⁸¹ or asking the court to construe a foreign divorce decree which was admittedly clear and unambiguous.⁸²

(1947), *appeal dismissed* 333 U.S. 852 (1948); *Drink, Inc. v. Babcock*, 77 N.M. 277, 421 P.2d 798 (1966); *Frankenthal v. Wisconsin Real Estate Brokers' Bd.*, 3 Wis. 2d 249, 89 N.W.2d 825 (1958).

74. FLA. STAT. § 86.071 (1971); UNIFORM DECLARATORY JUDGMENTS ACT § 9.

75. *In the Interest of My*, 162 So.2d 551 (Fla. 3d Dist. 1964).

76. *State Farm Mut. Auto. Ins. Co. v. Wallace*, 209 So.2d 719 (Fla. 2d Dist. 1968).

77. *Jensen v. Dipaolo's Italian Foods Co.*, 244 So.2d 513 (Fla. 2d Dist. 1970); *Berkowitz v. Firestone*, 173 So.2d 161 (Fla. 3d Dist. 1965).

78. *Zero Food Storage, Inc. v. Henderson's Sea Food, Inc.*, 121 So.2d 462 (Fla. 3d Dist. 1960).

79. *Bacon v. Crespi*, 141 So.2d 823 (Fla. 3d Dist. 1962).

80. *Bell v. Associated Independents, Inc.*, 143 So.2d 904 (Fla. 2d Dist. 1962).

81. *Bullema v. Losey*, 84 So.2d 715 (Fla. 1956); *Dade County v. Rauzin*, 81 So.2d 508 (Fla. 1955); *Duplig v. City of South Daytona*, 195 So.2d 581 (Fla. 1st Dist. 1967).

82. *Colby v. Colby*, 120 So.2d 797 (Fla. 2d Dist. 1960).

Since the greater includes the lesser, it would seem obvious that an allegation that plaintiff's clear legal right has been threatened by the defendant should be at least as good as an allegation that plaintiff's doubtful right has been so threatened.⁸³ Yet, in a few instances, district courts of appeal have held the positive allegations insufficient, presumably on the theory that the more certain a plaintiff is that he is right, the less entitled he is to relief.⁸⁴ These cases are illogical and should be repudiated.

The second point—that plaintiff need only show himself entitled to the declaration, not necessarily prove that he is right, in order to withstand a motion to dismiss—is clearly supported by the decisions. Numerous cases point out that in ordinary actions plaintiff must allege and prove his right to the claimed coercive relief, but that in declaratory proceedings the test of a complaint is not whether plaintiff will get a declaration in accordance with his contention, but whether he is entitled to a declaration at all.⁸⁵ If he is, the trial court is obligated to render a declaration. A dismissal of the complaint without a declaration is incorrect even though the final result would have to be a judgment for defendant on the merits.⁸⁶

Under both the Uniform Act and the Florida act, the subject matter of declaratory judgments may include all or substantially all of the range of the civil and criminal law. Many cases illustrating this conclusion have been collected in the works on this subject.⁸⁷ While the Florida decisions have not yet been so all-encompassing, they do illustrate the potentialities of this form of relief.

Since the adoption of the Florida Declaratory Judgments Act of 1919, authorizing declaratory judgments concerning written instruments,

83. "The cause of action is to be found in the petitioner's need for judicial relief and this need exists whether he requires affirmative recognition of his own claim upon another or whether he desires to be freed from the *unfounded claim* of another." BORCHARD, *supra* note 2 at 927 (emphasis added).

84. *Central Mut. Ins. Co. v. Espina*, 208 So.2d 144 (Fla. 3d Dist. 1968); *Johnson v. Atlantic Nat'l Ins. Co.*, 155 So.2d 886 (Fla. 3d Dist. 1963), *cert. denied* 162 So.2d 665 (Fla. 1964); *Lyles v. Dade County*, 123 So.2d 466 (Fla. 3d Dist. 1960).

85. *Modernage Furniture Co. v. Miami Rug Co.*, 84 So.2d 917 (Fla. 1955); *Gates v. City of Jacksonville*, 278 So.2d 645 (Fla. 1st Dist. 1973); *Caswell v. Nethery*, 258 So.2d 846 (Fla. 1st Dist. 1972); *Talcott v. Central Bank & Trust Co.*, 220 So.2d 411 (Fla. 3d Dist. 1969); *Heath v. Central Truck Lines*, 195 So.2d 588 (Fla. 1st Dist. 1967); *Kickliter v. National Union Fire Ins. Co.*, 188 So.2d 872 (Fla. 1st Dist. 1966); *R-C-B-S Corp. v. City of Atlantic Beach*, 178 So.2d 906 (Fla. 1st Dist. 1965); *Hankins v. Title & Trust Co.*, 169 So.2d 526 (Fla. 1st Dist. 1964).

86. *Local 532, Am. Fed. Emp. v. City of Fort Lauderdale*, 273 So.2d 441 (Fla. 4th Dist. 1973); *Talcott v. Central Bank & Trust Co.*, 220 So.2d 411 (Fla. 3d Dist. 1969); *McLaughlin v. Metropolitan Dade County*, 191 So.2d 615 (Fla. 3d Dist. 1966); *Kickliter v. National Union Fire Ins. Co.*, 188 So.2d 872 (Fla. 1st Dist. 1966). *Contra*, *Groover v. Adiv Holding Co.*, 202 So.2d 102 (Fla. 3d Dist. 1967) (affirming dismissals on grounds that defendants were entitled to judgment on the merits) and *Heath v. Central Truck Lines*, 195 So.2d 588 (Fla. 1st Dist. 1967). The latter two decisions seem clearly wrong.

87. BORCHARD, *supra* note 2 at 477-924 (civil), 1020-36 (criminal); 2 W. ANDERSON, DECLARATORY JUDGMENTS §§ 496-750 (2d ed. 1951) (hereinafter cited as ANDERSON).

declarations have been rendered on the validity, interpretation and breach of contracts.⁸⁸ Similar relief has been granted as to leases,⁸⁹ trusts,⁹⁰ and wills.⁹¹

Under the more inclusive provisions of the 1943 Act, new subjects have been opened to declaratory judgment. In real property cases, actions have been allowed to determine the marketability of a title which plaintiff title company had insured;⁹² to determine a boundary line;⁹³ and to establish interests in land or in the proceeds of its sale.⁹⁴ In personal property cases, declarations have been granted to determine the ownership of corporate stock⁹⁵ and to decide whether a decedent had made a gift of a note.⁹⁶

The broad authority granted by the 1943 Act in the field of public law has been exercised in many cases. Declarations have been granted on the constitutional validity of statutes⁹⁷ and ordinances;⁹⁸ instructing public officials as to their rights and duties under the constitution⁹⁹ and statutes;¹⁰⁰ and determining whether a municipal corporation had been legally organized so as to settle a conflict in governmental jurisdiction.¹⁰¹

88. *Dwiggins v. Roth*, 37 So.2d 702 (Fla. 1948); *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So.2d 671 (1944); *Jacksonville Land Holding Co. v. American Oil Co.*, 136 Fla. 491, 188 So. 809 (1938); *Goodman v. Winn-Dixie Stores, Inc.*, 240 So.2d 496 (Fla. 3d Dist. 1970); *Gars v. Woodard*, 214 So.2d 385 (Fla. 3d Dist. 1968); *Breuil v. Hobbs*, 166 So.2d 825 (Fla. 3d Dist. 1964); *Rodgers v. Kajax Realty Co.*, 165 So.2d 259 (Fla. 1st Dist. 1964); *Jackson Tom, Inc. v. Carlton*, 133 So.2d 752 (Fla. 1st Dist. 1961); *Coast Cities Coaches v. Whyte*, 102 So. 2d 848 (Fla. 3d Dist. 1958).

89. *Hyman v. Cohen*, 73 So.2d 393 (Fla. 1954); *Lincoln Tower Corp. v. Dunhall's Florida*, 61 So.2d 474 (Fla. 1952); *Garden Suburbs Golf & Country Club, Inc. v. Pruitt*, 156 Fla. 825, 24 So.2d 898 (1946); *Mayfair Operating Corp. v. Bessemer Properties, Inc.*, 150 Fla. 132, 7 So.2d 342 (1942); *Bal Harbour Towers, Inc. v. Keller*, 227 So.2d 219 (Fla. 3d Dist. 1969); *J.S. Michael Co. v. Rayonier, Inc.*, 212 So.2d 824 (Fla. 1st Dist. 1968); *Tulip Realty Co. v. Fuhrer*, 155 So.2d 637 (Fla. 2d Dist. 1963); *North Shore Realty Corp. v. Gallaher*, 99 So.2d 255 (Fla. 3d Dist. 1957).

90. *Griley v. Rackley*, 135 Fla. 824, 185 So. 734 (1939).

91. *Roberts v. Mosely*, 100 Fla. 267, 129 So. 835 (1930).

92. *Tamiami Abstract & Title Co. v. Malanka*, 185 So.2d 493 (Fla. 2d Dist. 1966).

93. *Bozeman v. Roberts*, 188 So.2d 23 (Fla. 1st Dist. 1966).

94. *Goldberg v. Michalik*, 237 So.2d 298 (Fla. 2d Dist. 1970) (interest in proceeds of sale); *P & N Inv. Corp. v. Florida Ranchettes, Inc.*, 220 So.2d 451 (Fla. 1st Dist. 1968) (interest in land); *Bamber v. Bamber*, 216 So.2d 806 (Fla. 3d Dist. 1968) (interest in land); *Singer v. Tobin*, 201 So.2d 799 (Fla. 3d Dist. 1967) (interest in land); *Rice v. Fremow*, 165 So.2d 447 (Fla. 2d Dist. 1964) (interest in land).

95. *Central Life Ins. Co. v. Afro-American Life Ins. Co.*, 74 So.2d 363 (Fla. 1954); *Day v. Norman*, 42 So.2d 273 (Fla. 1949); *Price v. Rome*, 222 So.2d 252 (Fla. 3d Dist. 1969); *Hewitt v. Price*, 222 So.2d 247 (Fla. 3d Dist. 1969); *Davidson v. Miami Beach First Nat'l Bank*, 215 So.2d 623 (Fla. 3d Dist. 1968).

96. *Lungu v. Walters*, 198 So.2d 99 (Fla. 3d Dist. 1967).

97. *Eelbeck Milling Co. v. Mayo*, 86 So.2d 438 (Fla. 1956); *McInerney v. Ervin*, 46 So.2d 458 (Fla. 1950); *Satan Fraternity v. Board of Pub. Instruc.*, 156 Fla. 222, 22 So.2d 892 (1945).

98. *Pace v. King*, 38 So.2d 823 (Fla. 1949); *City of Miami v. Rosenthal*, 208 So.2d 495 (Fla. 3d Dist. 1968).

99. *Brautigam v. White*, 64 So. 2d 781 (Fla. 1953).

100. *Overman v. State Bd. of Control*, 62 So.2d 696 (Fla. 1952); *State v. City of Miami*, 54 So.2d 250 (Fla. 1951); *Board of County Comm'rs v. Sloan*, 214 So.2d 74 (Fla. 2d Dist. 1968).

101. *Town of Daytona Beach Shores v. Foster*, 135 So.2d 903 (Fla. 1st Dist. 1962).

The 1943 Act provides both general authority to declare rights, privileges and immunities, and specific authority to pass on administrative regulations.¹⁰² These grants of power must, of course, be construed together with the constitutional¹⁰³ and statutory¹⁰⁴ provisions, as well as the rules of court,¹⁰⁵ relating to quasi-legislative and quasi-judicial action by administrative agencies and judicial review thereof.¹⁰⁶ The Florida courts have decided that if an administrative agency holds a trial-type hearing, in which a record is made and an adjudicative final order is entered, the exclusive method of review is by certiorari, either in the district court of appeal or in the circuit court.¹⁰⁷ However, other administrative actions or failures to act, and all administrative rules and regulations, may be reviewed by declaratory action in the circuit court.¹⁰⁸ The confusion in the language and even in the decisions of the cases as to when certiorari is available and when a declaratory suit is available has been trenchantly criticized by Professor Kenneth Davis.¹⁰⁹ Certainly it seems that the Florida courts have erected unnecessary procedural hurdles to the review of administrative actions by holding that certiorari and declaratory judgment are mutually exclusive, especially since declaratory actions are necessarily filed in the circuit court and certiorari proceedings must often be filed in the district court of appeal. To some extent, the dilemma presented to the practitioner has been eased by decisions that a claimant may proceed simultaneously by both certiorari and declaratory action, and thus avoid loss of rights *pendente lite*.¹¹⁰

Since tax assessments represent one type of administrative action

102. FLA. STAT. §§ 86.011, 86.021 (1971).

103. FLA. CONST. art. V, § 4(b)(1)(2).

104. FLA. STAT. §§ 120.30-.31 (1971).

105. FLA. R. APP. P. 4.1.

106. Statutory provisions too numerous to cite govern judicial review of specific agency actions.

107. *Meiklejohn v. American Distrib., Inc.*, 210 So.2d 259 (Fla. 1st Dist. 1968); *Loew v. Dade County*, 188 So.2d 869 (Fla. 3d Dist. 1966); *Carol Cities Util., Inc., v. Dade County*, 143 So.2d 828 (Fla. 3d Dist. 1962). *But see Florida Indus. Comm'n v. Neal*, 224 So.2d 774 (Fla. 1st Dist. 1969) (claimant allowed to attack legality of organization of Industrial Commission by declaratory action rather than by certiorari); *Johnson v. Thoburn*, 160 So.2d 729 (Fla. 3d Dist. 1964) (declaratory action available to construe a notice issued by Florida Board of Dental Examiners).

108. *Bayne v. Florida State Bd. of Dispensing Opticians*, 212 So.2d 762 (Fla. 1968); *Teston v. City of Tampa*, 143 So.2d 473 (Fla. 1962); *Goldstein v. Sweeny*, 42 So.2d 367 (Fla. 1949); *Bay Nat'l Bank & Trust Co. v. Dickinson*, 229 So.2d 302 (Fla. 1st Dist. 1969); *Jezek v. Vordemaier*, 227 So.2d 69 (Fla. 4th Dist. 1969); *Hardwick v. Florida Citrus Comm'n*, 207 So.2d 746 (Fla. 2d Dist. 1968), *cert. denied*, 214 So.2d 622 (Fla. 1968); *Dade County v. Jim's Northwest, Inc.*, 171 So.2d 612 (Fla. 3d Dist. 1965); *Hillsborough County v. Twin Lakes Mobile Home Village, Inc.*, 153 So.2d 64 (Fla. 2d Dist. 1963); *Bloomfield v. Mayo*, 119 So.2d 417 (Fla. 1st Dist. 1960). BORCHARD, *supra* note 2 at 875-924 contains an extensive discussion.

109. K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 24.06 (3d ed. 1972), *discussing Bloomfield v. Mayo*, 119 So.2d 417 (Fla. 1st Dist. 1960). *Bloomfield* was expressly approved in *Teston v. City of Tampa*, 143 So.2d 473 (Fla. 1962).

110. *City Council v. Trebor Constr. Co.*, 254 So.2d 51 (Fla. 3d Dist. 1971); *Canney v. Board of Pub. Instruc.*, 222 So.2d 803 (Fla. 1st Dist. 1969); *Alderman v. Connor*, 152 So.2d 819 (Fla. 2d Dist. 1963).

taken without a hearing, they may be reviewed through declaratory judgments. Declarations have been issued on the validity of tax assessment rolls;¹¹¹ the validity of a statutory increase in a license fee;¹¹² plaintiffs' rights to tax exemptions;¹¹³ and the validity of tax sale certificates.¹¹⁴

Although the 1943 Act does not expressly authorize review of executive action, the courts allow declaratory suits to review executive action or failure to act,¹¹⁵ provided, of course, that the particular question presented does not fall within the range of governmental exemption or non-reviewable discretion.¹¹⁶ Declaratory judgment has been held available to establish the validity or invalidity of municipal bonds, in a suit by the holder¹¹⁷ or by the municipality.¹¹⁸ However, the statute providing a special form of declaratory action by which a municipality may validate its bonds must be followed where applicable.¹¹⁹

In a number of cases attempts have been made to use declaratory actions to invalidate judgments or decrees previously entered in other cases, or to construe such judgments or decrees. Judgments and decrees are not among the "instruments in writing" specifically enumerated in the act, but the general power to declare the existence or nonexistence of any right would seem broad enough to apply to them.¹²⁰ Obviously, however, such an attempt to substitute collateral attack for direct review might conflict with the provisions of law governing appeals and those designed to give finality to judgments. Declaratory actions attacking the validity of prior judgments or decrees have, therefore, been dismissed unless the prior judgment was void, rather than merely erroneous or voidable.¹²¹ On the other hand, where the parties are merely uncertain as to

111. *Reid v. Kirk*, 257 So.2d 3 (Fla. 1972); *Townsend v. Gray*, 181 So.2d 612 (Fla. 1st Dist. 1966).

112. *Mayo v. National Truck Brokers, Inc.*, 220 So.2d 11 (Fla. 1969).

113. *Ammerman v. Markham*, 222 So.2d 423 (Fla. 1969); *Memorial Home Community v. Smith*, 214 So.2d 77 (Fla. 1st Dist. 1968).

114. *Board of Pub. Instruc. v. Little River Valley Drainage Dist.*, 119 So.2d 323 (Fla. 3d Dist. 1960). *Contra*, *Woodman v. Jones*, 101 Fla. 177, 133 So. 620 (1931) (under the Florida Declaratory Judgments Act of 1919, which, by section 1, was limited to "question[s] of construction arising under the instrument").

115. *Adams v. Gunter*, 238 So.2d 824 (Fla. 1970).

116. Declaratory judgment is often interchangeable with mandamus in this area. See text at note 233 *infra*.

117. *Alsop v. Pierce*, 155 Fla. 185, 19 So.2d 799 (1944).

118. *Mize v. County of Seminole*, 229 So.2d 841 (Fla. 1969).

119. *Bessemer Properties v. City of Opalocka*, 74 So.2d 296 (Fla. 1954) (applying the Bond Validation Act, currently FLA. STAT. §§ 75.01-17 (1971)).

120. "The circuit courts have jurisdiction to declare rights, status and other equitable or legal relations The court may render declaratory judgments on the existence or non-existence: (1) Of any immunity, power, privilege or right" FLA. STAT. § 86.011 (1971).

121. Declaratory actions dismissed in *Stahl v. Wilson*, 121 So.2d 662 (Fla. 3d Dist. 1960); *City of North Miami Beach v. Bernay*, 117 So.2d 863 (Fla. 3d Dist. 1960). Declaratory action allowed to attack void foreign decree in *Kittel v. Kittel*, 164 So.2d 833 (Fla. 3d Dist. 1964).

their rights under a decree in a prior case, a declaratory order answering their questions has been granted.¹²²

The 1943 Act clearly grants the circuit courts jurisdiction to declare not only the *law*, but also the "existence, or nonexistence . . . [o]f any *fact* upon which . . . such immunity, power, privilege or right does or may depend" ¹²³ The legislative intent is further demonstrated by the provision of the act that "[w]hen an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions,"¹²⁴ and by a jury, if appropriate. Thus, where disputed questions of fact must be resolved before the law can be applied, and the questions of law are appropriate for declaratory judgment, the circuit courts are given jurisdiction to resolve both types of questions, and have done so in numerous cases. Nevertheless, in other cases courts have refused to entertain declaratory actions because the only doubt was as to the "facts" on which the parties' rights depended. If the courts were holding that they lacked declaratory jurisdiction in cases involving only questions of fact, then these cases are contrary to the statute, contrary to numerous other Florida decisions, contrary to many decisions in other jurisdictions, and contrary to the opinions of text writers on the subject. Therefore, the preferable interpretation of those decisions is not that the courts held they lacked jurisdiction, but that, in their discretion, they declined to exercise it. We shall consider judicial discretion in declaratory cases, and other authorities on the subject, at a later point.¹²⁵

Up to the present time, the Florida decisions in declaratory judgment cases do not reflect any particular difficulty in distinguishing between "legal" and "non-legal" issues. The subject matter of the various cases brought before the state courts has generally been within traditional limits, and the principal problems have arisen in connection with the other elements of a justiciable controversy. Nevertheless, the increasing tendency, both state and federal, to expand governmental power into new fields, and the need for the courts to assert their rightful authority over legal issues in those fields, presage increased litigation in the future on this element of justiciability.

B. *Ripeness of the Case*

In order to present a controversy, and thus fall within the judicial power of the courts under the Florida constitution, a case must be "ripe,"

122. *Fleming v. State Rd. Dept.*, 157 Fla. 164, 25 So.2d 376 (1946); *Koscot Interplanetary, Inc. v. State*, 230 So.2d 24 (Fla. 4th Dist. 1970). *Contra*, *deMarigny v. deMarigny*, 43 So.2d 442, 444 (Fla. 1949), on the ground that decrees are not included in "deed, will, contract or other article, memorandum or instrument in writing," and because the decree was clear. The firststated ground seems erroneous.

123. FLA. STAT. § 86.011 (1971) (emphasis added).

124. FLA. STAT. § 86.071 (1971) (emphasis added).

125. See section IV *infra*.

but not overripe or "moot." The questions presented, in other words, must be live and genuine, not dead or hypothetical. The policy values inherent in this requirement go to the very essence of the courts' place in the constitutional scheme of things. If courts take jurisdiction over cases which do not present live questions, they are not deciding the legal relations of the parties before them, but instead are giving advisory opinions as to past or future conduct. Such decisions would often constitute judicial legislation, and thus violate the separation of powers requirement of the constitution. Furthermore, they are subject to an equally serious objection from the point of view of the courts themselves. Giving advisory opinions is an abandonment of the fundamental wisdom of Anglo-American jurisprudence, which counsels that correct conclusions are more likely to be reached when the judicial mind is focused on the application of legal principles to specific facts.

The question remains, of course, as to when a particular case is "live" and therefore "ripe" for judicial determination. The statutes have given little guidance on this score. The Florida Declaratory Judgments Act of 1919, authorizing declaratory judgments only for the construction of written instruments, did not mention the subject at all, and impliedly invited the courts to apply their pre-existing standards of ripeness in declaratory actions.¹²⁶ The 1943 Act, as amended, authorizes declarations concerning any immunity, power, privilege or right, "whether such immunity, power, privilege or right now exists or will arise in the future;"¹²⁷ and provides that "[a] contract may be construed either before or after there has been a breach of it."¹²⁸ Further, it authorizes a declaratory judgment "by way of anticipation with respect to any act not yet done or any event which has not yet happened," making such anticipatory declaration as binding on the parties "as if that act or event had already been done or had already happened before the judgment was rendered,"¹²⁹ and omits the express requirement, contained in the federal Declaratory Judgments Act and the acts of some other states, that there be an "actual controversy" in declaratory cases.¹³⁰ If the above language were literally interpreted, it would abolish the ripeness requirement altogether. Obviously the Florida Legislature had no such intention, and no such construction would be constitutionally permissible. The question of ripeness is therefore left to interpretation by the courts, bearing in mind the liberal legislative intent disclosed by the language quoted.

The declaratory procedure, which is designed to afford parties judicial relief at an earlier stage of their actual or potential dispute, often

126. Law of June 9, 1919, ch. 7857, §§ 1-2, [1919] Fla. Laws 148 (repealed 1943). The text of the act is set out in note 11 *Supra*.

127. FLA. STAT. § 86.011 (1971).

128. FLA. STAT. § 86.031 (1971).

129. FLA. STAT. § 86.051 (1971).

130. Declaratory Judgments Act, 28 U.S.C. § 2201 (1970).

raises questions of ripeness in an acute form. No one realized this better than Professor Borchard, who prefaced his discussion of ripeness by pointing out that "the danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events . . . and the prejudice to his position must be actual and genuine and not merely possible or remote."¹³¹ On the other hand, he asserted that

a controversy as to legal rights is as fully determinable before as it is after one or the other party has acted on his own view of his rights and perhaps irretrievably shattered the *status quo*. Such violence and destruction make the issue more painful and socially undesirable, but they do not make it any more controversial.¹³²

Obviously the two statements are in tension, and are difficult to reconcile. If the first be emphasized, it might be said that the declaratory remedy has added little to the existing arsenal. If the second be emphasized, it might be thought that parties could present to the court any hypothesis concerning future action and obtain a judgment on it. The key to resolving the difficulty is *genuineness*, *i.e.*, that the danger to the plaintiff may be based in part on future events, provided that the danger is real and that those events are not merely "hypothetical."

Thus, two requirements for ripeness of a declaratory action can be isolated. First, the threat to plaintiff's right, status, immunity, power or privilege must have either occurred or be reasonably likely to occur, and must be sufficiently substantial to warrant plaintiff's reasonable apprehension. Second, the right, status, immunity, power or privilege which is threatened must arise from events that have either already happened or are reasonably certain to happen.

As to the first requirement, it is obvious that the substantiality of the jeopardy or threat will sometimes be a question of fact and sometimes one of law. If the defendant has actually threatened the plaintiff, and possesses the apparent intention and ability to carry out his threat, the legal conclusion would normally be that reasonable danger to plaintiff's right or other legal interest exists. In most cases, however, no actual threat is required in order to entitle plaintiff to a declaration, provided defendant has the apparent intention and ability to harm plaintiff's interest. This is particularly true in the case of a statute, criminal or civil, which on its face jeopardizes plaintiff, leaving only the question of whether the statute will be enforced.¹³³ On the other hand, where the statute delegates enforcement discretion to an administrative agency, and the agency has not yet determined whether enforcement should be

131. BORCHARD, *supra* note 2 at 56.

132. *Id.* at 58.

133. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So.2d 445 (Fla. 1952); Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445 (1943).

attempted against persons in plaintiff's situation, plaintiff is not yet in jeopardy and should be required to await the agency decision before seeking judicial protection.¹³⁴

The question of what specific action or inaction by defendant may jeopardize the plaintiff is closely related to the question of the existence or nonexistence of adverse interests, and will be discussed below in the section dealing with the adversary character of the proceeding.¹³⁵ Therefore, the remaining discussion of ripeness will deal only with the second point mentioned above—the extent to which plaintiff's right, status, immunity, power or privilege must be based on events that have already happened, and the extent to which any of them may be based on events in the future. Assuming that the requirement of jeopardy to plaintiff has been met, we may now bring the second requirement into focus.

The question is, under what circumstances, if any, should a plaintiff be allowed to obtain a declaration of the legal consequences of future events? The question can be most conveniently examined by dividing the pertinent cases into three classes: (1) cases where the danger is to the plaintiff's present legal status or his ability to continue conduct in which he is already engaged; (2) cases where the danger is to future status or future events which are highly probable and of a specific character; and (3) cases where the danger is to future status or future events which are mere possibilities and have not yet been specifically defined.

1. EXISTING STATUS OR PRESENT CONDUCT

Where plaintiff asks for a declaration concerning his legal status based on existing facts, or concerning his privilege or immunity to continue conduct in which he is already engaged, the facts are fully developed, and the court has no difficulty in declaring their legal significance. The point is so clear that often the court will grant a declaratory judgment without even finding it necessary to discuss its right to do so. Thus, declarations have been granted determining whether plaintiff policeman held a permanent civil service appointment in the force;¹³⁶ whether plaintiff corporation was the actual owner of shares of stock in defendant corporation;¹³⁷ whether plaintiff's grantor had reserved grazing rights in a deed to defendant's predecessor in title;¹³⁸ and whether a psychologist might continue to practice his profession without obtaining a certificate

134. *Morrison v. Plotkin*, 77 So.2d 254 (Fla. 1955). On the other hand, plaintiff is entitled to declaratory relief where the agency has unlawfully threatened criminal prosecution, *Husband v. Cassel*, 130 So.2d 69 (Fla. 1961), or plaintiff has exhausted his administrative remedies, *Hillsborough County v. Twin Lakes Mobile Home Village, Inc.*, 153 So.2d 64 (Fla. 2d Dist. 1963).

135. See section III, C(2) *infra*.

136. *City of St. Petersburg v. Bolender*, 54 So.2d 31 (Fla. 1951); *Guilford v. City of Miami*, 169 So.2d 42 (Fla. 3d Dist. 1964).

137. *Central Life Ins. Co. v. Afro-American Life Ins. Co.*, 74 So.2d 363 (Fla. 1954).

138. *Wiggins v. Lykes Bros.*, 97 So.2d 273 (Fla. 1957).

from the State Board of Examiners, on the ground that the statute authorizing the granting of certificates was unconstitutional.¹³⁹ Declarations have also been rendered as to whether plaintiff had been released from liability under a guaranty which he had executed;¹⁴⁰ whether plaintiff could maintain its advertising signs without interference by a city under an allegedly unconstitutional ordinance;¹⁴¹ whether a lease of a restaurant would vest permanent ownership of the restaurant's liquor license in the lessees, or whether the license would revert to the landlords at the end of the lease;¹⁴² and whether a fireman was eligible for promotion at once, or had to wait for a vacancy in a higher position.¹⁴³ The last cited decision is of particular interest, because it shows that the declaration need not decide the entire case, provided that it finally disposes of a separable issue. A declaration that the fireman was eligible for promotion would not, of course, guarantee him the higher position—that would be determined by funds available and other factors within administrative discretion—but would merely declare unlawful defendants' present ground for refusing to consider him. The case is a clear illustration of a situation in which mandatory relief would not be available, and plaintiff would be without a remedy if he could not obtain a declaratory judgment.

Where the court is asked to issue a declaration concerning an administrative process before the agency proceedings are completed, plaintiff's remedy before the agency must be either lacking or clearly inadequate. Obviously, if the agency lacks constitutional or statutory power to act, there is no administrative remedy and plaintiff may seek an immediate judicial declaration.¹⁴⁴ If the administrative remedy is clearly inadequate, the same result follows. For example, plaintiff may show the court that the agency has adopted an illegal, self-executing rule, and that his livelihood or other vital interest is threatened with substantial injury unless the court grants immediate relief.¹⁴⁵ The advantage of using declaratory rather than injunctive proceedings in this situation is that a lesser showing of threatened injury is necessary for a declaration than for an injunction, which might have the effect of stopping in its tracks a coordinate branch of the government.¹⁴⁶

139. *Husband v. Cassel*, 130 So.2d 69 (Fla. 1961).

140. *Hollywood Shopping Plaza, Inc. v. Schuyler*, 179 So.2d 573 (Fla. 2d Dist. 1965).

141. *City of Sarasota v. Sunad, Inc.*, 181 So.2d 11 (Fla. 2d Dist. 1965).

142. *Marconi v. Schimmel*, 181 So.2d 167 (Fla. 3d Dist. 1965).

143. *McLaughlin v. Metropolitan Dade County*, 191 So.2d 615 (Fla. 3d Dist. 1966).

144. *Husband v. Cassel*, 130 So.2d 69 (Fla. 1961) (statute unconstitutional); *Florida Indus. Comm'n v. Neal*, 224 So.2d 774 (Fla. 1st Dist. 1969) (agency constituted in violation of statute).

145. *Stadnick v. Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962); *Florida Citrus Comm'n v. Owens*, 239 So.2d 840 (Fla. 4th Dist. 1970). The principle was established much earlier for the federal courts in *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407 (1942).

146. *Florida State Bd. of Medical Exm'rs v. James*, 158 So.2d 574 (Fla. 3d Dist. 1963).

2. SPECIFIC FUTURE STATUS OR EVENTS

If the only contingency standing in the way of a specific future status or event is the plaintiff's will to bring it about, and he declares a positive intention to do so, the classic case for invoking the declaratory remedy is presented. Prior to the declaratory judgment statutes, plaintiff's only course of action was to engage in the conduct, create the status, or cause the events to occur, taking the risk that his legal position was incorrect.¹⁴⁷ The Florida Declaratory Judgments Act specifically authorizes declaratory judgments "by way of anticipation with respect to any act not yet done or any event which has not yet happened," and thus corrects this situation.¹⁴⁸ Following the policy thus declared, the courts have issued declarations as to the legality of engaging in a particular business or profession under specified circumstances, which plaintiff declared his intention to do;¹⁴⁹ the authority of a church to enter into a proposed contract using the assets of a trust created by a will;¹⁵⁰ the right of a landowner to demolish an encroaching building;¹⁵¹ and the legal authority of a town to issue public improvement certificates which the town intended to sell.¹⁵² They have also rendered declaratory judgments as to whether a landlord had a lien on his tenant's liquor license, which he threatened to enforce if it existed;¹⁵³ whether a tenant exercising an option to purchase could exercise the rights of an owner immediately, or had to wait until the end of the term;¹⁵⁴ the validity of statutes relating to county clerical help and other matters, which plaintiff budget commission wished to determine in order to prepare its budget;¹⁵⁵ and the validity of specific action which a county declared its intention to take if it might lawfully do so.¹⁵⁶

Where contingencies beyond plaintiff's control stand in the way of specific future events, the jurisdictional question is much more difficult to answer. On the one hand, the future events must not be merely "hypothetical," because then there is no genuine controversy. Hence, the courts rightly reject complaints seeking declarations as to future events

147. *E.g.*, *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 429 (1933), discussed in the text of note 6 *supra*. The same result followed under the Florida Declaratory Judgments Act of 1919. *See Tankersley v. Davis*, 128 Fla. 507, 175 So. 501 (1937).

148. FLA. STAT. § 86.051 (1971).

149. *Holley v. Adams*, 238 So.2d 401 (Fla. 1970); *Bayou Barber College v. Mincey*, 193 So.2d 610 (Fla. 1967); *Mercer v. Hemmings*, 194 So.2d 579 (Fla. 1966); *Glackman v. City of Miami Beach*, 159 Fla. 376, 31 So.2d 393 (1947). *See Bryant v. Gray*, 70 So.2d 581 (Fla. 1954) (declaration denied where plaintiff did not allege positive intention to act).

150. *Florida Nat'l Bank v. Rector, Wardens & Vestry of St. John's Parish*, 45 So.2d 751 (Fla. 1950).

151. *May v. Holley*, 59 So.2d 636 (Fla. 1952).

152. *North Shore Bank v. Town of Surfside*, 72 So.2d 659 (Fla. 1954).

153. *James v. Golson*, 92 So.2d 180 (Fla. 1957).

154. *Platt v. General Dev. Corp.*, 122 So.2d 48 (Fla. 2d Dist. 1960).

155. *Walker v. Pendarvis*, 132 So.2d 186 (Fla. 1961).

156. *Coast Cities Coaches, Inc. v. Dade County*, 178 So.2d 703 (Fla. 1965); *Dade County v. Dade County League of Municipalities*, 102 So.2d 512 (Fla. 1958).

which may or may not come to pass.¹⁵⁷ On the other hand, where the need for a present declaration exists, and the future status or event is specific, the declaration may be granted. For example, an insured claiming present total disability, which is disputed by the insurer, may need to know whether he must pay future premiums to keep his policy alive, and a declaration finding that the disability exists and relieving him of future payments until the insurer proves a change of condition seems fully justified.¹⁵⁸ If plaintiff seeks a declaration interpreting a will granting him a future contingent interest in property, he may succeed in obtaining it by showing special circumstances creating a need for the declaration, and proof that under the mortality tables he will probably be the survivor.¹⁵⁹ In these situations, the combination of need for the relief, a fact situation which is specific even though contingent, and a strong probability that the contingent events will come to pass make the case concrete and genuine, and thus ripe for decision.

3. NONSPECIFIC FUTURE EVENTS

In this class of cases, plaintiff seeks a declaration concerning future conduct or events which are contingent and not specifically described in the complaint. In effect he asks the court to rule hypothetically on all the possibilities, and even to select a course of action which it would advise him to take. The answer to such a request would seem obvious, yet the United States Supreme Court has wavered on this question, sometimes granting declarations as to the constitutional validity of possible government action regulating nonspecific future conduct in which plaintiff may or may not choose to engage.¹⁶⁰ The Florida courts have con-

157. *Anderson v. Dimick*, 77 So.2d 867 (Fla. 1955); *Donovan v. Schott*, 58 So.2d 847 (Fla. 1952); *City of Pensacola v. Johnson*, 28 So.2d 905 (Fla. 1947).

158. Under the majority view, in an action at law for damages, the insured is limited to judgment for amounts due him at the time of suit, even though he claims total and permanent disability. *New York Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936); *Greguhn v. Mutual of Omaha Ins. Co.*, 23 Utah 2d 214, 461 P.2d 285 (1969). *Contra*, *John Hancock Mut. Life Ins. Co. v. Cohen*, 254 F.2d 417 (9th Cir. 1958); *Equitable Life Assur. Soc'y of United States v. Branham*, 250 Ky. 472, 63 S.W.2d 498 (1933) (allowing judgment for future installments to be paid when due, subject to the right of the insurance company to reopen the judgment and show termination of disability). Damages to date in such cases are wholly inadequate, since the insured needs a declaration as a guide to his future conduct. 5 A. CORBIN, CORBIN ON CONTRACTS § 118 at 663 (1964). If insured's only claim is for waiver of premiums, a declaration may be his sole remedy. *Cf. Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) (granting a declaration of non-disability to the insurance company).

159. See cases collected in the following: Annot., 139 A.L.R. 1239 (1942) (declaratory relief with respect to rights of or rights against estate of decedent prior to his death); Annot., 174 A.L.R. 880 (1948) (declaratory or advisory relief respecting future interest); Annot., 80 A.L.R.2d 941 (1961) (declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor). The need for the declaration is ordinarily based on present availability of evidence or improvement of marketability of the property concerned.

160. *Compare* *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450 (1945) (declara-

sistently rejected such requests as nonjusticiable. Thus, they have refused to declare the validity of future prosecutions based on conduct not specifically described;¹⁶¹ to advise plaintiff as to whether defendants had a right of way of necessity over plaintiff's land, when the existence of such way of necessity would depend on the use to which defendants put their land in the future;¹⁶² to advise a fraternal order as to what use it should make of its real property in order to obtain a tax exemption;¹⁶³ and to advise an attorney as to the validity of the law creating the small claims court, in order that he might counsel future clients as to where they should bring their suits.¹⁶⁴

As the above cases show, the Florida decisions have developed a doctrine of ripeness which is both self-consistent and generally in accordance with the policy of the Declaratory Judgments Act. Declarations have regularly been issued with respect to present status or conduct, and with respect to future specific status or events which are either inherently highly probable, or which the plaintiff intends and is able to bring about. Declarations have regularly been refused with respect to a future status or future events which were neither probable nor within the power of plaintiff to bring about, or which were presented vaguely or as alternative possibilities.

C. *Adversary Character of the Proceeding*

In order to permit an exercise of "judicial power" under the new judicial article of the Florida Constitution, or to constitute a "case" under the former judicial article, there must be an "adversary proceeding."¹⁶⁵ In declaratory cases, an "adversary proceeding" requires (1) a plaintiff with standing, *i.e.*, claiming some immunity, power, privilege or right dependent upon the facts or the law, and (2) a defendant possessing some adverse interest in the same subject matter.¹⁶⁶ The complaint must of course allege these adverse interests,¹⁶⁷ which give rise to doubt as to plaintiff's legal position.¹⁶⁸

tion denied), *with* *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (declaration granted).

161. *Ervin v. City of North Miami Beach*, 66 So.2d 235 (Fla. 1953); *Perry v. Genung*, 163 So.2d 54 (Fla. 2d Dist. 1964).

162. *Hunt v. Smith*, 137 So.2d 232 (Fla. 2d Dist. 1962).

163. *Benevolent and Protective Order of Elks v. Dade County*, 166 So.2d 605 (Fla. 3d Dist. 1964).

164. *McNevin v. Baker*, 170 So.2d 66 (Fla. 2d Dist. 1964).

165. *First Nat'l Bank v. Bebinger*, 99 Fla. 1290, 128 So. 862 (1930).

166. *May v. Holley*, 59 So.2d 636, 639 (Fla. 1952).

167. *Sarasota-Fruitville Drainage Dist. v. Certain Lands*, 80 So.2d 335 (Fla. 1955); *State v. Lewis*, 72 So.2d 823 (Fla. 1954); *Miller v. Miller*, 151 So.2d 869 (Fla. 2d Dist. 1963) (all holding that failure to allege adverse interests requires dismissal).

168. See text at notes 196-202 *infra*.

1. STANDING OF PLAINTIFF

The question of when a plaintiff has standing to sue involves one of the most controversial and rapidly developing fields of constitutional and administrative law.¹⁶⁹ It is often said that the plaintiff must have a "legal interest," but, as Borchard prophetically stated over thirty years ago, "[t]he idea of 'legal interest' is an expanding conception and rules of practice should not be used as a bar to its development."¹⁷⁰ It is therefore necessary to examine the present status of that "expanding conception," and attempt to trace the course of its development.

At one time the courts were disposed to say that only a plaintiff asserting a "legal right" had standing to sue, but this position has been repudiated in constitutional cases by the Supreme Court of Florida¹⁷¹ and by the United States Supreme Court.¹⁷² It is also the clear intent of the Florida Declaratory Judgments Act to reject that restricted interpretation. The act grants to the circuit courts jurisdiction to declare a right, immunity, power, privilege, status "and other equitable or legal relations;"¹⁷³ and authorizes a plaintiff to sue to determine the validity or construction of any statute, ordinance, contract, deed, will, franchise or other article, memorandum or instrument in writing if he claims or is "in doubt" about his rights under any of them, or if his "rights, status, or other legal or equitable relations are affected" by any of them.¹⁷⁴ Further, the 1943 Act specifically includes among authorized plaintiffs the fiduciaries, creditors and beneficiaries of a trust or estate,¹⁷⁵ and provides that parties to an action may include "all persons . . . who have or claim any interest which would be affected by the declaration."¹⁷⁶

The statute thus makes clear that (a) the plaintiff's interest need not be a "legal right," but can be a right, immunity, power, privilege, status or other legal or equitable relation; (b) plaintiff need not assert that the legal or equitable relation is created by a statute, ordinance, contract, deed, will, franchise or other instrument in writing, so long as it is "affected" by any of them; and (c) if plaintiff does assert that the legal or equitable relation may arise under any such instrument in writing, he need not make a positive claim but may merely assert the existence of a "doubt." The act appears to grant standing to the full extent permissible under the constitution, leaving to the courts the determina-

169. See, e.g., the report on the action of the House of Delegates of the ABA in 58 A.B.A.J. 1075-78 (1972).

170. BORCHARD, *supra* note 2 at 203.

171. *Keating v. State*, 173 So.2d 673 (Fla. 1965).

172. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

173. FLA. STAT. § 86.011 (1971).

174. FLA. STAT. § 86.021 (1971).

175. FLA. STAT. § 86.041 (1971).

176. FLA. STAT. § 86.091 (1971).

tion of whether they will exercise or decline to exercise the power granted them in any particular case. As the following discussion will show, the judicial interpretation of the act has not always been consistent with the liberal legislative intent so clearly expressed.

Where plaintiff can show injury in fact, either actual or reasonably apprehended, to any legally cognizable interest, it would seem obvious that he should have standing to sue. The courts have issued declarations protecting plaintiff's actual or potential financial interests from harm arising from the unlawful grant of a zoning variance to plaintiff's competitor, or the unlawful refusal to issue an occupational license to plaintiff.¹⁷⁷ However, the interest protected need not be financial, as is shown by the grant of standing to churches to prevent nearby liquor sales in violation of an ordinance.¹⁷⁸

Surprisingly, however, other cases have denied standing even though demonstrable financial harm to the plaintiff was threatened. In one of the earliest decisions after the passage of the 1943 Act, the court said that the statute did not authorize a labor union to obtain, against a city, a declaration that it was the city's duty to recognize the union as bargaining agent for city employees, because the union lacked "a bona fide and direct interest in the result."¹⁷⁹ Plaintiff had alleged that its members were coerced and intimidated by defendant, and that it had reason to fear that they would be discharged; thus, it seems obvious that both the union's financial interest in receiving dues and its alleged right to represent its members were threatened. The court appears to have confused the issue of standing to sue with the merits. Plaintiff should have had standing, whether or not it would ultimately lose at a trial. In another case, a district court of appeal denied standing to a plaintiff, lessee of land from a port authority, who claimed a right of access to a state road, and alleged that defendant's denial of access had caused a loan commitment obtained by plaintiff to be cancelled.¹⁸⁰ Again a court appears to have denied standing because of its view that plaintiff could not prevail on the merits. Such decisions are incorrect on their facts, are contrary to the many cases which have declared that the right to a declaration is a question entirely separate from the merits,¹⁸¹ and should be vigorously repudiated.

177. *Bayne v. Florida State Bd. of Dispensing Opticians*, 212 So.2d 762 (Fla. 1968) (refusal to issue occupational license); *Brown v. Foley*, 158 Fla. 734, 29 So.2d 870 (1947) (refusal to issue occupational license); *City of Miami v. Franklin Leslie, Inc.*, 179 So.2d 622 (Fla. 3d Dist. 1965) (unlawful grant of zoning variance).

178. *Banyan Cafeterias, Inc. v. Faith Lutheran Church*, 151 So.2d 426 (Fla. 1963); *Dade County v. Jim's Northwest, Inc.*, 171 So.2d 612 (Fla. 3d Dist. 1965).

179. *Miami Water Works Local 654 v. City of Miami*, 157 Fla. 445, 452, 26 So.2d 194, 198 (1946).

180. *Canaveral Marine, Inc. v. Canaveral Port Authority*, 244 So.2d 764 (Fla. 4th Dist. 1971).

181. See cases cited in note 85 *supra*.

The incorrectness of decisions denying standing to a plaintiff who has shown special damage to himself is emphasized by the numerous cases granting standing to taxpayers who showed no damage different from that of every other taxpayer in the community. Thus, individual taxpayers have obtained declarations concerning the legality of general tax levies at the county-wide assessment level;¹⁸² the legality of public expenditures having no specific impact on the plaintiffs;¹⁸³ and other subjects of general fiscal interest.¹⁸⁴ There has, however, been a tendency to insist that, where a public interest is being vindicated by a private citizen, the interest has to be financial.¹⁸⁵ The writer submits that this is a very benighted concept of the public interest to be served by citizens' suits. If the courts are willing to entertain such suits, as even the federal courts may now do,¹⁸⁶ the entire range of public interests should be subject to judicial protection at the suit of concerned citizens.

If the plaintiff is a public official, his interest need not be personal, and the question presented need not be financial in order for the court to issue a declaratory judgment. It is sufficient that he is in doubt about some aspect of his duty,¹⁸⁷ or desires to advance the interests of the citizens within his jurisdiction.¹⁸⁸

From the jurisdictional point of view, the only inquiry should be whether plaintiff has sufficient interest in the subject matter so that he can present to the court his side of the controversy, *i.e.*, the arguments in favor of the legal interest which he seeks to protect. If he will in fact be adversely affected financially, he has such an interest and is entitled

182. *Seaboard Air Line R.R. v. Peters*, 43 So.2d 448 (Fla. 1949); *Dickinson v. Bell*, 214 So.2d 24 (Fla. 1st Dist. 1968). *Contra*, *Burrows v. Hagerman*, 159 Fla. 826, 33 So.2d 34 (1947); *Grable v. Hillsborough County Port Auth.*, 132 So.2d 423 (Fla. 2d Dist. 1961).

183. *Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So.2d 445 (Fla. 1952); *City of Coral Gables v. Sackett*, 253 So.2d 890 (Fla. 3d Dist. 1971); *Pinellas County v. Town of Belleair Shore*, 180 So.2d 510 (Fla. 2d Dist. 1965); *Robinson's Inc. v. Short*, 146 So.2d 108 (Fla. 1st Dist. 1962), *cert. denied*, 152 So.2d 170 (Fla. 1963); *R.L. Bernardo & Sons, Inc. v. Duncan*, 134 So.2d 297 (Fla. 1st Dist. 1961), *quashed*, 145 So.2d 476 (Fla.), *rev'd*, 147 So.2d 542, (Fla. 1st Dist. 1962).

184. *City of Miami v. Keton*, 115 So.2d 547 (Fla. 1959) (whether city had to return traffic fines); *Safer v. City of Jacksonville*, 212 So.2d 785 (Fla. 1st Dist. 1968) (whether city's housing code was arbitrary, constituted an illegal usurpation of legislative power, etc.).

185. *Dade-Commonwealth Title Ins. Co. v. North Dade Bar Ass'n*, 152 So.2d 723 (Fla. 1963); *Askew v. Hold the Bulkhead-Save Our Bays, Inc.*, 269 So.2d 696 (Fla. 2d Dist. 1972); *Linning v. Board of County Comm'rs*, 176 So.2d 350 (Fla. 1st Dist. 1965); *Ashe v. City of Boca Raton*, 133 So.2d 122 (Fla. 2d Dist. 1961); *Guernsey v. Haley*, 107 So.2d 184 (Fla. 2d Dist. 1958). *Contra*, *Ervin v. Collins*, 85 So.2d 852 (Fla. 1956) (when attorney general is plaintiff).

186. *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Flast v. Cohen*, 392 U.S. 83 (1968).

187. *Reid v. Kirk*, 257 So.2d 3 (Fla. 1972); *Walker v. Pendarvis*, 132 So.2d 186 (Fla. 1961); *Overman v. State Bd. of Control*, 62 So.2d 696 (Fla. 1952); *State v. City of Miami*, 54 So.2d 250 (Fla. 1951); *Cobb v. Board of County Comm'rs*, 155 Fla. 60, 19 So.2d 505 (1944).

188. *City of St. Petersburg v. Briley, Wild & Assoc.*, 239 So.2d 817 (Fla. 1970); *Ervin v. Collins*, 85 So.2d 852 (Fla. 1956); *Broward County v. Lerer*, 203 So.2d 672 (Fla. 4th Dist. 1967). *Caldwell v. North*, 157 Fla. 52, 24 So.2d 806 (1946).

to standing, whether or not he is affected to a greater extent than other members of the public.¹⁸⁹ The same rule should apply if he will in fact be adversely affected in some way, other than financial, even though he is in the same position as other members of the public. Recent federal cases have so held.¹⁹⁰ If the public interest is to be vindicated, the courts must refuse to adhere to an outworn rule which, in effect, states that the more widespread the damage the defendant has done, the less susceptible he is to judicial remedy. For example, when the question is one involving the environment, the courts should recognize the standing of plaintiffs without proof of their having suffered financial damage, since plaintiffs will almost invariably be unable to show such damage, no matter how severe the harm to the habitability of the area. Statutory authority for such citizen suits is increasing.¹⁹¹

In 1971, Florida joined the parade by adopting a statute permitting any citizen to bring suit for injunction to redress environmental wrongs, after making appropriate demand on the public authorities charged with enforcement of environmental laws.¹⁹² When the legislature is willing to permit the drastic remedy of injunction in such cases, then standing to obtain a mere declaration should follow as a matter of course. Certainly the courts should now recognize the obsolescence of the "taxpayer" test and favor the "affected citizen" test in cases where the expanding role of the government presses constantly harder on the individual, be he rich or poor.

2. ADVERSE INTEREST OF DEFENDANT

It is clear that there can be no controversy without a defendant,¹⁹³ and it is often said that the defendant must possess an existing adverse interest.¹⁹⁴ However, there need not be an actual dispute before the complaint can be filed, *i.e.*, the defendant need not actually have asserted his interest against the plaintiff. The mere existence of potentially adverse interests is obviously sufficient in cases involving the validity or construction of a statute, ordinance, contract, deed, will, franchise or other article, memorandum or instrument in writing, since the Florida

189. See text at notes 182-85 *supra*.

190. See, e.g., *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), *cited with approval in* *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 155 (1970).

191. E.g., *Federal Clean Air Act*, § 304, 42 U.S.C. § 1857h-2 (1970); *Michigan Environmental Protection Act*, MICH COMP. LAWS ANN. §§ 691.1201-1207 (1970).

192. FLA. STAT. § 403.412(2) (1971).

193. *Ervin v. Taylor*, 66 So.2d 816 (Fla. 1953) (declaratory action must be dismissed for failure to name party defendant).

194. *Journeymen Local 234 v. Henley & Beckwith, Inc.*, 66 So.2d 818 (Fla. 1953); *Hialeah Racecourse v. Gulfstream Park Racing Ass'n*, 210 So.2d 750 (Fla. 4th Dist. 1968); *Sheppard v. Williams*, 193 So.2d 191 (Fla. 3d Dist. 1966); *Retail Liquor Dealers Ass'n v. Dade County*, 100 So.2d 76 (Fla. 3d Dist. 1958).

Declaratory Judgments Act itself specifies that in such cases it is sufficient that plaintiff be "in doubt,"¹⁹⁵ and the cases so hold.¹⁹⁶ The better construction of the act is that "doubt" on *each* side is sufficient, and that neither party need be actually hostile to the other.¹⁹⁷ Hostility is not present in many suits by public officials and in other "friendly" suits, and yet the courts' jurisdiction over them is undoubted. According to Borchard,

[t]he mere fact that the defendant's interest is *potentially adverse* justifies summoning him to defend; and the mere fact that he admits his liability or consents to be sued or even, under certain circumstances of so-called "friendly suits," that he is interested in the same judgment as the plaintiff, is not necessarily a bar to an ordinary executory action. . . . The court must merely be alert to distinguish the fictitious or collusive suits, where only information or opinion is sought, or where the defendant appears as a lay figure only for the purpose of obtaining jurisdiction, from those in which rights are placed in issue with the purpose of a binding determination.¹⁹⁸

However, if the interests of the parties are identical from the beginning, and are thus not even "potentially adverse," the case is not justiciable and no declaratory decree can be entered, since the court would be acting merely as a counselor and not deciding a controversy.¹⁹⁹

The courts are not always as careful of their language in this respect as they should be. An example of a correct decision, but a misleading formulation, is *Colby v. Colby*.²⁰⁰ That case involved a complaint for the construction of a foreign divorce decree which was clear and unambiguous. In the absence of reasonable doubt, the complaint was properly dismissed. However, the court went on to say:

There must be a bona fide *dispute* between the adversaries as to a present justiciable question. . . . The test to activate jurisdiction under the [Declaratory Judgments] [A]ct is whether or not the moving party shows that he is *in doubt* as to the existence or non-existence of some right, status, immunity, power, or privilege.²⁰¹

Thus, the court stated in successive sentences the erroneous requirement

195. FLA. STAT. § 86.021 (1971).

196. See text at notes 77-82 *supra*.

197. In the following cases, the opinions indicate that no actual hostility existed: *Riviere v. Orlando Parking Comm'n*, 74 So.2d 694 (Fla. 1954); *Bowden v. Carter*, 65 So.2d 871 (Fla. 1953); *Dickinson v. Buck*, 220 So.2d 48 (Fla. 1st Dist. 1969).

198. BORCHARD, *supra* note 2 at 38-39 (emphasis added).

199. *Brautigam v. MacVicar*, 73 So.2d 863 (Fla. 1954); *Lassiter v. City of Miami Beach*, 239 So.2d 269 (Fla. 3d Dist. 1970).

200. 120 So.2d 797 (Fla. 2d Dist. 1960).

201. *Id.* at 799 (emphasis added).

202. See section IV *infra*.

that a "dispute" must exist and the correct test that it is sufficient that plaintiff be "in doubt."

In conclusion, therefore, the jurisdictional requirement of an adversary proceeding should be, and usually has been, met where plaintiff claims some immunity, power, privilege or right in which he has sufficient interest so that he can adequately present it to the court for decision, defendant represents a different position on the same subject matter, which is an actual or potential threat to the plaintiff, and a reasonable doubt exists as to which position is correct. The extent to which the court will require the interest to be plaintiff's own, or will allow him to represent a public interest in which his share is no greater than that of many other citizens, properly depends on the court's *discretion*, which will be discussed hereafter.²⁰²

D. *Finality of the Judgment to be Rendered*

In a very real sense, the "justiciable controversy" requirements previously discussed are only preliminary considerations to the ultimate requirement that the issues presented be capable of final disposition by the court. If the controversy is not "legal" in nature, either because the issues are not susceptible of judicial resolution or because their resolution has been committed by the constitution or statutes to another authority, a court's judgment would be merely advisory to those having the true power. If the controversy is not "ripe," because the facts are not yet sufficiently developed or are regarded as too contingent, a judgment might be subject to later modification when the facts are presented concretely or the contingency is resolved. If the proceeding is not "adversary" in character, because plaintiff has no standing or because defendant's position is not such as to present real issues for resolution, a judgment might not be binding when a later suit presents to the court a true adversary proceeding.

The requirement that the court's judgment dispose of the legal and factual issues presented is as compelling in a declaratory action as in a coercive proceeding. The Supreme Court of Florida has clearly expressed that "[e]xcept for the coercive element in the judgment or decree . . . there is no difference between a declaratory judgment or decree and any other judgment between opposing parties."²⁰³ As one author has said, the absence of coercive words indicates "not the disappearance but the perfection of the rule of force."²⁰⁴ What the writer of these words meant is that the more civilized a society is, the more binding it will consider the judgment of a court acting within its jurisdiction, whether or not the judgment is followed by coercive words and by execution. But what if

203. *Sheldon v. Powell*, 99 Fla. 782, 793, 128 So.2d 258, 263 (1930).

204. Sunderland, *A Modern Evolution in Remedial Rights, The Declaratory Judgment*, 16 MICH. L. REV. 69, 70 (1917).

a party should defy the court's declaration? Is the court to stand helpless in the face of his defiance? Of course not! The necessary implication from any declaratory judgment is that the power to coerce must be standing in the background, ready to be summoned if needed. A court exercising the power to declare must ultimately possess the power to do more than declare, otherwise its judgment is merely advisory and no justiciable controversy exists.²⁰⁵

The Florida Declaratory Judgments Act itself recognizes that the court issuing a declaration must possess the power to compel obedience to the declaration, should such action become necessary.

Further relief based on a declaratory judgment may be granted when necessary or proper. . . . If the application is sufficient, the court shall require any adverse party whose rights have been adjudicated by the declaratory judgment to show cause on reasonable notice, why further relief should not be granted forthwith.²⁰⁶

Whether or not the court finds it necessary or proper to add "further relief" to its declaration is, of course, immaterial so far as the binding effect of the declaration is concerned. If the declaration has been issued by a court possessing jurisdiction of the subject matter and over the parties, it is *res judicata* in any subsequent proceeding in any court.²⁰⁷

There is, however, an important distinction to be noted between the scope of the ordinary action at law and the scope of the declaratory judgment. This distinction arises from the fact that, in the action at law seeking a coercive judgment, the court *must* grant the relief prayed for if the complaint is legally sufficient, whereas in the declaratory action the court *has discretion* to refuse the declaration if it will serve no useful purpose.²⁰⁸ Thus, a dismissal with prejudice in a declaratory action may mean no more than that the plaintiff is not entitled to declaratory relief and, if so, he may seek relief in another form of action.²⁰⁹ On the other hand, a judgment with prejudice in an ordinary action at law is conclusive, often even as to matters which could have been, but were not litigated, and thus, bars further litigation.²¹⁰

205. See *Developments in the Law—Declaratory Judgments—1941-1949*, 62 HARV. L. REV. 787, 788 (1949).

206. FLA. STAT. § 86.061 (1971). Examples of cases approving supplemental relief are: *South Dade Farms, Inc. v. Peters*, 107 So.2d 30 (Fla. 1958); *City of Miami Beach v. State*, 242 So.2d 170 (Fla. 3d Dist.), *cert. denied*, 246 So.2d 573 (1971).

207. *Garden Suburbs Golf & Country Club v. Murrell*, 180 F.2d 435 (5th Cir. 1950) (holding Florida declaratory decree construing lease *res judicata* in subsequent federal suit to collect rent); *Bartholf v. Bartholf*, 108 So.2d 905 (Fla. 1959) (declaratory decree on immunity from income tax allowed, although final adjudication must be in federal court); *Hillsborough County v. Twin Lakes Mobile Home Village, Inc.*, 166 So.2d 191 (Fla. 2d Dist. 1963) (declaratory decree held *res judicata*); *National Mut. Ins. Co. v. Dotschay*, 134 So.2d 248 (Fla. 3d Dist. 1961) (declaratory decree held *res judicata*).

208. See text at notes 215-17 *infra*.

209. *North Shore Realty Corp. v. Gallaher*, 99 So.2d 255 (Fla. 3d Dist. 1957).

210. The effect of the [declaratory] judgment, therefore, unlike a judgment for

The court should, of course, restrict its declaration to "legal" issues, and be careful not to intrude upon executive or administrative discretion. The court may therefore declare illegal executive or administrative actions, but it should not direct the executive or administrative agency as to the particular action to be taken unless affirmatively authorized by statute to do so.²¹¹

The Florida courts have taken care, sometimes to an excessive extent, to limit their declarations to controversies well within the judicial power, so that they can, if necessary, enforce their judgments by coercive action. Such judicial restraint contrasts with some decisions of the United States Supreme Court in recent years, declaring rights in the absence of any present or future power to enforce the judgment.²¹² The resulting problems presented to the lower federal courts have, in the words of one of them, been such as to "boggle the mind."²¹³ Either excess is to be avoided, but caution is the lesser of the two evils. Refusing a declaration that the court has power to grant may unjustifiably disappoint the individual parties. Granting a declaration that the court will not be able to enforce in the face of a serious challenge may imperil respect for law and, consequently, the foundation of the entire judicial system.

IV. JUDICIAL DISCRETION TO DECLINE TO EXERCISE JURISDICTION

Although the plaintiff may have established the elements necessary for a court's jurisdiction to grant a declaratory judgment, it does not follow that he is entitled to maintain his suit. He must still convince the court that it should exercise its discretion to render a declaration on the case presented by his complaint.

The Uniform Declaratory Judgments Act expressly authorizes the court to refuse to entertain a declaratory suit when its judgment or decree "would not terminate the uncertainty or controversy giving rise to

the payment of money, is not to merge a cause of action in the judgment or to bar it. The effect of a declaratory judgment is rather to make *res judicata* the matters declared by the judgment, thus precluding the parties to the litigation from relitigating these matters.

RESTATEMENT OF JUDGMENTS § 77, comment b at 333-34 (1942). Thus, it is necessary to determine what was actually declared even when there is a dismissal with prejudice. *North Shore Realty Corp. v. Gallaher*, 99 So.2d 255, 256 (Fla. 3d Dist. 1957).

211. *Green v. Taylor*, 70 So.2d 502 (Fla. 1954); *Varlas v. Meiklejohn*, 206 So.2d 449 (Fla. 1st Dist. 1968); *City of Miami Beach v. Klinger*, 179 So.2d 884 (Fla. 3d Dist. 1965).

212. *Mitchell v. Donovan*, 397 U.S. 982 (1970); *Powell v. McCormack*, 395 U.S. 486 (1969); *Zwickler v. Koota*, 389 U.S. 241 (1967).

213. *Bradley v. School Bd.*, 462 F.2d 1058, 1068 (4th Cir. 1972).

Declaratory relief in this case is particularly inappropriate since it could not finally terminate the controversy, indeed, it might well tend to resurrect the very conflict our holding of inappropriateness seeks to avoid.

Powell v. McCormack, 395 F.2d 577, 597 (D.C. Cir. 1968) (Burger, C.J.), *rev'd*, 395 U.S. 486 (1970). The Supreme Court seems to have returned recently to a clearer appreciation of the practical limits of judicial power. *See Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493 (1971); *Younger v. Harris*, 401 U.S. 37 (1971).

the proceeding."²¹⁴ The Florida act omits this language. Nevertheless, it is well settled in this state that the declaratory cause of action is equitable in nature, and that the court, as in other cases in equity, possesses the discretionary power to dismiss the complaint where it would not be equitable to grant relief to the plaintiff.²¹⁵ The discretion conferred upon the courts is not an arbitrary one, but is a sound judicial discretion subject to review for abuse.²¹⁶ Our inquiry therefore turns to an examination of the circumstances which have influenced the courts in exercising their discretion.

We may profitably begin by reminding ourselves that the Florida act, like other declaratory judgment acts, was enacted primarily to afford relief where a legal interest is threatened but cannot be protected by existing remedies. Both the Uniform Act and the Florida act expressly state that they are intended to be "remedial." According to the Uniform Act, its purpose is "to afford relief from uncertainty and insecurity with regard to rights, status and other legal relations; and is to be liberally construed and administered."²¹⁷ The background and statutory language of the acts indicate the criteria the courts should rely upon in exercising their discretion. Since the Florida act was passed to protect interests which were not otherwise adequately protected, the existence of a need for such relief is a prerequisite to favorable exercise of the court's discretion. In addition, since the purpose of the act is "to afford relief from insecurity and uncertainty," a declaration should not be issued, even though a need for it exists, unless the declaration will "terminate the uncertainty or controversy giving rise to the proceeding," to use the language of the Uniform Act.²¹⁸ Borchard has expressed these criteria in the following language:

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

214. UNIFORM DECLARATORY JUDGMENTS ACT § 6.

215. *North Shore Bank v. Town of Surfside*, 72 So.2d 659, 661-62 (Fla. 1954), followed in *Bell v. Associated Independents, Inc.*, 143 So.2d 904 (Fla. 2d Dist. 1962); *Garner v. Wood*, 150 So.2d 493, 495 (Fla. 2d Dist. 1963) (also relying on use of permissive word "may" in FLA. STAT. § 86.011 (1971)). *Jacksonville Roofing and Sheet Metal Contractors Ass'n v. Sheet Metal Workers' Local 435*, 156 So.2d 416, 418 (Fla. 1st Dist. 1963).

216. "Yet the discretion granted, however wide and unlimited in appearance, is a judicial discretion, hardened by experience into rule, and its exercise is subject to appellate review." BORCHARD, *supra* note 2 at 293.

217. UNIFORM DECLARATORY JUDGMENTS ACT § 12. The Florida section states that the act "is declared to be *substantive and remedial*. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status and other *equitable or legal* relations and is to be liberally administered and construed." FLA. STAT. § 86.101 (1971) (additions to the Uniform Act are italicized).

218. UNIFORM DECLARATORY JUDGMENTS ACT § 6.

accomplished, the court should decline to render the declaration prayed.²¹⁹

We shall now consider the Florida cases dealing with the criteria just mentioned.

A. *Need for Declaratory Relief*

Since the declaratory judgment acts arose out of the need for relief where other remedies were either nonexistent or inadequate, it might plausibly be asserted that, where there is another form of action which will afford equally adequate relief, the court should exercise its discretion to refuse a declaration. Nevertheless, the courts should be guided here by the expressly contrary legislative intent. Unlike the Uniform Act, the Florida act provides that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief."²²⁰ Surely this language, added to the model which was the basis for the Florida act, should be given some reasonable effect. It is submitted that the combination of the act's provision for liberal interpretation and its provision that another adequate remedy does not preclude relief, must be construed to require that the existence of an alternative remedy should preclude a declaration only if the court finds that the alternative is more than "adequate," *i.e.*, that it is *superior* to declaratory relief under the facts of or the law applicable to the case. Such an interpretation not only accords with the intent and language of the act, but it also tends to minimize the problems faced by the attorney who must choose the form of action which will best protect his client, since it allows some margin for error where the choice is evenly balanced. Many Florida decisions, either expressly or in their effect, support this interpretation.

Declarations have been refused in a number of cases because another remedy was clearly more advantageous to the parties, more advantageous to the judicial process, or more in accordance with constitutional or statutory principles. Thus, a suit praying for a declaration of the parties' rights under a contract, which actually is nothing more than an action to recover damages for alleged breach, should obviously be brought at law with a prayer for damages; it will therefore be transferred from the equity to the law side of the court.²²¹ Where another

219. BORCHARD, *supra* note 2 at 299 (emphasis added). *Accord*, *May v. Holley*, 59 So.2d 636 (Fla. 1952).

220. FLA. STAT. § 86.111 (1971). This clause has been relied upon to sustain a declaratory action when an action for an accounting and damages would have been equally adequate, and the plaintiff did not need a guide to future action. *Ennis v. Warm Mineral Springs, Inc.*, 203 So.2d 514 (Fla. 2d Dist. 1967). FED. R. CIV. P. 57 states: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

221. *Barrett v. Pickard*, 85 So.2d 630 (Fla. 1956); *Deen v. Weaver*, 47 So.2d 539 (Fla. 1950); *Reddick v. Christie*, 226 So.2d 434 (Fla. 4th Dist. 1969); *Joseph v. Board of Pub. Instruc.*, 184 So.2d 452 (Fla. 3d Dist. 1966); *Broward Drug Stores, Inc. v. Perini Land &*

form of action, with more stringent requirements than the declaratory action, specifically applies to the case, plaintiff will not be permitted to evade those requirements by suing only for declaratory relief, but must utilize the other form of action.²²²

In ejectment, the statutory cause of action permits not only an adjudication of the right to possession, but also a remedy for the net value of the improvements added to the land in good faith by defendant, so that all the rights of the parties can be settled in one suit.²²³ Ejectment is thus superior to a declaratory judgment, and must be used where applicable.²²⁴ If an administrative remedy is available, respect for the administrative process requires that such remedy be exhausted before any court suit, declaratory or otherwise, can be entertained.²²⁵ Where plaintiff seeks a declaration interpreting a contract, but the contract contains provisions for the arbitration of such disputes, he will, of course, be compelled to resort to arbitration.²²⁶ Finally, if another suit is pending by which plaintiff in the declaratory action can obtain complete relief, the court will insist that he litigate his claims in the other action, whether he be plaintiff²²⁷ or defendant²²⁸ in that case.

Conversely, where plaintiff cannot obtain complete relief as a defendant in another pending action, the court will declare his rights, even if a criminal prosecution must be stayed.²²⁹ If the remedy in a future action would be no more than adequate, a declaratory action may also be maintained.²³⁰ Permitting a declaratory judgment on the equity side does not deprive defendant of any right he might have to a trial by jury, since the Florida act expressly preserves trial by jury in declaratory actions.²³¹

Dev. Co., 170 So.2d 86 (Fla. 2d Dist. 1964). Under the Act of 1919, all declaratory actions were in chancery, and, thus, the defendant was deprived of his right to trial by jury. *Lippman v. Shapiro*, 151 Fla. 327, 9 So.2d 636 (1942).

222. *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So.2d 304 (Fla. 1971) (bond validation); *Bessemer Properties, Inc. v. City of Opalocka*, 74 So.2d 296 (Fla. 1954) (bond validation).

223. FLA. STAT. §§ 66.011-.101 (1971).

224. *Stark v. Marshall*, 67 So.2d 235 (Fla. 1963); *Cape Sable Corp. v. McClurg*, 74 So.2d 883 (Fla. 1954); *Bowden v. Seaboard Air Line R.R.*, 47 So.2d 786 (Fla. 1950).

225. *Florida Hotel and Restaurant Comm'n v. Marseilles Hotel Co.*, 84 So.2d 567 (Fla. 1956); *Mountain v. National Airlines, Inc.*, 75 So.2d 574 (Fla. 1954).

226. *Jacksonville Roofing and Sheet Metal Contractors Ass'n v. Sheet Metal Workers' Local 435*, 156 So.2d 416 (Fla. 1st Dist. 1963). An insurer's denial of coverage may constitute a waiver of the right to arbitration. *American So. Ins. Co. v. Daniel*, 198 So.2d 850 (Fla. 1st Dist. 1967).

227. *Taylor v. Cooper*, 60 So.2d 534 (Fla. 1952).

228. *Burns v. Hartford Acc. & Indem. Co.*, 157 So.2d 84 (Fla. 3d Dist. 1963); *McNair v. Dade County*, 127 So.2d 142 (Fla. 3d Dist. 1961).

229. *Watson v. Centro Espanol de Tampa*, 30 So.2d 288 (Fla. 1947).

230. *Marconi v. Schimmel*, 181 So.2d 167 (Fla. 3d Dist. 1965) (declaration granted lessee as to rights under renewal term of lease where otherwise marketability of lessee's business would be impaired).

231. FLA. STAT. § 86.071 (1971). In view of this section, refusal to transfer a case to the law side was held harmless error in *Caballero, Herdegen & Knight, Inc. v. Threlkeld*, 142 So.2d 124 (Fla. 3d Dist. 1962), and in *Olins, Inc. v. Avis Rental Car Sys.*, 131 So.2d 20 (Fla. 3d Dist. 1961).

Where plaintiff alleges a case for declaratory relief, he is entitled to a declaration on the merits, although he might have proceeded in some other adequate action, such as quo warranto,²³² mandamus,²³³ replevin,²³⁴ or other suit at law or in equity.²³⁵ Public officials are given authority to obtain declarations in order that they may determine whether to file a criminal information, or to disburse public funds for a particular purpose.²³⁶ Even if plaintiff does not allege a case for declaratory relief, but his prayer is broad enough to include other relief, it has been held to be error to dismiss the complaint, because the case should be retained for consideration of the other relief.²³⁷

There are, however, contrary decisions, refusing a declaration because of the existence of another remedy which was no more than adequate.²³⁸ Difficult to understand, or to reconcile with the statute and the preceding authorities, are decisions approving dismissal of a complaint for declaratory judgment because "injunction is more appropriate,"²³⁹ or where the parties were in dispute as to their rights under a contract.²⁴⁰ These cases appear to show a preference for the more traditional forms of action, which is not explained in any of the opinions, and which is contrary to the liberal purpose of the Florida Declaratory Judgments Act.

Cases holding that the existence of another merely adequate remedy precludes declaratory judgment have been subjected to a searching critical analysis by Borchard. He points out that, even in the absence of language such as that contained in the Florida act,²⁴¹ the decisions are wrong because they disregard the history and purpose of the declaratory remedy, disregard the language of the statutes, conflict with the great majority of the decisions granting relief in such cases, compel a plaintiff

232. *Shelly v. Brewer*, 68 So.2d 573 (Fla. 1953); *Lockleer v. City of W. Palm Beach*, 51 So.2d 291 (Fla. 1951); *Town of Daytona Beach Shores v. Foster*, 135 So.2d 903 (Fla. 1st Dist. 1962).

233. *Mayes Printing Co. v. Flowers*, 154 So.2d 859 (Fla. 1st Dist. 1963); *Fisher v. Dade County*, 127 So.2d 132 (Fla. 3d Dist. 1961).

234. *Title & Trust Co. v. Title Guar. & Abstract Co.*, 103 So.2d 211 (Fla. 2d Dist. 1958).

235. *Miller v. Doss*, 160 Fla. 660, 36 So.2d 442 (1948); *Kingdon v. Walker*, 156 So.2d 208 (Fla. 2d Dist. 1963).

236. *Jacksonville Expressway Auth. v. Duval County*, 189 So.2d 837 (Fla. 1st Dist. 1966) (controversy between county and state agency over disbursement); *Rachleff v. Mahon*, 124 So.2d 878 (Fla. 1st Dist. 1960) (to determine whether magazines were obscene).

237. *Middleton v. Plantation Homes, Inc.*, 71 So.2d 503 (Fla. 1954). Of course, the complaint is properly dismissed with prejudice where it is clear that the facts do not entitle plaintiff to any relief, declaratory or otherwise. *Silvers v. Drake*, 188 So.2d 377 (Fla. 1st Dist. 1966).

238. This category must include the numerous cases refusing to try issues of "fact" in declaratory actions. See discussion in text at notes 245 to 280 *infra*. In none of these cases was the other remedy more than adequate, and in some cases there was none.

239. *Garner v. DeSoto Ranch, Inc.*, 150 So.2d 493 (Fla. 2d Dist. 1963).

240. *Smith v. Jacksonville Terminal Employees Fed. Credit Union*, 193 So.2d 436 (Fla. 1st Dist. 1967); *Lyons v. Capi*, 188 So.2d 909 (Fla. 4th Dist. 1966); *M & E Land Co. v. Siegal*, 177 So.2d 769 (Fla. 1st Dist. 1965).

241. "The existence of another adequate remedy does not preclude a judgment for declaratory relief." FLA. STAT. § 68.111 (1971).

to use a drastic remedy when he prefers a milder one, and disregard the rule that under modern practice the court should entertain a complaint if the facts pleaded show that plaintiff is entitled to relief under any theory.²⁴² Decisions throwing such procedural roadblocks in a plaintiff's way, where his complaint shows that he is entitled to *some* relief, needlessly confuse the law and increase the cost of litigation.

B. *Termination of the Uncertainty or Controversy*

In spite of the absence of specific language on this point in the Florida act, it is clear that a court should not entertain a declaratory action where its judgment or decree "would not terminate the uncertainty or controversy giving rise to the proceeding."²⁴³ In fact, there is substantial doubt as to a court's jurisdiction in such cases, since, as was pointed out in the previous section, ability to enter a judgment or decree finally disposing of the issues presented is one of the elements of a "controversy" necessary to invoke the "judicial power" of the court. Conversely, if the court can terminate the controversy by its judgment, then it should hear the case, provided the other appropriate elements affecting jurisdiction and discretion are favorable to such a result.

The conclusion just stated appears equally sound whether the case turns on a determination of "fact" or a determination of "law." Plaintiff's need for the remedy may be equally great whether defendant's threat to his position arises from a dispute as to "fact" (what occurred) or a dispute as to "law" (the legal consequences of what occurred). Issues of fact and of law are ordinarily inseparable parts of plaintiff's cause of action. In addition, all of defendant's substantive and procedural rights are fully preserved in the declaratory proceeding. It serves no useful purpose to tell a plaintiff that he may have a declaratory remedy if defendant chooses to litigate his issues of law, but that if defendant chooses to litigate his issues of fact, even frivolously or without good faith, he may not have a declaratory remedy and may often have no remedy at all. Finally, refusal to issue declarations where questions of fact are involved is contrary to the legislative intent manifested by the provision of the act that the court "may render declaratory judgments on the existence, or nonexistence . . . [o]f any *fact* upon which the existence or nonexistence of any such immunity, power, privilege or right" may depend.²⁴⁴

There are many examples, both in Florida and elsewhere, of declaratory judgments rendered in cases where the decisive issues were issues of fact. The landmark case of *Aetna Life Insurance Co. v. Haworth*,²⁴⁵ which sustained the Federal Declaratory Judgments Act, itself turned

242. BORCHARD, *supra* note 2 at 315-46.

243. UNIFORM DECLARATORY JUDGMENTS ACT § 6.

244. FLA. STAT. § 86.011 (1971) (emphasis added).

245. 300 U.S. 227 (1937).

on the factual issue of whether Haworth was totally and permanently disabled. The Florida courts have frequently issued declarations resolving factual issues, often without finding it necessary to discuss their right to do so. For example, declarations have been granted as to whether the facts showed a sufficient change of circumstances to make it inequitable to enforce a restrictive covenant;²⁴⁶ whether the evidence showed that a contract had been made orally;²⁴⁷ what the terms of a disputed oral agreement were;²⁴⁸ whether defendant had used its "best efforts" to produce percentage rent, as required by a lease;²⁴⁹ and whether the facts were sufficient to require one party to a contract rather than the other to bear a hurricane loss.²⁵⁰ They have also been rendered as to whether a contractor had done defective work;²⁵¹ whether the proof was sufficient to show that a contract or lease had been terminated;²⁵² whether the testimony proved defendant guilty of fraud;²⁵³ whether the evidence showed compliance with the law in the preparation of a tax roll;²⁵⁴ whether defendant was guilty of failure to comply with the terms of a former decree;²⁵⁵ what the surrounding circumstances showed as to decedent's intention in making a will or a gift;²⁵⁶ and resolving factual disputes in many other cases.²⁵⁷

246. *Sinclair Refining Co. v. Watson*, 65 So.2d 732 (Fla.), *cert. denied*, 346 U.S. 872 (1953). Cases from other jurisdictions to the same effect are collected in Annot., 4 A.L.R.2d 1111, 1126, 1137 (1949).

247. *Storer v. Florida Sportservice, Inc.*, 115 So.2d 433 (Fla. 3d Dist. 1959), *second appeal*, 125 So.2d 906 (3d Dist. 1961).

248. *Simpson v. Ivey*, 67 So.2d 687 (Fla. 1953); *Goldberg v. Michalik*, 237 So.2d 298 (Fla. 2d Dist. 1970); *Price v. Rome*, 222 So.2d 252 (Fla. 3d Dist. 1969); *Hewitt v. Price*, 222 So.2d 247 (Fla. 3d Dist. 1969); *Barrineau v. B & F Auto Parts, Inc.*, 191 So.2d 53 (Fla. 1st Dist. 1966).

249. *Mayfair Operating Corp. v. Bessemer Properties, Inc.*, 150 Fla. 132, 7 So.2d 342 (1942).

250. *Triple E. Dev. Co. v. Floridagold Citrus Corp.*, 51 So.2d 435 (Fla. 1951); *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So.2d 671 (1944).

251. *Board of Pub. Instruc. v. Bradford Builders*, 81 So.2d 496 (Fla. 1955).

252. *Kanter v. Safran*, 68 So.2d 553 (Fla. 1953); *Koretsky v. Singer*, 159 Fla. 501, 32 So.2d 5 (1947); *Bal Harbour Towers, Inc. v. Keller*, 227 So.2d 219 (Fla. 3d Dist. 1969); *Rodgers v. Kajax Realty Co.*, 165 So.2d 259 (Fla. 1st Dist. 1964).

253. *J.S. Michael Co. v. Rayonier, Inc.*, 212 So.2d 824 (Fla. 1st Dist. 1968); *Gormley v. Gormley*, 187 So.2d 676 (Fla. 1st Dist. 1966); *Rice v. Fremow*, 165 So.2d 447 (Fla. 2d Dist. 1964).

254. *Townsend v. Gray*, 181 So.2d 612 (Fla. 1st Dist. 1966); *R.H. James, Inc. v. Anderson*, 165 So.2d 829 (Fla. 2d Dist. 1964).

255. *Fleming v. State Rd. Dept.*, 157 Fla. 164, 25 So.2d 376 (1946).

256. *Lungu v. Walters*, 198 So.2d 99 (Fla. 3d Dist. 1967); *Pancoast v. Pancoast*, 97 So.2d 875 (Fla. 2d Dist. 1957).

257. *Bloomfield v. City of St. Petersburg Beach*, 82 So.2d 364 (Fla. 1955) (whether plaintiff had changed his domicile); *Southern Food Stores v. Palm Groceries*, 134 Fla. 838, 184 So. 502 (1938) (right to credit on debt); *Pinellas County v. Dynamic Investments, Inc.*, 279 So.2d 97 (Fla. 3rd Dist. 1973) (whether facts sustained zoning restrictions); *City of Miami Beach v. Fein*, 263 So.2d 258 (Fla. 3d Dist. 1972) (whether parties had agreed to novation); *Caswell v. Nethery*, 258 So.2d 846 (Fla. 1st Dist. 1972) (whether conveyance was absolute or for security); *Goodman v. Winn-Dixie Stores, Inc.*, 240 So.2d 496 (Fla. 3d Dist. 1970) (whether employee had voluntarily terminated employment); *Davidson v. Miami Beach First Nat'l Bank*, 215 So.2d 623 (Fla. 3d Dist. 1968) (whether price was inadequate);

In the light of these decisions, it is astonishing to find Florida courts asserting in other cases that a declaratory judgment may not be used to resolve issues of "fact" alone.²⁵⁸ In some of those cases there were other adequate reasons for declining to exercise jurisdiction. Where only factual issues were presented and only money damages were demanded, but plaintiff filed a declaratory action in chancery, the courts have properly transferred the case to the law side of the court in order to preserve defendant's right to trial by jury.²⁵⁹ Unfortunately, however, the language in those opinions has subsequently been interpreted as forbidding *any* declaratory action raising only "fact" issues, and requiring *dismissal* rather than transfer of such an action.²⁶⁰ Such decisions completely lose sight of the fact that declaratory actions may be filed either at law or in chancery. If a declaratory action raising only legal issues which could be presented in another form of action is mistakenly filed in chancery, the defendant's rights are more fully protected by transfer to the law side, rather than by dismissal. The law court can then determine whether the action may proceed under the original declaratory complaint, or whether an amended complaint should be filed.

The anomalous insistence on dismissing declaratory actions raising only issues of "fact" reaches its most unjustifiable extreme in the insurance decisions, where need for the declaratory remedy is often manifest. The erroneousness of this position is apparent from the opinion which laid down the rule in *Columbia Casualty Co. v. Zimmerman*.²⁶¹ In that case, two automobile liability insurers were in dispute as to which should defend a number of claims arising out of a single accident. The dispute turned on whether a car was being driven with the consent of defendant's insured; if so, it was obligated to defend. Plaintiff assumed the defense of the damage suits, and, while these were still pending, filed a declaratory complaint alleging the pendency of these suits and the probability of others being filed, and asking the court to resolve the issue of consent. The majority opinion of the Supreme Court of Florida held that, in order for *jurisdiction* to exist under the declaratory judgment statute, there must be

Singer v. Tobin, 201 So.2d 799 (Fla. 3d Dist. 1967) (whether facts established equitable lien); Breuil v. Hobbs, 166 So.2d 825 (Fla. 3d Dist. 1964) (whether manufacturer could use certain boat designs); Tulip Realty Co. v. Fuhrer, 155 So.2d 637 (Fla. 2d Dist. 1963) (whether landlord had unreasonably withheld his consent to assignment of lease); Glassman v. Roney, 101 So.2d 25 (Fla. 3d Dist. 1958) (whether appraisal method was reasonable).

258. See notes 261-80 *infra* and accompanying text.

259. Barrett v. Pickard, 85 So.2d 630 (Fla. 1956); Halpert v. Oleksy, 65 So.2d 762 (Fla. 1953); Coral Gates Properties, Inc. v. Hodes, 59 So.2d 630 (Fla. 1952).

260. Florida Nat'l Bank v. Pugh, 88 So.2d 284 (Fla. 1956); M & E Land Co. v. Siegel, 177 So.2d 769 (Fla. 1st Dist. 1965); Broward Drug Stores, Inc. v. Perini Land & Dev. Co., 170 So.2d 86 (Fla. 2d Dist. 1964). *Contra*, Lincoln Tower Corp. v. Dunhall's-Florida, 61 So.2d 474 (Fla. 1952) (legal issues of fact within the province of the equity court do not authorize dismissal of a declaratory action).

261. 62 So.2d 338 (Fla. 1952) [hereinafter cited as *Columbia Casualty*].

some doubt as to the proper interpretation of the written contract or as to the existence or nonexistence of some right, status, immunity, power or privilege under the written contract, and that a construction thereof is necessary in order to determine the rights [of the plaintiff].²⁶²

The court then concluded that, since there was no doubt as to the meaning of the insurance contract, but only as to the existence *vel non* of the insured's consent, dismissal of the complaint would be affirmed. Mr. Justice Terrell filed a strong dissent, in which he pointed out that a declaration would avoid a multiplicity of suits by determining defendant's obligation once and for all, and that there was no warrant in the statute itself, or in decisions from other jurisdictions under similar statutes, for the conclusion that the act did not cover the case.²⁶³ It might be added that the insured, as well as the companies, would have benefited from a declaratory judgment, which would have imposed on one company or the other the duty to defend the suits and ended plaintiff company's defense under reservation of right.

Notwithstanding the wholly inadequate basis for the decision in *Columbia Casualty*, it has been followed in many subsequent cases, which hold that no declaration will be granted either to an insured or an insurer where coverage turns on a question of fact,²⁶⁴ but that the court will declare rights when the facts are undisputed and only the interpretation of the contract is in issue.²⁶⁵ None of the majority opinions in those cases examined the basis of the alleged rule. However, the dissenting judge in a recent case protested against it, pointing out that the statute authorizes declarations on issues of fact, and that the complaint before the court actually presented both issues of fact and issues of construction.²⁶⁶

The decisions in the above cases are not based on any real difficulty

262. *Id.* at 340.

263. *Id.*

264. *Bergh v. Canadian Universal Ins. Co.*, 216 So.2d 436 (Fla. 1968); *New Amsterdam Cas. Co. v. Intercity Supply Corp.*, 212 So.2d 110 (Fla. 4th Dist. 1968); *National Sur. Corp. v. White Constr. Co.*, 206 So.2d 220 (Fla. 1st Dist. 1968); *Central Mut. Ins. Co. v. Espina*, 208 So.2d 144 (Fla. 3d Dist. 1968); *Swain v. Reliable Ins. Co.*, 200 So.2d 862 (Fla. 3d Dist. 1967); *Smith v. Milwaukee Ins. Co.*, 197 So.2d 548 (Fla. 4th Dist. 1967); *Hartford Life Ins. Co. v. Albert*, 191 So.2d 579 (Fla. 3d Dist. 1966); *Johnson v. Travelers Indem. Co.*, 191 So.2d 61 (Fla. 1st Dist. 1966); *State Farm Mut. Auto Ins. Co. v. Couch*, 167 So.2d 786 (Fla. 3d Dist. 1964); *American Indem. Co. v. Southern Credit Accep., Inc.*, 147 So.2d 10 (Fla. 3d Dist. 1962).

265. *Tuggle v. Government Employees Ins. Co.*, 207 So.2d 674 (Fla. 1968); *Perez v. State Auto. Ins. Ass'n*, 270 So.2d 377 (Fla. 3d Dist. 1972); *Jones v. New Amsterdam Cas. Co.*, 213 So.2d 502 (Fla. 3d Dist. 1968); *Millers Mut. Fire Ins. Co. v. American Fid. Fire Ins. Co.*, 178 So.2d 742 (Fla. 3d Dist. 1965); *Ramirez v. Hardware Dealers Mut. Fire Ins. Co.*, 170 So.2d 317 (Fla. 3d Dist. 1964), *cert. denied*, 177 So.2d 13 (Fla. 1965); *Crown Life Ins. Co. v. Luzarraga y Garay*, 141 So.2d 633 (Fla. 3d Dist.), *cert. denied*, 143 So.2d 492 (Fla. 1962); *Sun Life Assur. Co. of Canada v. Klawans*, 137 So.2d 230 (Fla. 3d Dist. 1962), *quashed*, 165 So.2d 166 (Fla.), *conformed to*, 162 So.2d 702 (Fla. 3d Dist. 1964).

266. *New Amsterdam Cas. Co. v. Intercity Supply Corp.*, 212 So.2d 110, 114 (Fla. 4th Dist. 1968) (Reid, J., dissenting).

in trying factual issues in declaratory actions. This is made clear by a number of decisions permitting a declaratory judgment in insurance cases, even when the result depended on issues of fact,²⁶⁷ and other decisions approving a decree to declare rights and reform the insurance policy on the basis of parol representations to the insured.²⁶⁸ One opinion undertook to draw a distinction between those cases involving "a factual situation arising subsequent to the issuance of the policy and a factual dispute between a third party and the insured," which, it said, are not subject to declaratory judgment, and the case before the court, involving "a factual dispute between the insured and the company relative to a term of the policy," which was held to be subject to declaratory judgment.²⁶⁹ The supposed distinction destroys the basis of the rule which it undertakes to preserve. If a declaratory action is inappropriate for the trial of "facts," what difference can it make which parties are involved? Surely an "issue of fact" is still an "issue of fact," whether it arises between the insurer and a third party or between the insurer and insured.

The truth is that the "fact-law" distinction is impossible to apply consistently, as is demonstrated by the conflicting Florida cases. This is so for at least two reasons. In the first place, the courts have never been able to evolve a satisfactory distinction between the two. One might suppose that, where there was no dispute as to what occurred, and the only question was whether the insurer's delay in disclaiming coverage constituted a waiver of its right to do so, a question of "law" was presented. However, the Supreme Court of Florida has held such a question to be one of "fact," and directed dismissal of a declaratory action even though no party had raised the point.²⁷⁰ Second, even if the distinction could be made, it is often impossible to determine at the threshold of the case whether it will ultimately turn on a question of "law" or of "fact."²⁷¹ Thus, the court must often hold a hearing in order to decide whether

267. *National Auto Ins. Ass'n v. Brumit*, 162 So.2d 330 (Fla. 1957); *Massachusetts Cas. Ins. Co. v. Johansen*, 270 So.2d 397 (Fla. 3d Dist. 1972); *Florida Gas Co. v. American Employers' Ins. Co.*, 218 So.2d 197 (Fla. 3d Dist. 1969); *Jones v. New Amsterdam Cas. Co.*, 213 So.2d 502 (Fla. 3d Dist. 1968); *Hartford Acc. & Indem. Co. v. Shelby Mut. Ins. Co.*, 208 So.2d 465 (Fla. 1st Dist. 1968); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 194 So.2d 37 (Fla. 3d Dist. 1967); *Rosen v. Millers Mut. Fire Ins. Co.*, 193 So.2d 632 (Fla. 3d Dist. 1967); *Green v. United States Fid. & Guar. Co.*, 181 So.2d 198 (Fla. 3d Dist. 1966); *Levinson v. Motor Union (Aviation) Orion Ins. Co.*, 176 So.2d 125 (Fla. 3d Dist. 1965); *Zeagler v. Commercial Union Ins. Co.*, 166 So.2d 616 (Fla. 3d Dist. 1964), *cert. discharged*, 172 So.2d 450 (Fla. 1965); *Cruger v. Allstate Ins. Co.*, 162 So.2d 690 (Fla. 3d Dist. 1964).

268. *Hanover Ins. Co. v. Publix Market, Inc.*, 198 So.2d 346 (Fla. 4th Dist. 1967); *Coastal States Life Ins. Co. v. Raphael*, 183 So.2d 274 (Fla. 3d Dist.), *cert. denied*, 192 So.2d 494 (Fla. 1966). *Contra*, *Danson v. George Washington Life Ins. Co.*, 237 So.2d 774 (Fla. 1st Dist. 1970).

269. *Bituminous Cas. Corp. v. B & B Chem. Co.*, 179 So.2d 125 (Fla. 3d Dist. 1965).

270. *Bergh v. Canadian Universal Ins. Co.*, 216 So.2d 436 (Fla. 1969).

271. *Syndicate Gramercy, Inc. v. Daoud*, 43 So.2d 334 (Fla. 1949) (distinction between "fact" and "law" depended on which party's theory of the case was accepted).

jurisdiction should be exercised. In the *Bergh* case, jurisdiction was not denied until after both a trial on the merits and the decision of the case on appeal, since the supreme court permitted an insured, who had consented to a trial on the merits and lost, to raise the factual objection to jurisdiction for the first time on appeal.²⁷²

Thus, the "rule" that issues of fact will not be tried in declaratory cases has lost even the virtue of simplicity in error. The present state of the law seems to be that sometimes the circuit courts will be permitted to try declaratory actions turning on issues of fact, and sometimes they will not, and a plaintiff cannot be sure in which category his case falls until after the merits are litigated and reviewed by a court on appeal.

The decisions of the Florida courts denying declaratory judgments in "fact" cases were anticipated and refuted by Borchard more than a decade before the first of these decisions was rendered. In several passages dealing with this subject, he pointed out the need for such declarations in many situations, and their particular usefulness in insurance cases. This is so, he suggested, because of the following factors: in most jurisdictions the issue of coverage or lack of coverage could not be raised in a third party's suit against the insured; the saving of time and expense to both insured and insurer when coverage could be determined in advance of litigation on the claims; the large number of jurisdictions in which declarations had been granted in such cases; and the errors of reasoning in the few opinions refusing to grant declarations on questions of fact.²⁷³ The other leading author on declaratory judgments concurs, saying that denial of declarations in "fact" cases is an "unreasonable conclusion," and that "the modern rule . . . is that the courts in declaratory judgment actions will as readily determine questions of fact as in any other actions or proceedings that may come before them."²⁷⁴

Some *post hoc* justification for the Florida decisions refusing declarations concerning insurance coverage in the "fact" cases might be derived from the recent decisions allowing an insurance company to be named as party defendant along with the insured in a tort suit brought by a claimant,²⁷⁵ and permitting a separate trial on the issue of coverage before trial of the tort claim.²⁷⁶ It might be argued that, even if there was a need for the declaratory suit in such situations in the past, that need has been reduced or eliminated by the insurer's right to a "cover-

272. Three justices dissented on this point. *Bergh v. Canadian Universal Ins. Co.*, 216 So.2d 436, 442 (Fla. 1969). The dissent seems correct, since the question was not one of subject matter jurisdiction, but merely whether the complaint stated a cause of action. See *Florida Gas Co. v. American Employers' Ins. Co.*, 218 So.2d 197 (Fla. 3d Dist. 1969).

273. BORCHARD, *supra* note 2 at 309-12, 391-98, 645-55.

274. ANDERSON, *supra* note 87 at 987-88.

275. *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969), *overruling* *Artille v. Davidson*, 126 Fla. 219, 170 So. 707 (1936), and holding that insurer may be joined in tort action under automobile policy; *Beta Eta House Corp. v. Gregory*, 237 So.2d 163 (Fla. 1970) (holding that insurer may be joined in tort action under other forms of liability insurance).

276. *Stecher v. Pomeroy*, 253 So.2d 421 (Fla. 1971); *Beta Eta House Corp. v. Gregory*, 237 So.2d 163 (Fla. 1970).

age" hearing in a tort action. It is submitted that such an explanation is inadequate. One of the primary purposes of the declaratory action is to enable a party to establish nonliability without waiting until the claimant chooses to sue him, which latter suit may not occur until long after witnesses have been lost and the facts have been obscured. The insurance company may be particularly in need of such a right, since the facts on which it relies are often in the control of an insured who is hostile to a defense of noncoverage. The insured may also need to know where he stands, as a guide to his future action in making an investigation or negotiating settlement if he is not covered. Many declaratory actions have in fact been brought by the insured party. Nevertheless, it must be conceded that both insurer and insured now have a means other than a declaratory suit to determine coverage before they must actually stand trial on the tort claim, and that normally the tort claimant will bring suit promptly. In both respects they are better off than potential defendants in other "fact" cases, who can only stand and wait.

It may be that the Florida courts have refused relief in "fact" cases because they feared harassment of insured parties by frivolous actions for declarations of noncoverage which would subject them to great expense. If that is the reason, it should be brought out into the open, and a decision should be rendered on the merits of each case, rather than denying all declaratory relief in such cases even when they are meritorious. The courts have ample discretionary power to prevent the use of declaratory proceedings for harassment. Borchard has pointed this out:

The distinction between jurisdiction over the case and the propriety of *exercising* that jurisdiction must be borne in mind. The court should exercise its jurisdiction where it will serve a useful social purpose, and especially where it will terminate the controversy or settle the uncertainty giving rise thereto. The exoneration of the insurance company would be in many cases an adequate ground for the exercise of the jurisdiction.²⁷⁷

A circuit court can determine at a pretrial conference whether the insurer has a real need for the declaration,²⁷⁸ and may exercise its discretion at that time to dismiss any declaratory action not brought in good faith and for a desirable purpose. If the insurer's suit is dismissed, an award of attorney's fees in favor of the insured should follow as a matter of course.²⁷⁹

For the following reasons, the present seems a particularly appropriate time for the Supreme Court of Florida to reexamine declaratory actions turning on questions of "fact."

(a) *The insurance cases are now distinguishable from other "fact"*

277. BORCHARD, *supra* note 2 at 313.

278. FLA. R. CIV. P. 1.200.

279. FLA. STAT. § 627.428 (1971).

cases. Since 1969, insured and insurer can obtain what is essentially a declaratory judgment on coverage by preliminary hearing in a tort suit brought by the claimant. Their need for a separate declaratory action is thus less than that of other plaintiffs in such cases, who may be totally without adequate remedy if a declaratory suit is denied. The court can thus, if it sees fit, modify the decisions purporting to lay down a rule of law against "fact" cases without disturbing the insurance category.

(b) *Refusal to permit declarations in "fact" cases not involving insurance is clearly unjustifiable.* The alleged rule is contrary to the terms of the Florida Declaratory Judgments Act; is disregarded in numerous Florida cases; is unfair to the plaintiff who has need of a declaration, but is so unfortunate as to have issues of "fact" predominate in his case; is not justified by any explanation in the opinions of the courts; is impossible to apply consistently, because of the difficulty of drawing the "fact-law" distinction; and is time-wasting and expensive for both the courts and the parties, because of the frequent necessity of trial court hearings and even appeals to determine in which category a given case will fall. When we add to the above objections the recent willingness of the supreme court to reverse and remand for dismissal on this point, even though the question was never raised below,²⁸⁰ there is evident an exaltation of procedural snares over substantial justice that is difficult to explain or defend.

In concluding the discussion of judicial discretion, it is submitted that, in accordance with the remedial purpose of the Florida Declaratory Judgments Act, a complaint pleading a declaratory cause of action within the court's jurisdiction should be entertained unless the court finds that (1) there is no need for declaratory relief, because there is another remedy available which is exclusive or superior to the declaratory action; or (2) the case pleaded does not present a bona fide controversy which will finally dispose of a separable issue of fact or law; or (3) for some other reason, based on the circumstances of the particular case, the advantages of the declaratory action are outweighed by the disadvantages. In a proceeding that is equitable in origin, arbitrary classifications by subject matter, whether "fact-law" or otherwise, should never be decisive in the exercise of the court's discretion.

V. CONCLUSION

The road charted by the Florida Declaratory Judgments Act is clear. If a plaintiff alleges a case within the coverage of the act and a need for the relief, and if the court can ascertain that a declaration of law or fact would terminate the uncertainty giving rise to the proceeding, he has a prima facie right to a declaratory judgment or decree. The court should refuse to entertain the proceeding only if it can deter-

280. See notes 271-73 *supra*.

mine that, in the circumstances of the particular case, the advantages of the declaratory action are outweighed by the disadvantages.

The Florida courts can follow this road without serious difficulty if they will, in all cases, observe the legislative mandate that the act is "substantive and remedial," and that it is to be "liberally administered and construed" for the purpose of affording "relief from insecurity and uncertainty" in "equitable and legal relations."²⁸¹ Their occasional failures to follow this directive are the basis of the criticisms contained in this article. The present is an unusually appropriate time for the courts to conform their decisions to the original beneficial purpose of the act.

281. FLA. STAT. § 86.101 (1971).