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Jurisdictional Conflicts in Declaratory Judgment Actions

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JURISDICTIONAL CONFLICTS IN DECLARATORY JUDGMENT ACTIONS*

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The most serious question still unsettled in connection with declaratory judgment cases is the right of one forum, in which the declaratory judgment suit is brought, to enjoin the commencement of or further prosecution of actions in other courts. The most common of these situations arises where a casualty insurer has brought an action for declaratory judgment in a federal forum and seeks to enjoin the institution of or further maintenance of personal injury suits arising from the accident in question until the insurer's liability under the casualty policy —that is, its duty to defend such personal injury suits on behalf of its insured and to pay judgments arising therefrom, has been settled.

The same question may, of course, arise between forums of different states, a declaratory judgment suit perhaps being brought in New Hampshire and an injunction prayed to restrain personal injury actions in New York. Or a declaratory judgment may be sought in a New York state court, and that court asked to enjoin the maintenance of personal injury suits in one of the federal courts. But the situation most commonly presented, and the only one with which this article will deal, arises where a declaratory judgment is sought in a court of the United States and injunctive relief prayed against actions contemplated, or already pending, in state courts.

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*For a general discussion of declaratory judgments, see this author's articles *Federal Declaratory Judgments on Automobile Insurance*, Wisconsin Law Review, July, 1939, abstracted Current Legal Thought, December, 1939, and *Automobile Insurance and the Declaratory Judgment*, 23 American Bar Association Journal 551.

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When it is remembered that the purpose of passage of the Federal Declaratory Judgment Act was to permit one of several contracting parties to secure an immediate adjudication of his rights or liabilities, and to remove the hazard of acting upon his own interpretation of his obligations,[1] it would seem that the court's injunctive powers would be freely exercised toward this goal. As Representative Gilbert, in discussion of this bill stated in the House of Representatives, "Under the present law you take a step in the dark and then turn on the light to see if you have stepped in a hole. Under the declaratory judgment law you turn on the light and take the step."[2] Under those circumstances, it would logically follow that no reasoning directed toward effectuating the true purpose of this act would deny a liberal use of a federal court's injunctive power.

The difficulty is not so much a matter of legal philosophy as it is of strict legal principle. True, one court early advanced a sound equitable reason against the over-liberal use of injunctions in such instances. The court pointed out that the injured third party had no privity of contract with the insurer—that he was not necessarily interested in the outcome of private battles between insurer and insured, as to who should pay a judgment recovered. Consequently, his right to a speedy trial of the

[1] "Closely related to the actions in which the plaintiff, desiring to escape ostensible obligations, seeks a declaration of the nullity of the contract or his release from its obligations by act of the defendant or new event, are those in which the plaintiff seeks a declaration that he is under no duty to the defendant, as claimed. * * * A person, uncertain of his rights under contract, brought into question by claims against him, may take the initiative by requesting a declaration of his duties—that is, the rights of the defendant—instead of himself waiting to be sued. * * * The need for a declaration arises because the defendant asserts that the plaintiff is not privileged to act as he proposes and it is important to have the issue settled before a possible breach occurs, or because the plaintiff, fearful of incurring forfeiture, damages, or other penalty, desires an authoritative determination of his privileges under his contract with the disputing defendant; or because the plaintiff, claiming that the proposed act constitutes performance of the contract and a discharge of his obligations under it, seeks an authoritative confirmation of his claim, thus averting a subsequent suit for alleged breach and having the opportunity, should his claim of performance be denied, still to fudfill the obligation without committing any wrong. It is readily apparent that much loss and detriment is saved in all these cases by construing the contract before rather than after a purported breach." Borchard—*Declaratory Judgments* (1934) Banks-Baldwin Publishing Company, pages 419, 420, 422, 424.

[2] Report No. 1005, Seventy-Third Congress, Second Session.

issues in the personal injury case ought not to be abrogated by a squabble over a contract in which he has no direct interest.[3]

Other courts have felt, however, that the security of the average casualty company being unquestioned (or if questioned, a security bond could be required under the court's equity powers) it would be better, if legally permissable, to delay the personal injury suits and to secure an immediate determination of the duties of the insurer—which, if liable, must both defend such suits and pay judgments recovered therein. While some parties will suffer inconvenience, none will suffer loss, save in the highly unusual situation of a policyholder becoming insolvent in the short interim required for the determination of the policy issue.

Some decisions have bluntly stated that the federal courts have no power to enjoin personal injury suits pending in the state courts, relying upon the Act of March 2, 1793, Section 5, 1 Stat. 334.[4] That Act, it will be recalled, reads as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Even if this conclusion were accepted, it might still be questioned as to whether or not the real basis for non-interference by the federal forum with that of the state is, rather, because of the inherent, independent sovereignty of each court, which cannot be affected by alteration of statutes but only of the organic law.

It is likely that this provision was originally placed in the laws to prevent any possibility of the federal forums encroaching upon the state courts. It may be recalled that its passage was just subsequent to the decision of *Chisholm* v. *Georgia*,[5]

[3] "Basing their right to have the question determined under the New Hampshire statute and the decisions of the New Hampshire Supreme Court, the defendant's counsel entered a special appearance in the actions at law, and claimed that the trial should be postponed until the question of liability of the insurance company's coverage and duty to defend the assured had been determined.

"The right of the plaintiffs in this action at law to have their actions speedily tried and determined ought not to be held up because of some contract between the defendants and a third person or corporation to which they are not a party." Judge Morris, in Moulton v. Owler (1934) U.S.D.Ct. N.H. 5 Fed. Supp. 700 at 701.

[4] 28 United States Code, Section 379.

[5] 2 Dall. 419 (U.S. 1793).

which startled all citizens of the young nation by calmly permitting an action against a sovereign state by a citizen of another state in the federal court. The rather amazing immediate result of this act, however, was that the state courts encroached in fearful manner upon federal courts, federal officers, and federal jurisdiction in general, while the national bodies felt helpless to retaliate.[6] State courts enjoined federal officials, arrested them, sued them on their bonds. The situation then apparent was that the dog bit the man freely and frequently, but that the man was prohibited by statute from biting dog.

In 1872, the federal statute received its first real baptism in any case.[7] From that time henceforth, the decisions involving this act are quite inconsistent, and in many cases, ill-reasoned. For example, in one decision, the federal court enjoined the enforcement of a judgment obtained in a state court by fraud. The court pointed out that the injunction was issued only against the parties, not against the court itself. It merely took from a party litigant certain benefits, by preventing the enforcement of a fraudulent judgment, and did not constitute a direct interference with the processes of the state court.[8]

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[6] See the splendid historical discussion in Warren—*Federal and State Court Interference*, 43 Harvard Law Review, pages 34 *et seq.*

[7] Watson v. Jones, 13 Wall. 679, 80 U.S. 679 (1872). The prior decisions of Diggs and Keith v. Wolcott, 4 Cranch. 179, 8 U.S. 179 (1807) and Orton v. Smith, 18 Howard (59 U.S.) 263 (1856) should be read as early pointing the way toward enforcing the rule of non-interference.

[8] "These authorities would seem to place beyond question the jurisdiction of the Circuit court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court." Justice Harlan in Marshall v. Holmes, 141 U.S. 589 at 599 (1891).

See the pointed criticism of this result in Warren, *ibid.*, page 372; Taylor & Willis *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale Law Journal at 1185.

Nevertheless, a number of lower court decisions have followed this reasoning. National Surety Company v. State Bank of Humboldt, C.C.A. 8, 120 Fed. 593 (1903); Schultz v. Highland Gold Mines Company, 158 Fed. 337 (1907); Chicago, Rock Island & Pacific Ry. Co. v. Callicotte, C.C.A. 8, 267 Fed. 799 (1920); Hewitt v. Hewitt, C.C.A. 9, 17 Fed. (2) 716 (1927).

As a matter of fact, the only injunctions which are usually issued are directed to individuals, rather than to judges or to other officers of the court. It is hardly likely that the framers of this act even contemplated that the federal court would presume to exercise direct control over independent state officials and judges, as such. Yet state court trials can scarcely be considered free of federal restriction if the parties litigant before it are, by injunction, prevented from bringing a suit, proceeding to trial, or enforcing a judgment recovered. The distinction which the court strove to make is, it would seem, illogical.

Nor is it much better to hold that such an injunction against enforcing a state court judgment would lie, but resting it instead upon the basis that after a judgment is rendered the matter is no longer before the state court—that any injunction thereafter rendered is not, by reason thereof, in derogation of the state court's jurisdiction.[9] From a practical standpoint, any money judgments are enforced by the issuance of an execution. Is it not just as much a derogation of a state court's jurisdiction to prevent and to enjoin the use of a levy of execution as the maintenance of the action itself?

However, such distinctions seems to flow through this field of the law, the federal courts having held that they cannot enjoin a pending state court action upon the ground that a judgment rendered therein would be void for lack of jurisdiction,[10] but that, even before judgment, the plaintiff therein could be enjoined from doing anything to collect a judgment that might be rendered in his favor.[11]

Where the federal court has first acquired jurisdiction of the parties and subject matter, it is quite well settled that it will use

[9] "But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise." Simon v. Southern Railway Company, 236 U.S. 115 at 128 (1914). The case also rests its decision, apparently, upon the reasoning that the defendant had not been served with process; that accordingly the judgment obtained was necessarily void and a nullity; that proceedings in a state court which are a nullity are no proceedings at all, and an injunction does not violate the statute.

For a discussion of related authorities, an examination of Taylor & Willis, *ibid*, at 1186 *et seq.* is well worth-while.

[10] Detroit, M. & T.S.L.Ry. v. City of Monroe, U.S.D.Ct. E.D. Mich. S. Div. 262 Fed. 177 at 179 (1919).

[11] Western Union Telegraph Company v. Tompa, C.C.A. 2, 51 Fed. (2) 1032 at 1034 (1931).

its injunctive power freely to maintain its jurisdiction.[12] Despite occasional criticism of this result,[13] it has been followed with fair consistency.[14] As may be expected this has led to some sharp conflicts in the enforcement of property rights between state and federal forums, but the federal forum has been slow to relinquish control over any res, once it has gained jurisdiction thereof.[15] As a logical outgrowth thereof, the federal courts have enjoined new actions in state courts where the subject matter or legal relationships have been settled by federal decree.[16] There is, however, no uniformity in result as to whether proceedings in the state forum will be enjoined where constitutional matters are involved.[17]

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[12] "The court having jurisdiction in personnam had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive and could not be trenched upon by any other tribunal. * * * The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision." French v. Hay, 89 U.S. (22 Wall.) 250 at 252 and 253. See also Dietzbach v. Huideloper, 103 U.S. 494 (1880).

[13] Note (1911) 5 Illinois Law Review, page 508 *et seq.*

[14] "We are of opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seized should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the states." Justice Holmes in Rickey Land & Cattle Company v. Miller & Lux, 218 U.S. 258 at 262 (1910), citing *Ex parte* Young.

Other decisions reiterating this principle either in direct adjudication or by way of *obiter dicta* are set forth in detail in 28 U.S.C.A., sec. 379.

[15] Warren, *ibid.*, page 359 *et seq.* See the excellent discussion in Taylor & Willis, *ibid.*, pages 1177-1185, setting up the treatment of different types of *res.*

[16] St. Louis Mining & Milling Company v. Montana Mining Company, 148 Fed. 450 (1906); Missouri Pacific Ry. Company v. Jones, 170 Fed. 124 (1909). By implication, Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1920) and Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906), decision in which latter case is rested primarily upon another ground. But contrast the early case of Dial v. Reynolds, 96 U.S. 340 (1877).

[17] Compare the treatment in Looney v. Eastern Texas R.R. Co., 247 U.S. 214 at 221 (1918) with Grubb v. Public Utilities Commission, 281 U.S. 470 (1929) and Gilchrist v. Interborough Rapid Transit Company, 279 U.S. 159 at 211 (1928).

In the notorious case of *Ex parte Young*,[18] the federal court went a long step further than its past logic or even sound reason would seem to justify. The court upheld the right to enjoin sheriffs, prosecuting attorneys and other court officials from taking any steps or instituting any actions which the federal court considered might derogate from its jurisdiction of a cause pending before it.[19] The facts were as follows: The Minnesota legislature created a railroad and warehouse commission which fixed rates for various railroad companies, materially reducing them. The railroads filed and published schedules in accordance therewith. Subsequently an act was passed by the legislature providing special rates for certain commodities and fixing certain penalties for violations. These rates met with opposition. The stockholders of a certain railroad company brought suit in the federal court to enjoin the attorney general from prosecuting the railroad, claiming that the act was unreasonable, confiscatory, and deprived them of property without due process of law. Upon violation of such an injunction, the attorney general was fined $100.

Now, here, after hedging as regards injunctions of individuals, after debating upon distinctions between direct and indirect interference with judicial process, the court apparently

[18] "The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps toward the enforcement of an unconstitutional enactment to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of any officer.

* * * "The answer to all this is the same as made in every case where an official claims to be acting under authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a State official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional." Peckham in 209 U.S. 123 at 159 Harlan dissenting.

[19] Warren, *ibid.*, at 375 apparently feels that the result of comity is inferred in such cases as Gilchrist v. Interborough Transit Company, 279 U.S. 159 at 211 (1929). This result seems to be more clearly shown in Harkin v. Brundage, 276 U.S. 36 at 57, 48 S. Ct. 268 at 275, 72 L. Ed. 457 (1928). And see *In re* Walker Grain Company, 294 Fed. 951 (1923); Amusement Syndicate Company v. El Paso Land Improvement Company, 251 Fed. 345 (1918).

threw all caution aside and enjoined the actions of the highest ranking quasi-judicial officials. In more recent decisions, the court seems to have saved its judicial face by invoking the doctrine of comity—by refraining from attempting to exercise powers which, in the first instance, it is doubtful that it possesses.

It is very difficult, from such decisions at which we have cast such a cursory glance, to formulate fixed and definite rules to carry into declaratory judgment situations. In the face of hedging on the one hand and the exercise of unusual and extraordinary powers on the other, it is hard to recognize the value of *stare decisis*. Perhaps the statement of Taylor & Willis in concluding their discussion of the statutory prohibition is as frank and accurate as can be made: "Although sweeping and unqualified in its terms, it does not limit the jurisdiction of the federal courts, but only their equity powers; it does not bind them prior to the institution of state suits, nor after judgment therein; if deemed necessary to make effective their own jurisdiction, it is ignored altogether."[20] This is painfully reminiscent of the legendary Scotchman who faithfully observed that there were only three proper times for drinking: One was if going out into the cold; one, when coming in from the cold; the third, any other time.

Going to the question of declaratory judgments, it is apparent that two quite different questions are presented to the federal court for determination when injunctions are demanded by the plaintiff in the following situations.

1. Where the federal court acquires jurisdiction of all parties prior to the institution of any action in the state court.

2. Where actions are already pending in the state court and the federal forum is asked to stay the proceedings, even though the state court clearly has prior jurisdiction of the parties.

Now it is clear from a consideration of casualty insurance questions that a policy breach either does not appear or may not

[20] Taylor & Willis, *ibid.*, p. 1194. In this connection, see Sovereign Camp v. O'Neill, 266 U.S. 292, 45 S. Ct. 49 at 51 in which it is declared, "This section does not deprive a district court of the jurisdiction otherwise conferred by the federal statutes, but merely does to the question of equity in the particular bill; making it the duty of the court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which relief by injunction is prohibited by this section or may nevertheless be granted." *Comme ci, comme ca.*

occur, frequently, prior to the institution of personal injury suits. Suppose, for example, an accident occurs upon January 1. Suit is started by the injured person on March 1, whereupon the policyholder notifies the company of the accident, claim, and suit. Clearly, his delay in giving notice has breached the policy contract. The company requests that he execute a non-waiver agreement setting up the circumstances of delayed notice, the company agreeing to defend the personal injury suit but reserving its policy defense—the determination of the policy question to await the termination of the personal injury suit. The policyholder refuses to consent to a defense under such circumstances and refuses to sign the agreement. Now, under the doctrine of many states, the insurer must either disclaim liability entirely or accept the defense unequivocally.[21] If it does the first, it runs the risk of a default judgment against, or a weak defense by, the insured. It must rely solely upon its policy defense and loses all opportunity of a defense upon the merits. If it accepts the defense, it waives the policy breach regardless of prejudice or other circumstances.

It was to remedy just that type of quandry and hazard of loss that the federal Declaratory Judgment Act was passed. Yet, if the federal court cannot enjoin prior personal injury suits, much of the benefit disappears. In such cases of delayed notice, of lack of co-operation, and other defenses coming late to the attention of the insurer, if the personal injury suits are not enjoined, the company must always suffer a loss to the extent of the attorneys fees and costs in the defense thereof, if the insured permits it to reserve its rights—and if the insured refuses, the insurer must suffer the loss of either a meritorious policy defense or the risk of a large adverse judgment if its guess, upon disclaimer, should prove wrong.

Bearing this in mind, let us look to see what the federal courts have done in passing upon this question.

In 1937, the situation was presented where an insurer had made a settlement with one of several injured passengers in

[21] Blackwood v. Maryland Casualty Company, 24 Ala. App. 527, 137 So. 467 (1931), s. c. 25 Ala. App. 308, 150 So. 179 (1932), *cert. den.* 227 Ala. 343, 150 So. 180 (1933); DiFrancesco v. Zurich General Accident & Liability Insurance Company, 105 Conn. 162, 134 A. 789 (1926); Miller v. Union Indemnity Company, 209 App. Div. 455, 204 N.Y.S. 730 (1924); Beatty v. Employer's Liability Assurance Corporation, 106 Vt. 25, 168 A. 919 (1933).

an automobile driven by its insured, and was negotiating with the other passengers. Suddenly it was brought to the company's attention that these passengers had been transported by its insured for hire, a clear violation of the policy terms. The company immediately instituted a declaratory judgment action to determine its liability under the policy to defend the remaining causes of action or to pay judgments recovered therein, and to recover back the payments already made upon settlements. No personal injury suits having as yet been filed, an injunction was prayed to restrain their institution. The lower court denied the injunction and dismissed the suit.

Upon appeal, the Circuit Court of Appeals for the Fifth Circuit declared: "Upon the facts alleged Mrs. Caswell would have no defense in the damage suits. Appellant would be obliged to defend them and it is extremely doubtful that appellant could successfully urge its defense under the exception in the policy. Where the remedy is so doubtful there is not a plain, adequate, and complete remedy at law and equity has jurisdiction. Conceding that appellant would have a remedy in equity against Mrs. Caswell to determine the rights and obligations of the parties to the contract, that would not avoid the expense, annoyance, and danger of suits by the injured person. . . . The judgment appealed from is reversed and the case is remanded, with instructions to grant an interlocutory injunction pendente lite as prayed for and for further proceedings not inconsistent with this opinion."[22]

Clearly this result was justified under the holdings we have previously examined. Other decisions are found to be in accord.[23]

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[22] Central Surety & Insurance Corp. v. Caswell, (1937) C.C.A. 5 (Fla.) 91 Fed. (2) 607 at 609.

[23] "At the argument, I was impressed that since the present proceeding contemplated the rendering of a personal judgment, the writ of injunction could not issue to prevent the claimants from suing in the State court. However, upon closer study and examination of the authorities, I am convinced that the very nature of the relief contemplated by the declaratory judgment statute requires that when the court takes jurisdiction it should do so to the exclusion of other tribunals, as otherwise, should the plaintiff be held not liable, prosecution of the suit for damages in the State court would involve much expense by both sides to no avail." Standard Accident Insurance Company v. Grimmett, U.S.D.Ct., W.D. La., 32 F. Supp. 81, C.C.H. Automobile Cases, Vol. 2, page 1109 (1939). Temporary injunctions were found to have been granted by the lower courts also in the cases of American Casualty

Two years later, however, the same Circuit Court of Appeals is found vacillating badly upon the question. Some readers may point out that there is some distinction in the facts as two of the injured parties had already started suit, whereas in the earlier case, none of them had done so. Inasmuch as the court in the later decision places both groups upon the same footing and refuses to enjoin *either,* this distinction is not valid. Note the court's reasoning: "But it does not follow that the action for damages pending or prospective ought to be enjoined. The declaratory proceeding does not cover the same issues, nor can it afford the injured persons full relief. They are claiming Mrs. Norris and her husband are personally liable. The policy liability is limited to $20,000 and the two suits already filed are for $50,000. The policy may be wholly insuffient to cover all recoveries. Delay is always harmful to such suits. Insolvency might overtake Mrs. Norris, or even the Insurance Corporation. Death of a party may defeat such an action. Witnesses may die or disappear or their memory grow faint. A question of limitation may be raised. It would not be equitable, if there is power, to delay these persons in the legal pursuit of their rights in order to enable an insurance company not yet sued to ascertain where it stands, under a contract it has made with someone else."[24]

Since conflict is apparent even where the federal court first takes jurisdiction, more trouble may be anticipated where the state court actions have been filed prior to those in the federal forum. Until recently, it appears that many district courts have been granting such injunctions pendente lite upon application of the plaintiff, usually without their authority to do so having been questioned.[25] More recently, however, attorneys

Company v. Windham, U.S.D.Ct., M.D. Ga., 26 Fed. Supp. 261 (1939), Aff'd. (1939) C.C.A. 5, 107 F. (2d) 88; Maryland Casualty Company v. Aguayo, U.S.D.Ct., So. D. Cal., 29 F. Supp. 986 (1939).

[24] Central Surety & Insurance Company v. Norris et al., C.C.A. 5 (Fla.) 103 Fed. (2) 116 at 117 (1939). This reasoning is cogent and impressive. Certainly a weighing of equities must take place in every such case. However, when nearly every injured person intends to assert an ultimate liability against the insurance company, it may be questioned as to whether or not the arguments of the court are more academic than practical. In accord is the reasoning in Moulton v. Owler, U.S.D.Ct., N.H. 5 Fed. Supp. 700 (1934).

[25] It appears that temporary injunctions were issued by federal district judges in the following cases, where the state court had prior jurisdiction over the parties defendant. Maryland Casualty Company

have begun to fight vigorously against the wholesale grant of injunctions and some different results have obtained. The federal courts still permit the declaratory judgment actions to lie simultaneously with personal injury suits pending elsewhere, in order not to delay the determination of policy coverage,[26] but with fair uniformity have committed themselves to the doctrine of non-interference with the state court actions.

In 1938, the situation arose where a physician was sued for malpractice, the claim being made that he had performed an operation upon the deceased in such a negligent manner that peritonitis developed and death ensued. The physician turned the case over to his insurer which disclaimed liability, setting up that the operation was a criminal abortion, excluded from coverage. The physician refused to execute a non-waiver agreement and a declaratory judgment suit was brought by the insurer. At that time, suit was already pending in the state court.

The Circuit Court of Appeals for the Fourth Circuit held, of course, that the declaratory judgment suit would lie and that it was not in derogation of the state court's jurisdiction. Upon the injunction issue, however, the court laid down a clear rule of law: "It is true that injunctions restraining the prosecution of a pending case against an insured have been granted in some instances in connection with suits by an insurer seeking

v. Tighe, 24 Fed. Supp. 49 U.S.D.Ct., N.D. Cal. (1938); Standard Accident Insurance Company v. Alexander, Inc., U.S.D.Ct., N.D. Tex. 23 Fed. Supp. 807 (1938); Columbia Casualty Company v. Thomas, U.S.D.Ct., N.D. Fla. 20 Fed. Supp. 251 (1937); Maryland Casualty Company v. Sammons (see comments in 99 Fed. (2) 323); Trinity Universal Insurance Company v. Cunningham, U.S.D.Ct., W.D. Mo. 25 Fed. Supp. 801 (1938), where injunction was granted one day and modified the same day. And in Aetna Casualty & Surety Company v. Quarles, C.C.A. 4, 92 Fed. (2) 321 (1937), the court implies that such power is possessed but to be used at the discretion of the court.

[26] See discussion in Wisconsin Law Review, July, 1939, page 507, note 31. Also the following cases decided since that time: Maryland Casualty Company v. United Corp., C.C.A. 1, 111 F. (2d) 443 (1940); Pacific Indemnity Company v. McDonald, C.C.A. 9, 107 F. (2d) 446 (1939); Associated Indemnity Corp. v. Manning, C.C.A. 9, 107 F. (2d) 362 (1939); Commercial Standard Insurance Company v. Foster, U.S.D.Ct., Kansas, 31 F. Supp. 873 (1940); General Accident Fire and Life Assurance Corp. v. Morgan, U.S.D.Ct., W.D. N.Y., 30 F. Supp. 753 (1939); compare, however, State Farm Mutual Automobile Insurance Company v. Hugee, E.D.S.C., 32 F. Supp. 665 (1940); Maryland Casualty Company v. Tindall, W.D. Mo., 30 F. Supp. 949 (1938); Ohio Casualty Insurance Company v. Murphy, W.D. Ky., 28 F. Supp. 252 (1939).

a declaratory judgment of non-coverage (citing cases) but in our opinion this course should not be followed in the pending case. We should be guided rather by the principles enunciated in *Kline* v. *Burke Construction Co.* wherein the court considered the Act of Congress, 28 U.S.C.A. Section 379, which provides that the writ of injunction should not be granted by any court of the United States to stay proceedings in any court of a state. . . . This decision rules the application for injunction in the pending case. . . . Even without the prohibition of the federal statute, a federal court possesses no power to interfere with a proceeding in a state tribunal when there is no interference with subject matter in the possession of the federal court and no impairment of its jurisdiction. It may be embarrassing for the insurer here either to defend the action in the state court or to decline to do so, but that is a difficulty inherent in the provisions of its policy which requires it to defend the insured generally, but relieves it of the obligation in the event that the insured has been engaged in the commission of a crime. For like reasons, the fear of the insurer, that it may be estopped from setting up the defense of non-coverage if it defends the suit in the state court, furnishes no reason to restrain the injured party in the exercise of his undoubted right to press the suit against the alleged tort feasor."[27]

In view of the fact that two other Circuit Courts of Appeals have affirmed this view,[28] it may be accepted as representing

[27] Aetna Casualty & Surety Company v. Yeatts, C.C.A. 4, Va., 99 Fed. (2) 665 at 670 (1938). The court does not, however, rely solely upon this ground. Going on, the court proceeds upon the theory that the state and federal actions are substantially different and that neither court should, therefore, interfere with the free jurisdiction of the other. The court also relies to some extent upon the argument so cogently set forth in the Norris case, that the injured person being a stranger to the contract, ought not to be delayed in the enforcement of the cause of action for personal injury against the insured.

[28] "In so holding, however, we do not decide that the court should grant an injunction restraining Ross White from further prosecuting his suit in the court of Common Pleas pending the determination of the present proceeding, as prayed for in the petition. On the contrary it seems clear that the court would be without power to grant such an injunction in view of the provisions of section 265 of the Judicial Code, 28 U.S.C. section 379, 28 U.S.C.A. section 379." Maryland Casualty Company v. Consumer's Finance Service *et al.* C.C.A. 3, (Pa.) 101 Fed. (2) 514 (1938).

"As to the suits already filed in the State court, the statute against enjoining such proceedings stands in the way." Central Surety & Insurance Corp. v. Norris, C.C.A. 5, (Fla.) 103 Fed. (2) 116 (1939).

the law, unless, of course, it be modified at some future date by the Supreme Court. It should not be thought, however, that this result has been reached without dissent. In a District Court case arising in California, the question arose as to the interpretation of policy coverage. The insurer sought a determination of its liability by way of declaratory relief, its action being instituted subsequent to the commencement of the personal injury suit. In the original action, decided prior to the important decisions just discussed, the court held that it had power to issue such an injunction,[29] relying upon a number of lower court decisions, in which this writer, upon careful perusal, is unable to find any reference whatsoever to the issuance of such injunctions. The appeal therefrom was dismissed upon technical grounds, the higher court in discussing the facts referring to the issuance of the injunction but not commenting upon the propriety thereof.[30] Upon retrial in the lower court, the injunction feature came into particular discussion. By this date, the court surely must have had the various decisions hereinbefore referred to before it, but, without referring to these conflicting decisions in any way, the court held the issuance of injunctions *pendente lite* absolutely proper.[31]

The oddity of the situation is that the opinion of the court is eminently well-expressed. While it may be questioned whether

"This court has no power to continue the injunction restraining the defendants from prosecuting their suits in the state court pending the determination of the present action." Glen Falls Indemnity Company v. Brazen, U.S.D.Ct., M.D. Pa. 27 Fed. Supp. 582 (1939). And see the intimation of Maryland Casualty Company v. United Corporation, C.C.A. 1, 111 F.(2d) 443 (1940); Associated Indemnity Corp. v. Manning, C.C.A. 9, 107 F.(2d) 362 (1939); Maryland Casualty Co. v. Tindall, U.S.D. Ct., W.D. Mo., 30 F. Supp. 949 (1938).

See, however, Jamerson v. Alliance Insurance Company of Philadelphia, C.C.A. 7, 87 Fed. (2) 253 (not a declaratory judgment suit) and Supreme Court cases cited therein.

[29] Maryland Casualty Company v. Tighe, U.S.D.Ct., N.D. (Cal.) 24 Fed. Supp. 49 (1938).

[30] Tighe v. Maryland Casualty Company, C.C.A. 9, 99 Fed. (2) 727 (1938).

[31] Maryland Casualty Company v. Tighe, U.S.D.Ct., N.D. (Cal.) 29 Fed. Supp. 69 (1939), wherein the court declared: "Section 265 of the Judicial Code (28 U.S.C.A. Section 379) places no limitation upon the jurisdiction of the Federal Court, and if the complaint discloses a case for the exercise of equitable and injunctive powers an injunction may issue as it did in the present case. Smith v. Apple, 264 U.S. 274, 44 S.Ct. 311, 68 L.Ed. 678; Soverign Camp, Woodmen of The World v. O'Neill, 266 U.S. 292, 298, 45 S.Ct. 49, 69 L.Ed. 293; Alliance Insurance Company of Philadelphia v. Jamerson, 12 Fed. Supp. 957; Jamerson v. Alliance Insurance Company of Philadelphia (7 Cir.) 87 Fed. (2) 253."

the injunctive power can be extended to such situations under an acute reading of the statute, or under a proper consideration of the independent sovereignity of the several forums, nevertheless the opinion is based upon actual authority from the highest court in the land. It is because of the confusion rampant in decisions of the Supreme Court that lower courts can render directly contrary opinions and support each by precedent. Likewise, the *Jamerson* case, cited in the *Tighe* opinion, would seem to throw the weight of the Circuit Court of Appeals for the Seventh Circuit directly behind the particular district judge who liked injunctions.

In another District Court case, the insured failed to give prompt notice of an accident in which one Everts was injured. The insurer claimed the delay in giving notice breached the policy and brought a declaratory judgment suit, praying that the state court action be stayed pending the determination of the policy question. The court discussed the problem of a conflict in jurisdiction fully, stating: "Where there is a showing that the rights of the insured against the insurer will be fully determined in the state action, without the imminence of other controversies, the national court will not stay the state court suit nor retain a declaratory application. The suit in the state court and this suit here are each in personam. The state court suit was brought first. Suits of that nature may continue in the two jurisdictions until final judgment is reached in one of them. Where it is apparent that in the state court suit the rights of the insurer, as well as the rights of the insured, for that matter, will be fully determined, there is no reason for staying the state court suit."

The court then goes on to determine the application of the statute containing the statutory restriction. "The national statute, 28 U.S.C.A. Section 379, which protects the state court from such inerference by the national court, is not set aside by the Declaratory Judgment Act. That Act merely brought into being another exception to the operation of the statute which inhibits the staying of actions in the state court. But if the state court action will be as full and complete as the Declaratory Judgment remedy in the national court, there would be no such exception as would justify the giving of the new statutory remedy the right-of-way. The rule then would be

the same as it has always been, namely, that the two suits would proceed in the two jurisdictions until final judgment is reached in one of them which then may be pleaded as res adjudicata in the uncompleted action. This procedure saves a conflict of courts and preserves that comity which has always been highly desired (citing cases). It being apparent that the suit which Everts has brought in the state court may result in a judgment against Alexander, Incorporated, which may form the basis of a suit by Alexander, Incorporated, against the complainant, and even, for that matter, a suit by Everts against the complainant, and it being further apparent that the present state court suit does not determine the complainant's liability, either to respond to a final judgment, or, to defend, as requested, by Alexander, Incorporated, it seems to be appropriate that a stay order issue preventing the parties to that suit from proceeding until this court can act upon the application to determine and declare the liability under the policy."[32]

In this decision, District Judge Atwell hits upon the weakness of the Federal Declaratory Judgment Act, if, in truth, the difficulty lies there rather than in the courts construing it. He points out that if the subject matter of the state court suit and the federal court suit were the same, there would not only be no reason for an injunction to issue but no reason for entertaining the declaratory action. He then goes on to demonstrate the purpose of the Act—as set forth in the early portion of this article—and by showing that the proposed relief would seldom be effective without injunctive measures, determines that the Act set up another exception to the rule of non-interference with state forums. In other words, a partial repeal of the early statute must have been intended by the Congress, an additional exception to the rule, in order to effectuate the intention of the framers of the Act. Only, in this case, the exception was intended by the legislature rather than the judiciary alone.

Unquestionably, Judge Atwell knew of the familiar rule that repeal by implication, whether in toto or pro-tanto of an earlier statute by a later one, is not favored in the law. The court, however, looked beyond this doctrine and studied the intention of the Declaratory Judgment Statute itself. It was

[32] Standard Accident Insurance Company v. Alexander, Inc., U.S.D. Ct. N.D. Tex., 23 Fed. Supp. 807 at 809 (1938).

evident that so many cases would present themselves in which the relief would be worthless if another exception be not engrafted upon the already elastic prohibition that the court decided that it should be done.

More than the repeal pro tanto question, the problems troubling the writer may be divided into two parts: 1. Balancing of equities between the injured third person who is eager for trial and the insurer which desires a preliminary determination; 2. the inherent, independent sovereignty of courts of the several states and those of the United States, which would render an injunction by either upon the processes of the other absolutely void, regardless of statute.

The first question has been cogently, powerfully argued in various decisions herein discussed. The writer yet feels that so valuable is the declaratory judgment remedy, and so effective of operation, that it is more equitable to give its quick relief in insurance cases rather than to force the party upon whom ultimate liability will almost certainly rest to wait a year or two years until the personal injury suits have been tried and judgments rendered therein, to incur the costs of defense, to dissipate the funds of all policyholders in a situation where the particular insured is not entitled to protection—and to force all of this certain loss merely because of a slight inconvenience in the average case to several injured persons. The decision is not easy to make thereon and would often vary with the facts of the particular case, resting in the sound discretion of the court.

Upon the second point, the writer questions whether the federal statute prohibiting injunctions is really anything more than an expression of the realization that the courts of the sovereign states are free and independent tribunals, not subject to the judicial processes of the federal courts. If they are free of such control, then would not any modification of the statute, by implication or otherwise, or any other act which tends to impair the free exercise of power by the state courts be an invasion of their sovereign power? Such sovereignity exists, not by statute, but by the organic law. Any impairment of such sovereignity, whether by legislaure or by judges, is an attempt to change or to alter the organic law. If this be true, then all of the judge-made exceptions which we have examined

in the scope of this article are judge-made amendments to that organic law. However, since these exceptions have been created over a period of many decades and have received the passive acceptance of most state courts, it is probably not desirable to rake up hot coals of old conflicts and fan them into flame by raising this issue now. It is probably better to let it lie dormant and to resolve new issues upon questions of public policy and utility.

If, then, we resolve the matter purely upon desirability of result, we must agree that the purpose of the Declaratory Judgment Act is a sound one. It permits parties to avoid the gamble of acting upon their own interpretation of rights and duties, privileges and liabilities—of choosing between incurring a certain loss or facing the hazard of a much greater one. As previously pointed out, in many cases, the insurer must face both a definite loss and a hazard of greater loss if it be not permitted to secure a determination of its rights or duties by such an Act. The purpose of the framers of the Act was clearly to avoid all this difficulty and risk. The Act was intended to be liberally construed. In view of the past freedom in engrafting judge-made exceptions to the statutory prohibition against injunctions, is it desirable, when a really worth-while cause is presented, to stop short and say: "Thus far have we gone—no further will we go"? When the courts have, over a long period of time, occupied themselves with evading the statute against the granting of injunctions, is it wholly desirable that with sudden nicety they refuse to extend their judicial cloaks to cover this one form of action which otherwise stands naked of practical relief?

The federal decisions show clearly that injunctions will be issued where the federal court first obtains jurisdiction of the parties, despite the difference in subject matter. Pending suits, as shown herein, they have usually refused to touch. With so many exceptions already added to the judicial prohibition, the writer questions the wisdom of such restraint in passing upon declaratory judgment questions.