



Volume 28 | Issue 1

Article 2

November 1921

The Constitutionality of the Declaratory Judgment

William Gorham Rice Jr.

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Civil Procedure Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

William G. Rice Jr., *The Constitutionality of the Declaratory Judgment*, 28 W. Va. L. Rev. (1921).

Available at: <https://researchrepository.wvu.edu/wvlr/vol28/iss1/2>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

WEST VIRGINIA LAW QUARTERLY And THE BAR

VOLUME XXVIII

NOVEMBER, 1921

NUMBER 1

THE CONSTITUTIONALITY OF THE DECLARATORY JUDGMENT

By William Gorham Rice, Jr.*

I. THE PRESENT EXTENT OF DECLARATORY RELIEF.

A. DECLARATORY JUDGMENT IN COMMON LAW JURISDICTIONS.

I do not intend to give the honorable pedigree of the declaratory judgment nor make an argument in its behalf. Both have been well done by Professor Borchard.¹ Legal periodicals have published sufficient discussions of the subject during the last four years. I will, therefore, devote myself to the constitutional question.

The unconstitutionality of declaratory judgments had not been suggested, so far as I can discover, until last autumn the decision of *Anway v. Grand Rapids R. Co.*,² with due process of law executed on the guillotine of unconstitutionality the statute of Michigan which had been "prepared under the supervision of a committee of the State Bar Association." This decision has provoked considerable unfavorable comment in both legal and lay publications. Is it good law? If so, is the similar section of the New York Civil Practice Act doomed? Are acts of the same purport of other states doomed?

To answer these questions we must know these statutes and also know what powers the courts exercise apart from them. The first general use of the declaratory judgment in a common law jurisdic-

* Member of the New York State Bar.
1 28 YALE L. J. 1, 105.
2 211 Mich. 633, 179 N. W. 350 (1920).

tion was in England, where it was introduced in a limited form from Scotland by the Chancery Procedure Act of 1850. An amendment of 1852 provided that "No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right, without granting consequential relief." This was interpreted to empower the court at the plaintiff's option to give declaratory relief only in those cases in which he might have gotten consequential relief.³ This provision was enacted substantially without change in Rhode Island in 1876.⁴ Since then it has been several times reenacted and now reads: "No suit in equity shall be defeated on the ground that a mere declaratory decree is sought, but the court may make binding declarations of right in equity without granting consequential relief."⁵ The provision was given the narrow English construction above mentioned.⁶ In such a plight the statute was nearly valueless. But in England where the nearness of the Scotch example was potent, the scope of the declaratory judgment has been greatly enlarged by statute.⁷

In this country several states have statutes authorizing declaratory construction of wills. For instance, the New York Code of Civil Procedure⁸ empowers the surrogate's court, upon petition by an interested party, to determine "as to the validity, construction or effect of any disposition of property contained in a will" probated in the court. And this provision is retained in the new Surrogate Court Act.⁹ It has been repeatedly construed but I do not find that its constitutionality has ever been questioned.

New Jersey has gone further, but has limited declaratory power, like Rhode Island, to equity courts. The Chancery Act¹⁰ contains these words:

"Subject to rules, any person claiming a right cognizable in a court of equity under a deed, will, or other written instrument may apply for the determination of any question of con-

³ *Rooke v. Lord Kensington*, 2 Kay & J. 753, 760 (1856).

⁴ PUBLIC LAWS, ch. 563, § 17.

⁵ GENERAL LAWS, 1909, ch. 289, § 19.

⁶ *Hanley v. Wetmore*, 15 R. I. 386 (1886).

⁷ Order 25, Rule 5, of the SUPREME COURT RULES OF 1883, empowered the courts to make a declaration in any sort of action "whether any consequential relief is or could be claimed or not," and Order 54A of the RULES OF 1893, provided for the construction at the request of an interested party of any "deed, will, or other instrument." Similar rules of court exist today in the British self-governing colonies.

⁸ Section 2615.

⁹ Section 145.

¹⁰ PUBLIC LAWS, 1915, ch. 116, § 7.

struction thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested.”

This new jurisdiction of equity has been invoked and exercised in cases of wills,¹¹ conveyances,¹² and contracts.¹³ The cases cited are typical of the series. In none of them has the unconstitutionality of the statute been suggested. In fact it seems impossible to distinguish the power that an equity court has long had to entertain a trustee's bill for directions,¹⁴ from the power the statute gives it to act on an executor's petition for the construction of a will.¹⁵ And if the executor is allowed to have the will construed, there would seem to be no constitutional objection to allowing any interested party to obtain the construction of a will or of any other instrument.

The Florida and Wisconsin statutes of 1919,¹⁶ which provide for equitable declaratory relief, seem not yet to have been considered by the higher courts. Of the Kansas statute which took effect February 23, 1921, a writer says:

“The Michigan court regarded the statute of that state as countenancing moot cases and advisory opinions and, fearing judicial tribunals were to be degraded into bureaus of legal information, the court took advantage of a moot case to kill the statute. The Kansas legislature precluded all possibility of such an interpretation by confining operation of its enactment to”—I now quote the words of the statute itself—“cases of actual controversy,” “of actual antagonistic assertion and denial of right.”¹⁷

So recent a statute has of course not yet been considered by the higher courts.

The American Judicature Society has proposed a procedure statute containing declaratory judgment provisions based largely on English experience.¹⁸ This part of their draft statute has been published in the “Handbook of the National Conference of Commissioners on Uniform State Laws, 1920”¹⁹ where it is erroneously entitled “The English Act.” A tentative draft of a

¹¹ *In re Ungaro*, 88 N. J. Eq. 25, 102 Atl. 244 (1917), the first case under the statute; *Miers v. Persons*, 111 Atl. 638 (1920).

¹² *Renwick v. Hay*, 90 N. J. Eq. 148, 106 Atl. 547 (1919).

¹³ *Town of Kearny v. City of Bayonne*, 90 N. J. Eq. 499, 107 Atl. 169 (1919).

¹⁴ *Trenton Trust Co. v. Cook*, 88 N. J. Eq. 516, 103 Atl. 473 (1918).

¹⁵ *Snyder v. Taylor*, 88 N. J. Eq. 513, 103 Atl. 396 (1918).

¹⁶ FLORIDA GENERAL ACTS, 1919, ch. 7857; WISCONSIN SESSION LAWS, 1919, ch. 242.

¹⁷ 7 J. OF THE AM. BAR ASS'N 107.

¹⁸ BULLETIN 14.

¹⁹ Page 181.

uniform declaratory judgment statute prepared by a committee of the conference is added;²⁰ this has now been revised.²¹

B. JUDICIAL POWER UNDER AMERICAN CONSTITUTIONS.

“Section 473. Declaratory judgments. The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section.”

This is the provision of the New York Civil Practice Act which takes effect this autumn. Is it constitutional?

Though this question is purely a question of conformity with the state constitution, yet my remarks have no peculiar applicability to New York state. This question is being asked in other jurisdictions which have adopted or are thinking of adopting declaratory judgment laws. I have put the question specifically with relation to New York because there we have the unusual situation of a provision that is actually enacted but has not yet gone into effect. Also because in the New York constitution the powers of the judicial department are defined in only the most general terms: “The Supreme Court is continued with general jurisdiction in law and equity.”²² There is no explicit separation of powers, but the separation is implied as it is in the Federal Constitution.²³

In a unanimous decision, *Matter of Mitchel v. Cropsey*,²⁴ the Appellate Division of the Supreme Court said:

“Our constitution divides governmental powers into three branches; by its terms it confers one, the legislative, on the Senate and Assembly; another, the executive, upon the Governor and Lieutenant-Governor; and it then continues and creates courts and provides for the exercise of judicial powers. Undoubtedly these governmental powers are distinct in their very nature. Their separation is essential to freedom, and a union of the three in one person or body leads to tyranny.

²⁰ Page 188.

²¹ Page 91. See Professor Borchart's article on this revised draft in 34 HARV. L. REV. 697.

²² Art. 6, § 1.

²³ Art. 3, § 1, declares that “The legislative power of this state shall be vested in the Senate and Assembly,” and Art. 4, begins “The executive power shall be vested in a Governor.” Art. 5, be it noted, treats of certain inferior executive officers and Art. 6 opens with the words I have quoted. There is no explicit vesting of judicial power in the courts.

²⁴ 177 App. Div. 663, 668 (N. Y. 1917).

These principles have been vigorously set forth by our Court of Appeals (*P. ex rel. Burby v. Howland*, 155 N. Y. 270; *Village of Saratoga Springs v. Saratoga Gas, etc. Co.*, 191 N. Y. 123), but are nowhere more tersely expressed than in a resolution of the Circuit Court of the United States, composed of Chief Justice Jay and Justices Cushing and Duane, in refusing to perform as a court certain non-judicial functions attempted to be cast upon it by Congress. The resolution is as follows: 'That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. That neither the legislative nor the the executive branches can constitutionally assign to the judiciary any duties but such as are properly judicial and to be performed in a judicial manner.' (Footnote to *Hayburn's Case*, 2 Dall. 409.) The resolution passed in 1792 is equally true today, and of our state as well as of the United States Constitution. A purely legislative or executive function cannot be cast on the courts, for that would violate the provisions of the Constitution vesting the legislative power in the Senate and Assembly and the executive power in the Governor. But this line of demarcation has never been so artificially drawn as to prevent assignment to justices of this court of duties which relate to their general powers, or which call for the exercise of judgment or of that peculiar knowledge and skill which are the result of judicial experience. Many duties of this character are exercised by justices of the Supreme Court and judges of the County Court, instances of which are acknowledgment of deeds, adoption of children, appointment of commissioners of condemnation, approval of certificates of incorporation, guardianship of children and the insane.'

Perhaps this opinion shows a greater willingness to do semi-judicial work than some courts would manifest. But the New York courts will not be put upon by the legislature. In *Riglander v. Star Co.*²⁵ the court held unconstitutional, as an infringement of judicial power, the provision in Section 793 of the Code of Civil Procedure that "the court or justice must designate a day certain, during that term, on which day the said causes [those to be preferred] shall be heard."

Nor is the New York judiciary disposed to give legal advice. In *Matter of State Industrial Commission*,²⁶ the Court of Appeals dismisses an appeal from the Appellate Division on the ground that it

²⁵ 98 App. Div. 101 (N. Y. 1904), *affd.* without opinion in 181 N. Y. 531, 73 N. E. 1131 (1905).

²⁶ 224 N. Y. 13, 16, 119 N. E. 1027 (1918).

had no authority to give the Industrial Commission an advisory opinion and that the opinion it gave had therefore no binding force. Section 23 of the act creating the Commission authorized an appeal to the Appellate Division from an award or decision of the commission. Then it provided that "The Commission may also in its discretion certify to such Appellate Division of the Supreme Court, questions of law involved in its decision." Here the Commission had certified a question as to its powers which had not actually arisen. There were no adverse parties before the court, though persons that were interested were allowed to appear and file briefs merely as "friends of the court striving to enlighten its judgment."

"In that situation," says Judge Cardozo, "our duty is not doubtful. The function of the courts is to determine controversies between litigants [citing United States cases] . . . They do not give advisory opinions. The giving of such opinions is not the exercise of a judicial function . . . In the United States no such function attaches to the judicial office in the absence of express provision of the Constitution . . . In this state the legislature is without power to charge the courts with the performance of non-judicial duties (Matter of Davies, 168 N. Y. 89) . . . We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance and we wait till it arises."

So much for the opinion of the New York courts on the powers the constitution assigns to them. Their attitude I believe is fairly typical. Even states that have express prohibitions on the exercise of powers of any department by officers of any other have been constrained to admit that a complete separation of powers is impossible both analytically and practically. By using a term such as administrative or by giving a frankly more generous interpretation of the doctrine of separation of powers, such as in the New York case first quoted, the courts have generally supported the constitutionality of laws creating the innumerable officers and boards that have been endowed with a combination of executive, legislative, and judicial authority.²⁷ In Massachusetts for instance, where Article 30 of the Declaration of Rights forbids each department by name from exercising powers of each other department the courts have without a

²⁷ See also *State v. Crosby*, 92 Minn. 176, 180, 99 N. W. 636 (1904).

qualm acted under a statute giving them power to review removals from the civil service.²⁸ Certainly Massachusetts has been no more scrupulous in the maintenance of the separation of powers than have other states whose constitutions are less explicit.

But the declaratory judgment involves a question of constitutionality slightly different, for the power to make declaratory judgments can hardly be classed as legislative or executive by any stretch of the imagination. If it is not judicial, it is an outcast among governmental powers, a power that no government with the American type of constitution can wield. This would be a most unfortunate conclusion, for it is a power that has proved a great convenience to the people of most of the countries of the civilized world. Is it impossible for us to follow the example of our European and American neighbors by enabling our judges to decide legal controversies before they reach the point of causing legal injury? Is it beyond the purview of our constitutions that men be allowed to learn what their rights and obligations in a particular situation are, from the authority which will eventually pass upon them in the event of their being charged with exceeding the former or failing in the latter?

C. THE DECLARATORY JUDGMENT IN LIMITED FIELDS.

Before discussing the Michigan Act, which has been declared unconstitutional, it is well to note particular situations where, apart from any general power to give declaratory relief, the courts give judgments which are in their nature declaratory.

Without going back to very primitive law in which it would seem that the court, ordering nothing itself, merely declared whether the plaintiff might use his own right hand to remedy the wrong that had been done him, and without considering other systems of law, such as the Roman or the canon, we find several instances of declaratory judgments in the old common law writs.²⁹ It is true that

²⁸ "The power to appoint and the power to remove officers are in their nature executive powers," said the court in *Murphy v. Webster*, 131 Mass. 482, 488 (1881). The legislature then enacted that certain persons might be removed only after a hearing and gave an appeal to the court. "Such a hearing, although held before an officer whose main functions are executive, is in the nature of a judicial investigation," says the court in *Driscoll v. Mayor*, 213 Mass. 202, 100 N. E. 640 (1913). "A statute which requires a court to review the decision . . . does not impose the performance of executive duties."

²⁹ Such are the judgments upon the writs of *quo jure*, *FITZHERBERT*, *NEW NATURA BREVIVM*, 128F, and *libertate probanda*, *FITZHERBERT*, 77F. By the former the plaintiff seeks a declaration that defendant has no right of common in plaintiff's land; by the latter plaintiff seeks a declaration of his freedom against one who claims to hold him as villein. See mention also of the already obsolete (?) writ *de proprietate probanda* in *FITZHERBERT*, 77D.

these writs, like others instituting real actions, had gone out of use before our Constitution was adopted. But the former existence of them is at least some evidence that mere declarations of legal rights may be judicial in their nature. And certainly the fact that courts of many countries, and particularly of England, give declaratory relief today tends to show that there is no inherent impropriety in entrusting to a judicial body such authority.

However strong the analogy from foreign lands and ancient times may be, a basis for the declaratory judgment must be found in our own law. The constitution is invoked by the Michigan court to destroy a statute "prepared under the supervision of a committee of the State Bar Association." And though it is the Michigan constitution alone that applies, the court devotes about two thirds of its opinion to discussion of cases from other jurisdictions, counsel for both sides having relied largely on them, the court thereby recognizing that the constitutional question before it was not peculiar to Michigan.

Professor Sunderland enumerated in his brief in the Anway Case a number of situations in which courts now give declaratory relief apart from general statutes allowing it.³⁰ I can do no better than repeat his enumeration.³¹ Many of the cases are of statutory origin, but the scope of the statute in each case is narrower than that of the statutes previously discussed.

(1) Suits to quiet title and to remove clouds on title. A Connecticut statute³² goes far in extending this power of equity. It provides that

"An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the same or any part thereof, or to have any estate in the same . . . or . . . any interest in the same, or any lien or incumbrance thereon . . . for the purpose of determining such adverse estate, interest, or claim, and to clear up all doubts and disputes, and to quiet and settle the title to the same."

This statute has been the basis of judgment in *Barri v. Schwarz Bros. Co.*,³³ where the court construed certain conveyances in order

³⁰ In 19 MICH. L. REV. 86, 89, he gives a more extended list.

³¹ I do not include one of his categories, however, that of cases where a stockholder seeks an injunction to forbid a corporation's paying a tax that he claims is illegal. Here, as in many other cases, substantially the judgment is declaratory, but in form consequential relief is sought.

³² PUBLIC ACTS, 1915, ch. 174, p. 2003.

³³ 93 Conn. 501, 107 Atl. 3 (1919).

to settle title to submarine land and riparian rights. There is no suggestion that the constitutionality of the statute is subject to doubt. The California court, under Section 738 of the Code of Civil Procedure, has as broad a power but with respect to real estate only.³⁴

(2) Application of trustees for instructions for carrying out their trusts. The statutory extension of this privilege of having a document construed, to executors and other persons interested under a will is common, as has been said.³⁵ And we have noted the cases under the New Jersey law which extends the privilege to persons interested in a contract as well as those interested in a will.

(3) Proceedings to register title to land under the Torrens Acts.³⁶ These are similar to suits to quiet title, but the judgment is good against the world not merely against particular defendants. Destroyed Records Acts are similar.³⁷

(4) Determination of heirs without an order of distribution. By the Michigan statute such a determination is not *res judicata*, but in several states it is.³⁸ It is a little surprising that a court so hostile to the declaratory judgment statute because it imposed non-judicial duties on the courts should have acted under this heirship statute without a qualm, though its action was entirely indecisive. But the astounding thing is that the court in the *Anway Case* distinguishes that statute from the one before it on this very ground, saying in effect: "There the court was doing a judicial act because it decided nothing; but it would be non-judicial for us to declare rights without giving consequential relief." The court's words are:³⁹

"Our inquiry here is as to whether we are called upon to exercise judicial power, to perform judicial functions . . . But to resume the consideration of the cases thought to be applicable by the proponents of this act . . . Counsel also say that in proceedings to determine heirship the courts have exercised powers analogous to those here involved. They say such determinations of the courts are binding and cite us to *Fitzpatrick v. Simonson Mfg. Co.*, 86 Minn. 140, which does so hold. One difficulty in following this case, however, and it is a sufficient one, lies in the fact that this court has held exactly the con-

³⁴ See *German-American Savings Bank v. Gollmer*, 155 Cal. 683, 687, 102 Pac. 932 (1909). See also CIVIL CODE, § 3367, subdivision 3.

³⁵ See, for example, *Estate of Russell*, 150 Cal. 604, 89 Pac. 345 (1907).

³⁶ See *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129 (1907).

³⁷ See *Title Co. v. Kerrigan*, 150 Cal. 239, 88 Pac. 356 (1906).

³⁸ See, for instance, *In re Oxarart*, 78 Cal. 109, 20 Pac. 367 (1889).

³⁹ 211 Mich. 592, 599, 607, 179 N. W. 350, 353, 355, 356 (1920).

trary in *Lorimer v. Wayne Circuit Judge*, 116 Mich. 682, where our act was under consideration and where we said of such proceedings:

“The act under which the proceedings were instituted does not purport to make the proceedings of the probate court conclusive upon anybody. They are not binding even upon the relator. The petitioner, or any other person interested, if not satisfied with the findings, might, in any judicial proceeding, resort to original evidence, and wholly ignore the action of the probate court. The proceeding simply makes evidence, and any common law jury could overturn it in any other proceeding.’”

(5) Determination of the validity of a bond issue before the bonds are marketed.⁴⁰ In an action brought under Section 3480 of the California Political Code, the court considers at length the *dictum* in *Tregea v. Modesto District*,⁴¹ that such a determination might not be within the judicial power of Federal courts, but it has no doubt of its constitutionality under California law, and says: “By our decisions the constitutionality of the act has been directly and impliedly passed upon and approved more than once. And we will not enter into a discussion of that question.”⁴²

(6) Determination of the validity of a marriage under Chapter 2352 of the Revised Laws of Wisconsin 1919 which was applied in *Kitzman v. Werner*⁴³ without its constitutionality being questioned. The same court had said very broadly in *State ex rel. Milwaukee Medical College v. Chittenden*:⁴⁴

“Whenever the thing denominated status is a matter of public importance by principles of common law or by the letter or spirit of the written law, such as the condition of marriage, citizenship, parentage, residence, legal settlement, and many other matters that might be mentioned, the question in respect thereto is a legitimate matter for judicial determination by a tribunal having jurisdiction of the *res*.”

The cases cited, however, are ones where such determination either changed a status or else was accompanied by some consequential re-

⁴⁰ See *Pioneer District v. Bradley*, 8 Idaho 310, 68 Pac. 295 (1902).

In this connection it is interesting to note the West Virginia statute, ACTS OF W. VA. 1917, ch. 57, conferring this power on the Attorney General, and the article by Mr. Maurice T. Van Hecke in 27 W. VA. L. QUAR. 84, in which he reaches the conclusion that this is not a judicial but an administrative function.—The Editor.

⁴¹ 164 U. S. 179 (1896).

⁴² *People v. Linda Vista District*, 128 Cal. 477, 61 Pac. 86 (1900).

⁴³ 167 Wis. 308, 166 N. W. 789 (1919).

⁴⁴ 127 Wis. 468, 504, 107 N. W. 500 (1906).

lief. In either case the judgment is not merely declaratory as it may be under the recent Wisconsin statute.

(7) Determination of appeals by the state in criminal cases. This is debatable territory. The United States Supreme Court has held a statute authorizing such an appeal unconstitutional.⁴⁵ So has Arizona.⁴⁶ Some other courts have failed of unanimity but all others sustain the law: Ohio, Indiana, Iowa, Oklahoma, Kentucky, Arkansas, and Kansas.⁴⁷

To these classes that Professor Sunderland suggests, with which may be compared Professor Borchard's enumeration of examples⁴⁸ should be added at least three more, as follows:

(8) Determination of appeals in civil cases after they have become moot. As in criminal appeals, there are reasons of policy why such appeals should not be allowed, such as the probability that they will be badly argued and so waste the time of the court if not produce a poor opinion. It is clearly within the power of a court not to consider moot appeals, but, though a constitutional objection to them as moot cases might seem to exist, such appeals in equity suits, at least, are often decided on their merits.⁴⁹ Though the United States Supreme Court has passed on such cases, the following passage from *United States v. Hamburg-Amerikanische Gesellschaft*,⁵⁰ in which it refused to follow these precedents, recognizes this constitutional objection:

“While this mere outline shows the questions which are at issue and which would require to be considered if we had the right to decide the controversy, it at once further demonstrates that we may not without disregarding our duty, pass upon them because of their absolute want of present actuality.”

A little later the Court refers approvingly to *Director of Prisons v. Court of First Instance*,⁵¹ where on appeal: “after the death penalty had been inflicted on the accused, we . . . dismissed for want of jurisdiction because the case had become a moot one.”

(9) Suits against a state. Here judgment for the plaintiff is merely declaratory of the amount the state owes. No execution is-

⁴⁵ *United States v. Evans*, 213 U. S. 297 (1909).

⁴⁶ *State v. Miller*, 14 Ariz. 440, 130 Pac. 891 (1913).

⁴⁷ See note on *State v. Allen*, 107 Kan. 407, 191 Pac. 476 (1920), in 19 MICH. L. REV. 79.

⁴⁸ 28 YALE L. J. 1, 29-32.

⁴⁹ See 34 HARV. L. REV. 416.

⁵⁰ 239 U. S. 466, 475 (1916).

⁵¹ 239 U. S. 633 (1915).

sues to enforce the judgment. Suits between states before the Supreme Court are of course specifically authorized by the Constitution. But "courts of claims" are of statutory creation and are held constitutional. The difference between the earlier United States statute giving an appeal from the United States Court of Claims to the Supreme Court, which was held unconstitutional in *Gordon v. United States*,⁵² and the present statute is that the latter provides:

"The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties,"

whereas all previous statutes had made the judgment not "binding and conclusive," but subject to an estimate or revision by the Secretary of the Treasury.⁵³

(10) Judgments and decrees in favor of a defendant. In these we have a judicial declaration that the plaintiff has not the claim that he has asserted. A suit for a negative declaratory judgment is exactly this, except that the declaration is made at the behest of the party who in an ordinary case would be the defendant. The New Mexico law of March 11, 1903,⁵⁴ which authorizes any one to compel a person having a personal injury claim against him to bring his case to court, is an example of this sort of action that is authorized by a declaratory judgment law. This statute apparently has never been put to use. The California Code of Civil Procedure⁵⁵ gives a more complete remedy. It provides:

"An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation."

This has been law since 1851⁵⁶ and has been repeatedly applied by the courts.⁵⁷ Equity's power to cancel instruments for fraud

⁵² 2 Wall. 561 (U. S. 1864). For statute quoted below see U. S. COMP. STAT. 1916, § 1171.

⁵³ "This court," says the Supreme Court in *United States v. Klein*, 13 Wall. 128, 144 (U. S. 1871), "being of opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal."

⁵⁴ Ch. 33, § 2.

⁵⁵ Section 1050.

⁵⁶ PRACTICE ACT, § 527.

⁵⁷ It may be remarked in passing that judgments for the defendant even under ordinary procedure may be in substance in favor of the party who claims to have suffered a legal wrong, as for example, in *People ex rel. Tate v. Dalton*, 158 N. Y. 204, 52 N. E. 1119 (1899). In this case a state employee who had been dismissed brought

“*quia timet*” is closely analogous, though here in form an executory judgment is given.⁵⁸ At common law a plaintiff could prevent judgment against himself by the simple expedient of absenting himself at the time of the rendition of a verdict. Hence if a verdict was directed for the defendant, plaintiff habitually withdrew. He could sue defendant again at a more favorable time. This privilege of nonsuit is now much cut down; but plaintiff still has the privilege of deciding when he will bring his action.⁵⁹ By the negative declaratory judgment, the claim-holder’s freedom in asserting his claim is restricted a little further, for if the court approves, the adverse party can compel him to litigate. This is recognizing that an obligee as well as an obligor is entitled to a settlement of the claim; it is subjecting to more complete judicial control the obligor’s right to legal redress.

In short, we have the declaratory judgment already in many portions of the law; in its negative form, indeed in every portion. The declaratory judgment authorized by the Michigan Act is not different in kind nor even in degree from judicial determinations made every day.

II. THE ANWAY CASE.

It behooves us then to examine in some detail the decision in the Anway Case with the hope of discovering why the court came to the conclusion that this statute was unconstitutional. In the minority opinion in which Mr. Justice Clark concurred, Mr. Justice Sharpe sets forth with consideration and clearness the nature of judicial power and presents a strong argument for the constitutionality of the statute. He feels, however, that the facts of the case before the court did not warrant any declaration in this case being made.

The facts, though they have scarcely any bearing on the question to which I address my attention, are stated as follows by Mr. Justice Fellows, who writes the majority opinion:

“Briefly stated, the bill alleges that plaintiff is employed by

mandamus for reinstatement and the court refused relief declaring that his removal was void, and that he was still in office. Another case in which the court gives plaintiff substantial satisfaction, though giving judgment for defendant is Baird v. Wells, 44 Ch. Div. 661 (1890), where the court declares plaintiff’s expulsion from a social club was not justified, but refuses to compel his reinstatement because no property right is involved. See also German Savings Society v. Collins, 145 Cal. 192, 78 Pac. 637 (1904).

⁵⁸ Commercial Ins. Co. v. McLoon, 14 Allen 351 (Mass. 1867).

⁵⁹ Also today a claim-holder may not prevent a positive judgment against him in some cases, for the defendant in many states has a right to litigate counterclaims to judgment in his favor.

defendant street railway company as a conductor; that he desires to work more than six days in consecutive seven days; he does not claim to have any such contract with defendant; he claims no breach of any contract; he does not allege that defendant has committed, or threatened to commit, any wrong upon him, or that he has any claim, present or prospective, for any damages from defendant; he seeks to have this court advise him whether the defendant will violate the provisions of Act 361, Public Acts 1919, if it should in the future permit him to work more than six days in consecutive seven days. Stated in the language of plaintiff's brief:

“The sole question in the case is as to the meaning of Act No. 361 of the Public Acts of 1919. The precise question is: Does that act make it unlawful for a street railway company to allow its motormen or conductors or both to work more than six days in any consecutive seven days of twenty-four hours each if the conductors or motormen so desire?”

“The defendant railway company answers admitting the allegations of the bill. Division 836. Amalgamated Association of Street and Electric Railway Employes of America, intervenes. It is not claimed that the rights of any of these parties have been invaded, nor is there any threat of invasion of the rights of any one. No damages are claimed, nor is there threat of any damage. The proceedings must rest, and rest alone, upon Act 150 [of the Public Acts of 1919.]”

Perhaps it was the attempted use of the statute in so unpropitious a situation of fact that unconsciously prejudiced the court against it. Perhaps the phraseology of the statute that it was to be “liberally construed and liberally administered with a view of making the courts more serviceable to the people” offended the court's sense of its own dignity. Possibly the same unwitting reaction was produced by the title of Professor Sunderland's article “The Courts as Authorized Legal Advisers of the People.”⁶⁰

Certainly the court seems to have started with a prejudice against the statute. This is shown first by the fact that the Anway Case did not require a consideration of the constitutional question. It could have been disposed of on the ground upon which Mr. Justice Sharpe relies. It is shown again by the fact that court, not counsel, raised the question of constitutionality. Compare this with the conduct of the same court in *Walker v. Schultz*⁶¹ where it refused to consider exactly this question of constitutionality in a suit to quiet

⁶⁰ 54 AM. L. REV. 161.

⁶¹ 175 Mich. 280, 141 N. W. 543 (1913).

title, because the question had not been raised in the circuit court.

Prejudice is also shown by the fact that the court goes out of its way to give the declaratory judgment a "reddish" tinge:

"Under our government the state does not till our farms, manufacture our automobiles, conduct our great department stores, or do our law business for us. The unfortunate people of one country are at present trying such experiment in government."

And it says this despite the fact that it was well aware that the powers granted by the Michigan act are exercised by the courts of most of the civilized world.

It is shown, moreover, by the treatment it metes out to various analogies suggested by counsel. The treatment it gives to one of these, the statute authorizing the determination of heirship without consequential relief, I have already discussed. Another example is the New Jersey Chancery Act which is dismissed as irrelevant on the ground that the cases under it have not "treated the constitutional question" and that

"This court has for many years construed wills in equity cases and in proper cases have [*sic*] recognized the jurisdiction of the chancery court to construe wills, and such jurisdiction has been exercised without question."

In other words an admitted extension of jurisdiction in New Jersey (without its constitutionality being questioned) is treated as no evidence that an analogous extension in Michigan is constitutional, because this particular New Jersey extension has previously been made in Michigan without its constitutionality being doubted. The court moreover ignores the fact that the New Jersey act applies to other instruments besides wills.

I will not attempt to consider in detail the preliminary pages of the opinion which seem designed chiefly to produce in the reader a frame of mind hostile to the statute, by distorting its content. A single quotation will show the spirit of the court:

"Considering the act itself as well as the very able paper by its author in volume 54, *American Law Review*, 161, under the title "The Courts as Authorized Legal Advisers of the People," it at once becomes apparent that by the act the courts of this state are made the legal advisers of all seeking such advice, not through their existing opinions in matters

which have involved wrongs committed and redressed by such tribunals, but in advance of any infringement of their rights, any breaches of their contracts, and that in advance of any existing controversy that they be advised by a declaration of rights as to what the law is, or will be, in the event of future breaches, future contingencies which may or may not happen. Indeed, this is the essence of the measure. Before this court, with its membership of eight, takes up the work of advising 3,000,000 people, and before the Legislature is called upon to increase the membership of this court so as to efficiently conduct this work, it is well that this court pause long enough to consider, and consider fully, whether the act calls upon us to perform any duties prescribed by the Constitution or to exercise any power therein conferred."

Before proceeding to consider the only legal question which is presented by the case—whether the power conferred by the statute is judicial or not—I will quote the corresponding passage from Mr. Justice Sharpe's introductory pages:

"I am unable to concur in the opinion of Mr. Justice Fellows holding Act No. 150 of the Public Acts of 1919 unconstitutional. In my opinion, the construction which he places on the provisions of the act is not warranted by the language employed. I can find nothing in the act itself which places upon courts the duty to serve as "legal advisers of all seeking such advice" in advance of any existing controversy.

"Let us now examine the act for the purpose of ascertaining the duties therein imposed on the courts. It provides (section 1) that—

"No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of any one claiming to be interested under a deed, will or other written instrument of any question of construction arising under the instrument, and a declaration of the rights of the parties interested."

A. IS THE POWER OF EXECUTION ESSENTIAL?

The constitutional question is, in the words of Mr. Justice Fellows, "whether we are called upon by the act to exercise judicial power, to perform judicial functions." The majority hold that the act imposes non-judicial duties, first because the judgment is not executory, second because the case is moot. In the opinion these

two grounds are not clearly differentiated. The first question, and to Mr. Justice Sharpe the only question, is whether the giving of a declaratory judgment, when this is what the plaintiff requests, is an exercise of judicial power. It is to be remembered that in this connection "judicial" means "within the realm where courts may act," not, "within the realm where courts alone may act." This distinction was clearly made in *Matter of Mitchel v. Cropsey*⁶² and it is obvious that the Michigan statute can be held unconstitutional only if it attempts to give the courts a power which is distinctly non-judicial, not merely not exclusively judicial.

B. FEDERAL CASES RELIED ON.

The principal reliance of the majority is on United States Supreme Court cases. It may be mentioned in passing that it is possible that the Federal Constitution restricts the authority of Federal courts to something less than "judicial power," namely to "cases" and "controversies." Such a possibility is suggested by the fact that the Federal courts tend to view their jurisdiction as narrower than do state courts, in some cases, such as those of irrigation bonds and criminal appeals. But even if this jurisdiction is narrower, which I greatly doubt, there is little reason to believe that it excludes the rendition of declaratory judgments.

The Michigan court says of *Muskrat v. United States*:⁶³ "This case should forever put at rest this question. It is absolutely decisive of the question before us." The majority quotes the following passage from that case with no comment except the two sentences I have just repeated.

"It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most im-

⁶² *Supra*, note 24.
⁶³ 219 U. S. 346 (1911).

portant and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution."

The opinion expressed by the Supreme Court that this is not a case or controversy seems based not alone on the fact that "the judgment could not be executed," but equally on the fact that "such judgment will not conclude private parties when actual litigation brings to the court the question of the constitutionality of such legislation." The court seems thus to set up two tests of judiciality. And so do many other opinions that the Anway majority quotes. Take, for example, *Gordon v. United States*,⁶⁴ where the Supreme Court was considering the constitutionality of appeals from judgments of the Court of Claims which under the statute were

⁶⁴ 2 Wall. 561 (U. S. 1864).

inconclusive without further governmental action. In one passage Mr. Chief Justice Taney says:⁶⁵

“The award or execution is a part and an essential part of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, . . . ”

But he may be stressing the other test when he says:

“It is true the act speaks of the judgment or decree of this court. But all that the court is authorized to do is to certify its opinion to the Secretary of the Treasury, and if he inserts it in his estimates and Congress sanctions it by an appropriation, it is then to be paid but not otherwise. And when the Secretary asks for this appropriation, the propriety of the estimate for this claim, like all other estimates of the Secretary, will be opened to debate, and whether the appropriation will be made or not will depend upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the legislative department, and not by that department to which the Constitution has confided it.”

The latter seems the prevailing test, for he comments on *Hayburn's Case*⁶⁶ as follows: “When the decision of the court was subject to the revision of a Secretary and Congress, it was not the exercise of a judicial power and could not therefore be executed by the court.” In other words the decision was non-judicial because subject to revision, and incapable of execution because subject to revision. But there is no intimation that its incapability of execution made it non-judicial.

After quoting from this opinion of Mr. Chief Justice Taney, Mr. Justice Sharpe remarks:

“A careful reading of this opinion satisfies me that it was based on the lack of finality in the conclusion to be reached and judgment rendered by the court rather than the want of power in the court to enforce obedience to its order. This view is emphasized by the opinion rendered by Chief Justice Chase (that of Chief Justice Taney not having been filed) 2 Wall. 561, 17 L. Ed. 921, in which he said:

“ ‘We think that the authority given to the head of an execu-

⁶⁵ 117 U. S. 697 (1864).

⁶⁶ 2 Dall. 409 (U. S. 1792).

tive department by necessary implication in the fourteenth section of the amended Court of Claims Act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power from the exercise of which alone appeals can be taken to this court.' '67

C. STATE CASES RELIED ON.

A state case, cited by the majority, contains a typical *dictum* upon the limit of judicial power:⁶⁸

“Where a complainant has sustained no injury and the object of the action is merely to obtain a declaration as to the constitutionality of a legislative act, the question presented to the court is merely an abstract one and the action will be dismissed. * * *

“Abstract questions cannot be made the subject of an action. They will not be answered, although it may appear that at some time in the future they will probably be the subject of a real controversy. A question which the courts will entertain must be in an action or proceeding where the necessary parties are before it, in which there is a subject-matter, and where the determination of the court can be placed in a judgment or final order forever controlling upon the parties and their privies, and in which final process can be issued to carry the judgment or order into effect.”

Here, as in the Muskrat Case, the tests are enumerated as cumulative, but finality of the judgment is the only test needed for the decision reached.

To pile up quotations as to the nature of judicial power seems fruitless. I have selected the opinions, outside of Michigan, which seem most forcibly to support the majority opinion. A detailed examination of the cases of any state would probably show but slight variation. James Schoonmaker of the St. Paul Bar has made such an examination of the Minnesota law.⁶⁹ After criticizing the use made in the Anway Case of *In re Application of the Senate*⁷⁰ where the court refused to give an advisory opinion, Mr. Schoonmaker says:

⁶⁷ The quotation that I have previously made from *United States v. Klein*, 13 Wall. 128 (U. S. 1871), which sustained the constitutionality of appeals under a subsequent modification of the Court of Claims statute bears out the opinion of Mr. Justice Sharpe for decisions are now conclusive but not executory.

⁶⁸ *Hanrahan v. Terminal Station Commission*, 206 N. Y. 494, 100 N. E. 414 (1912).

⁶⁹ 5 MINN. L. REV. 172.

⁷⁰ 10 Minn. 78 (1865).

“In 1868 . . . the same judges decided *Home Insurance Co. v. Flint* [13 Minn. 244] and here is what they say concerning the word ‘judicial:’ . . . ‘A judicial investigation proceeds after notice and eventuates in a judgment, which is the final determination of the rights of the parties, unless reversed by an appellate tribunal. The necessity of notice in the inception, and the conclusive character of the determination are perhaps as good a test as any other, as to what proceedings are judicial.’ ”

I will not attempt to define judicial power. But I maintain that wherever executory relief is applied as a test, conclusiveness of the adjudication may be applied alternatively (except perhaps in Michigan), and that the latter alone is a sufficient test and the proper one.

The Michigan decisions, on which the court did not particularly rely and some of which that I shall quote from, it did not even mention, certainly lay peculiar stress on execution. The memory of these decisions must have remained with the court.

When, in the case of *Mackin v. Detroit-Timkin Co.*,⁷¹ the powers of the Industrial Accident Board were attacked as unconstitutional because they combined “executive, administrative [*sic*], and judicial functions,” they were supported on the ground which has found favor in other states, namely, that the board “is but an administrative body, vested, it is true with various and important duties and powers, some of them quasi-judicial in their nature, but”—and here is where the Michigan court goes on a frolic of its own—“without that final authority to decide and render enforceable judgment which constitutes the judicial power. Its determinations and awards are not enforceable by execution or other process until a binding judgment is entered thereon in a regularly constituted court. Sec. 13, pt. 3 of said act.”

The section to which reference is thus made provides that after adjudication of an accident claim by the Board “either party may present a certified copy of the decision . . . to the circuit court for the county in which such accident occurred, whereupon said court shall, *without notice*, render a judgment in accordance therewith against said employer . . . which judgment . . . shall have the same effect as though duly rendered in an action duly tried and determined by said court.”

Here is the *reductio ad absurdum* of the doctrine of separation of

⁷¹ 187 Mich. 8, 18, 153 N. W. 49 (1915).

powers. The court is making a mere mechanical putting into motion of the process of execution the only requisite of judicial power. One would think it more appropriate that the process of execution be reckoned characteristic of executive power.

But though it does no harm to support on an absurd ground legislation giving judicial or quasi-judicial power to the Industrial Accident Board, it is baneful to apply such a criterion to thwart the will of the legislature. And though it is relatively innocuous to say that proceedings that can not eventuate in an executory decree are *not exclusively judicial*, no good can come from holding that proceedings that can not eventuate in an executory decree are *exclusively non-judicial*.

In the Mackin Case the court supports its opinion by quoting the following passage from *Underwood v. McDuffee*:⁷²

“The judicial power, even when used in its widest and least accurate sense, involves the power to ‘hear and determine’ the matters to be disposed of; and this can only be done by some order or judgment which needs no additional sanction to entitle it to be enforced. No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial.”

In this earlier case, the principal objection to the proceedings (before a referee), says the court, “is claimed to be found in the clauses of the constitution which vested all the judicial power of the state in courts and which provide how these courts should be constituted, and, as is argued, leave no room for judicial power elsewhere.” Then follow the sentences quoted in the Mackin Case. The court then cites a case holding that a sheriff presiding over a jury acted, not judicially, but “ministerially, because he had no power to give judgment” and proceeds: “It is the inherent authority not only to decide but to make binding orders or judgments which constitutes judicial power.” The court therefore holds that the decision of a referee chosen by the parties is quite as unobjectionable as a confession of judgment. The authorities cited do not justify the court’s statement that the sanction of execution is essential to judicial power. Moreover the sentence last quoted shows that the court does not differentiate between this test and the true one, the “binding” quality of the judgment rendered. The Declaratory Judgment

⁷² 15 Mich. 361, 368 (1867).

Act of Michigan uses this very word:⁷³ "The court may make binding declarations of rights whether any consequential relief is or could be claimed or not."

I can not better close this part of my consideration of the Anway Case than by quoting another passage from the minority opinion:

"The test to be applied, in my opinion, is: Will the judgment or decree of the court settle for all time the rights of the parties in the matter presented? A reading of the authorities cited by Mr. Justice Fellows will, I believe, reveal the fact that the determination of that question, as applied to the facts in each particular case, was decisive of the conclusion reached therein. I have been unable to find any case in which the refusal of the court to act was necessarily based on its inability to enforce obedience to its judgment or decree. While the opinions in many cases refer to such want of power, the language so employed will, I think, always be found to follow that in which the court finds a lack of finality in the judgment sought.

"Herein lies the distinction between declaratory judgments and moot cases or advisory opinions. The declaratory judgment is a final one, forever binding on the parties on the issues presented. The decision of a moot case is mere dictum, as no rights are affected thereby, while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between interested parties."

Mr. Justice Sharpe, in the second paragraph is referring to the other basis of the majority opinion, to wit, that the jurisdiction attempted to be conferred by the statute is a jurisdiction to decide moot cases. It is but fair to say that some of the cases I have heretofore quoted from, notably the Muskrat Case, were used by the court, it seems, principally in support of the proposition that a court cannot decide a moot case.

D. WHAT IS A MOOT CASE?

No one will deny that courts can not decide moot cases. But the court fails utterly to show that cases within the declaratory judgment statute are moot. All it says in this connection is contained in a single paragraph where its objections are couched in the broadest terms and where no mention is made of the particular facts of the Anway litigation. I quote:

"While the advocates of this measure insist that the pro-

⁷³ Section 1.

ceedings authorized by the act do not constitute a moot case, and while the proceedings may not square in all particulars with the technical definition of a moot case, they are such in every essential. The act contemplates determinations of abstract propositions of law before any cause of action has accrued or before any wrong has been committed, or before any damages have been occasioned or threatened; it does not contemplate final process to put the determination of the court into force unless there be a further proceeding on application by petition. Section 3. It contemplates construction of deeds and written instruments when no one is questioning their construction, and the determination of rights under contracts which have never been breached and never will be. In short, it requires that the time of the court shall be taken, not in the determination of actual controversies where rights have been invaded and wrongs have been done, but in the giving of advice to all who may seek it. If the proceedings do not square with the technical definition of a 'moot case' they possess all its objectionable characteristics, and in every essential it attempts to legalize what before was considered by many courts and text-writers a contempt of court—the presentation of a moot case."⁷⁴

An examination of these charges is in order. "The act contemplates determinations of abstract propositions of law." This is true of any legal case in one sense, for every judgment has its *rationes decidendi*; certainly it is nothing peculiar to an action for declaratory relief. "Before any cause of action has accrued or before any wrong has been committed or before any damages have been occasioned." All this is true, but it is equally true of all suits based on threatened injury—all preventive relief. "Or threatened." This is not true; the object of declaratory relief is to get a declaration of rights when the parties disagree as to their legal rights and each threatens to act in accordance with his opinion concerning them. "It does not contemplate final process, etc." This is entirely true, and is the purpose of the statute. "It contemplates construction of deeds and other written instruments when no one is questioning their construction." This is not true; no action would be brought if someone did not question their construction. Moreover if action were brought frivolously, the court might properly dismiss the action. "And the determination of rights under contracts which have not been breached and never

⁷⁴ 211 Mich. 592, 604, 179 N. W. 350, 354 (1920).

will be." In these last words the court goes in for prophecy. If there is not a *bona fide* controversy, the court would refuse relief. If there is a *bona fide* controversy, though there has been no breach, the court will give the declaratory relief as a preventive of breach. "In short, it requires that the time of the court shall be taken . . . in giving advice to all who may seek it." This is not true. The act authorizes the court to give judgment, not advice, to all who seek it, having a genuine legal dispute.

From this blanket indictment, all that emerges as a valid charge is that the statute "does not contemplate final process." Now if this alone makes cases moot, then we have again the proposition that power to give an executory judgment is essential to judicial power, stated in a new form. All the examples of declaratory relief and all the argument that has already been advanced go to show that there is no such constitutional principle.

A moot case is objectionable because it is not based on facts—the situation is fictitious or hypothetical—a situation to which the declaratory judgment statute does not apply. The statute says:

"No action . . . shall be open to objection on the ground that a merely declaratory judgment . . . is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

The effect of the statute, therefore, is solely to remove a heretofore existing obstacle to adjudication of cases where only declaratory relief is desired or perhaps, possible. The provision in the Kansas statute that there must be "actual antagonistic assertion and denial of right" seems to have been inserted merely to make it "fool-proof"—in view of the *Anway Case*. The Michigan statute does no more than it purports to do; it removes a single obstacle. It allows preventive relief where before only reparative relief after injury could be given. It enables the court, for instance, when the meaning of a will is sought, to give a construction of it binding the parties as in *Barton v. Barton*⁷⁵ and relieves it from the necessity of dismissing the case as in *Greeley v. Nashua*.⁷⁶ From this New Hampshire case the Michigan court quotes as follows:

"The plaintiffs take whatever they may be entitled to under the will, not in their character as executors, or in trust, but in their own right. They present no question touching the proper

⁷⁵ 283 Ill. 338, 119 N. E. 320 (1918).

⁷⁶ 62 N. H. 166 (1882).

disposition of trust funds but request the court to inform them what their legal rights and those of the defendants are in the property devised. The court might with equal propriety be called upon by the parties interested to advise them regarding the title of land, the construction of a contract, or any other question of law. Such questions are not ordinarily adjudicated until it becomes necessary to decide them in proceedings instituted for the redress of wrongs."⁷⁷

To this I will add the succeeding sentence from the New Hampshire opinion:

"They are prospectively determined by a court of equity in behalf of trustees who in the execution of their trust are entitled to its protection."

This sentence gives us light as to the grounds of the New Hampshire decision. The court does not call this a moot case. It recognizes that exactly what is here requested is done when instructions are given to trustees. The court refuses to extend the relief to others than trustees on grounds of precedent or policy, not on any constitutional grounds. The court recognizes that "trustees are entitled to its protection" in prevention of breach of trust. What the Michigan statute does is to say that contractors and other persons are likewise entitled to court protection in prevention of breach of contract or other legal rights. The analogy seems perfect. There is a mere extension of preventive relief to new situations.

III. CONCLUSION

I have said nothing about constitutive or investitive judgments, those that create new jural relations without being executory in the sense of requiring the losing party to do something or to suffer something to be done to him. A decree of divorce is of this kind while the accompanying award of alimony is executory. A decree of dissolution of a voidable marriage is also of this kind but a decree like that in *Kitzman v. Werner*⁷⁸ declaring that a marriage is void is only declaratory. It is merely a declaration that a jural relation, supposed to exist, does not exist. It does not change the actually existing relation. It was chiefly of these investitive judgments that the New York Appellate Division was speaking in *Matter of Mitchel v. Cropsey*.⁷⁹

⁷⁷ 211 Mich. 592, 614, 179 N. W. 350, 358 (1920).

⁷⁸ *Supra*, note 43.

⁷⁹ See also 1 ELLIOTT, GENERAL PRACTICE, § 246.

Since investitive judgments are recognized as constitutional, an argument might be adduced for the constitutionality of declaratory judgments from their analogy to investitive ones. But such an argument seems to me needless in view of the sufficiency of the analogy furnished by the many classes of declaratory judgments already recognized as exercises of the judicial power.

I have endeavored to demolish the foundation of the majority in the *Anway Case* by showing that the conduct authorized by the Michigan declaratory judgment statute is not unconstitutional on either of the grounds upon which the court relies. It does not require nor purport to authorize non-judicial acts. It does not confer a power to decide moot cases or to give nugatory judgments. It enables the court to give binding judgments in settlement of jural relations. If it be admitted that the foundation of the majority opinion is bad, what constitutional objection remains to this statute? It is difficult to conceive that any can be urged. Moreover if any is offered, it is difficult to see why it will not apply equally to some or all the classes of cases which I have enumerated, in which declaratory judgments are already in use and recognized as valid.

BIBLIOGRAPHY

Discussions of the declaratory judgment, all favoring it:

- Edwin M. Borchard, "The Declaratory Judgment—A Needed Procedural Reform," 28 *YALE L. J.* 1, 105. (Analytical and historical).
- Edwin M. Borchard, "Recent Declaratory Judgment," 29 *YALE L. J.* 545.
- Edwin M. Borchard, "Brief in Support of Senate Bill 5304, 65th Congress, 3d Session," *NEW REPUBLIC*, Jan. 12, 1921.
- Edwin M. Borchard, "The Uniform Act on Declaratory Judgments," 34 *HARV. L. REV.* 697.
- E. R. Sunderland, "A Modern Evolution in Remedial Rights—The Declaratory Judgment," 16 *MICH. L. REV.* 69.
- E. R. Sunderland, "A New Function For Courts—Declaring the Rights of Parties," 88 *CEN. L. J.* 6.
- E. R. Sunderland, "The Courts as Authorized Legal Advisers of the People," 54 *AM. L. REV.* 161.

James M. Kerr, "Declaration of Rights without Consequential Relief," 53 AM. L. REV. 161.

James Schoonmaker, "Declaratory Judgment," 5 MINN. L. REV. 32.

Maurice E. Harrison, "The Declaratory Judgment in California," 8 CAL. L. REV. 133.

Note on recent legislation in 20 COL. L. REV. 106.

"Kansas Declaratory Judgment Act," 7 J. OF THE AM. BAR ASS'N 107.

Discussions of its constitutionality, all criticizing the Anway decision:

W. F. Dodd, "Michigan Declaratory Judgment Decision," 6 J. OF THE AM. BAR ASS'N 145.

Edwin M. Borchard, "Constitutionality of the Declaratory Judgment," 30 YALE L. J. 161.

Ralph W. Aigler, "Declaratory Judgments," 19 MICH. L. REV. 86.

James Schoonmaker, "Declaratory Judgment," 5 MINN. L. REV. 172.

NEW REPUBLIC, Jan. 19, 1921.

The only considerable expression of opposition to the declaratory judgment either on constitutional or other grounds that I have discovered is in the majority opinion in the Anway Case.