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JUDGMENTS - FEDERAL DECLARATORY JUDGMENTS ACT

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JUDGMENTS — FEDERAL DECLARATORY JUDGMENTS ACT — Underlying the declaratory judgment[1] is the idea that in an organized and civilized society where law and order are thoroughly recognized and established, coercion is normally unnecessary to settle legal dis-

[1] Professor Borchard's description of a declaratory judgment is: "We would confine that term to those judgments which merely declare the existence of a jural relation, i.e., some right, privilege, power or immunity in the plaintiff, or some duty, no-right, liability or disability in the defendant. They do not presuppose a wrong already done, a breach of duty. They cannot be executed, as they order nothing to be done. They do not constitute operative facts creating new legal relations of a secondary or remedial character; they purport merely to declare existing relations and create no

putes between parties.[2] The belief is that in many lawsuits the plaintiff is not seeking a means of coercing the defendant but that the plaintiff and the defendant merely want a final and conclusive decision of a disputed question on which their legal relations depend.[3] The value of the declaratory judgment lies in that it may be used to settle this dispute, in many cases before any other form of legal relief is available,[4] and without the use of harsh and hated coercive judgments and decrees.

In giving a declaratory judgment the court should exercise a sound discretion "according to rule and to criteria established by precedent."[5] This discretion should be similar to that exercised by the equity court in granting equitable relief, and the trial court's exercise of discretion

secondary or remedial ones. Their distinctive characteristic lies in the fact that they constitute merely an authentic confirmation of already existing relations." Borchard, "The Declaratory Judgment," 28 YALE L. J. 1 at 5 (1918).

[2] Sunderland, "The Declaratory Judgment," 16 MICH. L. REV. 69 (1917). For good discussions of the history and theory of the declaratory judgment see also: Borchard, "The Declaratory Judgment," 28 YALE L. J. 1, 105 (1918); Borchard, "The Declaratory Judgment in United States," 37 W. VA. L. Q. 127 (1931); Borchard, "The Constitutionality of Declaratory Judgments," 31 COL. L. REV. 561 (1931); Borchard, "Judicial Relief for Peril and Insecurity," 45 HARV. L. REV. 793 (1932); BORCHARD, DECLARATORY JUDGMENTS (1934); 33 C. J. 1097 (1924); 1 C. J. S. 1025 (1936). In isolated instances the courts have long given relief in the nature of a declaratory judgment without ever formally recognizing such relief as being really a declaratory judgment. For examples, see 31 MICH. L. REV. 707 (1933), and the articles cited above.

[3] However, there are many cases, especially those involving the collection of debts, where the sole need is for coercion and where there is no quarrel about the rights and legal relations between the parties. Such cases have led to the development of statutory summary actions for collection and to the cognovit note and the power of attorney to confess judgment. For the typical fact situations where the declaratory judgment may be used, see: Sunderland, "The Declaratory Judgment," 16 MICH. L. REV. 69 (1917); Borchard, "The Declaratory Judgment," 28 YALE L. J. 105 (1918); Borchard, "Judicial Relief for Peril and Insecurity," 45 HARV. L. REV. 793 (1932); Schroth, "The 'Actual Controversy' in Declaratory Actions," 20 CORN. L. Q. 1 (1934); 34 MICH. L. REV. 85 (1935).

[4] See the note to the dissenting opinion of Circuit Judge Stone in Columbian National Life Ins. Co. v. Foulke, (C. C. A. 8th, 1937) 89 F. (2d) 261. Also see 16 MICH. L. REV. 69 at 77 (1917).

[5] Borchard, "The Federal Declaratory Judgments Act," 21 VA. L. REV. 35 (1934). See also Borchard, "The Declaratory Judgment," 28 YALE L. J. 105 (1918); Borchard, "Recent Developments in Declaratory Relief," 10 TEMPLE L. Q. 233 (1936); Schroth, "The 'Actual Controversy' in Declaratory Actions," 20 CORN. L. Q. 1 (1934); 34 MICH. L. REV. 85 (1935); 50 HARV. L. REV. 357 (1936); 1 C. J. S. 1033 (1936). There are a few cases where the federal courts have apparently exercised this discretion. See, Zenie Bros. v. Miskend, (D. C. N. Y. 1935) 10 F. Supp. 779; Link-Belt Co. v. Dorr Co., (D. C. Del. 1936) 15 F. Supp. 663; New Discoveries, Inc. v. Wisconsin Alumni Research Foundation, (D. C. Wis. 1936) 13 F. Supp. 596; Automotive Equipment Co. v. Trico Products Corp., (D. C. N. Y.

may be reviewed on appeal.[6] In exercising this discretion the court should consider the adequacy of other remedies, if any are available to either the plaintiff or the defendant, and whether or not settling the controversy at this point will in any way work a hardship on the defendant.[7] Because of the dislike and distrust of the bench and bar for cases decided by an exercise of discretion,[8] the courts have often warped some legal principle to fit the occasion and to become the legal basis for a refusal to give declaratory relief. This tendency has caused many of the weak spots and inconsistencies already apparent in the case law on declaratory judgments.[9] By a sound exercise of discretion, the courts could have reached the same results in these cases, and could have done so without the consequent injury to the body of the case law as a whole.

In several cases the United States Supreme Court has confused the declaratory judgment with the advisory opinion and in dicta has condemned them both[10] as being outside the realm of judicial power.

1935) 11 F. Supp. 292; City of Orlando v. Murphy, (C. C. A. 5th, 1935) 77 F. (2d) 702; Anderson v. Aetna Life Ins. Co., (C. C. A. 4th, 1937) 89 F. (2d) 345.

[6] This is shown, if any demonstration is necessary, by the numerous appellate court decisions wherein the decision of the trial court is reversed or modified.

[7] Borchard, "The Declaratory Judgment," 28 YALE L. J. 105 (1918), and Schroth, "The 'Actual Controversy' in Declaratory Actions," 20 CORN. L. Q. 1 (1934). Professor Borchard states that the declaratory judgment should not be used to replace some specific statutory mode of relief, as eminent domain or annullment proceedings. Borchard, "Recent Developments in Declaratory Relief," 10 TEMP. L. Q. 233 (1936).

[8] Because such cases are not broad enough to be good precedent to use in deciding later cases or to use as guides for the regulation of a client's future conduct.

[9] In Associated Indemnity Corp. v. Manning, (D. C. Wash. 1936) 16 F. Supp. 430, the plaintiff insurer prayed for a declaratory judgment that it was not liable for injuries caused defendant claimants by defendant insured in an automobile accident, and that plaintiff had no duty to defend defendant insured if sued by the injured claimants. The court stated that a declaratory judgment would take away jurisdiction of the damage suit, if there should be one, from the state court, and then, as the legal reason for dismissing the plaintiff's petition, held that there was no justiciable controversy between the parties. Here the court should have rested its decision on an exercise of discretion, not on a warped and misused rule of law. Other examples of this regrettable approach are: Aetna Life Ins. Co. v. Haworth, (C. C. A. 8th, 1936) 84 F. (2d) 695; Western Casualty & Surety Co. v. Beverforden, (D. C. Mo. 1936) 17 F. Supp. 928; Columbian National Life Ins. Co. v. Foulke, (C. C. A. 8th, 1937) 89 F. (2d) 261 at 263 (the dissenting opinion). See also 46 YALE L. J. 286 (1936), and Borchard, "The Federal Declaratory Judgments Act," 21 VA. L. REV. 35 (1934).

[10] For example see, Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 S. Ct. 282 (1927); Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Assn., 276 U. S. 71, 48 S. Ct. 291 (1928); Willing v. Chicago Auditorium Assn., 277 U. S. 274, 48 S. Ct. 507 (1928); Alabama v. Arizona, 291 U. S. 286, 54 S. Ct. 399 (1934); Selected Products Corp. v. Humphrey, (C. C. A. 7th, 1936) 86 F.

However, in an appeal from a declaratory judgment rendered by a state court under a state declaratory judgments statute, the Supreme Court held that a proper occasion for the exercise of the judicial power, as defined in the constitution,[11] could be presented by a typical declaratory judgment action.[12] Two years later the Federal Declaratory Judgments Act[13] was passed giving the federal courts power to "declare rights and other legal relations." In *Aetna Life Insurance Co. v. Haworth*,[14] the Supreme Court reaffirmed its holding in the above case and, in addition, held that in passing the federal act the Congress was exercising its constitutional power over the jurisdiction of the federal courts, and, therefore, the federal act was valid. Thus, the Supreme Court concluded that as long as there is an actual controversy before them, the federal courts may exercise their judicial power even though no injunction or award of process or payment of damages was sought.[15]

An "actual controversy" is, of course, present if there is available

(2d) 821. Compare 1 C. J. S. 1012, § 17 (1936) with 1 C. J. S. 1018, § 18 (1936), where the same loose use of language is found. See also Borchard, "The Constitutionality of Declaratory Judgments," 31 COL. L. REV. 561 (1931).

[11] U. S. Constitution, art. III, § 2 (1). See Sunderland, "Scope of Judicial Relief," 27 MICH. L. REV. 416 (1929); 49 HARV. L. REV. 1351 (1936).

[12] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933). The Court said (288 U. S. at 264): "But the constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies." It was also pointed out that the plaintiff had alleged facts sufficient to support a bill to enjoin.

[13] Judicial Code, § 274 d, 48 Stat. L. 955 (1934), 28 U. S. C., § 400 (1935). The text of the first section of the act is as follows: "In cases of actual controversy, except with respect to Federal taxes, the courts of the United States shall have power upon petition, declaration, complaint or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." For collections of various cases under this act, see: Borchard, "Justiciability," 4 UNIV. CHI. L. REV. 1 (1936); 49 HARV. L. REV. 1351 (1936); 46 YALE L. J. 286 (1936); 36 COL. L. REV. 1168 (1936); 21 MINN. L. REV. 424 (1937); 1 C. J. S. 1018 et seq. (1936).

[14] 300 U. S. 227, 57 S. Ct. 461 (1937), noted 36 MICH. L. REV. 499 (1938).

[15] Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 49 S. Ct. 499 (1929). Other cases wherein the constitutionality of the Federal Declaratory Judgments Act was discussed are: Lionel Corp. v. De Fillipis, (D. C. N. Y. 1936) 15 F. Supp. 19, citing and discussing a great many cases on the question what is a case or controversy; Ashwander v. T. V. A., 297 U. S. 288, 56 S. Ct. 466 (1936); Pan American Petroleum Co. v. Chase National Bank, (C. C. A. 9th, 1936) 83 F. (2d) 447; N. Y. Life Ins. Co. v. London, (D. C. Mass. 1936) 15 F. Supp. 586. See also Borchard, "Justiciability," 4 UNIV. CHI. L. REV. 1 (1936) and 21 MINN. L. REV. 424 (1937).

to the plaintiff in the declaratory judgment action a conventional cause of action wherein the same issues may be raised.[16]

In *Aetna Life Insurance Co. v. Haworth*[17] the plaintiff had issued five life insurance policies to the defendant, each policy containing a disability clause providing for disability payments in some cases or for abatement of premiums in other cases. For four years prior to the suit the defendant had asserted by affidavit that he was disabled, but the defendant did not bring any sort of an action to enforce his rights. The plaintiff maintained that the defendant was not disabled and so refused to pay the defendant. Because of the possible loss of evidence and because of the expense of maintaining reserves to meet a possible claim on defendant's policies at his death, the plaintiff petitioned for a declaration that the defendant was not disabled and that his policies had lapsed for non-payment of premiums. It is clear that the plaintiff here had no conventional cause of action against the defendant and that the only conventional way in which the issue of the defendant's disability could be brought before the courts would be a suit by the defendant against the plaintiff insurance company, a proceeding which the defendant declined to follow. In this situation the Supreme Court very properly held that these facts presented "a dispute between parties who face each other in an adversary proceeding" which is "manifestly susceptible of judicial determination." The Court points out that "it is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative," and that "the character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer." We may conclude, then, that an "actual controversy" may be present even though the plaintiff in the declaratory judgment action could have maintained no conventional cause of action.[18]

But suppose that neither the plaintiff nor the defendant in the declaratory judgment action has a conventional cause of action avail-

[16] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933), discussed in 31 MICH. L. REV. 707 (1933).

[17] 300 U. S. 227, 57 S. Ct. 461 (1937).

[18] *Accord*: Guaranty Trust Co. v. Hannay & Co., [1915] 2 K. B. 536; Black v. Little, (D. C. Mich. 1934) 8 F. Supp. 867; Commercial Casualty Ins. Co. v. Humphrey, (D. C. Tex. 1935) 13 F. Supp. 174; E. Edelmann & Co. v. Triple-A Spec. Co., (C. C. A. 7th, 1937) 88 F. (2d) 852; Travelers Ins. Co. v. Young, (D. C. N. J. 1937) 18 F. Supp. 450; Aetna Life Ins. Co. v. Williams, (C. C. A. 8th, 1937) 88 F. (2d) 929; 49 HARV. L. REV. 1351 (1936); 46 YALE L. J. 286 (1936). *Contra*: Boggus Motor Co. v. Onderdonk, (D. C. Tex. 1935) 9 F. Supp. 950; Bradley Lumber Co. v. National Labor Relations Board, (C. C. A. 5th, 1936) 84 F. (2d) 97; Columbian Nat. Life Ins. Co. v. Foulke, (D. C. Mo. 1936) 13 F. Supp. 350 [reversed, (C. C. A. 8th, 1937) 89 F. (2d) 261]; Associated Indemnity Corp. v. Manning, (D. C. Wash. 1936) 16 F. Supp. 430; 14 TEX. L. REV. 550 (1936).

able to him? Must this necessarily mean that there is not an "actual controversy" present? This problem is on the frontier of declaratory judgment law and has not been very thoroughly explored by the courts.[19] In *New Discoveries, Inc. v. Wisconsin Alumni Research Foundation,*[20] the plaintiff owned a patented process for making vitamin D and was engaged in selling licenses to use this patented process. The defendant also had a patent on a similar process and had warned the plaintiff and the plaintiff's present and prospective licensees that the plaintiff's process infringed upon the defendant's process. However, neither the plaintiff nor its licensees had made any vitamin D as yet and so there had been no actual infringement. Here we have a present dispute between two parties, neither of whom has at the moment a conventional cause of action, but both of whom, because of their financial interest, would presumably be willing to go the limit in backing up their respective claims. Unless a declaratory judgment is allowed in this situation, all the plaintiff can do is to abandon its patent or take the risk of liability in damages for infringement by manufacturing under its patent. It seems that the only valid excuse for refusing declaratory relief in this situation is a sound exercise of discretion based on a finding that to force the defendant to try the issue of infringement at this point would work an unreasonable hardship on it.[21] The Federal District Court in Wisconsin, on these facts, refused to give the plaintiff a declaratory judgment on the validity of the defendant's patent, apparently on the ground that no "actual controversy" existed. The court mentions several other grounds for its decision,[22] among them its right to exercise its discretion; but the rather confused opinion

[19] The following are cases where neither the plaintiff nor the defendant had a conventional cause of action. Declaratory judgment was denied in: International Harvest Hat Co. v. Caradine Hat Co., (D. C. Mo. 1935) 17 F. Supp. 79; Bettis v. Patterson-Ballagh Corp., (D. C. Cal. 1936) 16 F. Supp. 455; Agnew & Co. v. Hoage, (D. C. D. C. 1937) 17 F. Supp. 606; Securities & Exchange Commission v. Electric Bond & Share Co., (D. C. N. Y. 1937) 18 F. Supp. 131. Declaratory judgment was allowed in: Pan American Petroleum Co. v. Chase National Bank, (C. C. A. 9th, 1936) 83 F. (2d) 447; S. S. Kresge Co. v. Sears, (C. C. A. 1st, 1936) 87 F. (2d) 135; Cockrell v. Board of Commissioners, (D. C. La. 1936) 16 F. Supp. 273. The courts, though, in many of these cases did not clearly decide on the effect of the presence or absence of conventional causes of actions.

[20] (D. C. Wis. 1936) 13 F. Supp. 596.

[21] Sunderland, "The Declaratory Judgment," 16 MICH. L. REV. 69 (1917); and Borchard, "Judicial Relief for Peril and Insecurity," 45 HARV. L. REV. 793 (1932).

[22] Among them was the argument that patent infringement questions are too complicated for the summary declaratory judgment action. Other courts, though, have never questioned the adaptability of the declaratory judgment action to patent cases. See Zenie Bros. v. Miskend, (D. C. N. Y. 1935) 10 F. Supp. 779, and E. Edelmann & Co. v. Triple-A Spec. Co., (C. C. A. 7th, 1937) 88 F. (2d) 852.

shows that the court never was able quite to isolate and discuss this basic problem. We submit that, notwithstanding this case, the correct rule is that an "actual controversy" may be present even though there is no conventional cause of action available to either the plaintiff or the defendant in the declaratory judgment action.[23]

If we assume or find that an "actual controversy" is present, then, by the express terms of the act,[24] the availability of a conventional cause of action to the *plaintiff* in the declaratory judgment action does not prevent a federal court, *within its discretion*, from giving a declaratory judgment.[25]

But what if there is a conventional remedy available to the defendant? In *Columbian National Life Insurance Company v. Foulke*[26] the plaintiff had insured *A* against accidental death. *A* had died and the beneficiary of the policy claimed that the death was accidental. The plaintiff claimed that *A's* death was a result of natural causes, and asked for a declaratory judgment to that effect against the beneficiary. As the circuit court of appeals readily admitted, there is an "actual controversy" in this case, even though there was no conventional cause of action available to the plaintiff. The defendant beneficiary could have brought suit against the plaintiff on the insurance contract. The terms of the Federal Declaratory Judgments Act seem only to cover the situation where some other form of relief is available to the plaintiff,[27] so we cannot rely here on the principle stated in the preceding paragraph. The Circuit Court of Appeals for the Eighth Circuit were themselves unable to agree on the proper holding in this

[23] Supra, notes 19 and 21. In addition, see: Schroth, "The 'Actual Controversy' in Declaratory Actions," 20 CORN. L. Q. 1 (1934); 31 MICH. L. REV. 707 (1933); 46 YALE L. J. 286 (1936). *Contra*: 13 TEX. L. REV. 89 (1934); 14 TEX. L. REV. 550 (1936).

[24] The Federal Declaratory Judgments Act provides for declarations of right, etc., in cases of actual controversy "whether or not further relief is or could be prayed."

[25] F. C. Vogt & Sons v. Rothensies, (D. C. Pa. 1935) 11 F. Supp. 225; Penn v. Glenn, (C. C. A. 6th, 1936) 84 F. (2d) 1001, opinion in (D. C. Ky. 1935) 10 F. Supp. 483; Interstate Natural Gas Company v. Gully, (C. C. A. 5th, 1936) 82 F. (2d) 145, affirming (D. C. Miss. 1934) 8 F. Supp. 174; Mitchell & Weber v. Williamsbridge Mills, (D. C. N. Y. 1936) 14 F. Supp. 954; Anderson, Clayton & Co. v. Wichita Valley Ry., (D. C. Tex. 1936) 15 F. Supp. 475; E. Edelmann & Co. v. Triple-A Spec. Co., (C. C. A. 7th, 1937) 88 F. (2d) 852; Sunderland, "The Declaratory Judgment," 16 MICH. L. REV. 69 (1917); Borchard, "Recent Developments in Declaratory Relief," 10 TEMP. L. Q. 233 (1936); Borchard, "The Declaratory Judgment as an Exclusive or Alternative Remedy," 31 MICH. L. REV. 180 (1932); 46 YALE L. J. 286 (1936); 14 TEX. L. REV. 550 (1936); 1 C. J. S. 1028, note 76 (1936).

[26] (C. C. A. 8th, 1937) 89 F. (2d) 261.

[27] Supra, note 13.

situation.[28] The majority of the court held that the declaratory judgment is not to be limited to the actual controversies for which no other remedy exists. Therefore, they lay down as the correct principle, which we indorse, that the availability of a conventional cause of action to the defendant in the declaratory judgment action should not prevent a federal court, *within its discretion*, from giving a declaratory judgment.[29] Since the trial court in this *Foulke* case had made no pretense at exercising its discretion, this issue was not before the appellate court, and the court held that it would give a declaratory judgment in this case.

The existence of an "actual controversy" is not alone enough to give the federal courts jurisdiction; the controversy must in addition involve a "federal question" or must be between certain parties before the federal courts may act. In regard to conventional causes of action, this is a matter of common knowledge to the entire legal profession. But with the passage of the Federal Declaratory Judgments Act a few attorneys seemed to feel that merely asking for a declaratory judgment under the federal act would be enough to bring any "actual controversy" within the jurisdiction of the federal courts regardless of the parties or the subject matter involved. The federal courts correctly held that the Federal Declaratory Judgments Act in and of itself does not give the federal courts jurisdiction over every "actual controversy" and that, even though an "actual controversy" exists, it must also be shown that either because of the subject matter or the parties involved, it is an "actual controversy" of the type over which the federal courts ordinarily have jurisdiction.[30]

The venue for a declaratory judgment action is another rather

[28] Stone, J., dissented.

[29] The following cases are in accord, at least as far as fact situation and results are concerned, although not all the courts expressly passed on this question: Zenie Bros. v. Miskend, (D. C. N. Y. 1935) 10 F. Supp. 779; Interstate Natural Gas Co. v. Gully, (C. C. A. 5th, 1936) 86 F. (2d) 145; Link-Belt Co. v. Dorr, (D. C. Del. 1936) 15 F. Supp. 663; Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461 (1937); Anderson v. Aetna Life Ins. Co., (C. C. A. 4th, 1937) 89 F. (2d) 345; Travelers Ins. Co. v. Young, (D. C. N. J. 1937) 18 F. Supp. 450. *Contra*: Automotive Equipment Co. v. Trico Products Corp., (D. C. N. Y. 1935) 11 F. Supp. 292; Western Casualty & Surety Co. v. Beverforden, (D. C. Mo. 1936) 17 F. Supp. 928; Hann v. Venetian Blind Corp., (D. C. Cal. 1936) 15 F. Supp. 372. Also see the law review articles and notes cited, supra, note 25.

[30] Automotive Equipment Co. v. Trico Products Corp., (D. C. N. Y. 1935) 10 F. Supp. 736; Zenie Bros. v. Miskend, (D. C. N. Y. 1935) 10 F. Supp. 779; Interstate Natural Gas Co. v. Gully, (C. C. A. 5th, 1936) 86 F. (2d) 145; Southern Pacific Co. v. McAdoo, (C. C. A. 9th, 1936) 82 F. (2d) 121; Borchard, "Recent Developments in Declaratory Relief," 10 TEMP. L. Q. 233 (1936); 45 YALE L. J. 1287 (1936); 49 HARV. L. REV. 1351 (1936).

simple point about which there has been some misunderstanding among the members of the bar. This misunderstanding seems to arise out of lack of familiarity with the declaratory judgment procedure. The accepted rule should be that the venue in a declaratory judgment action depends upon the place of residence or of service of the parties and the basis[31] of jurisdiction of the court, as does the venue in any conventional cause of action.[32]

There is one situation, however, where the jurisdiction of the federal courts in declaratory judgment actions may be different from the jurisdiction of the same courts in conventional causes of action. This is where there are federal acts restricting the jurisdiction of the federal courts in conventional causes of action, such as the Johnson Act,[33] or the act prohibiting suits to restrain the collection of any tax.[34] By the express terms of the Federal Declaratory Judgments Act in cases of actual controversy, a declaration of rights may be given "whether or not further relief is or *could be* prayed."[35] The federal acts restricting the jurisdiction of the federal courts in conventional causes of action usually do not expressly prohibit a declaratory judgment.[36] So, as a matter of strict statutory interpretation, the federal courts should feel free to give a declaratory judgment in this situation.[37] Also, the purpose of prohibiting injunctions and other conventional forms of coercive relief is usually to prevent the delay and the obstruction of efficient administration which ordinarily accompanies such judicial interference. A declaratory judgment causes no delay or hindrance before the act or action in question is declared unconstitutional or unlawful,[38] and, of course, *after* such a declaration any sort of coercive

[31] For instance, Judicial Code, § 51, 28 U. S. C., § 112, says that a suit in which the jurisdiction of the federal court is not based on diversity of citizenship should be brought in the district where the defendant is "an inhabitant."

[32] Automotive Equipment Co. v. Trico Products Corp., (D. C. N. Y. 1935) 11 F. Supp. 292; Putnam v. Ickes, (D. C. App. 1935) 78 F. (2d) 223; Webster Co. v. Society for Visual Education, (C. C. A. 7th, 1936) 83 F. (2d) 47; Borchard, "Recent Developments in Declaratory Relief," 10 TEMP. L. Q. 233 (1936).

[33] Section 24 of the Judicial Code, 48 Stat. L. 775 (1934), 28 U. S. C., § 41 (1, 1 a) (1935). This act withdraws from the jurisdiction of the federal courts certain public utility rate cases.

[34] Rev. Stat., § 3224 (1878), 26 U. S. C., § 1543 (1935). A similar act is the one which required three judges to sit in any case where an injunction against the enforcement of a rate schedule promulgated by a state utility commission is sought.

[35] Assuming, of course, the existence of an actual controversy.

[36] Act of August 24, 1935 [49 Stat. L. 750 (1936), 7 U. S. C., § 602 et seq. (Supp. 1936)] prohibits any suit to secure an injunction or a declaratory judgment against the tax imposed by the Agricultural Adjustment Act.

[37] 49 HARV. L. REV. 1351 (1936).

[38] Penn v. Glenn, (C. C. A. 6th, 1935) 84 F. (2d) 1001, opinion in (D. C. Ky. 1935) 10 F. Supp. 483.

interference is justified. Therefore, we conclude that where there is no express prohibition, the federal courts may grant a declaratory judgment, if, in its discretion, the court believes that granting such relief is not contrary to the spirit or purpose of any act which restricts the courts' jurisdiction in conventional causes of action.[39]

In a few early cases the federal courts showed some misunderstanding of the terms of the Federal Declaratory Judgments Act wherein the courts are given power to declare "rights and other legal relations."[40] But *Aetna Life Insurance Company v. Haworth*[41] and *Columbian National Life Insurance Company v. Foulke*[42] have now established, as the correct rule, that the power of the federal courts under the terms of the act is not limited merely to the declaration of the *rights* of the plaintiff in the affirmative sense but includes "negative declarations," i.e., declarations of the non-liability of the plaintiff or of the no-right of the defendant.[43]

It was early recognized that the declaratory judgment action would furnish a counterclaim just as it furnishes a direct action.[44] Since the federal act provides for a declaration at the petition "of any interested party," the defendant in any action should be able to counterclaim for a declaratory judgment on any question which presents an "actual controversy." The purpose of one common type of conventional counterclaim is to secure a reduction of the money judgment to be awarded the plaintiff in the principal suit by pleading a set-off at the same time, but a declaratory judgment obviously cannot be used for this pur-

[39] Penn v. Glenn, (C. C. A. 6th, 1935) 84 F. (2d) 1001, opinion in (D. C. Ky. 1935) 10 F. Supp. 483; Mississippi Power & Light Co. v. Jackson, (D. C. Miss. 1935) 9 F. Supp. 564; Inland Milling Co. v. Huston, (D. C. Iowa 1935) 11 F. Supp. 813; Lake Erie Provision Co. v. Moore, (D. C. Ohio 1935) 11 F. Supp. 522. See, Jones v. Viley, (D. C. Idaho 1935) 12 F. Supp. 476, which was decided after the federal act cited supra, note 36. Borchard, "The Federal Declaratory Judgments Act," 21 VA. L. REV. 35 (1934); 49 HARV. L. REV. 1351 (1936).

[40] Columbian Nat. Life Ins. Co. v. Foulke, (D. C. Mo. 1936) 13 F. Supp. 350 [criticized by Borchard, "Recent Developments in Declaratory Relief," 10 TEMP. L. Q. 233 (1936), and Borchard, "Justiciability," 4 UNIV. CHI. L. REV. 1 at 17-20 (1936)]; reversed (C. C. A. 8th, 1937) 89 F. (2d) 261; N. Y. Life Ins. Co. v. London, (D. C. Mass. 1936) 15 F. Supp. 586 (dicta). See also 36 COL. L. REV. 1168 (1936).

[41] 300 U. S. 227, 57 S. Ct. 461 (1937). Accord, Travelers Ins. Co. v. Helmer, (D. C. Ga. 1936) 15 F. Supp. 355.

[42] (C. C. A. 8th, 1937) 89 F. (2d) 261.

[43] Professor Borchard contends that by use of the phrase "other legal relations," Congress intended to adopt the Hohfeldian analysis of jural relations which includes right and duty, power and liability, privilege and no right, immunity and disability of each party. Borchard, "Recent Developments in Declaratory Relief," 10 TEMP. L. Q. 233 (1936); Borchard, "Justiciability," 4 UNIV. CHI. L. REV. 1 (1936).

[44] 17 J. PAT. OFF. SOC. 244, 674 (1935).

pose. Other cross actions germane to the principal action, in which declaratory relief is asked, are proper subjects for counterclaims, although one of the federal district courts has held that if the facts set up as a basis for a declaratory judgment constitute a defense they are not available as a counterclaim.[45] This decision rests upon what appears to be a strained constructive limitation in Equity Rule 30, which is clearly inadmissible under the redraft of that rule as presented by the report of the Supreme Court Advisory Committee.[46] Another federal district court saw no difficulty in a counterclaim for a declaration of invalidity of a patent in a patent infringement suit notwithstanding that the facts pleaded in the counterclaim constituted a complete defense to the principal action.[47]

Finally there is the question of further relief. It seems fairly well established in the cases, assuming that an "actual controversy" exists, that the plaintiff, if he so desires and if he has the proper causes of action, may receive by the express terms of the act,[48] but within the discretion of the court, both coercive and declaratory relief at the same time and in the same suit.[49] What a particular federal court holds in regard to this question will, in the absence of an opinion of the United States Supreme Court, depend a good deal on what the same court holds in regard to the question, discussed earlier herein, of the effect of the availability of a conventional cause of action to either party. If this particular court refuses to give a declaratory judgment whenever a conventional cause of action is available to either party, then the

[45] In Hann v. Venetian Blind Corp., (D. C. Cal. 1936) 15 F. Supp. 372, a patent infringement case, the court dismissed a counterclaim petition for declaratory judgment as to invalidity of the plaintiff's patent on the ground that the matter could be fully presented by way of affirmative defense. Approved, 10 UNIV. CIN. L. REV. 491 (1936); criticized, 50 HARV. L. REV. 357 (1936). See 45 YALE L. J. 160 (1935).

[46] Report of the Advisory Committee on Proposed Rules of Civil Procedure for the District Courts of the United States (April, 1937), Rule 13 (c).

[47] Link-Belt Co. v. Dorr, (D. C. Del. 1936) 15 F. Supp. 663; 17 J. PAT. OFF. Soc. 244 (1935).

[48] "Whether or not further relief *is* or could be prayed." Entire section quoted supra, note 13.

[49] F. C. Vogt & Sons v. Rothensies, (D. C. Pa. 1935) 11 F. Supp. 225; Zenie Bros. v. Miskend, (D. C. N. Y. 1935) 10 F. Supp. 779; Anderson, Clayton & Co. v. Wichita Valley Ry., (D. C. Tex. 1936) 15 F. Supp. 475; Mitchell & Weber v. Williamsbridge Mills, (D. C. N. Y. 1936) 14 F. Supp. 954; E. Edelmann & Co. v. Triple-A Spec. Co., (C. C. A. 7th, 1937) 88 F. (2d) 852; 101 A. L. R. 689 (1936) (on state statutes but useful here). In Link-Belt Co. v. Dorr, (D. C. Del. 1936) 15 F. Supp. 663 at 664, the court states, without any explanation, that "In the infringement suit in Illinois complete relief may be afforded by injunction and accounting. No such relief can be afforded in this declaratory judgment suit." Why not?

question of simultaneously granting further relief in the same suit cannot arise. But, as we indicated before, the availability of a conventional cause of action should make no difference, and thus the question of further relief should be of importance in all federal courts.

Section 2 of the Federal Declaratory Judgments Act provides for "further relief based on a declaratory judgment or decree . . . whenever necessary or proper." [50] This section was probably designed to provide further relief in a suit separate from the declaratory judgment proceeding or at least for further relief at a time subsequent to the issuance of the declaratory judgment itself. The act itself does not say what shall be the nature of this "further relief" and, as is to be expected,[51] there have not been many cases on this question. However, it seems clear that the "further relief" which the plaintiff may request under section 2 of the act is not merely further declaratory relief,[52] but should include any sort of coercive relief which the federal courts have power to give,[53] including the awarding of damages.[54]

If a case or controversy is present, and if this controversy is between parties proper to give the federal courts jurisdiction or involves subject matter giving the federal courts jurisdiction, then a declaratory judgment action begun in a state court under a state declaratory judg-

[50] The complete text of section 2 is: "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require an adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith." 48 Stat. L. 955 (1934), 28 U. S. C., § 400 (1935).

[51] As said before, the underlying theory of the declaratory judgment is that coercive relief is not necessary and that a mere declaration will, in most cases, be sufficient.

[52] No federal case has been found on this, but in Brindley v. Meara, 207 Ind. 657, 198 N. E. 301, 101 A. L. R. 682 at 689 (1935), the court, in interpreting section 8 of the Indiana Declaratory Judgments Act, which is identical in all respects with section 2 of the Federal Declaratory Judgments Act, held that "further relief" meant only additional declaratory relief and did not include executory or coercive relief.

[53] See Penn v. Glenn, (C. C. A. 6th, 1935) 84 F. (2d) 1001, opinion in (D. C. Ky. 1935) 10 F. Supp. 483; 101 A. L. R. 689 (1936).

[54] In E. Edelmann & Co. v. Triple-A Spec. Co., (C. C. A. 7th, 1937) 88 F. (2d) 852, the court awarded both damages and a declaratory judgment in the same suit at the same time. It should not be greatly different if these damages are asked in a subsequent suit rather than in the same suit. See Penn v. Glenn, (C. C. A. 6th, 1935) 84 F. (2d) 1001, opinion in (D. C. Ky. 1935) 10 F. Supp. 483. The commentator in 49 HARV. L. REV. 1351 (1936) suggests that the declaratory judgment action should be treated as an open action remaining on the court's docket for the subsequent awarding of coercive relief if necessary. This would do away with the bringing of a new and separate suit to secure further relief.

ments statute should be removable to the federal courts.[55] This should be true, even though the declaratory judgment is the only remedy available to either the plaintiff or the defendant in the declaratory judgment action.[56] Since the declaratory judgment is merely procedure,[57] the Conformity Act will require the federal courts to apply the state statutes in such cases.

It has been the purpose of this comment to briefly discuss the various problems which have so far arisen out of the use of the Federal Declaratory Judgments Act, and, by the citation of cases on these problems, to show what sort of treatment this act has received in the hands of the federal courts. We conclude then, that, with the exception of a few errors due mainly to the novelty of the declaratory judgment procedure, the declaratory judgment has been wisely and liberally used by the federal courts and that it will be a most useful legal tool.

Charles R. Moon, Jr.

[55] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933); McKesson & Robbins v. Charsky, (D. C. Colo. 1936) 15 F. Supp. 209; 31 MICH. L. REV. 707 (1933).

[56] It might be argued that, where the declaratory judgment is the only remedy available to either party, the declaratory judgment is creating a substantive right and not merely affording new procedure. See Sunderland, "The Declaratory Judgment," 16 MICH. L. REV. 69 at 77 (1916). But if we remember that the jurisdiction of the courts of the land extends at least to all controversies, and that in isolated cases the courts have always given declaratory judgments, thereby indicating that the power to do so has always resided in these courts, then it is rather easy to conclude that the declaratory judgment merely provides new procedure for the protection and clarification of "rights" which always had existed and always had been within the bounds of judicial power.

[57] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461 (1937); Borchard, "The Constitutionality of Declaratory Judgments," 31 COL. L. REV. 561 (1931); 31 MICH. L. REV. 707 (1933); 21 MINN. L. REV. 424 (1937).