

through excessive penalties from testing its validity, is unconstitutional on its face, as it amounts to a denial of due process.<sup>31</sup> Although the validity of this penal provision is highly doubtful, the court could not consider it, as this was a civil action.

M. J. G.

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DECLARATORY JUDGMENTS—SUIT BY INSURER TO DETERMINE THE EXTENT OF LIABILITY AS "CASE AND CONTROVERSY."—[Federal].—The Eight Circuit Court of Appeals in adjudicating its first declaratory judgment case<sup>1</sup> has chosen to take a conservative view of the function of declaratory proceedings. The decision was rendered in a suit brought under the Federal Declaratory Judgments Act<sup>2</sup> by an insurance company against an insured to have the court render a declaratory judgment that the policy had lapsed for non-payment of premiums because the insured was not so disabled as to relieve him from further payments within the terms of the policy. In praying for a declaratory decree the petitioner pointed out that 1) the insured has not instituted any action wherein the petitioner could prove the absence of disabilities of the insured, 2) that the action on the policy will not be barred until after the running of the Statute of Limitations following the death of the insured, and 3) that because permanent disability has not been judicially determined the petitioner is compelled annually to set aside and maintain substantial reserves upon the policies. The court, with one judge dissenting, affirmed the decision of the lower court,<sup>3</sup> holding that the facts alleged failed to present an "actual controversy" in that it did not show that any right of the petitioner was being invaded or prejudicially affected by the alleged acts of the defendant.

The validity of declaratory actions is now well established,<sup>4</sup> and it is only its applicability to particular fact situations which gives rise to conflicting decisions.<sup>5</sup> Judges who are hostile toward any innovation bearing upon the exercise of the judicial power have been inclined to find that the facts sought to be determined do not present an "actual controversy"<sup>6</sup> within the meaning of Article III.<sup>7</sup>

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31. *Ex Parte Young*, 209 U. S. 123, 28 S. Ct. 441 52 L. ed. 714 (1908); *Oklahoma Operating Co. v. Love*, 252 U. S. 325, 337, 40 S. Ct. 338, 64 L. ed. 598 (1919).

1. *Aetna Life Insurance Co. v. Haworth et al*, 84 F. (2d) 695 (C. C. A. 8, 1936).

2. 48 Stat. 955, 28 U. S. C. A. sec. 400 (1934).

3. 11 F. Supp. 1016 (D. C. W. D. Mo., 1935).

4. *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1923); *Nashville, etc. Ry. v. Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. ed. 730, 87 A. L. R. 1191 (1933).

5. With the instant case compare *New York Life Insurance Co. v. London*, 15 F. Supp. 586 (D. C. D. Mass., 1936), *Travelers Ins. Co. v. Helmer*, 15 F. Supp. 355 (D. C. D. Ga., 1936).

6. The opening phrase of the Federal Declaratory Judgment Act, "In cases of actual controversy" owes its origin to the since overruled decision of the Michigan Supreme Court in *Anway v. Grand Rapids Ry. Co.*, 211

The problem presented by the instant case is whether a suit brought by an insurer against an insured, who is asserting rights which are being denied by the insurer, presents a justiciable controversy. While there are contrary holdings,<sup>8</sup> there is convincing authority permitting declaratory decrees in a suit brought by the party charged against the claiming party for a declaration that he is not liable as claimed, and is through breach of the claimant released from further obligation to him.<sup>9</sup> These cases recognize that the real controversy is as to the extent of the insurer's liability.

Insurance contracts are peculiarly susceptible to effective adjudications by declaration.<sup>10</sup> To hold, as did one court,<sup>11</sup> that a declaratory decree can only be rendered at the instance of the person claiming the right and intending to assert it, is to defeat the very purpose of the act—to determine the jural relations of parties although under the conventional procedure the

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Mich. 592, 179 N. W. 350 (1920). This provision expressly forecloses against the assumption that the Act directed the rendering of advisory opinions, as in *Muskrat v. U. S.*, 219 U. S. 346 (1911). See Borchard, *The Federal Declaratory Judgment Act* (1934) 21 Va. L. Rev. 35, 44. The Uniform Act, adopted in the large majority of the states (See *Laws of Mo.* 1935 p. 218), does not include this phrase but the cases are legion in requiring the existence of an "actual controversy" as a prerequisite to a declaratory decree. See cases cited in note 38 of Note, *Declaratory Judgments With Recent Missouri Developments* (1935) 21 ST. LOUIS LAW REV. 49.

7. U. S. Const. Art. III, sec. 2: "The Judicial Power shall extend to all Cases . . . ; to Controversies . . . ." See generally Borchard, *Declaratory Judgments* (1934) 29 and 35; Schroth, *The "Actual Controversy" in Declaratory Actions* (1934) 20 Cornell L. Q. 1; Note, 41 Harv. L. Rev. 232 (1927).

8. *Aetna Life Ins. Co. v. Bellos*, 158 Tenn. 554, 13 S. W. (2d) 795 (1929) reh. denied, 158 Tenn. 562, 14 S. W. (2d) 961; *Aetna Life Ins. Co. v. Richmond*, 107 Conn. 117, 139 Atl. 702 (1927).

9. *New York Life Ins. Co. v. London*, 15 F. Supp. 586 (D. C. D. Mass., 1936); *Travelers Ins. Co. v. Helmer*, 15 F. Supp. 355 (D. C. D. Ga., 1936); *U. S. Fidelity & Guaranty Co. v. Hearn*, 170 So. 59 (Ala., 1936); *Utica Mutual Ins. Co. v. Glennie*, 230 N. Y. Supp. 673 (1928); *Ohio Casualty Ins. Co. v. Plummer*, 13 F. Supp. 169 (D. C. S. D. Tex., 1935); *Commercial Casualty Ins. Co. v. Humphrey*, 13 F. Supp. 174 (D. C. S. D. Tex., 1935); *Merchant's Mutual Casualty Co. v. Pinard*, 133 Atl. 36 (N. H., 1936); *Guaranty Trust Co. v. Hannay & Co.*, (C. A.) 2 K. B. 536 (1915): "A declaration that a person is not liable to an existing or possible action is one which will hardly ever be made though it is not beyond the power of the court to make such a declaration."

10. Borchard, *Declaratory Judgments* (1934) 490, where this statement is supported by the reasoning that 1) many questions of validity are likely to arise before the loss insured against occurs, and 2) insurance companies are usually responsible concerns and a declaration against them is equivalent to a judgment for damages.

11. *Columbia National Life Ins. Co. v. Foulke*, 13 F. Supp. 350 (D. C. W. D. Mo., 1936). Declaratory judgments were rendered in suits brought by the insured in the following cases: *Frasch v. London, etc. Ins. Co.*, 213 Cal. 219, 2 P. (2d) 147 (1931); *Malley v. American Indem. Corp.*, 297 Pa. 216, 146 Atl. 571 (1929); *Post v. Metropolitan Casualty Ins. Co.*, 237 N. Y. Supp. 64 (1929), aff. 254 N. Y. 541, 173 N. E. 857 (1930); *Seligman v. Eagle Ins. Co.*, 1 Ch. 519 (1917).

petitioner would have no cause of action.<sup>12</sup> In fact, the declaratory procedure is the only recognized method by which an insurer can, of its own motion, secure a determination of his liability or non-liability.<sup>13</sup>

The rendition of a declaratory judgment in the instant case would not have circumvented any statutory policy of the state.<sup>14</sup> Nor would it amount to a determination of rights<sup>15</sup> which were future, contingent and uncertain.<sup>16</sup> A declaratory decree, as the dissenting judge pointed out,<sup>17</sup> would have determined whether the legal relation of insurer and insured existed between the parties to the suit, together with the attendant rights, duties and privileges. Had the insured instituted the suit to reinstate the policy a justiciable controversy would have been presented.<sup>18</sup> The mere fact that the suit was instituted by the insurer, and that the declaration in respect to these conflicting rights would also determine the obligations of the insured, should not oust the court of jurisdiction.<sup>19</sup>

There are four classifications of "case and controversies":<sup>20</sup> 1) where rights have been impaired and damage incurred, 2) where injury is impending, 3) where there has been no actual damage but merely a bona fide dispute between parties who seek a determination so as to avoid acting at their peril, and 4) moot cases and advisory opinions. The declaratory judgment was designed to cover actions falling within the third classification.<sup>21</sup> Since the Declaratory Judgment Act was designed to supply the need for a procedure permitting the determination of controversies before they lead to the repudiation of obligations, the invasion of rights and the commissions of wrong,<sup>22</sup> it is regrettable that narrow and technical constructions are being resorted to—constructions which in effect are thwarting the "benevolent purposes" of the Act.<sup>23</sup>

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12. *Glen Falls Indemnity Co. v. Keliher*, 187 Atl. 473 (N. H., 1936); *London Assoc. of Shipbuilders v. London & India Dock Committee*, 2 Ch. 242 (1892); *Ellis v. Duke of Bedford*, 1 Ch. 494, 515 (1899).

13. *Glen Falls Indemnity Co. v. Keliher*, *supra*, note 12.

14. That this would be a valid reason for refusing a declaratory decree see *Fisher Flouring Mills v. Vierhus*, 78 F. (2d) 889 (C. C. A. 9, 1935); *Meridian Grain & Elevator Co. v. Fly*, 12 F. Supp. 64 (D. C. S. D. Miss., 1935).

15. See for example *Ashwander v. T. V. A.*, 297 U. S. 288, 56 S. Ct. 466, 80 L. ed. (adv.) 427 (1936).

16. *Brix v. People's Mutual Life Ins. Co.*, 2 Cal. (2d) 446, 41 P. (2d) 537 (1935); Comment, 20 ST. LOUIS LAW REV. 278 (1935).

17. 84 F. (2d) 695, at p. 700.

18. *Missouri Cattle Loan Co. v. Southern Life Ins. Co.*, 330 Mo. 988, 52 S. W. (2d) 1 (1932).

19. *New York Life Ins. Co. v. London*, 15 F. Supp. 586 (D. C. D. Mass., 1936).

20. Note, 49 Harv. L. Rev. 1351 (1936).

21. *Hearings Before the Subcommittee of Senate Committee on Judiciary on H. R. 5623*, 70th Cong., 1st Sess. (1928) 47 et seq.

22. Note, 21 ST. LOUIS LAW REV. 49, 74 (1935).

23. General purpose of declaratory judgments is to quiet and stabilize uncertain or disputed jural relations either as to present or prospective obligations. *Socony-Vacuum Oil Co. v. City of New York*, 287 N. Y. Supp. 288 (1936); *James v. Alderton Dock Yards*, 256 N. Y. 298, 176 N. E. 401 (1931); *Siegel v. Wise*, 114 Conn. 297, 158 Atl. 891 (1932).

In equitable actions to quiet title or *quia timet* any claim or assertion casting doubt upon the plaintiff's rights, sufficiently damages his material interests to present a condition of justiciability.<sup>24</sup> Logically, it would seem to follow that where differences between parties have reached a point where future litigation is inevitable, a sufficient controversy, justifying invoking the declaratory procedure, is present.<sup>25</sup>

While it is yet too early to predict with assurance what scope the courts will give to declaratory actions, an encouraging trend is discernible.<sup>26</sup> It is submitted that the instant case unnecessarily curtails the use of the declaratory actions. It is definitely "out-of-line" with the more acceptable decisions.<sup>27</sup>

W. F.

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EVIDENCE—EXPERT WITNESSES—HYPOTHETICAL QUESTION—MODEL EXPERT TESTIMONY ACT—[California].—In a suit to recover the reasonable value of legal services, a hypothetical question was asked of an expert witness by plaintiff. No objection was made to it then by defendant, but on appeal he contended that it was error to allow the hypothetical question because it omitted mention of certain letters that had a bearing on the case. *Held*; the competency of a hypothetical question is not affected by the fact that it does not contain all the facts bearing on the issue in the case.<sup>1</sup>

Because of the abuses to which it has been subjected, the abolition of the hypothetical question has been urged.<sup>2</sup> The instant case is in accord with the general rule.<sup>3</sup> Being permitted to use as few facts as he desires in framing his hypothetical question, a clever lawyer can often, by concealing the real significance of the evidence or by unduly emphasizing certain data, mislead the jury.<sup>4</sup> Furthermore, the opinion he obtains from the witness will be remembered by the jury, but the fact that it is based upon a partial statement of the facts in the actual case will be forgotten.<sup>5</sup> Cross

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24. *Guthery v. Ball*, 206 Mo. App. 570, 228 S. W. 887 (1921); *Walsh, On Equity* (1930) 541 et seq.

25. *Sullivan & Sons Mfg. Co. v. Ideal Bldg. & Loan Assoc.*, 313 Pa. 407, 170 Atl. 263, 98 A. L. R. 1 (1934); *Cryan's Estate*, 301 Pa. 386, 152 Atl. 675 (1930).

26. Note, *The Declaratory Judgment and the Insurance Contract* (1936) 46 *Yale L. J.* 286.

27. In a recent case almost identical with the facts of the instant case the judge said, ". . . remedy by declaratory judgment seems to be of ideal application to such a case." *Travelers Ins. Co. v. Helmer*, 15 F. Supp. 355, 356 (D. C. D. Ga., 1936).

1. *Matthiesen v. Smith*, 60 P. (2d) 873 (Cal., 1936).

2. 1 *Wigmore, Evidence* (2d ed. 1923) sec. 686; 32 *Am. L. Rev.* 851 (1898).

3. 1 *Wigmore, Ibid.* sec. 682; 18 *Ann. Cases* 646 (1909).

4. *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405 (1908).

5. *Opp v. Pryor*, 294 Ill. 538, 128 N. E. 580 (1920).