Under the facts of the present case, the court's decision was consistent with prevailing law. Plaintiff's conduct in using his personal influence with the legislators was quite enough to justify the decision. While it is possible to contract legitimately for services to be rendered before a legislature on behalf of a claim or bill, it is essential that one use the utmost care in drafting and performing such a contract. J. W. F.

DECLARATORY JUDGMENTS—CONSTITUTIONAL REQUIREMENT OF CASE OR CONTROVERSY—THREAT TO ENFORCE ALLEGEDLY UNCONSTITUTIONAL STATUTE —[Federal].—The Southern Pacific Company sought a declaratory judgment against the Attorney General of Arizona, individually, to the effect that the Arizona Train Limit Law was in violation of the Federal Constitution. The complaint alleged that defendant had said that it was his duty as attorney general to prosecute plaintiff for any violation of this law. Defendant denied the allegation and stated that he would not attempt to enforce the statute until he had decided that it was constitutional. The court made a finding of fact in favor of defendant. Proceedings were dismissed by the district court for want of jurisdiction, no case or controversy within the judicial power of the United States having been presented. The circuit court of appeals affirmed the dismissal and *held*, that there was no case or controversy. *Southern Pacific Co. v. Conway.*[1]

The Federal Declaratory Judgments Act gives to the federal courts the power to issue declaratory judgments "in cases of actual controversy except with respect to federal taxes * * *."[2] The limitation of the power to cases of "actual controversy" means that it pertains to "cases" and "controversies" in the constitutional sense.[3] The Declaratory Judgments Act has not changed the jurisdiction of the federal courts. It is merely a procedural statute, providing remedies in cases where jurisdiction already exists.[4]

In a suit between a private party and a state officer for a judgment declaring a statute unconstitutional, there is a sufficient controversy when the officer expresses an intention to enforce an act alleged to be unconstitutional and capable of causing irreparable injury to the plaintiff. The officer may be sued in a federal court as an individual.[5] But when the officer has given no indication of his intent to enforce the act, and has done nothing to place himself in a position adverse to the plaintiff, by the weight

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1. (C. C. A. 9, 1940) 115 F. (2d) 746.
2. (1934) 48 Stat. 955, c. 512, 28 U. S. C. A. (Supp. 1940) sec. 400.
3. Aetna Life Ins. Co. v. Haworth (1937) 300 U. S. 227.
4. Aetna Casualty & Surety Co. v. Quarles (C. C. A. 4, 1937) 92 F. (2d) 321; John P. Agnew & Co. v. Hoage (App. D. C. 1938) 99 F. (2d) 349; Utah Fuel Co. v. National Bituminous Coal Comm. (App. D. C. 1938) 101 F. (2d) 426; United States Fidelity & Guaranty Co. v. Thompson (D. C. S. D. Iowa 1940) 32 F. Supp. 15.
5. Nashville, C., & St. L. Ry. v. Wallace (1933) 288 U. S. 249; Currin v. Wallace (1939) 306 U. S. 1; Chester C. Fosgate Co. v. Kirkland (D. C. S. D. Fla. 1937) 19 F. Supp. 152; Gully v. Interstate Natural Gas Co. (C. C. A. 5, 1936) 82 F. (2d) 145; Black v. Little (D. C. E. D. Mich. 1934) 8 F. Supp. 867; Acme Finance Co. v. Huse (1937) 192 Wash. 96, 73 P. (2d) 341.

of authority no controversy exists and no declaratory judgment may be entered.[6] This view is supported by strict deductive logic. The danger to the plaintiff is contingent upon the event of prosecution by the attorney general, which, as far as the instant case is concerned, is a hypothetical future event. And there may be no declaratory judgment based upon a hypothetical state of facts, for that would amount to a mere advisory opinion.[7] Power to issue a declaratory judgment does not depend upon the immediacy of the threatened wrong, but the mere surmise of the plaintiff that some right adverse to his claims may be asserted is not enough to confer jurisdiction.[8] If the plaintiff is merely in doubt as to his rights under the statute, without having had them challenged, the case is premature and not properly the subject of a declaratory judgment.[9] Moreover, if no action is proposed or threatened or suggested by anyone who has a right to act, the plaintiff may not create an "actual controversy" merely by taking a position and challenging the government to dispute it.[10]

As a result of the decision in the instant case, plaintiff is in the position of having to choose between complying with the law, to his needless detriment if it should be unconstitutional, and violating it, at the risk of incurring severe penalties if it should be constitutional. It would seem that the Declaratory Judgments Act was meant to apply in just such situations—to provide adjudication before actual violation of rights, without waiting for an adversary to bring suit, and to avoid accrual of avoidable damages.[11] The declaratory judgment is somewhat in the nature of an expanded bill

6. Liberty Warehouse Co. v. Grannis (1927) 273 U. S. 70; F. W. Maurer & Sons Co. v. Andrews (D. C. E. D. Pa. 1939) 30 F. Supp. 637; Adams v. Walla Walla (1938) 196 Wash. 268, 82 P. (2d) 584.

7. Aetna Life Ins. Co. v. Haworth (1937) 300 U. S. 227; Ashwander v. Tennessee Valley Authority (1935) 297 U. S. 788; E. W. Bliss Co. v. Cold Metal Process Co. (C. C. A. 6, 1939) 102 F. (2d) 105; Imperial Irr. Dist. v. Nevada-California Elec. Corp. (C. C. A. 9, 1940) 11 F. (2d) 319; Business Men's Assur. Co. v. Sainsbury (C. C. A. 10, 1940) 110 F. (2d) 995; John P. Agnew & Co. v. Hoage (App. D. C. 1938) 99 F. (2d) 349; Ohio Casualty Ins. Co. v. Marr (C. C. A. 10, 1938) 98 F. (2d) 973; New York, etc. Utilities Co. v. Public Service Comm. (D. C. S. D. N. Y. 1938) 23 F. Supp. 313; United States Fidelity & Guaranty Co. v. Pierson (D. C. W. D. Ark. 1937) 21 F. Supp. 678; Bethlehem Shipbuilding Corp. v. Nylander (D. C. S. D. Cal. 1936) 14 F. Supp. 201; New Discoveries, Inc. v. Wisconsin Alumni Research Foundation (D. C. W. D. Wis. 1936) 13 F. Supp. 596; Note (1921) 12 A. L. R. 52, 71.

8. Caterpillar Tractor Co. v. International Harvester Co. (C. C. A. 9, 1939) 106 F. (2d) 769; Angell v. Schram (C. C. A. 6, 1940) 109 F. (2d) 380; Bettis v. Patterson-Ballagh Corp. (D. C. S. D. Cal. 1936) 16 F. Supp. 455; Note (1921) 12 A. L. R. 52, 72.

9. Board of Comm'rs v. Cockrell (C. C. A. 5, 1937) 91 F. (2d) 412; Maryland Casualty Co. v. United Corp. (C. C. A. 1, 1940) 111 F. (2d) 443; American Motorists Ins. Co. v. Busch (D. C. S. D. Cal. 1938) 22 F. Supp. 72.

10. F. W. Maurer & Sons Co. v. Andrews (D. C. E. D. Pa. 1939) 30 F. Supp. 637.

11. Aetna Casualty & Surety Co. v. Quarles (C. C. A. 4, 1937) 92 F. (2d) 321; Milwaukee Gas Specialty Co. v. Mercoid Corp. (C. C. A. 7, 1939) 104 F. (2d) 589; Maryland Casualty Co. v. Hubbard (D. C. S. D. Cal. 1938) 22 F. Supp. 697.

quia timet,[12] and in such actions it is not necessary that the event feared be presently threatened. Thus, in a bill to quiet title, it is not necessary that title be assailed. It is enough that someone have grounds for assault.[13]

Professor Borchard[14] takes the view that a threat to enforce a statute is unnecessary for a declaratory judgment because public officials are presumed to do their duty.[15] In the instant case, the court maintained that it may not be presumed that a public officer will enforce an unconstitutional law. This position seems to conflict with *Southern Pacific Co. v. Peterson*.[16] It was there held that, in the very law involved in the principal case, the provision imposing upon the attorney general the duty of enforcement was mandatory and, therefore, gave rise to a fair assumption that the attorney general would discharge his duty. There had been in that case no attempt by the attorney general to enforce the law, but the court held that there was no doubt of impending injury, and that a case or controversy existed. Furthermore, in suits to enjoin the enforcement of an unconstitutional statute aimed at the plaintiff, Professor Borchard pointed out that it is not usual to allege that the attorney general has threatened action.[17] In *Euclid v. Ambler Realty Co.*[18] it was held that the mere enactment of a zoning ordinance with no attempt to apply it to the plaintiff presented a case or controversy appropriate to allow injunctive relief. In *Pierce v. Society of Sisters*[19] the mere existence of a *potential law*, an act of the legislature not to be effective for two years, gave rise to a case or controversy sufficient for granting of an injunction. There seems to be no reason why an issue presenting a case or controversy in a suit for injunctive relief should not also present a case or controversy in a suit for a declaratory judgment.[20]

M. G.

12. Meeker v. Baxter (C. C. A. 2, 1936) 83 F. (2d) 183; Brooks v. Welch (D. C. D. Mass. 1938) 25 F. Supp. 819.

13. Sharon v. Tucker (1891) 144 U. S. 533, 543, cited in Borchard, *Declaratory Judgments* (1934) 289, n. 144.

14. Professor Borchard, who was instrumental in the adoption of the Act, has expressed a view contrary to that held by the federal courts. He maintains that the mere prospect of a criminal penalty offers those affected the necessary legal interest in a judgment raising the issue of validity, immunity, or status. Borchard, *Declaratory Judgments* (1934) 47. However, the cases he cites in support of this statement [(State ex rel. Hopkins v. Grove (1921) 109 Kan. 619, 201 Pac. 82; Erwin Billiard Parlor v. Buckner (1927) 156 Tenn. 278, 300 S. W. 565)] present situations where there were actual adverse contentions between the parties.

15. Borchard, *Declaratory Judgments* (1934) 47.

16. (D. C. D. Ariz. 1930) 43 F. (2d) 198.

17. Borchard, op. cit. supra, note 15, at 276.

18. (1926) 272 U. S. 365, cited in Borchard, op. cit. supra, note 15, at 276.

19. (1925) 268 U. S. 510, cited in Borchard, op. cit. supra, note 15, at 277.

20. Borchard, op. cit. supra, note 15, at 275.