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THE "ACTUAL CONTROVERSY" IN DECLARATORY ACTIONS

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That recently enacted Act of Congress which appends to the Judicial Code a new section authorizing the courts of the United States to grant declaratory judgments[1] brings this form of proceeding once more into prominence. The Act possesses much interest merely as another step in the movement for the general adoption of the declaratory action. Its greater interest, however, lies in the fact that the Act gives a new importance to the attitude of the Supreme Court of the United States toward the declaratory judgment. That form of procedure must now justify itself finally and decisively before a tribunal which in the past has found that it presented serious constitutional difficulties.

With the constitutionality of the new Act likely to be mooted, its opening words which purport to limit the declaratory action to "cases of actual controversy", become especially significant.[2] This limiting phrase is not an expression peculiar to the Act. It may, in fact, be found in the declaratory judgment statutes of several states whose courts have, as we shall presently see, invariably considered the phrase the hall-mark of constitutionality. The inclusion of this limitation in the federal statute must, therefore, be attributed solely to the desire to obviate constitutional difficulties. These four words are thus expected to bear successfully the brunt of the constitutional attack and to quiet the scruples of the Supreme Court of the United States.

Whether or not that Court will find the phrase a convincing proof of the Act's validity must, of course, remain for the present an open question. Yet the mere presence of the formula in the Act, viewed in the light of its purpose, kindles interest in its origin, its development

[1]H. R. REP. No. 343, 73d Cong., Serial No. 4337, "An Act to amend the Judicial Code by adding a new section to be numbered 274D." Approved, June 14, 1934.

[2]The first paragraph of the new Act, which contains the grant of power, states: "In cases of actual controversy 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."

and, above all, its meaning. Closely connected with these questions and of more interest to those who favor the extension of this new type of action is the problem of this limitation's effect upon the usefulness of the declaratory action. Many of these queries cannot be met with categorical answers. Yet a survey of certain doctrines, pertaining to the propriety of the declaratory judgment, which have been advanced by state courts and by the United States Supreme Court will aid in defining the problems inhering in the phrase, in presenting the issues, and in suggesting possible solutions.

In essaying this task, we must begin with a clear understanding of the doctrines, hostile to the declaratory action, which have been advanced in the past. To attain such an understanding we must, in turn, call to mind the essential nature of this type of procedure. At the outset it cannot be too strongly insisted that declaratory judgments are *judgments* in every sense of that term. They presuppose parties with substantial adverse interests and a legal contest concerning rights or other legal relationships. The declaratory judgment, moreover, constitutes a final judgment, subject only to appeal. As res judicata it forever binds the parties to the action in respect to the matters litigated and determined. The declaration, therefore, resembles in many respects the ordinary or executory[3] judgment. The declaratory judgment differs from the latter, however, in that it can be granted before a wrong has either occurred or been threatened. This difference arises forthwith from the principal purpose of declaratory relief. That form of proceeding constitutes a remedy for doubt and insecurity. It represents a variety of preventive relief, designed to stabilize jural relationships which have become clouded with uncertainty, thus avoiding the wrongs and threatened wrongs which frequently spring from such situations of uncertainty.

Precisely at this point of divergence between the executory and declaratory actions looms the constitutional objection which has been advanced to the latter proceedings. In 1920 the Supreme Court of Michigan declared the declaratory statute of that state unconstitutional in *Anway v. Grand Rapids Railway Company*.[4] Most of the constitutional difficulties advanced by this discursive opinion resulted from a complete misunderstanding of the declaratory judgment. If these be cast aside, the court's remaining objections find their basis in the simple fact that such proceedings involve no wrong or threatened wrong.

[3]Under the term, "executory action", as herein used, must be classified all actions which are designed to redress wrongs already committeed or prevent those immediately threatened.

[4]211 Mich. 592, 179 N. W. 350 (1920).

From this circumstance, the Michigan tribunal deduced that declaratory actions state no "cause of action" and, therefore, present no *actual controversy.* The absence of a cause of action, in the court's opinion, rendered the issues presented in declaratory proceedings moot or fictitious and consequently non-justiciable. On these premises, the court declared the declaratory judgment statute void as an attempt to confer upon the courts of Michigan a power other than the judicial.

The objection thus stated by the Michigan court has received the concurrence of the Supreme Court of the United States. In *Liberty Warehouse Company v. Grannis,*[5] which involved an action against the Commonwealth Attorney of the state of Kentucky for a declaration that a certain Kentucky statute violated the state and federal constitutions, the Court flatly denied the federal judiciary's competence to take jurisdiction of a declaratory action. Mr. Justice Sanford speaking for the Court, held that "while the Commonwealth Attorney is made defendant as a representative of the Commonwealth, there is no semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the Court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective."[6] On these grounds, the Court decided that the matter before them constituted neither a case nor controversy to which the constitution extends the judicial power of the United States. Mr. Justice Brandeis, speaking for the Court in *Willing et al. v. Chicago Auditorium Association*[7] reiterated this doctrine in more concise language. This case arose in an Illinois court when the Association, having cause to doubt its own right to replace the structure then standing upon the land which it had leased from Willing and others, sought a declaration of rights. When certain of the defendants removed the case into a federal court, the question of that court's power to give declaratory relief was raised and finally carried to the Supreme Court. The Court emphatically denied the jurisdiction of the courts of the United States to grant declaratory judgments. It asserted that "the fact that plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so. Resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts

[5] 273 U. S. 70, 47 Sup. Ct. 282 (1927).
[6] *Id.* at 73, Sup. Ct. at 282-3.
[7] 277 U. S. 274, 48 Sup. Ct. 507 (1928).

at the time of the adoption of the Constitution and for more than half a century thereafter."[8]

According to both the Michigan and United States Supreme Courts, therefore, a prayer for a declaration of rights, prior to the threat or commission of a wrong, states no cause of action. Now a "cause of action" may be defined as that aggregate of juristic facts which vests in the plaintiff a right of action, i.e., a right to invoke the aid and protection of the judicial power. Consequently, when these courts maintain that a wrong or threat of wrong constitutes an essential element of a cause of action, they embrace the proposition that the judicial power can only redress wrongs already committed or prevent those immediately threatened. A theory of judicial power, therefore, lies at the base of the arguments advanced against the declaratory judgment.

That theory appears to be subject to easy refutation. An examination of the *function* performed by the judicial power in the adjudication of cases reveals nothing which requires that power to remain inactive until a wrong or threat of wrong has occurred. Even in those cases where an alleged wrong is to be redressed, the essence of the judicial function can only be the declaration of rights. If, for example, defendant *B,* in an action for damages, denies that plaintiff *A* possesses the right which *B* has allegedly infringed, the peculiar duty of the judicial power must lie in declaring whether or not *A* has the right thus controverted. If the court decides this question in *A's* favor, there remains the inquiry whether or not the acts of *B* do, in truth, amount to an infringement of that right. Briefly, in order to decide the issues presented by the case, the judicial power must first declare the existence of the alleged right and its orbit or extent—both purely declaratory functions. Why, therefore, cannot the judiciary declare rights before a wrong has been committed or threatened? Indeed, no one would maintain that the mere absence of a wrong or threat of wrong effects an alteration in the judicial function, provided that the court is asked to do no more than give an authoritative declaration of rights. The absence of a wrong or threat of wrong necessarily curtails the fact-finding activities of the court. This feature of such a proceeding, however, affects the jury, not the judicial power, because the determination of facts constitutes the jury's province. The judicial power, regarded as a *function* of government, seems not, therefore, to require a wrong or threatened wrong as a condition precedent to its action.

If we regard the judicial power in the light of its history, the theory under discussion seems, at first blush, more formidable. None can gainsay that originally the courts existed merely to redress wrongs.

[8] *Id.* at 289, Sup. Ct. at 509.

But neither can it be denied that the equitable, preventive activities of the courts have steadily grown in importance. In order to take cognizance of these latter aspects of judicial power, the Michigan and United States Supreme Courts have been forced to join threatened wrongs to actual wrongs as constituting valid causes of action. This admission, which indeed could not be avoided, seriously detracts from the intellectual respectability of their theory. The judiciary, in enjoining a threatened wrong, acts to preserve the existing legal network which binds man to man. But, if the courts may undertake to preserve, as well as to restore, it seems difficult to understand what principle requires the former function to be confined to cases of threatened wrongs. What, moreover, constitutes a *threat* of wrong? At what point does respondent's act assume the proportions of a threat? These questions must always remain difficult to answer. Indeed, the limitation of the preventive jurisdiction of the courts to cases of threatened wrongs places only the flimsiest of bridles upon that aspect of judicial power. The concept of a threatened wrong can, in fact, be easily expanded in order to permit courts to grant, under the guise of injunction proceedings, something very like a declaratory judgment.[9] Hence, while a theoretical distinction may be drawn between the grounds for injunctive relief and those warranting only a declaration, in practice the line must be shadowy and ill-defined.

But the inadequacy of the doctrine under discussion becomes even more obvious when we reflect that certain long-established judicial proceedings do not presuppose even a theoretical wrong or threat of wrong. If the judicial power can operate only in the presence of a wrong, actual or threatened, how are we to explain such traditional actions as bills to remove clouds from title and interpleader? In the former action, the mere existence of some legal instrument which casts a cloud upon plaintiff's title constitutes grounds sufficient to enable him to invoke the judicial power. In the latter, the plaintiff-stakeholder, having in his custody a thing of value to which other persons assert conflicting claims, comes into court and, by forcing the contestants to litigate their claims, secures an authoritative determination of their rights and his duty. In both, the mere existence of facts which cast doubt upon plaintiff's rights and duties constitutes a cause of action entitling him to move the judicial power for a definitive declaration of rights.

The existence of these actions, in short, not only shows the inadequacy of the doctrine enunciated by the Michigan and United States

[9]See, *e. g.*, Commonwealth of Pennsylvania v. State of West Virginia, 262 U. S. 553, 43 Sup. Ct. 658 (1923).

Supreme Courts, but indicates very clearly that declaratory actions must be entirely within the competence of the judicial power. Hostile claims or other facts which cast doubt upon a party's right and duties constitute, in proceedings to remove clouds and interpleader, a valid cause of action. Why may not such claims or facts become a cause of action generally? The declaratory action constitutes, in fact, merely an action to remove clouds from all legal relations and, therefore, an extension, by analogy, of the principle underlying *quia timet*. The importance of land tenure in the social scheme and the consequent necessity for certainty in land titles produced, in the past, the bill to remove clouds. The necessity for certainty in, and security of, all legal relationships in the complex society of today has led to a wider application of the same remedy in the form of the declaratory judgment. Surely, when courts have performed a function in particular cases for years, a mere extension of that activity to new fields cannot jeopardize their judicial chastity.

It appears, therefore, that a wrong or threatened wrong, an "actual controversy" in the language of the Michigan Court, is not a prerequisite to the activity of the judicial power. In fact, the objection to the declaratory judgment which finds its basis in the alleged absence of a cause of action, springs from a very narrow, inadequate theory of that power. The complete overthrow of such an objection requires nothing more than an elucidation of the broader aspect of judicial power and a reference to the traditional remedies, similar in principle to the declaratory action, which have long been available before the occurrence of a wrong or threatened wrong. Many state courts have, however, avoided such a direct, frontal attack on the theory of judicial power previously discussed, although they emphatically upheld the constitutionality of the declaratory judgment. The *Willing* and *Grannis* cases have been swept aside by drawing a distinction between the judicial power of the states and that of the United States. Thus we are informed that the judicial power of the United States, either because it extends only to "cases" and "controversies"[10] or because, being delegated power, it is fettered by the history of judicial power,[11] possesses limitations which forbid its granting declaratory judgments. These vexatious restrictions the judicial powers of the several states have, of course, providentially escaped.

With the federal cases thus cavalierly despatched, the *Anway* case

[10]Morton v. Pacific Construction Co., 36 Ariz. 97, 283 Pac. 281 (1930); Bramann v. Babcock, 98 Conn. 549, 120 Atl. 150 (1923); Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930); Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1924).

[11]Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930).

alone stood in the path of the declaratory judgment. Nevertheless, many of the state courts have also been able to avoid a direct collision with the doctrine of that case. In 1921–1922, when the legislatures of California, Kansas, Kentucky and Virginia adopted declaratory judgment statutes,[12] they specifically limited the new proceedings to "cases of actual controversy", thus purporting to obviate the objection of the Michigan court that such action presented no actual controversy. This expedient, as we have previously indicated, was eminently successful. The supreme courts of those states, relying upon this phrase to distinguish the statutes before them from the Michigan statute, upheld the constitutionality of the declaratory action.[13] Moreover, the legislature of Michigan, duly impressed with the efficacy of these four words, inserted them in the rejected 1919 statute and re-enacted the measure.[14] Again the magic formula worked, for in 1930 the Supreme Court of Michigan sustained the act, rejoicing that the inclusion of the phrase prevented the courts of Michigan from becoming "a fountain of legal advice to fill the cups of loitering wayfarers."[15]

Meanwhile, in 1925, the case of *In re Kariher's Petition*,[16] challenging the constitutionality of the Pennsylvania declaratory judgment act, came before the Supreme Court of Pennsylvania. At that time, the Supreme Courts of California and Kansas had already sustained their respective declaratory judgment acts,[17] making, as we have noted, specific mention of the fact that those acts, unlike the Michigan Act of 1919, were applicable only in "cases of actual controversy." The Pennsylvania statute made no reference to "actual controversies". The Pennsylvania court, however, did not hesitate to remedy this alleged defect by declaring, in the *Kariher* case, that the court would not grant a declaratory judgment unless satisfied that an "actual controversy" existed between the parties. In New York State, the Supreme Court, Monroe County, essayed a similar task of judicial legislation. Although the New York declaratory judgment act[18] contained no

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[12]CAL. CODE CIV. PROC. (Deering, 1923) § 1060; KAN. REV. STAT. ANN. (1923) § 60-3127; KY. CODES ANN. (Carrol, 1927) Civil Prac. § 639; VA. CODE ANN. (Michie, 1930) § 6140a.

[13]Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495 (1923); Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1921); Patterson's Executors v. Patterson, 144 Va. 113, 131 S. E. 217 (1926).

[14](1919, re-enacted 1929) MICH. COMP. LAWS (1929) § 13903.

[15]Washington-Detroit Theatre Co. v. Moore, *supra* note 11, at 676, 229 N. W. at 619.

[16]284 Pa. 455, 131 Atl. 265 (1925).

[17]Blakeslee v. Wilson; Hopkins v. Grove, both *supra* note 13.

[18]N. Y. C. P. RULES § 212.

mention of an "actual controversy", the court maintained that the "constitutionality of . . . a declaratory judgment, where an actual controversy exists . . . is not open to question."[19]

This line of doctrine has now received the approval of the Supreme Court of the United States in *Nashville, Chattanooga and St. Louis Ry. Co. v. Wallace.*[20] The case arose when the railway company, alleging that a certain taxing measure of the State of Tennessee conflicted with the United States Constitution, brought a declaratory action against the comptroller of the state treasury in a chancery court of that state. The judgment of the chancery court sustaining the constitutionality of the tax had been affirmed, on appeal, by the Supreme Court of Tennessee, whence it was carried, by writ of error, to the United States Supreme Court. The Court, after hearing argument on the question "whether a case or controversy is present in view of the nature of the proceedings in the State Court," decided that the matter before them was entirely justiciable and affirmed the judgment of the state courts.

The opinion lays down a general test of justiciability. The Court announced that the mere novelty of the proceedings presented no difficulties because "the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies . . ."[21] On the contrary, the substance of the proceedings must be scrutinized before its justiciability can be established. The case must, in truth, retain "the essentials of an adversary proceeding involving a real, not hypothetical, controversy."[22] If the case does, in fact, present a "real controversy", the judicial power may act upon it, irrespective of its procedural form. It necessarily followed that a declaratory action possesses all the attributes of justiciability, if it involves a "real controversy".

Thus, the constitutional debate respecting the declaratory judgment has come to rest at the same point in the federal courts as in those of many of the states. The limitation of declaratory actions to cases of actual or real controversy may be regarded as the final result of the doctrine of the *Grannis, Willing* and *Anway* cases. Yet, if the requirement of an actual controversy as a condition precedent to declaratory relief be a result of those doctrines, it is, most emphatically, not their conclusion. The constitutional issues raised by those cases live on, hid-

[19]Board of Education v. Van Zandt, 119 Misc. 124, 127, 195 N. Y. S. 297, 300 (1922).

[20]288 U. S. 249, 53 Sup. Ct. 345 (1933).

[21]*Id.* at 264, Sup. Ct. at 619.

[22]*Ibid.*

den in the limiting phrase which they produced. In truth, the phrase "cases of actual controversy", whether placed in the declaratory judgment statutes by the legislatures or read into them by the courts, brings to the fore an all-important problem, the problem of the phrase's meaning and of its effect upon the usefulness of the declaratory action.

It will not be forgotten that when the Michigan court declared the declaratory action void as presenting no "actual controversy", it meant that such proceedings did not necessarily involve a wrong or threat of wrong. To the court, the term "actual controversy" retained its common-law meaning, broadened sufficiently to embrace within its scope actions for injunctive relief. The natural inference would, therefore, be that when legislatures and courts limited the declaratory action to cases of actual controversy, for the sole purpose of removing the constitutional difficulties raised by the *Anway* case, they intended to make the remedy available only in cases involving wrongs or threatened wrongs. We should, in fact, be justified in concluding that the attempt to establish a new type of preventive relief had been abandoned and that the declaratory judgment was to become merely a milder alternative remedy for wrongs and a means of providing additional judicial relief for threatened wrongs.

Whether or not the term, "real controversy", as used in the *Wallace* case, actually places such limitations on the declaratory judgment remains an open question, because the Court has not vouchsafed a definition of the phrase. Yet, one passage in the opinion points to the conclusion that the Court does consider a wrong or threatened wrong an essential element of a "real controversy." In affirming its ability to take jurisdiction of that case, the Court took care to limit the scope of its decision. The Court, in fact, recognized that the railway company might have brought its suit in the form of a proceeding for injunction. The opinion, consequently, declared "the narrow question presented for determination is whether the controversy before us, which wonld be justiciable in this Court if presented in a suit for injunction, is any less so because through a modified procedure appellant has been permitted to present it in the State courts without praying for an injunction or alleging that irreparable injury will result from the collection of the tax."[23] The considerations thus set forth may well have been decisive with the Court. Perhaps the Court intended to say no more than that declaratory actions possess justiciability whenever they involve threats of wrong or, we may confidently add, wrongs. Under this view, the "real controversy" mentioned in the opinion constitutes a controversy involving a wrong or threatened wrongs. These specula-

[23] *Supra* note 21, at 262, Sup. Ct. at 618.

tions would lead to the conclusion that the *Wallace* case does not, after all, overthrow the doctrines of the *Grannis* and *Willing* cases.

The meaning to be attached to the term, "actual controversy," as used in the state statutes and by the state courts does not, however, offer so fertile a field for speculation. The legislatures of Kansas and Virginia have given content to the phrase by incorporating in their declaratory judgment acts[24] the definitive expression, "actual antagonistic assertion and denial of right." Cases of actual controversy, therefore, are, within the meaning of the statutes, cases of "actual antagonistic assertion and denial of right." In similar vein, the Supreme Court of Pennsylvania, when called upon to explain the nature of the "actual controversy" which it had declared an essential prerequisite to declaratory relief, stated that such a controversy appears when the differences between the parties have reached the stage of antagonistic claims actively pressed on one side and opposed on the other.[25] In brief, under both definitions the term "actual controversy" means a verbal dispute over rights.

No painstaking analysis will be required to show that both definitions attach a meaning to the words "actual controversy" considerably different from that intended by the Michigan court. Neither of the new meanings makes a wrong or threatened wrong an essential element of an "actual controversy." Quite obviously, the conception of an "actual controversy" presented by the *Anway* case is narrower than that implied in the words, "actual antagonistic assertion and denial of right" or "antagonistic claims actively pressed and opposed." Thus, the legislatures and the courts, while adopting the words of the Michigan court, rejected its meaning. By broadening the conception of an "actual controversy," they have made the declaratory action something more than a mere alternative remedy for wrongs and an additional remedy for threatened wrongs. That procedure, although limited to cases of actual controversy, can be employed in any dispute, in any case of "actual antagonistic assertion and denial of right," whether a wrong or threat of wrong has occurred or not.

Yet the mere fact that *Anway v. Grand Rapids Railway Company* directly or indirectly caused the limitation of declarations to "cases of actual controversy" suffices to prove its importance. Although the narrow definition of the phrase employed in that case has been repudiated, the phrase in itself guarantees that the reasoning therein expressed and the conception of judicial power therein entertained will continue to limit the usefulnes of the declaration. In truth, the alteration in the

[24] *Supra* note 12.

[25] *In re* Cryan's Estate, 301 Pa. 386, 152 Atl. 675 (1931).

meaning of "actual controversy" does not touch the underlying argument of the *Anway* case. The Michigan court considered executory actions as the only appropriate occasions for an exercise of judicial power. The phrase, "actual controversy," even with its new meaning, seeks to model the declaration after the executory action.

The truth of this assertion becomes apparent upon examination of this new definition of a "controversy." An "actual antagonistic assertion and denial of right," the statutory formula, and the phraseology of the Supreme Court of Pennsylvania, "antagonistic claims . . . actively pressed and opposed," possessed substantially the same meaning. To satisfy either definition, there must be affirmative action by both parties. According to the statutory phrase, the "actual" assertion of right must be met by an "actual" denial. Under the doctrine of the Pennsylvania court, the "antagonistic claims" must be *actively* opposed as well as pressed. It follows, in strict logic, that plaintiff *A* cannot secure a declaration of his rights unless defendant *B* has denied them, or, to use the Pennsylvania formula, has actively opposed them. It is, therefore, an act of the defendant *B,* i.e., his denial of right or active opposition, which vests in the plaintiff *A,* a right of action. Thus, defendant's *behaviour* constitutes an essential element of the cause of action.[26]

The resemblance between such a cause of action and those which give rise to executory actions becomes at once apparent. The right to sue for damages, for example, does not vest until defendant has committed a tort. An injunction cannot be secured unless defendant has threatened a wrongful act. Detinue can be maintained only when defendant wrongfully refuses to relinquish possession of a chattel. Defendant's wrongful taking, coupled with refusal to return, constitutes grounds for replevin. In all such actions, defendant's behaviour, his wrongful act, constitutes an indispensable element of the cause of action. In declaratory actions limited to cases of "actual controversy," defendant's denial of right or opposing claims, although not a wrong in the technical sense, comes to occupy a very similar position in the aggregate of facts which bestows a right of action upon the plaintiff. Thus, by virtue of this limitation, the declaratory action becomes, like the executory, a remedy for an act of the defendant.

No one can deny that defendant's behaviour, his wrongful acts,

[26]Thus, the Supreme Court of Pennsylvania has announced that, in declaratory actions, it will not decide questions which are not controverted. *In re* Brown's Estate, 289 Pa. 101, 137 Atl. 132 (1927). And to controvert means "to dispute; to deny; to oppose or contest; to take issue on". Reese v. Adamson, 297 Pa. 13, 16, 146 Atl. 262, 263 (1929).

must condition the right to bring an executory action. That result flows, logically, from the purpose which those actions seek to fulfill. The purpose of an ordinary action for damages, for example, is to give compensation for an injury, i.e., for defendant's wrongful act. Manifestly, defendant's wrongful act must, in that case, constitute an element of the cause of action, for plaintiff has no right to damages without it. The same principle applies to other executory actions, such as replevin, specific performance, injunction proceedings, *etc.* The redress of a wrongful act, or the prevention of one immediately threatened, constitutes their entire purpose and effect. If that wrong has not been committed, or threatened, the remedy, being patently inappropriate, remains unavailable to the plaintiff.

There can be no reason, however, for applying the same principle to the declaratory action. A declaration does not purport to be solely a remedy for a particular kind of behaviour. It is designed neither to force defendant to act, nor to restrain him from acting, nor yet to levy damages upon him for a tort. On the contrary, the declaratory judgment seeks merely to quiet doubtful legal relationships. The authoritative determination of uncertain legal relations constitutes its salient function, irrespective of the source of the uncertainty. Consequently, the very purpose of the procedure demands that any circumstance which casts substantial doubt upon the plaintiff's rights or other jural relations shall constitute a sufficient cause of action, provided only that there be some party of adverse interest against whom the action may be brought. The emphasis should, therefore, lie upon the existence of an uncertainty in legal relationships rather than upon a hostile word or deed of the opposing party.

No one can deny that defendant's behaviour may be the circumstance or fact which renders plaintiff's rights uncertain. When a defendant, having the requisite legal interest, denies plaintiff's rights or actively presses a elaim antagonistic to them, it cannot be disputed that doubt has been cast upon those rights and that declaratory relief has become manifestly appropriate. But doubts, equally substantial and consequently equally sufficient to warrant a declaration, may arise with respect to plaintiff's rights although defendant has remained completely inactive both in deed and word. Ambiguities in contracts, wills, or leases may cast harassing doubt upon one party's rights although the other party has never actually asserted the antagonistic claims which the ambiguities seem to warrant. A single example will prove sufficiently illustrative. *A* has possession of a parcel of land under the terms of a will, but ambiguous provisions thereof make it doubtful whether he holds a fee or merely a life estate with a remainder interest in *B*. In

such a case, the fact that *B* did not deny *A's* right of full ownership would not relieve that right of the burden of doubt. On the contrary, the mere existence of the ambiguity constitutes a serious danger to *A's* full enjoyment of his rights because it reveals a basis for an attack on those rights. Thus, in this case, the ambiguity itself presents an adequate cause of action for declaratory relief, whether *B* actually denies *A's* rights or not.

It is in this respect that the similarity between the declaratory action, given its proper scope, and the bill *quia timet* appears. An "actual controversy", whether in the sense in which that term was used in the *Anway* case or in the sense of the statutes and the *Cryan* case,[26a] has never been a condition precedent to relief by a bill *quia timet.* The maintenance of the suit depends, in no wise, upon defendant's behaviour either by word or deed. On the contrary, the bill seeks merely to "quiet" title by removing "clouds" which prejudice that title. A "cloud" in legal parlance, is a semblance of title, either legal or equitable, or a claim of interest in land. Hence the proceeding is aimed at a particular instrument or piece of evidence which is dangerous to plaintiff's rights and which may be ordered to be destroyed.[27]

The mere existence of such a "cloud", therefore, constitutes a sufficient "cause of action" to warrant this type of relief, although no one has actually disputed the complainant's title. Indeed, the mere fact that a person had *verbally* disputed complainant's title did not, in the absence of a "cloud", give a right of action under the ancient rule of equity. In many jurisdictions, however, the long-established bill *quia timet* has been supplemented by a statutory action to determine adverse claims.[28] This statutory action will lie whenever a right, hostile to complainant's title, has been asserted, whether the asserted right be founded upon evidence, i.e., upon a "cloud" or not. Thus, an owner of realty has two remedies available for the purpose of quieting his title. If doubt be cast upon his title by the existence of a legal instrument hostile thereto, he may bring a bill *quia timet* and have the cloud removed, although no one verbally disputes his title. On the other hand, if some one disputes his title, he may resort to the courts in proceedings for the determination of adverse claims and force the disputant to submit the matter to adjudication.

Under similar circumstances, the declaratory action, given its proper scope, affords the same protection to legal relations generally. A declaration is a remedy appropriate, not only in cases of "actual con-

[26a] *Supra* note 25.

[27] WALSH ON EQUITY, (1st. ed. 1930) 541.

[28] *Id.* at 542.

troversy," but also in cases of substantial doubt or uncertainty. Whenever substantial doubt exists with respect to rights, a declaration should be granted whether or not that doubt has its origin in assertions of adverse claims, in the ambiguous phraseology of written instruments, or merely in operative facts which, de facto, render the rights of plaintiff insecure. In declaratory proceedings, therefore, the court need not inquire whether or not the suit grows out of an "actual controversy." It need only ascertain that defendant has "a true interest to oppose the declaration sought,"[29] and that the jural relations between the parties are in such a state of uncertainty as to require stabilization. If such a situation exists, it becomes the duty of the court to throw around that relationship the protection of res judicata.

Perhaps the most concise statement of the proper scope to be given the declaratory judgment has been vouchsafed by the Court of Appeals of New York. In *James v. Alderton Dockyards*[30] the court pointed out that "the general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain *or* disputed jural relationship either as to present or prospective obligations."[31] Thus, the Court of Appeals acknowledged the declaratory judgment's dual purpose. Viewing the declaration as a remedy designed to stabilize jural relationships, it recognized that logically such relief must be made available, not only in cases of dispute, but in cases of uncertainty. Hence, the court did not hesitate to pronounce the declaratory judgment an appropriate remedy for both types of cases. In so doing, the Court of Appeals not only defined, concisely, the declaration's proper scope but indicated its own belief that the courts can constitutionally undertake to quiet, not only title, but all jural relationships whatsoever.

The issue thus raised, being simply whether the declaration shall be modelled upon the executory action or whether it shall follow the principles of *quia timet,* will gain precision if examined in the light of a few representative cases in which declaratory relief has been granted. Perhaps the most striking fact revealed by a survey of the cases is the frequency with which declarations have been either substituted for executory actions[32] or demanded in conjunction therewith.[33] In the

[29]Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, [1921] 2 A. C. 438.

[30]256 N. Y. 298, 176 N. E. 401 (1931).

[31]Id. at 305, 176 N. E. at 404; *cf.* Bramann v. Babcock, *supra* note 10. Bramann v. Babcock, *supra* note 10.

[32]Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495 (1923); Stueck v. Murphy, 107 Conn. 656, 142 Atl. 301 (1928); Johnson v. Mortenson, 110 Conn. 221, 147 Atl. 705 (1929); Miller v. Siden, 259 Mich. 19, 242 N. W. 823 (1932); Naugle

former class of cases, the plaintiff had a cause of action, in the usual sense of that term, for damages,[34] an injunction,[35] or other coercive relief,[36] but contented himself with the milder and less cumbersome declaration. In the latter class, the plaintiffs combined a prayer for a declaration with a demand for coercive relief in order to take advantage of the fact that courts will frequently grant a declaration of rights although they dismiss the prayer for coercive relief on technical grounds.[37] In both types of cases, an "actual controversy" exists in the strictest sense of that term, i.e., a controversy centering around a wrong or threatened wrong. In such causes, the courts need not, or do not, demand an "assertion and denial of right," for the conflict between the parties appears on the face of the proceedings. Thus in a

v. Baumann, 96 N. J. Eq. 183, 125 Atl. 489 (1924); Hewitt v. Camden Co., 7 N. J. Misc. 528, 146 Atl. 881 (1929); St. John's Baptist Society v. Ukranian Nat'l. Assn., 105 N. J. Eq. 69, 146 Atl. 886 (1929); Leibowitz v. Bickford Lunch System, 241 N. Y. 489, 150 N. E. 525 (1926); Bareham v. City of Rochester, 246 N. Y. 140, 158 N. E. 51 (1927); Pathe Exchange v. Cobb, 202 App. Div. 450, 195 N. Y. S. 661 (3d Dept. 1927); Loesch v. Manhattan Life Ins. Co., 128 Misc. 232, 218 N. Y. S. 412 (1927); Allen v. Carstead Realty Co., 133 Misc. 359, 231 N. Y. S. 585 (1929); National City Bank v. Waggoner, 230 App. Div. 88, 243 N. Y. S. 299 (1st Dept. 1930); James v. Alderton Dockyards, 256 N Y. 298, 176 N. E. 401 (1931); Pratter v. Lascoff, 140 Misc. 211, 249 N. Y. S. 211 (1931); Wingate v. Flynn, 139 Misc. 79, 249 N. Y. S. 351 (1931); Cupp Grocery Co. v. City of Johnston, 288 Pa. 43, 135 Atl. 610 (1927); Evans Co. v. Baldridge, 294 Pa. 142, 144 Atl. 97 (1928); Malley v. American Indemnity Corp., 297 Pa. 216, 146 Atl. 571 (1929).

[33]Siegel v. Wise, 114 Conn. 297, 158 Atl. 891 (1932); Sternburger v. Tunison, 92 N. J. Eq. 159, 111 Atl. 309 (1920); Union Trust Co. v. Goerke Co., 103 N. J. Eq. 159, 142 Atl. 560 (1928); Butterick Pub. Co. v. Fulton & Elm Leasing Co., 132 Misc. 366, 229, N. Y. S. 86 (1928); Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Ogden v. Riverview Holding Co., 134 Misc. 129, 234 N. Y. S. 147 (1929); Sloan v. Longcope, 288 Pa. 196, 135 Atl. 717 (1927).

[34]Blakeslee v. Wilson; Stueck v. Murphy; Johnson v. Mortenson; Leibowitz v. Bickford Lunch System; Loesch v. Manhattan Life Ins. Co.; Allen v. Carstead Realty Corp.; National City Bank v. Waggoner; James v. Alderton Dockyards; Malley v. American Indemnity Corp., all *supra* note 32.

[35]St. John's Baptist Soc. v. Ukranian Nat'l. Assn.; Bareham v. City of Rochester; Pathe Exchange v. Cobb; Pratter v. Lascoff; Cupp Grocery Co. v. City of Johnston; Evans Co. v. Baldridge, all *supra* note 32.

[36]Miller v. Siden (replevin); Naugle v. Baumann (foreclosure); Hewitt v. Camden Co. (ejectment); Wingate v. Flynn (mandamus), all *supra* note 32.

[37]As, for example, Baumann v. Baumann, *supra* note 33, where plaintiff asked a declaration that she was the wife of one of the defendants and that the Mexican divorce secured by that defendant was void. She also asked the court to enjoin the defendants from living together as man and wife. The court granted the declaration but refused the injunctive relief prayed. *Cf.* Siegel v. Wise, *supra* note 33.

very large number of cases the courts are not required to consider the problem here under discussion.

A second class of cases, but slightly larger than the first, comprises cases of "actual controversy" in the modified sense connoted by the words, "assertion and denial of right." In all such cases, a dispute over rights or other jural relationships had occurred between the parties and the plaintiff invoked the judicial power to resolve this controversy. In none had plaintiff a cause of action for coercive relief, although in some, involving negative declarations, a right of action had vested in the defendant. This group of cases, therefore, represents the use of the declaratory judgment as a form of preventive relief in controversies which have only reached the stage of a verbal dispute.

The disputes thus submitted to the courts are many and varied. The terms of leases, wills, deeds and contracts constitute matters particularly susceptible to dispute and, therefore, may be readily adjudicated in declaratory proceedings even when the declaration is limited to "cases of actual controversy." We are not here concerned with the variety of situations in which declaratory relief has been given. Instead, we confine ourselves to the problems centering around the phrase "actual controversy." To give an account of each case would, therefore, be more wearisome than enlightening. It seems more profitable to essay a classification of the cases and to treat ouly the most representative cases of each class.

Although the mass of declaratory actions involving "assertions and denials of right" presents considerable resistance to a logical classification, one group, composed of negative declaratory actions, may be segregated from the remainder with ease. The salient feature of all these cases lies in the fact that a cause of action for coercive relief has alrcady vested in the *defendant*. The plaintiff (prospective defendant), therefore, sues, not to establish a right in himself, but to secure a judgment declaring that he owes no duty to the defendant (prospective plaintiff). Thus, the plaintiff asks the court to declare that the defendant has not, in actual fact, a remedial right to coercive relief against him.

An excellent example of such a negative declaratory judgment may be found in the case of *McCrory Stores Corporation v. Braunstein, Inc.*[38] The plaintiff corporation occupied a certain store as lessee of Braunstein, Inc. The lease between the parties provided that the lessee should "pay all the increases in taxes on and after October 27, 1920." The taxes for 1920, which, although levied be-

[38]102 N. J. Law 590, 134 Atl. 752 (1926).

fore, fell due after October 27, 1920, were substantially higher than those of 1919. The defendant, therefore, demanded that McCrory Stores Corporation pay that increase, pointing to the lease provision. The latter, alleging that the terms of the lease required it to pay only the increases in taxes levied after the stated date, refused and brought a declaratory action against Braunstein, Inc. The facts of the case, therefore, make it clear that the defendant had a right to sue the plaintiff for damages arising from the alleged breach of the lease. Plaintiff lessee's entire purpose in bringing the action was to terminate the controversy and to protect itself from future litigation.[39]

Although the plaintiff seeking such a negative declaration has not been injured by the defendant, the relation between the parties obviously constitutes an actual controversy in the strict sense of that term. Hence, while plaintiff's right of action is derived from the fact that defendant has *asserted* a right against him and, therefore, the action arises from an "assertion and denial of right," yet such negative declaratory actions remain but executory actions with the parties reversed. The mere fact that the parties come before the court in capacities different from those which they would occupy in an executory proceeding does not alter the nature of the controversy between them. Thus, this type of declaratory action has an appearance of novelty, but actually requires the courts to perform nothing more than they have done from time immemorial—namely, adjudicate controversies growing out of wrongful acts.

We turn now to those controversies which involve merely an "assertion and denial of right" and nothing more. A clear-cut example of such a controversy may be found in *Aaron v. Woodcock*.[40] The plaintiff had leased a certain property from the defendant for ten years. Under the terms of the lease, the rent was set at $600 per month for the ten-year period with a proviso that the lessee should have the "privilege of re-leasing. . . (the property) at the yearly rental of $7,200 payable monthly at $600 per month." At the expiration of the original lease, the lessee sought to exercise his option. During the ensuing negotiation, a controversy arose between the parties, the lessee asserting that he had a right to a new ten-year lease and the lessor alleging that the above proviso en-

[39] *Cf.* Cloverdale Union High School District v. Peters, 88 Cal. App. 731, 264 Pac. 273 (1928); Town of Greece v. Murray, 130 Misc. 55, 223 N. Y. S. 606 (1927); Sartorius v. Cohen, 249 N. Y. 31, 162 N. E. 575 (1928); Ufa Films v. Ufa Eastern Div., 134 Misc. 129, 234 N. Y. S. 147 (1929).

[40] 283 Pa. 33, 128 Atl. 665 (1925).

titled the lessee to a one-year re-lease only. This dispute the court resolved by a declaration in favor of the defendant, before a wrong had been committed by either party.[41]

The same type of controversy is presented by *Brokaw v. Fairchild et al.*[42] The plaintiff had a life-estate under a will, in a certain property upon which stood an old-fashioned, brown-stone residence. Plaintiff wished to demolish this building and erect an apartment house on the property, but the remaindermen denied his right to do so, alleging that the demolition would constitute waste. Brokaw, thereupon, brought the action for a declaration of his right to destroy the old structure and erect the new.[43] Here again, the controversy between the parties involved nothing more than an "assertion and denial of right."

Another class of cases in which the declaratory judgment has been widely used involves restrictions on the use of property. Usually such cases present controversies concerning the validity either of restrictive provisions in deeds[44] or of easements[45] or zoning ordinances.[46] The plaintiffs in these cases desired to use their property in a manner forbidden by the restrictive clauses, while the defendants not only denied their right to disregard the provisions, but also threatened suit. The controversies, therefore, possessed an indubitable reality and, unless settled by a declaration, seemed likely to result in future suits for executory relief.

It must be quite clear that in all the cases previously discussed, the interests of the parties to the controversy were distinctly adverse. In many of them,[47] one of the parties could have availed himself of an

[41]Similar controversies involving leases: Braun v. McLaughlin Co., 93 Cal. App. 116, 269 Pac. 191 (1928); McFadden v. Lick Pier Co., 101 Cal. App. 12, 281 Pac. 429 (1928); Wright v. Wright Mining & Royalty Co., 137 Kan. 619, 21 P. (2d) 350 (1933); Fidelity & Columbia Trust Co. v. Levin, 128 Misc. 838, 221 N. Y. S. 269 (1927); Simkin v. Blum, 131 Misc. 365, 226 N. Y. S. 702 (1928); Bard v. Columbia University Club, 243 N. Y. 609, 171 N. E. 803 (1930).

[42]135 Misc. 70, 237 N. Y. S. 6 (1929).

[43]Similar controversies involving wills: Dodge v. Campbell, 128 Misc. 778, 220 N. Y. S. 262 (1927); B'nai Braith Orphanage v. Roberts, 284 Pa. 26, 130 Atl. 298 (1925); *In re* Brown's Estate, 289 Pa. 101, 137 Atl. 132 (1927); *In re* Kidd's Estate, 293 Pa. 21, 141 Atl. 644 (1928); *In re* Cryan's Estate, 301 Pa. 386, 152 Atl. 675 (1931).

[44]Satterthwait v. Gibbs, 288 Pa. 428, 135 Atl. 862 (1927); Brown v. Levin, 295 Pa. 530, 145 Atl. 593 (1929); Henry v. Eves, 306 Pa. 250, 159 Atl. 857 (1931).

[45]Rochex & Rochex, Inc. v. Southern Pacific Co., 128 Cal. App. 474, 17 P. (2d) 794 (1932); Garvin & Co. v. Lancaster Co., 290 Pa. 448, 139 Atl. 154 (1927).

[46]Taylor v. Haverford Township, 299 Pa. 402, 149 Atl. 639 (1930).

[47]Cases cited *supra* notes 32, 33, 38, and 39.

executory action. In the remainder,[48] although no "cause of action," in the ordinary sense, had accrued, the dispute between parties unless resolved by a declaration must inevitably have led to litigation. Thus, these causes wear all, or nearly all, of the panoply of legal warfare.

A few cases of "assertions and denials of right" do not, however, appear to involve actual hostility between the original parties to the controversy. In this category must be placed *In re Kariher's Petition.*[49] In that case, three persons who claimed to be owners in fee of a certain farm negotiated a lease for quarrying the sub-surface limestone thereof. The proposed lessee, after examining the wills under which the three lessors claimed, declined to take, asserting that one of the lessors had only a life-estate, not a fee simple. The lessor whose right was thus denied brought an action against the lessee and the alleged remaindermen for a declaration of rights. An analogous situation may be found in the case of *In re Smith's Petition.*[50] There the children of one Mrs. Bennett, claiming to own a parcel of land by virtue of their mother's will, contracted to sell the property to the petitioner, Smith. A question then arose whether or not the will in question actually gave the sellers a fee in the property. Smith asserted that the sellers had merely a life-estate and, forthwith, instituted a declaratory action against them and other interested parties.

No one will deny that an "actual controversy", i.e., an "assertion and denial of right," existed between the parties to both of these cases. Neither can it be disputed, however, that strictly speaking the parties to that controversy had no adverse interests. There is no evidence to show that either Smith or the lessee in the *Kariher* case really desired to break their respective bargains. Nothing in the factual set-up of the cases indicates that the respective "denials of right" were advanced as a convenient means of upsetting those agreements. On the contrary, the facts seem to show that both parties in each case actually desired to consummate the bargains. The lessee in the *Kariher* case and the buyer in the *Smith* case, however, wanted to be certain that the other contracting parties actually had the legal right to make the respective contracts. A defect in the titles of these latter parties would absolutely vitiate the contracts. Prudence dictated, therefore, that the validity of those titles be finally established before the contracts were consummated.

Consequently, it seems very apparent that both actions resulted from a desire to settle dubitable legal relationships rather than from a

[48]Cases cited *supra* notes 40 to 46 inclusive.

[49]*Supra* note 16.

[50]291 Pa. 129, 139 Atl. 832 (1927).

"controversy." The parties who "denied" the respective rights had no actual interest in securing the overthrow of those rights. The parties who had a true interest in "denying" the rights of the alleged owners, i.e., those parties who might claim remainder interests, did not, in fact, dispute them. The controversy, the "assertion and denial of rights," constituted in both cases a mere formality. The actions represented, in reality, applications of the principle of quia timet. Both Smith and Kariher's proposed lessee denied the rights of their respective opposing parties *because they feared* to fulfill their contracts without an authoritative adjudication of those rights. Each desired a judgment which would banish his fears by determining finally the exact legal relationship between the other party to his contract and those third parties who might have an interest in the property, as remaindermen. The *Smith* and *Kariher* cases, therefore, represent a kind of bill *quia timet* disguised as an "actual controversy."[51]

The cases heretofore discussed show that the declaration may be employed in four types of actions. In the first place, it may generally be substituted for, or used as a supplement to, an executory action. Secondly, the declaratory action in its negative form is available to a prospective defendant against the party in whose favor a cause of action, in the ordinary sense, has accrued. Thirdly, it may be employed to resolve actual, antagonistic disputes over jural relationships before a wrong has been committed. Finally, the declaration will be granted in order to quiet doubtful legal situations, *if the matter can be cast in the form of an "actual controversy."* All these categories quite obviously fall within the scope of the term, "actual controversy."

The test of the net effect of the "actual controversy" requirement upon the declaratory action, however, would come in those cases where the plaintiff invoked the courts for a determination of doubtful jural relationships *before a controversy had arisen.* In such cases, there could be no "actual controversy," no "assertion and denial of right." On the contrary, the plaintiffs would be merely harassed by doubts concerning their rights and would bring the action under the principles of *quia timet,* to have those doubts removed. The defendants in those actions would be joined, not because they denied or controverted plaintiff's rights, but because they had interests adverse to the plaintiffs' in the matter, i.e., because they had "a true interest to oppose the dec-

[51] *Cf.* State *ex rel.* Enright v. Kansas City, 110 Kan. 603, 204 Pac. 690 (1922), where plaintiff state law-officer denied defendant city's right to issue certain bonds because of "ambiguities" in the governing statutes. Here, again, a declaration of rights was given in order to resolve a doubtful jural situation, with the "actual controversy" amounting to little more than a formality.

laration sought".[52] In such cases, the courts would be required to determine whether an "actual controversy" is an absolute prerequisite to declaratory relief, or whether a substantial doubt or uncertainty will suffice.

On the whole, the courts have not frequently faced this problem because the declaratory actions brought before them do, in fact, usually involve some kind of dispute. Data, sufficient to warrant a dogmatic answer to the question, cannot, therefore, be found. Yet the pertinent cases do appear to indicate that the courts, following the strict logic of the "actual controversy" requirement, deem a dispute essential to declaratory relief. In *Wardrop Company v. Fairfield Gardens,*[53] a prospective purchaser of land had refused to complete the bargain because he feared that certain restrictive covenants running with the land forbade his erecting a hospital upon it. The prospective vendor, in order to remove this doubt, immediately brought an action against adjacent property owners for a declaration that the covenants would not prevent the construction of a hospital. Because none of these defendants had actually controverted the right claimed by the plaintiff, the court declared that the case presented no real controversy, and refused a declaratory judgment.

The case of *Di Fabio v. Southard,*[54] presents a somewhat similar situation. There, the vendee of a house and lot refused to fulfill his contract, asserting that the house in question did not comply with the building restrictions of the subdivision in which it was located. The owner of the property, joining only the adjacent property owners as defendants, sought a declaratory judgment that the house complied with the restrictions. The court refused the declaration on the ground that the controversy existed between plaintiff and his vendee, not between plaintiff and the adjacent owners.

In *Lyman v. Lyman,*[55] the absence of a dispute again prevented the plaintiff from securing declaratory relief. Plaintiff sought a declaratory judgment that a will, purporting to give him a life-estate in certain lands with the remainder to his heirs, operated legally to vest him with a fee simple, by virtue of the rule of *Shelley's Case.* In bringing his suit, he joined, as defendants, his living heirs, none of whom had contested his claim. The court, advancing two major objections to the case before them, refused declaratory relief. The first of these found its basis in the fact that plaintiff's unborn children were un-

[52] *Supra* note 29.
[53] 237 App. Div. 605, 262 N. Y. S. 95 (1st Dept. 1933).
[54] 106 N. J. Eq. 157, 150 Atl. 248 (1930).
[55] 293 Pa. 490, 143 Atl. 200 (1928).

represented. Since courts generally decline to grant declaratory judgments when all interested parties are not joined, no criticism can be levied at the principle of this objection. The court's second objection to the case, however, revolved around the absence of an actual controversy. The court deemed the case inappropriate for declaratory relief because neither the defendant heirs nor *any prospective purchaser* had disputed plaintiff's claim. Thus, the absence of a controversy appeared to the court an insuperable barrier to relief by a declaration of rights.

Upon the opposite side of the ledger must be entered the cases of *Trenton Saving Fund Society v. Wythman*[56] and *Muskegon Heights v. Danegelis*,[57] neither of which involved a controversy. In the former, the complainant society asked a declaration of the effect of a certain law regulating wills upon powers granted the society in its charter. Under that charter, the society was authorized to keep a book in which depositors might place the names of persons to whom their deposits should be paid in the event of the depositors' dying intestate. The legislature of New Jersey had enacted a new "wills act", which, it was alleged, conflicted with these charter provisions. The society brought the declaratory action against three persons whose names appeared in the book, simply to resolve the doubtful legal situation with no suggestion that any of the defendants had, in any way, controverted the complainant's legal rights or advanced claims hostile thereto. Although no controversy appeared on the record, the court granted the declaration sought.

In the second case, *Muskegon Heights v. Danegelis,* the plaintiff city had issued bonds for poor-relief. A prospective purchaser questioned the power of the city under its charter to issue bonds for that purpose. Thereupon, the city commenced this declaratory action against two principal tax-payers, asking the court to declare the bonds valid. Neither of these defendants had questioned the validity of the bonds. The prospective buyer, and he alone, actually questioned the city's authority to issue such bonds. Thus, as far as the proceedings before the court are concerned, the action constituted merely an attempt to terminate an uncertainty rather than to resolve a controversy. Nevertheless, the court sustained the use of the declaration under the circumstances.

These cases possess, perhaps, less significance than a recitation of their facts seems to warrant. The *Wythman* case arose in a court of equity because complainant was held to be a trustee. The proceedings,

[56]104 N. J. Eq. 271, 145 Atl. 462 (1929).
[57]253 Mich. 260, 235 N. W. 83 (1931).

therefore, bore a resemblance to a trustee's bill for advice. This similarity might well have been the underlying reason for the court's granting the declaration, although no dispute had arisen between the parties.[58] The force of the *Danegelis* case is also weakened by the fact that the court seemed to consider the case very unusual. Indeed, it felt the necessity for justifying the use of the declaration under the circumstances. Thus, the tribunal pointed out that "under former practise a friendly suit would have been brought, entertained and right in the matter adjudicated."[59] Moreover, the questions involved were "of great public moment" and, consequently, the declaratory action "must be permitted to serve in this instance."[60] The conclusion seems inescapable that the court had no intention of opening wide its doors to non-controversial declaratory actions. It seems rather to have regarded this type of case as a kind of exception to the general rule.

It must be obvious that, were the declaration administered under the principles of the bill to remove clouds, all the cases mentioned above would be deemed appropriate for declaratory relief. In those cases, the declaratory judgment, by banishing the plaintiffs' doubts, by casting around their rights the protection of *res judicata,* would have converted uncertainty into security. The plaintiffs would, in fact, have been given authoritative decisions under the cover of which they could have exercised their rights, unharassed by possible hostile claims. Briefly stated, the respective judgments would have removed the clouds on the plaintiffs' rights. The achievement of such results constitutes the salient purpose of the declaratory action. Yet the cases were treated as improper for declaratory relief. The plaintiffs were informed they could expect no aid from the judicial power until they joined, as defendant, someone who had disputed their claims of right. The courts thus closed their eyes to the uncertainty in legal relationships revealed by the facts of the cases and saw only the absence of a dispute between the parties. The final result was that the cases came to nought, with the consequent waste of time and money.

The serious results of the "actual controversy" requirements do not, however, fully appear in the *Southard* and *Fairfield Gardens* cases. The court's dismissal of the former case did not entirely deprive plaintiff of declaratory relief because his controversy with the vendee could be made the basis for a new declaratory action. While no con-

[58]On the other hand, the Supreme Court of Pennsylvania dismissed *In re* Sterrett's Estate, 300 Pa. 116, 150 Atl. 159 (1930), for want of a controversy, notwithstanding the similarity between that case and a trustee's bill for advice.

[59]Muskegon Heights v. Danegelis, *supra* note 57, at 265, 235 N. W. at 84.

[60]*Ibid.*

troversy had yet occurred in the *Fairfield Gardens* case, the facts of the case indicated that a dispute could easily be brought about. Not only plaintiff vendor but also his prospective vendee desired a judgment which authoritatively answered the question whether or not plaintiff could lawfully erect a hospital on his property. Indeed, it was the vendee who had raised this question. Here, then, existed the foundation for a friendly suit between the vendor and his vendee similar to the one presented in the *Kariher* case.[61] Merely by denying the vendor's right to build a hospital on his property, the vendee could make possible a declaratory action in which the doubts harassing both parties might be removed. The fact that two parties desired a declaratory judgment thus made possible a friendly controversy and mitigated the severity of the court's action in dismissing the *Fairfield Gardens* case.

But what relief can be expected by a person who has no such friendly opponent to dispute his rights? *Lyman v. Lyman* both affords the answer to that question and completely illustrates the pernicious effects of the "actual controversy" limitation. Notwithstanding the serious clouds on plaintiff's right and the presence of parties having adverse interests, the absence of a dispute operated to deprive him of declaratory relief. The opinion, it is true, suggested that he might secure a declaration if some hypothetical prospective purchaser denied his title. This purchaser, like the vendee in the *Fairfield Gardens* case, would have an interest in plaintiff's securing a judgment because the validity of his own purchase would depend upon the soundness of plaintiff's title. Since a declaration would give him security, the purchaser could be expected to make the "denial of right" necessary to confer upon plaintiff a cause of action for declaratory relief. This friendly suit, however, might remain forever impossible, because plaintiff might never attempt to sell the property. In that eventuality, he could obtain no declaratory relief unless the possible remaindermen controverted his title. But the remaindermen, unlike the prospective vendee, had no pressing need for a declaration of the plaintiff's rights in the land. On the contrary, they might prefer to wait indefinitely for an adjudication of the question existing between themselves and the plaintiff. Parties so situated might, in truth, intend to deprive the plaintiff of declaratory relief altogether in order to force him either to forego the exercise of his rights or to exercise them at the peril of a future executory action. Adverse parties, hoping to mulct a plaintiff for damages in an executory action, would be careful not to dispute his rights and thus give him grounds for a declaratory action in which

[61] *Vide supra* pages 19, 20.

the rights of all parties would be fixed and the possibility of future wrongs removed.

Although the *Lyman* case does not, in fact, present adverse parties with such hostile intentions, it illustrates a grave difficulty arising from the "actual controversy" requirement. It demonstrates that, in the absence of a friendly disputant, the party whose rights are clouded by doubts remains absolutely at the mercy of the adverse parties so long as courts insist upon a controversy as the only ground for declaratory relief. Because such a party must wait until his rights have been disputed, he is powerless in the face of a party of adverse interest whose failure to controvert springs from a hostile, inequitable motive. In insisting upon an "actual controversy," courts have forgotten that the absence of controversy, in the sense of a verbal dispute, may reveal more real hostility between the parties than its presence. Indeed, nothing shows the absurdity of this limitation better than a comparison between the friendly disputes involving a vendor and vendee which meet the "controversy" requirement and the situation of hostility here envisaged, which the limitation renders non-justiciable.

The difficulty thus arising from the limitation could, of course, be mitigated by giving the adverse parties the alternative of "denying" plaintiff's rights, thus submitting the matter to declaratory adjudication, or of being thenceforth estopped from controverting them. Thus, the mere fact of defendant's silence in the face of plaintiff's "assertion of right" would bar the former from denying those rights in a future suit. But, obviously, when a declaratory action has been dismissed for want of a controversy, nothing on the record prevents the defendants from advancing hostile claims in a future suit. The judgment of the court, in fact, has no operation upon the substantive rights of the parties, for it merely announces that the court will not, in the existing action, declare those rights. There remains, of course, the broad doctrine of equitable estoppel which might be used to obviate these difficulties. Courts, impressed with the injustice inherent in the situation herein envisaged, might decide that equity and good faith prevented defendants, who had made no objection to plaintiff's claim of rights, from later controverting his rights in an executory action.

There is, however, no evidence that the courts will accept this line of reasoning. Nothing in the *Southard, Lyman,* and *Fairfield Gardens* cases points to such a solution of the difficulty. Indeed, the courts seem not to have recognized the existence of the problem. Moreover, were this doctrine adopted, it would constitute a palliation of the injustice rather than a complete remedy. The party forced to rely on estoppel would, necessarily, be required to establish the *fact* of his own previous

claim of right and of the opposing party's failure to dispute that claim. These acts would have occurred out of court. Their proof would involve the presentation of evidence and a finding of fact by the court. Obviously, the doctrine of estoppel, under these circumstances, gives the party whose rights are merely clouded by doubts a degree of security decidedly less than that afforded by the doctrine of res judicata. Only by res judicata could he be given the absolute security so necessary to the beneficial use of his rights.

The fact of the matter is that to give a party, situated as suggested above, an adequate degree of protection involves nothing less than the granting of declaratory judgments before a controversy has arisen between the parties. The party whose rights are clouded must be permitted to bring his action and join, as defendants, all adverse parties irrespective of whether or not they have controverted his claim of right. The courts must abandon the requirement of an "actual controversy" as a condition prerequisite to declaratory relief and allow the plaintiff, by bringing his action, to *force* a controversy before the court. The issues would thus be brought before the court, the rights of the parties litigated and both parties, after having had their day in court, would receive a binding declaration of their rights. If the adverse parties should assert hostile claims against the plaintiff in future litigation, he would need to present no evidence to show estoppel. The former judgment of the court, a matter of record, would constitute a complete bar to such claims. The issues would have been already decided; the questions of right forever closed.

It may be urged, however, that the courts, in seeking thus to give the plaintiff security, might commit a serious injustice against the adverse parties. The defendant in the ordinary actions coming before the courts has committed or at least threatened to commit an act hostile to plaintiff's rights. He is a wrong-doer, who meets retribution at the hands of the court. Having injured the plaintiff, he may not complain if the latter seeks redress through the processes of the law. But if the "actual controversy" requirement be abolished, persons who are entirely innocent of any wrongful act may be made defendants in declaratory actions. In fact, such persons may not have even verbally controverted plaintiff's claims. Why, it may well be argued, should such a person be forced into litigation? Why should he be made to bear the expenses and tribulations of a judicial trial merely because the rights of another are uncertain, when he has done nothing to render those rights precarious? Granted that such declaratory relief may be advantageous to the plaintiff (so the argument may run), does it

follow that courts must close their eyes to the burden thus cast upon the defendant?

This hypothetical argument possesses some merit in so far as it demonstrates that the declaration might cast a grave burden upon the defendant. We must, however, recognize two categories of defendants. One class, although having adverse interests, does not in fact claim any rights hostile to those of the plaintiff. Defendants of this class need not litigate the matter at all. They need but appear in court and disclaim, thereby saving themselves from an assessment of costs. By so doing, they suffer no loss, for they claimed no rights, while at the same time they give the plaintiff the security of res judicata, which he requires. The other class comprises those who not only have adverse interests but also claim rights which conflict with those of plaintiff. These defendants are, as we noted, forced to litigate the matter on the spot. But why should they not be required to do so? If the matter be not litigated in the declaratory proceeding, it will be tried in an executory proceeding, "after the fact," with the present defendant in the role of plaintiff. Unless the present plaintiff foregoes the exercises of the rights which he claims, the question is not *whether or not* the matter shall be litigated, but merely *when* it shall be litigated.

Indeed, this entire question may be reduced to simple terms. In the case of a conflict of rights between *A* and *B*, shall *A* or *B* determine the exact time of the submission of the matter to a court? When the declaratory action is available to "quiet" uncertain jural relations, *A* may determine the time of trial by bringing a declaratory action *before* exercising his asserted rights. If no declaratory judgment may be had, or even if the declaration is strictly limited to cases of "assertion and denial of right," *B* has the privilege of deciding when the courts shall be invoked, subject, of course, to the statute of limitations. It follows, therefore, that by allowing *A* to secure declaratory relief whenever he chooses, the courts confer on him no greater privilege than that which would be enjoyed by *B*, were there no declaratory judgment statute or were *A* required to wait until *B* had "denied" his rights before bringing a declaratory action.

This, however, is merely a partial answer to the argument outlined above. And, in truth, the mere fact that we have denominated the power to determine the time of suit, a "privilege"—and few would undertake to say otherwise—forbids our leaving the argument at this point. In strict justice, there can be no reason why either *A* or *B* should have an absolute power to determine the time for invoking the courts. Neither party is a wrong-doer, either in fact or theory. Consequently, there remains not the slightest shred of reason for giving

either party an advantage over the other. On the contrary, every reason exists for consulting the interests of both with respect to the time of trial.

The fact that the granting of a declaratory judgment rests in the discretion of the court makes such a result possible. When a declaratory action has been commenced, the court may, with perfect propriety, inquire whether or not the defendant has an objection to a trial of the matter at that time. If a valid objection be advanced, the court must then balance that objection against plaintiff's need for declaratory relief and determine whether the action should, nevertheless, proceed or whether justice requires that it be postponed. The sound discretion of the court would thus control the time of suit and prevent whatever injustice to the defendants exists in the plaintiff's unrestrained power to bring declaratory actions before the occurrence of a dispute.

It appears, therefore, the refusal to declare rights in case of doubt, as contradistinguished from cases of controversy, constitutes a wholly unnecessary and pernicious curtailment of the declaratory judgment's usefulness. The beneficent, flexible use of this proceeding demands an abolition of the "actual controversy" requirement and a recognition of the true nature of the action as a kind of bill to remove clouds from all legal relationships. At the present moment, statutory phraseology and judicial precedents stand in the way of this clear-cut solution. The remedy, therefore, lies in the direction of a reconstruction of the term "actual controversy." Fortunately, the materials for this work are already at hand. The Supreme Court of Tennessee has brought forward in the case of *Miller v. Miller*[62] a definition of a controversy which obviates the objections herein advanced. Speaking of the factual situations warranting declaratory relief, the court declared that "the only controversy necessary to invoke the action of the court and have it declare rights . . . is that the question must be real, not theoretical; the person raising it must have a real interest and there must be someone having a real interest in the question who may oppose the declaration sought."[63]

By accepting this definition of a "controversy," the courts would achieve by indirection precisely the same result as might have been directly effected by removing the requirement of a controversy. Indeed, the formula of the *Miller* case envisages a potential controversy rather than an existing controversy. A plaintiff being in doubt concerning his rights may, under this definition, bring a declaratory action by asserting them against someone "who may oppose the declara-

[62]*Supra* note 10.

[63]Miller v. Miller, *supra* note 10, at 487, 261 S. W. at 972.

tion sought." It is not necessary that the defendant actually dispute the plaintiff's claim. He need merely have an adverse interest in the question, i.e., the legal right to oppose the declaration. The plaintiff may secure a declaration if he can find a "proper contradictor, that is someone presently existing who has a true interest to oppose the declaration sought."[64] Thus, the formula of the *Miller* case requires merely that the parties have hostile interests in the question propounded. If the parties possess such interests, the manner in which the question arose, whether by a dispute or by doubt, is of no particular significance.

It seems incontestable, therefore, that an adoption of this definition would make the declaration available in cases of doubt even though the statutes or precedents limit that proceeding to "cases of actual controversy." The question remains, however, whether or not the courts will accept this solution. The doctrine of the *Miller* case represents a broad, liberal conception of the function of the declaration. Against that view is pitted judicial conservatism, the product of the judges' experience in the daily adjudication of "actual controversies" in the strict sense of that term. Because the greater portion of the litigation before them involves a collision between the parties, or at least a threatened collision, courts naturally view with a hostile eye any proceeding not presenting such elements. Indeed, we cannot state with any degree of certainty that the courts will remain content with a merely verbal dispute as proof of the hostility of the parties, for at least in one case, *Village of Grosse Pointe Shores v. Ayres*,[65] the existence of such a dispute was deemed insufficient to warrant relief.

The *Ayres* case constitutes, in fact, an excellent example of the conservative views. Ayres and others, all residents of the plaintiff village, dedicated land to the village for highway purposes. In the deeds of the dedicated lands, the defendants incorporated provisions which specified the exact position of the proposed highway and of the water and gas mains, and provided that if the village should violate any of the provisions, the land should revert to the original owners. The plans for the highway as finally adopted by the village provided that the water and gas mains should occupy a position different from that specified in the deeds, although the highway itself conformed in every way with those provisions. A dispute thereupon arose between the parties, the village contending that *none* of the restrictive covenants were valid. To settle this dispute, the village sought a judgment declaring *all* the restrictive provisions void. In giving judgment, however, the court re-

[64] *Supra* note 29.

[65] 254 Mich. 58, 235 N. W. 829 (1931).

fused to consider the question of the validity of the provisions affecting the position of the highway itself and confined itself to those covenants which dealt with the water and gas mains. The grounds put forth to justify this discrimination were two-fold. In the first place, the court asserted its incompetence to declare future rights. The second reason had its basis in the fact that plaintiff village did not intend to lay the highway contrary to the specifications and therefore—so concluded the court—no "actual controversy" existed with respect to the highway provisions.

It may be noted, in passing, that plaintiff's asserted right to construct the highway contrary to the specification was not a future right in the legal sense of that term. The essence of a future right may be found in the fact that its possessor has absolutely no power to exercise the right until a future date. If the village had the right to ignore the covenants, it could have exercised its right in the immediate present. The right in question, therefore, must have been a present right. Certainly the village's right did not become a future right merely because its possessor had voluntarily refused to exercise it in the present. Of more importance, however, is the fact that this case introduces an additional element into the concept of an "actual controversy." No one may deny that the dispute between the parties involved *all* the restrictions contained in the dedicatory deed. Ayres had denied the village's right to disregard any of those provisions. Were an "assertion and denial of right" the sole element of an "actual controversy", the actuality of the controversy with respect to each and every provision could not be questioned. But, according to this case, there remains another element. The party asking relief must intend to exercise immediately the right which he seeks to have declared. If such intention be wanting, there can be no "actual controversy."

This doctrine constitutes, in plain fact, a return to the conception of a controversy contained in the *Anway* case. The requirement of an "assertion and denial of right" gnaranteed, as we have pointed out, that there be a kind of collision between the parties somewhat similar to those presented by executory actions. The rule of the *Ayres* case requires in addition an actual wrong to have been threatened. For, if *A* announces his intention to exercise a right, the existence of which is disputed by *B,* the party of adverse interest, he in effect threatens to wrong *B*. Thus, in the *Ayres* case, the village's avowed intention to disregard the provisions governing the location of the water and gas mains constituted, in the eyes of Ayres and his co-defendants, a thrcat of wrong. No subtle analysis is required to show the similarity between the circumstances necessary to give rise to the declaration, when thus

limited, and those which constitute a cause of action for injunctive relief. In sober truth, the *Ayres* case, as it comes from the court's hands closely resembles a proceeding for an injunction with the parties reversed. Thus, the rule of the case makes the declaration somewhat of a counterpart to injunctive relief.

Here then is a conservative doctrine to be placed over against the liberal formula of the *Miller* case. Whercas the latter requires merely a potential controversy between parties of adverse interest, the former requires a present dispute amounting to a threat of wrong. The rule of the *Miller* case, by demanding, as a condition precedent to declaratory relief, merely the existence of the factual basis for a controversy, brings the declaratory action under the principles of the bill to remove clouds, for in every situation of real doubt there lurks a potential controversy. On the other hand, the *Ayres* case obviously ignores these principles and follows the conceptions proper only to executory actions. Thus, by following the former doctrine, the courts can mould the declaratory action into a flexible remedy for doubts in legal relationships. By adopting the latter view, they can confine the declaration within narrow bounds and curtail its usefulness. The final outcome rests, therefore, in the discretion of the courts. The solution they adopt will depend entirely on the extent to which they are dominated by the conservative conceptions growing out of the every-day litigation before them.

Only very tentative conclusions can, therefore, be drawn from our survey. We ean state that the simple issue of constitutionality no longer stands in the path of the declaratory action in the state jurisdictions. We can, perhaps, predict, with all due diffidence, that the Supreme Court of the United States will also sustain the constitutionality of the new federal declaratory judgment act. Certainly the *Wallace* case, which points to the existence of a "real controversy" as the sole criterion of justiciability, appears to be a clear precedent for upholding the validity of the declaratory judgment when limited, as in the act, to "cases of actual controversy." The closing of the constitutional question in the federal jurisdiction would, however, merely project upward a larger question, the question of the meaning of the term, "actual controversy." Thus, the Supreme Court would face a problem which has been already faced by state courts.

If the views herein advanced be sound, this problem should never have arisen. Had the analogy between the declaratory action and the bill to remove clouds been recognized, the impropriety of the "actual controversy" requirement would have become at once apparent. Unfortunately, judicial conservatism, dominated by a theory of judicial

power which sees the mark of a case's justiciability in a present collision between the parties, forced this limitation. To the advocate of declaratory relief, the problem of the limitation's construction becomes, therefore, the problem of obviating its unwelcome consequences and of restoring the declaratory action to its full usefulness. In brief, the proponent of declaratory relief seeks a definition of the requirement which will admit of the declaration's being administered under the principles of the bill to remove clouds.

Such a result may be achieved by a general adoption of the formula presented by the *Miller* case. By virtue of that definition, the declaratory judgment becomes automatically a remedy for doubts arising from potentially adverse interests of other parties. It takes on its widest, most appropriate scope as a flexible means of administering preventive justice. This solution, however, involves the overthrow of those conceptions of judicial power which produced the "actual controversy" requirement. It, therefore, must meet the vigorous opposition of established doctrine. Nevertheless, upon its success in overthrowing that doctrine depends nothing less than the widest usefulness of the declaratory action.