The Declaratory Judgment in California

SEVERAL scholarly articles have recently appeared in the law reviews—by Professor Borchard of Yale University, by Professor Sunderland of the University of Michigan, and by Mr. James M. Kerr of Los Angeles—all advocating the adoption in this country of the provisions of the English law for a declaratory judgment. The subject is one of profound interest to any student of our procedure, and it will be worth our while to consider the effect which the adoption of the proposed legislation would have upon our California law.

It is a truism that in early law civil actions were derived from, and for a long time confused with, criminal prosecutions, and that it was not until a comparatively recent period of the development of the law that the compensation for a private wrong came to be clearly distinguished from the punishment of a public offense. "The early forms of procedure," says Justice Holmes, "were grounded in vengeance." Because of this fact and because in England the older remedies were enforced for centuries in courts separate from the one wherein newer and supplementary forms of relief were granted, the theory has become embedded in our legal tradition that every action results from a wrong done by the defendant which infringes a right of the plaintiff. Blackstone confines his discussion of procedural law to a book entitled "Of Private Wrongs." And Mr. Pomeroy, writing a century later, and after the adoption of the codes of civil procedure, defines a cause of action as consisting, with few exceptions, of a primary right of the plaintiff and a wrong done by the defendant.

This was the basis of the common law action. But the common law action was inadequate to grant the relief which a developing society demanded of the courts, and a supplementary series of

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1 Address delivered before the tenth annual convention of the California Bar Association, October 24, 1919.
3 The Common Law, p. 2.
remedies was devised and applied in the Court of the Chancellor. As these remedies were developed, the old theory that there must be a wrong on the part of the defendant no longer obtained in every case. Usually, it is true, the remedy was framed to prevent or correct a wrong, which had been threatened or done; but in many cases the plaintiff could demand relief in equity, without any showing that his right had been infringed. Whether or not, as Bentham claimed, the concept of a right is derived from the prior recognition of certain acts as wrongs, no one can say that the plaintiff relied on a wrong actually committed by the defendant when he presented a bill for discovery, or for partition, or for an interpleader. Moreover, in the development of the system of jurisprudence administered in their court, the chancellors often had occasion to define rights—a thing impossible in the common law actions, wherein the judgment was based on the verdict of a jury, and only awarded damages or property to the prevailing party, without express declaration of antecedent rights. But in the interlocutory decree in partition, and in other interlocutory decrees in equity, the rights of the parties were defined; and in one instance at least—the case of the decree advising a trustee upon doubtful questions arising in connection with the administration of the trust—the court of equity, by its final decree, neither commanded nor forbade, but only declared the rights in the trust property. Here we have the declaratory judgment pure and simple. But aside from this case, and aside from the interlocutory decrees already mentioned, which were incidental to later coercive relief, the declaratory judgment did not exist.

In the early part of the nineteenth century the introduction of the declaratory judgment into the English law was first advocated and it became evident that the community was beginning to feel the need for another new remedy. Lord Brougham, in 1828, addressed the House of Commons upon the defects in the administration of justice in the Court of Chancery; and in addition to the delays and expenses which had become a scandal to the name of justice, he called attention to the fact that the English courts did not grant a suitor the right to a declaration of a disputed right or title, although there had existed for centuries in Scotland the action of declarator, in which a person could secure an adjudication of practically any disputed legal right.

By this time the equity system had become crystallized. Had

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6 18 Hansard (2nd ser. 1828), 127, 179.
the suggestion of Lord Brougham come a century before, the declaratory action might have been developed from early prece-
dents, as the bill for specific performance under Lord Hardwicke
or the great variety of injunctive relief under Lord Eldon had
been theretofore developed to meet the needs resulting from
changes in social conditions. But the chancery court had almost
lost its power for any considerable development of novel reme-
dies; certainty had been obtained at the cost of invention;
and equity was becoming more and more that part of juris-
prudence administered by a particular tribunal, rather than an
adaptable body of principles by the use of which the deficiencies
of previously existing law might be supplemented. It is perhaps
regrettable that equity had become so incapable of new growth and
development, and that the hardening of the system into a molded
form should have been almost as noticeable in the United States
as in England. A symptom of this arrested development is to be
seen in the provisions of the Field codes upon the subject of
specific and preventive relief, whereby the equity jurisdiction of
our courts has been so seriously impaired. Indeed, it was neces-
sary at the last session of the California legislature to amend a
section of our Civil Code dealing with injunctions so as to allow
our courts to issue injunctions in certain cases of the breach of
contracts for personal service in which the power to enjoin had
been exercised for half a century by the courts of England and
the other states.7

Equity was thus powerless to supply the new remedy of a
declaratory judgment; therefore a statute became necessary. By
the Chancery Procedure Act of 18528 and by Sir George Turner's
Act of 18509, it was enacted that a suitor should no longer be
compelled to ask in every case for a judgment coercive in its
nature, but should be allowed to seek only a declaration of his
right, or the construction of a written instrument affecting such
right. This statute did not give all the relief desired; because as it
was narrowly interpreted by the courts, it allowed a party to claim
a declaration only where he was entitled to other relief, such as
an injunction, but chose instead to obtain a mere declaration, the
declaration being refused if the plaintiff was not entitled to other
relief. Thus the situation remained, even after the passage of the
Judicature Acts, until the year 1883, when the rule was adopted

8 Stats. 15 and 16 Vict., ch. 80, 86, 87.
9 Stats. 13 and 14 Vict., ch. 35.
upon which the legislation now proposed is based. This rule provided that:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."\(^{10}\)

This rule was supplemented by another, adopted in 1893, whereby the court was given power to construe written instruments, including wills, deeds and contracts, for the purpose of declaring the rights of interested parties.\(^{11}\)

Under these rules the English courts have operated for the past twenty-five years. The declaratory action has so grown in favor that the current reports of the Chancery Division show that in a majority of the cases which have come before that division of the court the plaintiff has sought no judgment capable of execution against the defendant, whether for money or property or for an injunction or command, but simply the declaration that the plaintiff had a certain right, or was free from a certain obligation to the defendant. In some cases the right was in rem and related to property; in others it was a right to the performance of a certain contract; but what the plaintiff desired was merely the definition of his right, whatever its nature might be, and his usual purpose in seeking this relief was to secure in the judgment a guide to his future conduct. It would be, in the writer's opinion, a grave mistake to adopt the provisions of the English rules without a careful consideration of our own procedural law. Uniformity is desirable, and the progress that is being made toward the goal of uniformity of our substantive law is very encouraging; but uniformity in procedure is not presently obtainable, and it would be neither desirable nor practicable to secure at the present time the adoption of a statute on the subject of declaratory judgments which would require a remodeling of our whole procedural system. Let us, therefore, without making any attempt to divide the subject-matter with philosophic accuracy, consider the English declaratory judgment in actions involving status, property, contractual rights and rights against the sovereign.

In the first place, as to the effect of the declaratory judgment upon status. Usually, when a judgment deals directly with status,

\(^{10}\) Statutory Rules and Orders, 51.

\(^{11}\) Statutory Rules and Orders (1893) 552. See article by Professor Borchard, supra, n. 2, for full account of the development of the declaratory judgment in England and elsewhere.
and is not based on an infringement of a right arising therefrom, it has the effect of changing the status. This is the case of a judgment in divorce, of a judgment of adoption (where the adoption proceedings are judicial), and in this state of a judgment in annulment, since the marital relationship continues under our law until the decree of annulment is pronounced. These judgments have been called investitive. They are in no sense declaratory, because they change status, whereas a declaratory judgment adjudicates upon a status already existing.

In England, status may be established in a declaratory action since 1858, when the Legitimacy Declaration Act was passed\(^\text{12}\). In California the subject of marital status is fully covered by two provisions of the code, one of which allows an action to establish the validity of a marriage, and the other of which provides for an action to have an alleged marriage declared void.\(^\text{12}\) The former section was used in two cases appearing in the California reports, once in the famous case of Sharon v. Sharon\(^\text{14}\), and again in Norman v. Norman\(^\text{15}\), which determines the invalidity of a marriage performed on the high seas without the solemnization required by the statute. Practically the only other case where a declaration of status may be needed is where it is desired to establish the existence of the relation between a parent and his natural or adopted child. There would seem to be no reason why such a statute should not be passed, especially as it might serve to settle the validity of adoption proceedings so as to remove occasions for future doubt and dispute and litigation.

But in modern law there is far more occasion for a declaration of property rights than of rights arising from status. When a property right was in dispute, the common law remedies gave relief only where possession had been disturbed. The equitable remedies by bills of peace and bills *quia timet* were applicable only under special circumstances and were burdened with limitations which made them inapplicable to many situations. What was demanded by the interests of owners and the interests of society in general was the recognition of the right of any claimant to property to apply at any time for a judgment effectively declaring and settling disputed rights. This demand was met in England by the rule of 1883\(^\text{16}\), whereby the court was empowered to make binding declara-

\(\text{\textsuperscript{12}}\) Stats. 21 and 22 Vict., ch. 93, § 1.
\(\text{\textsuperscript{13}}\) Cal. Civ. Code, §§ 78, 80.
\(\text{\textsuperscript{14}}\) (1885) 67 Cal. 185, 7 Pac. 456.
\(\text{\textsuperscript{15}}\) (1898) 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343.
\(\text{\textsuperscript{16}}\) Supra, n. 10.
tions of right, and by the rule of 1893\textsuperscript{17}, whereby parties were granted the right to apply for the construction of a deed, or will, or other written instrument. Under these rules the English courts will determine any disputed question of title by a declaratory judgment, whether the right relates to real or personal property, to a present or future interest, and whether it is derived by will, or succession, or deed.

That this change has been beneficial no one can deny; but before we adopt in this state the English provisions on the subject, as is substantially suggested by the articles previously referred to, and by the American Judicature Society, it is worth while to consider the progress already made in California in securing the right to a judgment declaratory of property rights.

A consideration of our statutes and of their interpretation by the courts will show that we already have, as far as real property is concerned, the declaratory judgment in all its effectiveness. The action to determine adverse claims under section 738 of the Code of Civil Procedure is burdened by none of the limitations which had fettered the old equitable remedy of the bill \textit{quia timet}. It is no longer necessary that the plaintiff be in possession\textsuperscript{18}; the claim of the defendant need no longer constitute a technical cloud on the title\textsuperscript{19}; and the right has been extended so that, in the language of the Supreme Court, "the owner of any estate or interest in land of which the law takes cognizance is entitled under this statute to have any claim adverse to his interest, such as it is, determined."\textsuperscript{20}

The lessee may dispute his lessor, if the lessor disputes his interest\textsuperscript{21}; the mortgagor may sue his mortgagee, if the amount of the debt secured is in dispute\textsuperscript{22}; and in any conceivable situation where

\textsuperscript{17} Supra, n. 11.
\textsuperscript{18} Casey v. Legget (1889) 125 Cal. 664, 58 Pac. 264, and cases cited; Davis v. Crump (1912) 162 Cal. 513, 123 Pac. 294.
\textsuperscript{20} German American Savings Bank v. Gollmer (1909) 155 Cal. 683, 687, 102 Pac. 932, 24 L. R. A. (N. S.) 1066. We may also note the existence in California of certain declaratory actions relating to the title to real property which, in addition to their declaratory character in personam, operate to bind claimants not made parties. Thus, proceedings under the McEnerney Act; under the provisions of §§ 749, 750, Cal. Code Civ. Proc.; and under the Land Title Law, generally referred to as the Torrens Act. Cal. Stats. 1915, p. 1932, particularly §§ 14, 15, 16. The legislature has recognized the declaratory nature of the relief afforded under our practice by subdiv. 3, § 3367, Cal. Civ. Code, providing that: "Specific relief is given . . . . by declaring and determining the rights of parties, otherwise than by an award of damages."
\textsuperscript{21} Pierce v. Felter (1878) 53 Cal. 18.
\textsuperscript{22} Mentry v. Broadway Bank Co. (1912) 20 Cal. 'App. 388, 129 Pac. 470.
rights in land are subject to doubt or uncertainty, that doubt may be resolved by a decree determining the question and declaring the rights of the parties. In only one case has the remedy been refused, and that is the case where the owner of an equitable estate sues the holder of the legal title for a declaration of his right\textsuperscript{23}; but even in this situation, a recent decision of the Supreme Court allows the equitable claimant to bring an action for the purely declaratory relief of having the trust established by decree\textsuperscript{24}. 

The great value and convenience of this remedy must surely be apparent. As far as land is concerned, we have secured in California, at least as fully as have the people of England, the benefits of the declaratory judgment. In fact, the statute proposed by the American Judicature Society would have the effect, not of enlarging the right to a declaratory judgment in such cases, but of actually restricting it; for the proposed act makes the granting of relief discretionary with the court and provides that in all cases the court may refuse to declare rights where the declaration is not necessary or proper under the circumstances. It would seem that there is no necessity in the case of property rights to limit the right of a suitor to obtain an adjudication of an adverse claim, and that as far as real property is concerned, we may well allow our statute to stand.

There is one respect, however, in which the California law relating to the declaration of property rights may well be supplemented, and this is by providing that the right to have adverse claims determined should apply to personal as well as real property. The writer has already called attention to the fact that the English courts will declare by judgment the rights of the parties in personal property. A statute allowing the determination of all adverse claims, whether to real or personal property, was passed in 1915 in the State of Connecticut\textsuperscript{25}. But in California there can be no determination of an adverse claim to personal property unless there has been a wrong done by the defendant which would have formed the basis of an action at the time of the Declaration of Independence. This was illustrated by a recent case before one of the district courts of appeal.\textsuperscript{26} The plaintiff claimed certain securities and wished an adjudication that the defendant had no title thereto. The court, after holding that there had been no con-

\textsuperscript{23}Buchner \textit{v. Malloy} (1909) 155 Cal. 253, 255, 100 Pac. 687 and cases cited.

\textsuperscript{24}Donohoe \textit{v. Rogers} (1914) 168 Cal. 700, 144 Pac. 958.

\textsuperscript{25}General Statutes of Connecticut, Revision of 1918, ch. 270, § 5113.

version, consequently that trover could not be maintained, and that there was no possession by the defendant such as to justify the maintenance of replevin, was compelled to deny all relief on the ground that a suit to quiet title to personal property could not be maintained in California. In another case the plaintiff claimed to be owner of an interest in a co-operative association, and the defendant claimed the same interest by virtue of an execution sale against the plaintiff's assignor; and here, also, the court refused to determine the rights of the parties. It would seem that the defect in our procedural system which is disclosed by these decisions, and which we share with almost all of the other states, might well be remedied by the extension of the provisions of section 738 of the Code of Civil Procedure to cover questions of the title to personal property.

One other feature of property rights deserves our attention. A large part of the declaratory actions in England are brought for the construction of wills, and in a jurisdiction where a decedent's real estate is not administered in judicial proceedings, the necessity for some provision for declaring rights of succession and rights based upon wills is obvious. To that end the American Judicature Society has proposed that wills should be construed, and questions arising in the administration of estates should be determined, in declaratory actions brought for the purpose. There is in California no need for any such provision. The decree of distribution in this state not only constitutes a muniment of title, but also declares all rights of the interested parties, whether arising under the will or the succession statute. Moreover, we have in our statutory proceeding, under section 1664 of the Code of Civil Procedure, a scheme whereby any person may have declared by the superior court, sitting in probate, his rights as heir or under a decedent's will. The decree rendered in this proceedings is entirely declaratory, and constitutes an adjudication of rights in the decedent's estate; it has in several reported cases been applied to questions of the validity and construction of wills; and there would seem to be no reason for the slightest statutory change in this regard. The enactment of the statute in the form proposed would only serve to con-

28 Jewell v. Pierce (1898) 120 Cal. 79, 52 Pac. 132; Luscomb v. Fintzlerberg (1912) 162 Cal. 433, 123 Pac. 247, and cases cited.
29 Estate of Blythe (1895) 110 Cal. 231, 42 Pac. 643; Estate of Hormann (1914) 167 Cal. 473, 140 Pac. 11.
30 Estate of Dunphy (1905) 147 Cal. 95, 81 Pac. 315; Estate of Campbell (1906) 149 Cal. 712, 87 Pac. 573; Estate of Russell (1907) 150 Cal. 604, 89 Pac. 345; McClellan v. Weaver (1906) 4 Cal. App. 593, 88 Pac. 646.
fuse our procedure, without giving to any person any new right of substantial value.

If we turn from rights in property to rights based on contract, we will find that the need for an extension of the right to obtain declaratory relief is even greater and more urgent. Without the declaratory judgment, every contracting party must await an actual breach of contract before he can obtain any authoritative adjudication of his rights. He may be in doubt about the validity of the contract, the meaning of its terms, the effect of some statute upon the contract obligation, the obligation to continue performance after some act done by the other party, but whatever his doubt may be he can obtain nothing better than the opinion of counsel which may or may not agree with the later decision of the court. The decision itself he cannot secure until he or the other contracting party has committed some act which can be relied on as a breach of contract and subjected himself to a possible liability for damages which in some cases may be exceedingly heavy. No matter what his good faith or desire to perform his obligation, the law casts upon him the duty of resolving all doubts against himself under penalty of a recovery of damages if his judgment and that of his counsel should disagree with that of the court. The English courts have solved the difficulty by allowing a declaratory action to be brought at any time by either party for the purpose of obtaining a definition of rights under the contract. In order to appreciate the measure of their success in solving this problem, it will be well to instance a few cases of the granting of this relief.

The court will decide in a declaratory action whether a binding contract has been made. In one case the parties had had some correspondence and the plaintiff claimed that this correspondence showed a contract to make a lease. Under our practice it may be doubted whether the question could have been determined until there was a refusal to perform; but the English court allowed the plaintiff to maintain an action to have it declared whether or not the letters constituted a contract.

The court may also decide by declaration whether one party has failed in performance so as to release the other party from

\[\text{[Footnote 31]}\] A contract to make a lease in futuro as distinguished from a lease in praesenti creates no interest in the land. Porter v. Mercer (1879) 53 Cal. 667. See also, as to this distinction, 24 Cyc. 899 and cases there cited; Pacific Improvement Co. v. Jones (1912) 164 Cal. 260, 128 Pac. 404. It cannot therefore be assumed that a person who has a contract right to have a lease executed in the future is entitled to bring the statutory action to determine adverse claims as is the actual lessee under Pierce v. Felter, supra, n. 21.

performance. For instance, where the vendor of real estate claimed that he had good marketable title, and the purchaser had made objections to the title, the court made a declaration that the objections were good and the title defective.\footnote{In Re Soden & Alexander's Contract [1918] 2 Ch. 258.}

Another situation where the declaratory judgment has been of very great value is where the parties are in doubt as to the effect of some governmental act upon the contract obligation. The importance of this remedy has never been more apparent than during the war with Germany. The writer ventures to say that there is hardly a lawyer who has not had to do, in one form or another, with the question of the effect of the war, and of governmental action during the war, upon contract obligations. Many of the questions presented have been exceedingly difficult, and the careful lawyer was obliged to advise his client that the decision of the court could not be predicted with any certainty. In these cases, as in others, the client was obliged either to sacrifice what he believed to be his rights, or subject himself to a possible liability for damages, if the court ultimately failed to adopt his contention. He could not have determined the question of right and obligation until after the performance of the contract had become impossible, and the question of liability for damages was no trifling matter when prices fluctuated as much as they did during the war. The English business man and his counsel labored under no such difficulty. If a question arose involving the effect of the war upon a contract, he was allowed to apply to the court and obtain a binding declaration of his rights and liabilities.

Thus in the case of Ertel, Bieber Company v. Rio Tinto Company,\footnote{[1918] A. C. 250.} which came before the House of Lords in 1918, plaintiff was an English company which owned copper mines in Spain. Before the war it had entered into a contract with the defendant, a German corporation, to sell copper from the mine over a period of years extending from 1910 to 1919. The plaintiff claimed that the contract was terminated by the declaration of war between Great Britain and Germany. The defendant relied on a clause of the contract stating that the contract obligation should be suspended during war, and claimed that the plaintiff's obligation to deliver copper, although interrupted, would revive when the war came to an end. It is obvious that in this case it was a matter of extreme importance to the plaintiff to know whether he was obliged to deliver copper after the war. Under our system, he
could have obtained no relief whatever until the war had terminated and performance was demanded. But the English suitor was in no such difficult position. He brought suit and obtained a declaratory judgment that the contract was not merely suspended, but was actually terminated by the war, and it was held that if the clause relied on by the defendant were given any other meaning, it would be void as against public policy as requiring intercourse with the enemy.

In another case, a declaratory judgment was rendered that a contract not to sell a certain zinc product to any one other than an enemy purchaser was terminated, and not merely suspended, during the war\(^3\). Here the contract provided for a time of performance extending to 1919, and the decision was rendered in 1916, affording another example of the value of the declaration as a guide to the future conduct of the parties.

The declaratory judgment was also used to determine doubtful questions regarding the effect on pending contracts of the statutes and acts of the home government during the war. In Metropolitan Water Board v. Dick, Kerr & Company,\(^3\) the defendants agreed to build a reservoir for the plaintiff within six years, time being made of the essence of the contract. The Minister of Munitions was authorized by law to restrict the carrying on of any work for the purpose of increasing the production of munitions. Acting under this authority, the Minister ordered the defendants to cease work on the reservoir, and to hold their plant and labor at his disposal. Defendants claimed that their duty to complete the contract was terminated, whereas the plaintiff claimed that the performance was only suspended by the Minister's order. Here again no action could be brought under common law rules; yet it was essential to the parties that their rights be determined so that they might choose their future course of conduct. Plaintiff brought a suit for a declaration that the contract obligation still remained, and had been only temporarily suspended. The King's Bench Division granted this declaration; but the judgment was reversed by the Court of Appeal, which held that the act of the law had interfered with performance to such an extent as to make a substantial compliance with its terms commercially impracticable.

Without pursuing a wearisome statement of case after case, it may be added that the English courts have adjudicated, by declaratory judgment, the effect upon a contract of employment of the con-

\(^3\) [1917] 2 K. B. 1.
scription of the agent into military service\textsuperscript{37}, the effect of a foreign embargo upon a contract of sale\textsuperscript{38}, and the effect of the income tax provision for collection at the source upon a contract to pay money\textsuperscript{39}.

There is no need to discuss at length the advantage to the community, and particularly to men of business, of the declaratory judgment. It is safe to say that if the procedure becomes as general here as it has in England, it will enable the courts to render an immense service to society by settling in advance and with little loss many disputes which would otherwise entail uncertainty, bitter litigation and tremendous expense and damage. The only serious question is whether there are any dangers of abuse in the system. It may be feared, and not without reason, that if the right to apply for a declaration of rights under contracts were given without any restriction, the proceeding would be used for trivial purposes and in moot cases cleverly disguised, and that the time of our courts would be unduly occupied with proceedings under the new statute. The English courts have met this difficulty by making the granting of the relief discretionary, and by denying it whenever the declaration would serve no useful purpose. Some such provision should be inserted in any statute which we may adopt on the subject.

The need for some legislation affording declaratory relief, even before a cause of action for damages accrues to the plaintiff, has already been recognized to a limited extent by the California law. Ever since the adoption of the Practice Act, we have had the provision now stated in section 1050 of the Code of Civil Procedure, that "an action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation." This statute does not provide for the declaration of a right of the plaintiff, but for a declaration of the absence of liability to the defendant, and as far as it goes, it is a distinct and valuable recognition of the desirability of the judgment declaring rights in personam. As a matter of fact, this statute covers the very situation to which the English rules were not held to apply until 1915. In that year suit was brought to have it declared that the defendant had no right against plaintiff for the performance of an obligation; and it was finally held, by a divided court, that the relief would be granted, although the declaration was not an affirm-

\textsuperscript{38} Smith, Concy & Barrett v. Becker, Gray & Co. [1916] 2 Ch. 86.
\textsuperscript{39} Wasmuth v. James [1918] 2 Ch. 54.
ative one of the suitor’s right, but a negative one of the suitor’s freedom from liability. Sixty years before and only five years after our adoption of the common law, the courts of California had allowed James King of William to prosecute an action under the Practice Act for a declaration that he was not indebted to the defendant upon a promissory note; and, in view of this situation, it is rather amusing to read the statement of Professor Sunderland of the University of Michigan, that while the American lawyer has been asleep, the declaratory judgment has been discovered abroad, and that he may now awake and, like Rip Van Winkle, have disclosed to his astonished eyes a new wonder invented by the wide-awake foreigner during his sleep. To all of this we may well reply that whatever soporific influences may have existed in Michigan, the repose of the California lawyer has not been so complete that he did not discover and apply at least one form of the declaratory judgment at least sixty years before the English High Court of Justice saw its way clear to do so.

We may also note other instances where provision has been made for a declaration of contract rights. Under the provisions of section 3480 of the Political Code, an action may be brought by the trustees of a reclamation district which has issued bonds “to have it determined that said bonds are a legal obligation of such reclamation district,” and our Supreme Court has stated that the judgment in such an action “declares” the rights of the parties and will be binding upon them in future proceedings. The code provision for the submission of a controversy without action is another attempt to meet the situation; but it is insufficient for two reasons: first, because it requires the consent of both parties before the proceeding can be commenced, and secondly, because it can only be availed of where the question may be the subject of a civil action. The need for a declaration of contract rights has also been recognized by administrative bodies. When the Railroad Commission of California framed rules to govern the assessment of demurrage charges, it was provided that if any dispute should arise with regard to the construction of the rules, such dispute

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41 King v. Hall (1855) 5 Cal. 83.
42 “The American lawyer . . . is like a modern Rip Van Winkle, who, having gone to sleep in an age when courts were only the nemesis of wrongdoers, awakens to find that they have become the guardians and advisers of those who respect the law.” 16 Michigan Law Review, 77.
43 Hershey v. Reclamation Dist. (1912) 162 Cal. 401, 405, 122 Pac. 1074.
45 Matter of DeLucca (1905) 146 Cal. 110, 79 Pac. 853.
should be submitted to the commission for decision. The difficulty with this provision is that the decision of the commission is not, unless voluntarily submitted to, an adjudication binding upon the courts. Again, the United States Food Administration undertook during the war to construe and declare the right to the performance of many commercial contracts of sale affecting the food supply of the country. Of course, this power was used only while hostilities lasted; but it affords another striking example of the recognition by men dealing with practical affairs of the value of a declaration of rights under contracts.

Although our code provides for a declaratory judgment in the one important class of cases arising out of contract which has already been referred to, it is clear that there are many other cases to which this remedy may be and should be extended, and that a declaration of contract rights and obligations should be generally obtainable before any breach. But any statute adopted with this end in view should contain certain definite qualifications. In the first place, the relief should be, to a certain extent at least, discretionary with the court and should not be granted where it would serve no useful purpose. It has already been said that in England the declaration is refused, in the discretion of the court, when the case appears to be a trivial one, or where the dispute is over a moot question, and the relief has also been denied where the court believed that the defendant was not in as good a position as he would be later to present his evidence upon the matter in controversy. But the English courts have interpreted their own rules more freely than our courts may be willing to interpret a legislative act, and the doctrines which have developed in England to check privileged litigation should be embodied here in statutory form. Although no such limitation has been found desirable in the case of property rights, it may become necessary in the case of rights based on contract.

In the second place, the plaintiff should be allowed to combine with his request for declaration a demand for coercive relief, and the court should have power to substitute the declaration, in a proper case, for the other relief demanded. We would thus obtain in our procedure the same freedom enjoyed by the English courts in the administration of this remedy, and would avoid the possibility of over-technical decisions. In one English case the mun-

cibal authorities of a town brought an action to enjoin a clergyman from delivering sermons on the seashore, which was town property. The case was held to be too trivial for the issuance of an injunction, but the court made a declaration of the rights of the parties. In another case, decided with the past few months, the plaintiff claimed an easement of light and applied for an injunction against the construction of a building which, as he claimed, would constitute an infringement of the right. The court was inclined to believe that an injunction should issue, but was in doubt as to whether the injury would be irreparable. The suggestion was then made that if the court would declare the rights of the parties, there would probably be no necessity for an injunction, because the parties would respect the rights declared in the judgment. The court accordingly granted the declaration, with leave to apply for an injunction should it thereafter become necessary. These cases illustrate the desirability of a flexible administration of the remedy, and show that the declaratory judgment should not be treated as a novelty in our system of administering justice, to be used only in rare cases when applied for in a special proceeding. In truth, it is not a novelty at all, but an old remedy, for which we have found new and varied uses; and the courts and parties should feel free to make use of it, whenever the needs of justice may require, in conjunction with or as a substitute for other and sterner remedies of retribution and coercion.

One other danger should be guarded against. When the code system of pleading was introduced and forms of action were abolished, the change was held to have introduced a change in the nature of the cause of action, and, therefore, in the application of the rule under which a judgment operates as a bar. This change was not realized by many members of the profession, and proved a trap for the unwary. The situation is well exemplified in the case of Hahl v. Sugo, where the plaintiff had sued and obtained the ordinary judgment for the recovery of specific land. He later brought an action in the nature of a suit in equity to compel the defendant to remove a wall from the land. The relief was denied him on the ground that the first judgment was a bar, and that he was obliged to obtain in the one suit all relief, whether legal or equitable, resulting from what had become, by the adoption of the codes, a single cause of action. To prevent a similar denial of justice because of the adoption of the declaratory judgment, it

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49 Litchfield-Speer v. Queen Anne's Gate Syndicate, Ltd. [1919] 1 Ch. 407.
should be provided in the new statute that, although the judgment should operate as an adjudication of the rights of the parties, the plaintiff should not be precluded from later seeking other relief based upon the same facts.

There is one other situation to which, it has been suggested, the declaratory action should be applied, and that is the case where a person seeks against the government a declaration of the validity or meaning of a statute. Professor Borchard suggests that the meaning of the Sherman Anti-Trust Law might not have been for so many years an enigma to the lawyers and business men of the country if they had been able to obtain from the courts, upon its enactment, an interpretation of its terms. And the American Judicature Society similarly points out the advantage of having the constitutionality of statutes promptly declared by the courts. But it would seem that this is a subject which should be considered more deliberately before any legislation is passed by the states. Certainly it would be cause for regret if we should, by attempting too much in a doubtful direction, lose the opportunity to bring about a substantial reform in cases where the benefits of the system are as sure as the effects of any legislation can be. For it would be very questionable if a practicable system could be devised whereby the citizen could call into question at will the validity or meaning of a statute as against the government. Such a proposal would meet with strong and not unreasonable opposition. It would either lead to moot cases, with consequent lack of interested contention, or it would add little to our present remedy, which, in case of actual invasion of the citizen's rights, would seem to give reasonably adequate remedies. Moreover, it would depend for its full effectiveness on the adoption of the same remedy in the federal courts by act of Congress. Finally, the statute proposed by the American Judicature Society would be insufficient to bring about the result which it seeks in California, because of our decisions to the effect that a statute will not be considered as conferring a right to sue the sovereign state unless it contains an explicit declaration to that effect. What has been said is not intended to impugn the value of the declaratory judgment in interpreting the effect of statutes upon rights between individuals, and perhaps a proceeding should be devised whereby, at the suit of the state, the rights between the sovereign and the citizen may be adjudicated; but for the present no legislation

51 28 Yale Law Journal, 146.
52 Colusa County v. Glenn County (1897) 117 Cal. 434, 49 Pac. 457; Whittaker v. Tuolumne County (1892) 96 Cal. 100, 30 Pac. 1016.
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would seem to be advisable for the purpose of allowing suits against the state, and, in any event, no such proposal should be intermingled with and thus endanger the provisions, far more urgently needed, for the declaration of contract and property rights.53

It must be remembered that the proposal with regard to declaratory judgments which has been made by the American Judicature Society is only a part of a comprehensive plan for the enactment of an entirely new code. Unless we intend to remodel our code thoroughly, it would not be wise to adopt the single article on declaratory relief, because it conflicts in many respects with our present procedural scheme. In order to obtain the benefits of the English declaratory judgment, we need only extend our action to determine adverse claims to cases involving personal property, broaden the scope of actions for the determination of status so as to cover the parental relation, and, most important of all, adopt a comprehensive statute for the declaration of rights arising out of contract. Such a statute must be framed only after a careful consideration of the experience of other countries and the substantive and procedural law of our own. It may be confidently expected that the California Bar Association and its committees will formulate and present to the legislature a statute which will meet the requirements of the situation.54

5a It may be suggested that provision should be made for the declaration of the validity of a will before the testator’s death. The advantages and disadvantages of allowing such a declaration will readily suggest themselves. 5b The California Bar Association at its meeting in October, 1919, recommended the passage of an act in accordance with the suggestions in the text. A committee of the Commonwealth Club of San Francisco is engaged in preparing a similar bill.

The Connecticut Bar Association also, at its last meeting in 1919, unanimously approved the adoption of a statute giving the superior courts of that state the power to declare rights and other legal relations on request for such declaration, whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. The proposed statute is practically identical with Senate Bill 5304, Sixty-fifth Congress, third session.

Statutes providing for declaratory judgments were passed in Michigan and Florida during 1919. The Florida statute provides for an equitable proceeding to secure a declaration of the rights of persons arising under a written instrument. Laws of Florida, 1919, General Acts, No. 75. The Michigan statute is more comprehensive. It embodies the provisions of the English rules; provides that a declaration may be obtained either at law or in equity, that issues of fact which may arise in the proceedings and which are triable by jury may be submitted to the jury in the form of interrogatories, that consequential relief may be granted upon an order to show cause, and that the act shall be “liberally construed and liberally administered with a view of making the courts more serviceable to the people.”

Declaratory relief is by no means an innovation. A freeman claimed as a villein was allowed at an early date the writ de libertate probanda. Glanville thus describes the judgment in this proceeding: “The freedom having been sufficiently proved in court, then, the party whose liberty has been questioned
Whatever may be the proper terms of such a statute, we welcome this opportunity to make our law in this regard more responsive to the needs of the community. As students of the law, we are interested in the declaratory judgment as another step in the process of developing new remedies to meet new conditions, and we look forward hopefully to the effect of its introduction in doing away with the remnants of artificial distinctions between remedies as having originated in courts of law or courts of equity; but beyond and above our interest in the problems of historical and analytical jurisprudence, we are interested as citizens of the commonwealth in securing for society a fuller measure of service from the courts, that they may thereby more fully merit, though they may not always enjoy, the gratitude of the people.

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shall be absolved from the claim of him who would draw him to Villeinage, and forever freed from it. If, however, he would fail in his proof, or if he should be recovered by his Adversary as his Villein-born, he shall be irrecoverably adjudged to belong to his Lord, together with all the Chattels he possesses." Book V, ch. 4, Beames' translation. The declaratory nature of this judgment is not affected by the origin of the proceeding in the previous non-declaratory action brought by the claimant in the county court. Glanville, Book V, ch. 1. Likewise some of the effect, if not the form, of a declaratory judgment may be discerned in the fine as it existed under the early common law.