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IS DECLARATORY RELIEF CONSTITUTIONAL?*

Clifton Williams†

An impending contest as to the validity of the declaratory relief law in Wisconsin, based upon the argument that such remedy should be abolished because the federal court holds that there cannot be a removal, or that there cannot be an original case in the federal system under declaratory relief, has led the writer to set forth in this article certain outstanding truths which tend not only to point out the fallacy of the aforementioned argument, but also to dispel any further doubt which might arise in the minds of the students of this question.

Wisconsin has been issuing declaratory relief judgments from an early date.

This statement, seemingly paradoxical (in view of the date of enactment of the declaratory relief judgments act1), is nevertheless true, when the various forms in which these innocently, or otherwise, framed cases are considered, and their effect examined.

In the presentation of these cases, no effort has been made to exhaust the field, but we will discuss them in the same manner as did the supreme court of Pennsylvania in a case discussed subsequently herein, to prove our contention that declaratory relief is nothing new in Wisconsin.

We will make no effort to go back into the early cases, of which there are many collected and referred to by the courts in some of the cases which we will discuss later.

A very interesting case, which was really a declaratory judgment case, is Milwaukee Electric Railway & Light Company v. Bradley, 108 Wis. 467. Imagine a street railway company bringing "an action to restrain defendants from interfering with plaintiff’s business by endeavoring to ride upon its street cars without paying the fare demanded pursuant to its lawful regulations, and to judicially establish the validity of such regulations." The above quotation is taken from the very first paragraph in the record of the Supreme Court (see page 468) which

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*Editor's Note: The material presented above is an editorial revision of a brief upon the question of the validity of the declaratory relief law in Wisconsin. Those divisions not germane to the question at hand were omitted, but the continuity of the original brief has been preserved.

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1Chapter 212, Laws of 1927.
preceded the opinion. The decision of the lower court dissolving the temporary restraining order was reversed by the supreme court, and there are many pages of declarations of rights. If this case should now be brought under the new declaratory relief statutes, would the opponents of declaratory relief claim that every passenger would have to be sued?

One of the most important cases in the books holding that there should be a classification of statutes into classes which would not violate the constitutional mandate as to uniformity was the case of Johnson v. City of Milwaukee, 88 Wis. 383. Presumably the plaintiff was a taxpayer, but the case does not say so. The city was anxious to know if these classified laws were within the then new constitutional provision which prohibited special legislation to amend city charters. The court proceeded to declare the statutes valid by affirming the order sustaining the demurrer to the complaint. The case was a declaratory relief case in every sense of the word.

One of the early cases holding that a plaintiff may enjoin the threatened enforcement of an ordinance is Schlitz Brewing Company v. Superior, 117 Wis. 297. The plaintiff was permitted to go into equity and get an ordinance into court by alleging “that the defendant city and its officers threatened to institute proceedings against the plaintiff under said ordinance. . . .” As desired, the court proceeded construing the ordinance. The case was clearly declaratory relief because it saved the plaintiff and others from the necessity of submitting to an arrest and raising the question of the validity of the ordinance in that case. At that time equity was not supposed to afford a relief if there was a clear and adequate remedy at law, but the desire to give declaratory relief apparently outweighed the then existing well known principle of law and the court proceeded to give the declaratory judgment. It is a peculiar method of reasoning that says a statute would be void which makes it possible for a court to do what the court has already decided to do without the existence of the statute.

In Bonnett v. Vallier, 136 Wis. 193, the plaintiff, a property owner, brought an action to restrain officers from enforcing the state tenement house law which had certain criminal features, and although this lot was located in the City of Milwaukee, the court went into the application of the law to the entire state, wrote a full declaratory opinion and held the law void because of several features of the law which had no application to the plaintiff’s property.

In C. Beck Company v. Milwaukee, 139 Wis. 340, by resorting to a temporary restraining order and an appeal from an order dissolving the temporary injunction, a city ordinance, which punished one for
the removal of stone or sand from the beach of Milwaukee, was brought before the supreme court for full declaratory relief.

In *Wadham Oil Company v. Tracy*, 141 Wis. 150, there was an action brought against the state oil inspector who "under pretended authority of the legislative enactment mentioned, will, unless judicially prevented, interfere with plaintiff's business to its great pecuniary and irremediable detriment; that the act violates (here mentions various sections of the constitution); that the inspection fees are exorbitant; and the act, generally is unreasonable and indefinite." The court immediately proceeded to construe the statute. Justice Marshall wrote the opinion and he apparently was conscious of many of the cases which have been mentioned above, and in speaking of the way that the validity of the law was brought before the court, says:

The doors of that ultimate resort should swing open freely. But it will not do to make of the courts, by equitable interference, a sort of superior upper house to consider and pass, in general, and particular as well, upon legislative enactments, as the court is requested to do in this case.

Then follow four and one-half pages of construction of the statute.

In the same volume appears the famous opinion entitled *In the Matter of the Appointment of a Revisor of the Statutes*, 141 Wis. 592. There was no case, no pleadings and no parties, but the court proceeded to determine the validity of the statute and the propriety of the expenditures of large sums of money thereunder, and a majority of the court decided to carry out the provisions of the law. What becomes of this case when the legislature merely attempts to provide the form of action which would permit interested parties to ask the court to do what it did without any pleadings whatever or without any argument for that matter?

*State ex rel Buell v. Frear*, 146 Wis. 291, is a case on the civil service law. Without any lack of respect to anyone we will state that a scheme was figured out whereby an original mandamus action was brought before the supreme court to compel the secretary of state to order paid a bill for the services of one of the commissioners, although he was a state officer and there was an appropriation and there was no reason why he should not be paid. It was generally known at the bar that the case was rigged up and nobody raised any question but that it was properly so done. The case is so clearly a declaratory relief and advisory case that it appears on the face of it that the court handed down an immediate memorandum opinion covering three phases of the law, which opinion is clearly advisory, and within a month later the court filed a long opinion covering the various provisions of the statute.
IS DECLARATORY RELIEF CONSTITUTIONAL?

Now we come to one of the most farreaching cases in the books. It is Borgnis v. Falk Company, 147 Wis. 327. The case changed the status of thousands of employees, affected hundreds of employers who were not represented and was the foundation of the institution of a completely new system of procedure in industrial accidents in this state, including an expensive administrative body to carry out the law. A foreman with a salary of $2,000 a year claimed to have a contract running a little while in the future and through some theory which has never been explained he seems to claim that this contract had something to do with his injuries which might occur in the future. He did not even allege that he thought he might under some possible circumstance eventually be injured in the future. All he asked was that the defendant be enjoined from electing to go under the workmen's compensation law. Chief Justice Winslow wrote the opinion, but so frankly admitted that it was an advisory opinion or declaratory relief case that he stated this (page 337):

It seems to be true that this action might very well be disposed of without considering the question of the validity of the act in question. Ordinarily under such circumstances that course would be the proper one to pursue, for the question of the constitutionality of the statute passed by the legislature is not one to be lightly taken up, and generally such a question will not be decided unless it be necessary to decide it in order to dispose of the case. [Here comes the frank admission of declaratory relief.] There are circumstances here present, however, which seem to call very loudly for immediate consideration of the question of the validity of the act in question, if under any view of the case it can be considered as involved.

Then follow many pages of declaratory relief including concurring opinions by two of the justices. The decision was accepted by the bench and bar as a complete settlement of the validity of the Industrial Commission law and as a complete justification for the institution of the Industrial Commission. Millions of dollars of insurance moneys in the shape of premiums and compensations have been paid under this opinion and hundreds of thousands of dollars of expenses of the Industrial Commission have been expended. As we have shown, it was frankly and admittedly a declaratory judgment. And it seems that it would be much better for our administration of justice to have such opinions and judgments authorized by the written law, and certainly a written law which merely authorizes what the court has thus been doing should not be seriously questioned on the ground of constitutionality. This case of Borgnis v. Falk Company, received favorable comment by textbook writers, authors, economists, law journalists and others throughout the land. On the subject of classification of
employers under the constitution and the fact that the constitution is an instrument which must be construed to keep abreast of the times, Dean Hall in his famous book of *Cases of Constitutional Law* uses *Borgnis v. Falk Company*, on page 363, so that it has been and is being used throughout the land in most of the law schools for instruction purposes among law students.

In the very next volume of the reports we find a case in Milwaukee County regarding a court room and the continuing expense thereof determined without pleadings or parties. It was slightly different than *In re Revisor*, 141 Wis. 592, in that there was an appeal to the supreme court from an order which had been entered in the circuit court in the absence of pleadings and parties.\(^2\)

Immediately following the above case, which is clearly a declaratory opinion, there appear the *Water Power Cases*, 148 Wis. 124, which was clearly and frankly another declaratory relief case. The court does not even say whether it is a mandamus suit, an injunction suit, or what-not. The simple statement is "a series of suits, as above indicated, involving the validity of chapter 652, laws of 1911, was brought in this court against....[naming various state officials]. When leave to bring these suits was granted, the question of the jurisdiction of this court to entertain the suits was expressly reserved." The court finally decided, on page 135, that the actions should be brought as *quia timet*, while the bar and the bench generally recognized and admitted that the suits were for no other purpose than to get an expression from the supreme court as to the validity of the water power statute. *Quia timet* cases are referred to throughout the land by courts and authors as one of the best illustrations of declaratory judgment cases, which were tolerated in various places before various declaratory relief statutes were enacted, which made such cases slightly more respectable.

In the same volume we have the *Income Tax Cases*, 148 Wis. 456. The relator did not complain about his own tax or his possible tax. In the very first line of the opinion, on page 468, Justice Winslow states that the actions were brought in equity for the purpose of enjoining the secretary of state and the tax commission from expending any money in administering the newly passed income tax law. Under these circumstances the interests of the relators (there were two or three cases which were finally combined) would be infinitesimal and beneath the value of any known coin. This became apparent to the judge and the fact that there were three or four declaratory relief opinions in the same volume and handed down practically at the same

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\(^2\) See *In re Court Room*, 148 Wis. 109.
term of court must have also been in his mind because he says (starting on page 477):

If, whenever such a law is passed, it is within the power of any taxpayer, however paltry his contribution to the public funds, to come into this court and invoke its original jurisdiction and compel it to pass upon the validity of the law, it is not difficult to forecast the result. Every important law will be adverse to the interests of some taxpayers, and with such a principle established this court stands in great danger of becoming to all intents and purposes a third chamber of the legislature, not named in the constitution, but exercising a veto power over the other houses when invoked by any taxpayer.

With this reservation the court proceeded to determine the validity of the statute and handed down a very long and valuable opinion, which thereafter guided the bench and bar with reference to income taxes. Apparently, if we should go out and get a taxpayer to enjoin the commissioner of public works from spending any money to make a tentative assessment on the Cedar-Biddle widening, none of the defendants in the case at bar would raise any question about the matter whatever, although the interest of the taxpayer could not be calculated in any known coin. It seems much more respectable to have a statute authorizing declaratory judgments than to follow in the well-defined channel of the practice which has grown up as we have seen from many of the above cases, and permitting the taxpayer’s suit where the interest of the taxpayer is impossible of calculation because it is smaller than any known coin unless we resort to Chinese ‘brass money.

The writer of this article has always thought that Ekern v. McGovern, 154 Wis. 157, was clearly a declaratory judgment. The parties were involved in the throes of an ordinary quo warranto action, or what should have been one, but rather than be required to proceed along the well defined channels of quo warranto one of the parties was allowed to step aside and proceed as if in equity. The case is not so clearly declaratory in that the plaintiff represented one taxpayer, or one personally interested in civil service, or one owner of a water power, but it is declaratory in that the court expressed a willingness to pass upon the situation without compelling the parties to follow the well-known lines of procedure.

Cream City Bill Posting Company v. Milwaukee, 158 Wis. 86, is a plain case of declaratory relief. An examination of the opinion will not disclose at the beginning what kind of a case it was. The court had so fallen into the habit of writing declaratory judgments that they did not even mention at the beginning the nature of the action. The fact is that it was another one of those cases where a corporation which feared that it might be arrested for the violation of an ordi-
nance did not wait to raise the question of the validity of the ordinance in a prosecution case but, following precedent, went into the equity side of the circuit court and sought an injunction for no other purpose than to get an expression from the court as to the validity of the ordinance.

We do not wish to be understood as criticizing this practice. It was then thoroughly legitimate because the court had in many cases even before the case of Schlitz Brewing Company v. Superior, 117 Wis. 297, held that the doors of equity were open in this kind of a situation. Violence had been done years before when it was first held that injunction could be resorted to as a remedy in order to get the validity of an ordinance passed upon, although the point could be raised in a prosecution suit. What we mean to say is that a declaratory relief statute, if it had been passed a great many years ago, would have prevented the original violence to the old and honorable equity rule that equity will not hear a party who has a relief in law. In the mind of the author of this brief anyway these cases where constructions of ordinances and statutes are procured by injunction are clearly declaratory.

Now comes a case where the complaint is preserved verbatim and it is not only instructive, it is amusing to read the complaint with the subsequent declaratory relief statute in mind. We refer to State ex rel Atwood v. Johnson, 170 Wis. 218,—the well known soldiers' bonus case. An effort to keep this article as reasonably short as possible prevents quotation of the complaint from pages 220 to 226 of that case, but we cannot refrain from pointing out that the complaint says that doubt has arisen as to the validity of the act (see page 221). It is admitted in the complaint, on page 225, that more than fifteen million dollars are involved. An attempt was made to enforce some officer from spending a few nickels. The very first lines in the case are: "This action was originally brought in this court to test the constitutionality of ch. 667, Laws 1919, known as the Soldiers' Bonus Act, and, if found unconstitutional, to restrain the enforcement of the act." The prayer for relief (on page 225) is the most frank admission that we find in the books prior to the passage of the declaratory judgment act. It reads:

Wherefore plaintiff respectfully prays the judgment of this court:

1. That the validity of chapter 667, Laws of 1919, be determined and the rights and duties of those charged with its administration be declared; . . . .

While the plaintiff was a member of the State Tax Commission he was represented by a private attorney. The other state officers were
IS DECLARATORY RELIEF CONSTITUTIONAL?

represented by the attorney general. Eminent counsel represented some soldiers. On the very first page of the opinion proper as distinguished from the record of the case Justice Kerwin says (page 226):

The defendants charged with the administration of the law are entitled to have the question of its validity settled and, if valid, be advised respecting their rights and duties under it.

Although the plaintiff brought the suit the court had so gotten into the habit of writing declaratory judgments that Justice Kerwin frankly says that the defendants are entitled to be advised.

Further on in the opinion, (on page 223) Justice Kerwin states and relies upon an advisory opinion entitled "Opinion of Justices, 190 Mass. 611." Subsequently in this brief we will point out the difference between an advisory opinion and a declaratory opinion.

The declaratory judgments were becoming so common that the city attorney thought he might as well get one and proceeded to do so in the case of State ex rel Miller v. Niven, 180 Wis. 583. We had a serious question as to whether or not the minimum wage scale fixed by the common council of the city or a different one fixed by the sewerage commission should be inserted in the contract. In order to get the required advice the chairman of the sewerage commission brought an action in the supreme court to compel the city attorney to approve the contract which contained the wage scale propounded by the sewerage commission in place of the one propounded by the common council. The court satisfied the desires of the parties and wrote a declaratory judgment authorizing the writ of mandamus against the city attorney to require him to approve of the contract which had the sewerage commission's scale of wages in it.

In the case of Wagner v. Milwaukee, 180 Wis. 640, there was a suit brought against the minimum wage ordinance. The plaintiff said he was a taxpayer but frankly admitted, and the court points out on page 641 in the bottom paragraph, that the action is brought "to have such ordinance declared null and void and the defendants restrained from taking any steps to enforce such ordinance or making the same any part of the contracts to be thereafter let by the City of Milwaukee for public work." Without the slightest effort we can think of several ways that the validity of this ordinance could have been raised along well-defined channels. Again the interest of the plaintiff could only be calculated in Chinese money because it certainly does not cost very much to insert the provisions of an ordinance in a contract. The plaintiff did not even allege that the enforcement of the ordinance would be expensive. He did not even allege that he had a contract or that he would be threatened with arrest if he did
have a contract and violated it. The case was clearly a declaratory judgment case, but it was four years before the declaratory judgment act was passed. It is interesting to note that the three last above cases were all in one volume.

Now we come to the Building Height Cases, 181 Wis. 519. We challenge any one to determine from the supreme court case and the opinion the nature of the action. Justice Owen says in the very first line of the opinion:

These actions are brought to test the validity of ch. 424 of the Laws of 1923, being sec. 4444f of the Statutes. The law in question is set out in full in the margin. It is claimed that the law is not a valid exercise of the police power and that it takes private property without just compensation, contrary to the provisions of the state and federal constitutions.

One of the cases involved the local telephone company building, but as a mental exercise an interesting puzzle would be to figure out how the case can be entitled Klefisch and another v. Wisconsin Telephone Company.

In the case of State ex rel Ekern v. Zimmerman, 187 Wis. 180, the very first paragraph is as follows (page 181):

Original action of mandamus in this court to compel the defendant Zimmerman, as secretary of state, to audit a voucher for the payment of $25 to N. B. Dexter for right of way acquired on a federal-aid project undertaken by virtue of an appropriation of $1,000,000 made by sec. 2, ch. 30, of the laws of 1925.

It does not seem necessary to say anything more.

We now come to one of the latest declaratory cases in Wisconsin. It is State ex rel. Ekern v. Milwaukee, 190 Wis. 633. The case was declaratory in two respects, but it might be well to get the story before the court first. There was a growing sentiment in favor of allowing the Schroeder Hotel to be built more than 125 feet high. The city passed a home rule ordinance suspending the operation of a state law which limited buildings to 125 feet and passed the cubical content ordinance which would permit the volume of the building to equal the result of multiplying the ground area by 125 feet so that air courts and setbacks could carry up the building indefinitely if the cubical content did not exceed the result of the multiplication. It was finally figured out that if the attorney general would step in and question the right of the city to exercise this bit of governmental power that that would get the case before the Supreme Court. The scheme worked and the case came before the Supreme Court and a judicial opinion was written. Here comes the second declaratory feature. While Mr. Niven and the writer of this article were closeted considering not
only the advisability but the contents of a motion for re-hearing we received a telegram from the clerk of the Supreme Court to the effect that the court on its own motion had set aside the former opinion in the case and that another opinion was about to be filed. So the last case which we will mention in this long string of judicial judgments in Wisconsin is a double-barreled one. It is just as well that it should be the last one to be written in Wisconsin because it was just a short time before the adoption of the Uniform Declaratory Judgments Act.

The declaratory judgment act will merely purify the practice, in every respect legalizing a long continued practice in Wisconsin and will in the future eliminate all "rigging" or "framing" of cases.

Certainly the long continued practice in writing declaratory judgments is a persuasive argument that such a judgment is not unconstitutional. We do not wish to be understood as criticizing the methods that were used in numerous cases in Wisconsin in securing declaratory judgments. Necessity is always the mother of invention. We wish we could find milder terms than "rigging up issues" or "framing up cases," but it is a well known fact that even if we could find a milder term of description, the practice has been going on in Wisconsin for many many years. Possibly it has become entirely respectable, but certainly it can do no harm to have it now authorized by the legislature; and to declare the authorization unconstitutional would indeed be an unfortunate slap at the memory of and the great work done by such men as Chief Justice Winslow, Justice Marshall, Justice Timlin, Justice Dodge, Justice Barnes, Justice C. Becker and many others. It just happened that while the men named in the preceding sentence were on the Supreme Court of the State of Wisconsin, scores and scores of declaratory judgments were written, including constructions of the workmen's compensation law, the civil service act, the primary election law, the income tax law, the tenement house law, soldiers' bonus law, and many, many others.

These declaratory judgments have an ancient and honorable history.

There are many available well written articles which point out the fact that declaratory judgments have been known in the English system of jurisprudence for hundreds of years. It has occurred to the writer of this article that one point has not been sufficiently emphasized and that is that declaratory judgments were well known in the English practice and were part of the English common law when the Constitution of the United States and the Constitution of Wisconsin were adopted. There are so many cases holding that the fundamental principles and the practices of the common law became embedded in
law by the adoption of these constitutions that it seems unnecessary to cite a single one. Now if the historians are right and if many English decisions are right which point out the early history of this development then the power to write a declaratory judgment was a part of the judicial power before either one of the said constitutions were adopted, and then it is inevitably and unavoidably true that the bestowal of judicial power included the power to write declaratory judgments and for that reason the constitutionality cannot be questioned.

One of the earliest English declaratory judgments which we have been able to find was written in 1760.\(^5\)

A very good recent Canadian case points out the early Canadian practice.\(^4\)

We have had advisory opinions under constitutional provisions in various states of this country from a very early day as has been pointed out by various supreme courts, which will be discussed in another part of this article where declaratory judgment opinions will be taken up separately. We have had some very early declaratory judgments in this country. There is a vast difference between advisory opinions and declaratory judgments and the pointing out of that difference is the subject of the next heading of this article.

If textbook writers and law authors are right in their contentions that quieting title cases are an instance of declaratory judgments, then we have in Wisconsin a very recent case of that kind where the very first sentence in the opinion reads: "Millions of dollars are involved in the decision herein".\(^6\) The right of the city to fill in about ninety acres of land in the Milwaukee harbor was involved. No one represented the navigators or fishermen and it was not even suggested that the riparian owners on the harbor should be represented. The case was tried as a plain quieting title suit against the State of Wisconsin, which had passed the two statutes involved, and the court proceeded to write a very learned and valuable opinion and has put at rest the right of the city to go ahead with this mammoth improvement.

Advisory opinions are entirely different when compared with declaratory judgments.

The very title of most advisory opinion cases shows that they are not law suits. There have been more advisory opinions written in Massachusetts and Nebraska than in any other two states. An advisory opinion in Massachusetts is ordinarily called "Opinion of the Justices"

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\(^6\) Milwaukee v. the State, 193 Wis. 423.
IS DECLARATORY RELIEF CONSTITUTIONAL?

and is then followed by the volume and page. In Nebraska the subject generally reads "In re" something.

Ordinarily the duty and obligation of rendering an advisory opinion is bestowed upon the court by clause in the state constitution. In some states the clause requires the opinion to be given to the legislature, and in some to the governor, and in some to either the governor or the legislature; for instance, in Massachusetts, Section 3, Article 2, of the constitution requires the Supreme Court to give opinions to the legislature. The court has held, of course, that the opinion must be upon a pending matter.

In Maine, Section 3, Article 6, of the constitution requires the court to give the opinions to the governor.

The court has, however, held that the request in the opinion should be limited to some important question of law.

In Missouri the old constitution, in Section 11 of Article 6, required the opinion to be given either to the governor or the legislature on important questions of constitutional law. A little research, however, reveals that the new constitution of Missouri has dropped this clause.

In Florida, Section 13 of Article 4 of the Constitution authorizes the governor to ask the Supreme Court for opinions.

Colorado had a well defined practice although the court had been quite reluctant in many cases. Section 3 of Article 6 of the constitution required the court to give advisory opinions to the legislature. One of the late cases is the opinion in 79 Pac. 1009. Colorado was one of the first states to adopt the uniform declaratory relief act.

In Rhode Island, Section 3 of Article 10 of the constitution requires the opinions to be given to the legislature.

In South Dakota, Section 13 of Article 5 of the constitution gives the governor the power to ask the supreme court for advisory
opinions.¹⁵ South Dakota adopted the uniform declaratory judgment act in 1925.¹⁶

Kentucky has been rendering both advisory opinions and declaratory judgments for several years, but Kentucky is not classed as one of the states that have adopted the uniform declaratory judgment act.¹⁷

The constitution of New Hampshire has from an early date authorized advisory opinions. There have been many opinions written in that state. Sometimes they are entitled "Opinions of the Justices."¹⁸

While it will be found that there is a different title as follows: "In re School-Law Manual, 63 N.H. 574, 4 Atl. 878," there is a very comprehensive historical discussion of this proposition of advisory opinions in 15 C. J. under "courts" section 78, page 785.

We seem to have two advisory opinions in Wisconsin, or at least two opinions which partake of all the characteristics of advisory opinions although we have no provision in the constitution and we have no statute authorizing the procedure.

_In re Appointment of Revisor_, 141 Wis. 592, has all of the characteristics of an advisory opinion in that there were no parties and no pleadings and no argument.

_In re Court Room_, 148 Wis. 109, has some of the characteristics of an advisory opinion in that there were no pleadings and no parties, but it has one characteristic of declaratory judgment acts in that there was an appeal from an order, which Judge Turner dictated and filed in the lower court with respect to his court room. By turning to page 110 and subsequent pages of the opinion, the informality of the court order in the circuit court will be immediately apparent. The so-called court order includes correspondence between the judge and the owners of the building and between the judge and a committee of the county board and then the judge "ordered" that the court room to which the county board proposed to have him moved was not suitable; and then it was further ordered that until the further order of his branch of the court, his court room would be established on the fourth floor of the Masonic Building. There was an appeal from that so-called order and an opinion written. As just stated, it partakes somewhat of an advisory opinion and somewhat of a declaratory relief.

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¹⁶ See: Chapter 214, Laws of 1925.

¹⁷ See: _In re Sinking Fund_, 32 S.D. 414, for an advisory opinion; and one of the latest declaratory relief cases is _Charette v. St. Mathew Bank_, 214 Ky. 200; 283 S.W. 410; 50 A.L.R. 34.

The opponents of declaratory judgments very readily and almost willfully confuse the subject with advisory opinions, but there is no basis for the confusion and they should be kept separate in the mind of any one who is investigating either subject. It is very easy to say that an advisory opinion is non-judicial, but only one court of this land has said that a declaratory judgment is non-judicial. The notes in 12 A. L. R. 52, which is at the end of that Michigan case show that the decision was without support when written and a collection of cases subsequently made herein will demonstrate that the case has never been followed.

Only one American court (Michigan) has held a declaratory judgment act unconstitutional, and within the same year other courts began refusing to follow the opinion and the dissent by states is now uniform.

The Michigan case has been so thoroughly discredited by law authors and other supreme courts that it does not seem necessary here to say very much about it.10 To the casual observer two weaknesses are apparent which are repeatedly pointed out by courts and authors. First, the facts in the case were very weak. Second, the Michigan court lost sight of the basic difference between Federal Government and the state government. The Michigan court quotes at length from Muskrat v. United States, 219 U. S. 346, wherein it is pointed out that the United States Government is a government of delegated power and that the power of the court must be found in the constitution or it cannot be found at all. It is also pointed out that the Federal Supreme Court is a court of delegated power because it was created by the constitution, which was in turn created by the thirteen original states and clearly then the Federal Supreme Court has no inherent powers, and for any matter to be determined in the Federal Supreme Court it must be a case where a controversy exists within the language of the Federal Constitution. Speaking of the Muskrat decision, the Michigan court says:

This case should forever put at rest this question. It is absolutely decisive of the question before us.

Immediately other courts and law authors began to show the false premises in this last quotation with a result that not a single court has followed the opinion, at least eleven have criticized it and refused to follow it and law authors generally have pointed out the error.

Within the same year Kansas refused to follow the Michigan case and we believe that Kansas was the first state to refuse. Then came California, then Tennessee, then Pennsylvania, then Virginia, then

Kentucky, then Connecticut, followed by New York and so forth. These decisions will be treated of later herein.

On page 84 of the Pacific Report of the Kansas case the court very carefully points out the difference between declaratory judgments and advisory opinions, stating "A mere advisory opinion upon an abstract question is obviously not a judgment at all, since there are no parties to be bound, and the rights of no one are directly affected." The court then takes up declaratory judgments, mentions the old actions to quiet title, and various other cases in which declaratory relief has in fact been given since the early days, and then says:

Why the Legislature cannot authorize similar procedure in like situations to meet like needs is not apparent.

In the California case above referred to, the court positively repulsed the Michigan decision by stating:

Much that is said by the Michigan court is satisfactorily anwered by the decisions in Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129; Title Restoration Co. v. Kerrigan, 150 Cal. 289; 88 Pac. 356; and Hoffman v. Superior Court, 151 Cal. 386; 90 Pac. 939. It therefore seems unnecessary for us to further consider the decision of that court.

It will be found in this decision that the California statute is not the uniform declaratory relief act, but has most of the important provisions thereof. In fact, California adopted its statute before the uniform law commissioners were quite ready to report the result of their labors.

In Tennessee we have possibly the first case in the books which held the uniform declaratory judgment act to be constitutional. It is noticed above that both Kansas and California had refused to follow the Michigan case and had held declaratory judgment statutes to be valid, but neither one happened to be the uniform act. The Tennessee court refused the Michigan case in detail and refused to follow it and this is one of the cases which also points out how the Michigan court was misled by not observing the basic distinction between the Federal Government and the state governments. After pointing out the distinction the Tennessee court said:

Therefore we do not think that the case of Muskrat v. United States, and the other federal decisions cited in the majority opinion in the Anway Case, are controlling in the instant cause.

Without further elaboration, we are of the opinion that this act under consideration does not violate any provision of our Constitution, and is therefore a valid statute.

\[20\] State ex rel Hopkins v. Grove, 109 Kans. 619; 201 Pac. 82; 19 A.L.R. 1116.
\[21\] Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495.
\[22\] Miller v. Miller, 149 Tenn. 463, 261 S.W. 965.
The declaratory relief statute again came before the Tennessee court in a later case, and while the court pointed out in this case that the declaratory judgments act was not a cure-all, it used the following sentence:

This court is committed to a liberal interpretation of the Declaratory Judgments Act so as to make it of real service to the people and to the profession.\(^\text{23}\)

Subsequently the Tennessee court was asked to pass upon the validity and constitutionality of the statute, and the case answers some of the very contentions that are made by some of our opponents, who claim that seeking a declaratory judgment upon the validity of the statute is merely asking an advisory opinion from the supreme court.\(^\text{24}\)

The attorney general made that very contention in the Tennessee case now under discussion and the court said that since there were parties before the court on opposite sides of the question, some contending that the statute in question was invalid and others pointing out that it was valid, that the court would be obligated to write a declaratory judgment, which it proceeded to do.

The Tennessee court was again called upon to render a declaratory judgment as to the validity of a recent statute of Tennessee governing the operation of pool and billiard rooms.\(^\text{25}\) The court points out that the parties are interested in the question of the constitutionality of this statute, and then says:

We are of the opinion that a person so situated is entitled to bring and maintain an action for the determination of the proper construction or constitutionality of such a statute, under the provisions of the Declaratory Judgments Law, and the bill in the present cause was properly filed against the sheriff, in view of the averment of the bill that the sheriff had given notice of his intention to proceed against complainants.

The court next proceeded to find the statute under investigation to be unconstitutional and entered a declaration of the rights and status of the parties as the declaratory judgment law required. Here again is an emphatic answer to the question that the validity of the statute cannot be determined under declaratory judgment procedure.

In a later Tennessee case the parties were anxious to know whether or not a statute of 1927 passed by the Tennessee Legislature had repealed another act of 1907.\(^\text{26}\) The complainants' appeal merely asked for a declaration of the law as to that one question. Here is the final determination of the case:

\(^{23}\) Hodges v. Hamblen, 277 S.W. 901.

\(^{24}\) Goetz v. Smith, 278 S.W. 417.

\(^{25}\) Erwin Billiard Parlor v. Buckner, 300 S.W. 656.

\(^{26}\) Frazier v. City of Chattanooga, 1 S.W. Rep. 2nd Series.
A decree will accordingly be entered in this court adjudging that the Acts of 1907, (C.149), is not repealed by the subsequent enactment of the Acts of 1927, (C.457).

What a sensible procedure that is. It obviates the necessity of expensive litigation in order to finally get into the supreme court after extensive effort to find out whether or not it has been done under the wrong law.

Now we come to the previously mentioned Pennsylvania case, which is one of the best reasoned cases in the books. The decision is written by Chief Justice Moschzisker, one of the clearest thinkers on an American Bench today. On page 267 of the Atlantic Reporter he refers to the article written by Professor Borchard in 28 Yale Law Journal, 1-32. He points out that Pennsylvania has been writing declaratory judgments for years in one form or another. Then he takes up the Michigan case and we have nothing to add to what he does to that Michigan case. He not only very pointedly says that the Michigan court was mistaken, but he also says:

But this decision has not been followed in any other state, as far as we are aware.

On the question of the constitutionality of the new uniform act, which had been up before him he says:

In our opinion, the Uniform Declaratory Judgments Act is a constitutional piece of legislation, which, within proper limits, can be made of real use.

The supreme court of Virginia made the following finding when asked to pass upon the 1922 statute of that state authorizing declaratory judgments:

Its effect is to increase the usefulness of the courts and remove doubt and uncertainty as to the final result of legal controversies, by empowering the courts to enter declaratory judgments and decrees touching the rights of the parties in such cases.

An interesting history is related on page 219 showing the first English statute to be in 1850 and that the law then spread to Australia and Canada. The court points out several states where the procedure has been adopted, including Hawaii, which is the only one we have been unable to find. And then the court says:

The constitutionality of these statutes has been considered by the courts of several states, and sustained in each instance except in Michigan.

Immediately thereafter the court refuses to follow the Michigan case.

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27 Petition of Kariher, 284 Pa. 455, 131 Atl. 265.
28 131 Atl. 271.
29 Patterson v. Patterson, 131 S.E. 217.
In a New York case (1922) the Supreme Court of that state was asked for a declaratory judgment, defining the limitations upon the amount of a tax to be raised. The court proceeded to render a declaratory judgment and said:

The constitutionality of such a proceeding as this one for a declaratory judgment, where an actual controversy exists involving only a question of law, and the power of the Supreme Court to authorize such a procedure in such a case is not open to question.

Many authorities are cited in support of this statement.

Another New York declaratory judgment case worthy of consideration is one which arose under some New York statutes precipitating this statement by the court:

It would be difficult to find a more appropriate case for the application of the law permitting declaratory judgments. We are told that important public interests are involved, the speedy determination of which is imperative. It is therefore necessary that the respective rights of the parties be determined without delay. Their determination will probably promote the public welfare and render possible the performance of acts necessary for the advancement of the business interests of the city.

Two judges dissented, but they said they concurred in the conclusion reached by the court that it was a proper controversy for the rendering of a declaratory judgment.

Connecticut, likewise has been called upon to consider the validity of its declaratory judgments act, which was passed in 1921, prior to the recommendation of the uniform act by the commissioners. The Connecticut act bears many of the features of the uniform act. The court points out that there is no distinction between declaratory judgment and any other judgment entered in a proceeding like quieting title or some such proceeding. The court then holds that the refusal of the declaratory judgment would be a restriction upon judicial powers because such judicial power has been exercised from an early day. The court says that the method of procedure may be novel, but that it is nothing but an enlargement of the method of procedure and is clearly within the judicial power. The court says that they have examined the recent Michigan case, but it has not changed the opinions which they expressed in an earlier Connecticut case entitled Dawson v. Orange, 78 Conn. 96, 61 Atl. 101.

In declaring the uniform act constitutional, the New Jersey Supreme

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20 Board of Education of the City of Rochester v. Van Zandt, 195 N.Y.S. 297.
21 Craig, City Comptroller v. Commissioners of Sinking Fund, 203 N.Y.S. 236.
22 Braman v. Babcock, 98 Conn. 549, 120 Atl. 150.
Court pointed out that an earlier statute had been passed in 1873, and its validity determined previously.\textsuperscript{33}

The court said:

Declaratory judgment statutes similar to, if not identical with, that now under consideration have been enacted by the Legislature of many of our sister states, and have been the subject of much discussion by the courts of several of those states in considering the question whether challenges to the validity of such legislation, similar in essence to that interposed by counsel for the defendant, rest upon a sound legal basis. The great majority of those courts have held that the powers conferred upon judicial tribunals by these statutes, and the duties imposed upon them in the exercise of those powers, were not violative of constitutional principles. [Citing several authorities.] \textsuperscript{34}

The court finally says:

Our conclusion is that the attack upon the constitutionality of this statute is without legal basis.

There is another Pennsylvania case that might be well to consider for just a moment.\textsuperscript{35} The opinion was also written by Chief Justice Moschzisker.

There was a fine application of the declaratory judgment law to an involved lease controversy and the Chief Justice says:

In a case like the present, by proceeding according to the Declaratory Judgments Act, the parties avoid the necessity of first actually erecting a building in order to be in a position to obtain a judicial construction of their respective rights and liabilities. . . . A prime purpose of the Declaratory Judgments Act is to render “practical help” in ending controversies such as the one now before us.

The declaratory judgment entered in the lower court was affirmed.

We now have declaratory judgments acts in twenty-three states including Wisconsin.

In the opening paragraph of his very learned article in the American Bar Association Journal for December, 1928, Professor Borchard, of Yale University, states that twenty-three states now have adopted the declaratory judgment procedure. There might be an inference from the language used that all of these states have adopted the uniform law. To that extent the statement is not quite clear. Twelve of the states have adopted the uniform act without change and in some of the other states we find somewhat similar acts, but in some instances considerably older.\textsuperscript{36}

\textsuperscript{33} In re Public Utility Board, 83 N.J. Law, 303; 84 Atl. 706.
\textsuperscript{34} McCrory Stores Corporation v. S. M. Braunstein, Inc., 102 N.J. 590, 134 Atl. 752.
\textsuperscript{35} Girard Trust Co. v. Tremblay Motor Co., 291 Pac. 507; 140 Atl. 506.
\textsuperscript{36} The following states, arranged alphabetically, have adopted the uniform act:
There is a vast difference between the Federal Government and the State Governments.

Possibly the clearest statement by the Supreme Court of the United States is in the famous case of United States v. Cruickshank, 92 U.S. 542, 549-551, 23 L. Ed. 588. Mr. Chief Justice White very clearly says:

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the states or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states.

Another very famous case where this distinction is pointed out is M'Culloch v. Maryland, 4 Wheaton, 316, 4 L. Ed. 579. There after a struggle the court construed out of the Constitution as written, the authority to incorporate a federal bank by considering it one of the expressed powers to coin money, collect taxes, borrow money, regulate commerce, and so forth.

In short, when we are examining a federal question we must look for delegated power in the Federal Government and we must find it expressed in the Constitution or necessarily implied, in order to carry out a power which is clearly mentioned in the Constitution. When examining a state proposition where the government is one of inherent sovereignty, we must look only for limitations or prohibitions. In other words, a federal uniform declaratory judgment act may not be valid because the Constitution bestows no such power upon Congress, as was pointed out in the Muskrat case, while in a state the act is valid unless there is some prohibition in the state constitution prohibiting the legislature from thus changing the form of Civil Procedure before the courts.

Our legislature has full power to regulate forms of actions.

Arizona, Chapter 10, Laws of 1927; Colorado, Chapter 98, Laws of 1923; Indiana, Chapter 81, Laws of 1927; New Jersey, Chapter 140, Laws of 1924; North Dakota, Chapter 237, Laws of 1923; Oregon, Chapter 300, Laws of 1927; Pennsylvania, Chapter 321, Laws of 1923; South Dakota, Chapter 214, Laws of 1925; Tennessee, Chapter 29, Laws of 1923; Utah, Chapter 24, Laws of 1925; Wisconsin, Chapter 212, Laws of 1927; Wyoming, Chapter 50, Laws of 1923.

The following states, according to our investigation, cannot be said to have the uniform act, although they do have complete acts authorizing declaratory judgments. Rhode Island, Acts of 1876, Chapter 563 Sec. 17; Florida, Laws of 1919, Chapter 148; Kansas, Laws of 1921, Chapter 168; California, Laws of 1921, Chapter 689 Sec. 1060 C, page 1923; Kentucky, Laws of 1922, Chapter 235; Virginia, Laws of 1922, Chapter 902; South Carolina, Laws of 1922, Chapter 967.
The present law authorizing declaratory judgments is not nearly as abrupt a change in the form of court procedure as was the adoption of the original code in 1856. Just imagine how the new Code sounded to the old common law and equity pleaders when it said this:

Sec. 260.08 (formerly sec. 2600 of the Code). The distinction between actions at law and suits in equity, and the forms of all such actions and suits, have been abolished, and there is in this state but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action.

If the courts have all the judicial power which the opponents of declaratory relief claim, why did not the courts refuse to abide by that provision?

Why then do the courts permit a man to have a second trial in an ejectment suit?

If judicial power is so beyond regulation by the legislative branch of the government, why do not our courts put divorce judgments immediately into effect? Why do the judges call the parties up and instruct them that the judgment is not to be good for a year? We could go through the various instances in our practice, acts, and Code of Procedure, where the legislature has rendered the forms of actions and described the form of procedure, even telling the judge what he may do and what he may not do. For instance, why does not the Supreme Court allow an appeal from an order sustaining a demurrer forty days after it was rendered in the lower court, if judicial power is what the opponents seem to think it is? It must be admitted by all that judicial power is the power to determine, but that the method of arriving at the determination is clearly within the hands of the legislature. Surely the uniform declaratory judgments act is mild when compared with many of the statutory regulations of court procedure and many of the changes that have been brought about from time to time by various statutes.