Declaratory Judgments in Nebraska

Matthew A. Schumacher
University of Nebraska College of Law, mschumaher@stl-lawoffices.com

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DECLARATORY JUDGMENTS IN NEBRASKA

I. INTRODUCTION

A. HISTORICAL ESTABLISHMENT OF THE REMEDY

In 1929, Nebraska adopted the Uniform Declaratory Judgments Act which was prepared in 1922 by the National Conference of Commissioners on Uniform State Laws. The act was subsequently declared constitutional in *Lynn v. Kearney County*. Today, the uniform act has been adopted by forty states and the remaining ten states have some form of statutory declaratory relief. The federal courts have their own declaratory judgment procedure, made available in 1934, which is similar to the uniform act. The procedure, as we know it in this country, was originally developed and finally adopted by England in 1852. It has been estimated that today sixty per cent of all causes of an equitable nature in England and its possessions are adjudicated in the form of a declaratory action.

Perhaps overzealously, some earlier proponents saw declaratory relief as a potential reformation of the entire English legal system. In any respect, the declaratory action has performed and continues to perform a much needed function in our legal structure. The potential use of declarations is as broad as the field of law itself. Although the Nebraska experience with the act has been of longer duration than that of most states, the declaratory judgment has not been as fully utilized in this state as it has in other jurisdictions.

2. 121 Neb. 122, 236 N.W. 192 (1931). See 10 Neb. L. Bull. 183 (1931), where this case is noted. Also discussed in 12 Neb. L. Bull. 262 (1934). The plaintiff, a taxpayer, successfully brought an action against Kearney County for a declaration that the defendant county, having concluded certain contracts for road construction with several townships in the county, had no legal power to make and execute such contracts. The court had no difficulty in deciding the case and upholding the Nebraska statute.
5. 15 & 16 Vict., c. 86, § 50 (1852). "No Suit in the said Court shall be open to Objection on the Ground that a mere declaratory Decree or Order is sought thereby, and it shall be lawful for the Court to make binding Declarations of Right without granting consequential Relief."
8. See notes 66-71 and 90-92 infra and accompanying text.
B. THE NATURE AND FUNCTION OF DECLARATORY JUDGMENTS

Two deficiencies in the remedies available in the ordinary law-equity system are believed to have caused the widespread acceptance of the modern declaratory device. First, legal or equitable relief is usually not available until damage has occurred. The declaratory judgment, however, serves the function of preventing damage by extending judicial protection and relief to the complainant before a wrong has been committed. The purpose of the declaratory judgment, as stated by the act, is to “... afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” Thus, the declaratory action meets a growing need in the modern world for a means of settling controversies before they lead to invasion of rights, repudiation of obligations, or the commission of wrongs. Second, a legal or equitable remedy is intended to provide coercive relief. However, a complainant may not wish a coercive judgment; a simple declaration of his rights defining the legal status of the parties may be sufficient to solve the dispute so that the parties may voluntarily govern their conduct. The declaratory judgment declares the rights of the parties or expresses the opinion of the court on a question of law without necessarily ordering anything to be done.

The declaratory judgment is a procedural device intended to supplement the relief made available by the traditional legal and equitable remedies. Except for the absence of a prayer for coercive relief, the petition or complaint differs in no material respect from the form of traditional types of actions:

It [an action seeking a declaratory judgment] seeks only a final determination, adjudication, ruling, or judgment from the court,

10 There are some exceptions, however. E.g., equity under some circumstances will enjoin a threatened tort or prevent the negotiation of a fraudulent instrument.
12 “The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one’s peril or to act on one’s own interpretation of his rights, or abandon one’s rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity.” S. Rep. No. 1005, 73d Cong., 2d Sess. (1934).
13 Traditional relief is usually either an award of money damages or an order for the defendant to proceed with or refrain from a certain action.
14 However, the declaratory judgment may warrant a later equitable decree or judgment at law. Richardson v. Waterite Co., 169 Neb. 263, 99 N.W.2d 265 (1959). See note 109 infra and accompanying text.
but the conditions of the usual action, procedural and substantive, must always be present, namely, the competence or jurisdiction of the court over parties and subject-matter, the capacity of the parties to sue and be sued, the adoption of the usual forms for conducting judicial proceedings (including process, pleadings, and evidence), the existence of operative facts justifying the judicial declaration of the legal consequences, the assertion against an interested party of rights capable of judicial protection, and a sufficient legal interest in the moving party to entitle him to invoke a judgment in his behalf.\(^\text{15}\)

The legislature's acceptance of the declaratory judgment in Nebraska left to the courts the task of fitting the new procedure into the existing legal system. In interpreting the applicability of the Uniform Declaratory Judgments Act, the Nebraska courts have encountered certain basic questions faced by all courts in administering declaratory relief: 1) How shall the availability of another remedy affect the right of the parties to declaratory relief? 2) Shall the court declare the rights of parties who present no justiciable controversy in the traditional sense but are merely seeking advice on a hypothetical question? 3) How shall the court limit the action by its judicial discretion in granting relief? The present article will attempt to briefly survey questions concerning the availability of the remedy, explore the difficulties encountered in seeking declaratory relief, and evaluate current use of the remedy in the courts of Nebraska.

II. AVAILABILITY OF THE REMEDY

A. EXISTENCE OF A JUSTICIABLE CONTROVERSY OR CLAIM

It is a well established rule under the Uniform Declaratory Judgments Act that a proceeding for a declaratory judgment can be instituted or maintained only in a case where there is an actual controversy of a justiciable nature.\(^\text{16}\) Such a justiciable controversy is a requirement for jurisdiction. Likewise, the Federal Declaratory Judgment Act specifically provides that the remedy is available only "In a case of actual controversy..."\(^\text{17}\)


\(^{17}\) 28 U.S.C. § 2201 (1964). Throughout its history the United States Supreme Court has refused to decide moot or hypothetical questions. In the landmark case, Muskrat v. United States, 219 U.S. 346 (1911), the Court citing In re Pac. Ry. Comm’n, 32 Fed. 241, 255 (1887) stated
In Nebraska a justiciable controversy has been judicially defined as a case where interested parties are asserting adverse claims on a state of facts wherein a legal judgment is sought that would control or direct future action. In dismissing cases as nonjusticiable, the court has cast its opinions in various terms. The requirements of procuring declaratory relief in Nebraska were outlined in *Schroder v. City of Lincoln:* 1) The controversy must be between persons whose interests are adverse—or, a controversy in which a claim of right is asserted against one who has an interest in contesting it. 2) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest. 3) The issue involved in the controversy must be ripe for judicial determination—in other words, capable of present determination and not prematurely brought before the court. Unless these conditions are met, it is unlikely that an action will support a proceeding for, or the award of, declaratory relief.

(1) Absence of An Adverse Party

The Nebraska Supreme Court found no actual justiciable controversy between the plaintiffs and the two county officials named defendants in *Miller v. Stolinski.* The plaintiffs sought a declaratory judgment as to the constitutionality of the state community property law against the county assessor and the county treasurer of Douglas County. The court held there were no justiciable issues presented as the county officials made defendant did not have an interest in the controversy. The court found that the defendants' acts were not so definite and final as to constitute a genuine threat to the pecuniary interests of the plaintiffs. In so holding the court

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18 *Stanton v. Mattson,* 175 Neb. 767, 123 N.W.2d 844 (1963); *Graham v. Beauchamp,* 154 Neb. 889, 50 N.W.2d 104 (1951); *Nebraska Mid-State Reclamation Dist. v. Hall County,* 152 Neb. 410, 41 N.W.2d 397 (1950); *Redick v. Peony Park,* 151 Neb. 442, 37 N.W.2d 801 (1949).

19 155 Neb. 599, 52 N.W.2d 808 (1952).

20 *Id.* at 608, 52 N.W.2d at 813.

21 149 Neb. 679, 32 N.W.2d 199 (1948).
cited Borchard's extensive treatise on declaratory actions:\textsuperscript{22}

Actions for declaratory judgments brought by individuals to test or challenge the propriety of public action often fail on this ground, either because the plaintiff is deemed not to have an adequate personal interest in the issue, or because the public officer or other person selected as a defendant has no special duties in relation to the matter which would be affected by any eventual judgment. The absence of adversary or the correct adversary parties is in principle fatal.\textsuperscript{23}

The right sought to be established or enforced must be asserted against one who has an interest in contesting it. In the \textit{Miller} case the plaintiffs questioned the validity of a state tax statute by bringing an action against parties who had no duties to perform or responsibilities to discharge in connection with the Community Property Act. The state tax commissioner was charged by law with the duty of enforcing the provisions of the tax law; whether the act was held constitutional or unconstitutional would not affect the assessor's valuation of the taxable property or the treasurer's interest in the amount of tax revenue in the county; therefore, they had no interest whatever in the upholding of the act.

Conversely, a declaratory judgment action was successful in declaring unconstitutional an act imposing a tax of fifteen cents per pound on oleomargarine in \textit{Thorin v. Burke}.\textsuperscript{24} However, the defendant was the director of the Department of Agriculture and Inspection in the State of Nebraska, whose duty it would be to enforce such law over the entire state.\textsuperscript{25} The plaintiff, a retail grocer, brought the action against a party legally competent to jeopardize his rights. Unlike the \textit{Miller} case, the parties' interests were truly adverse, that is, the claim was asserted against a defendant interested in opposing it.

\textbf{(2) Lack of a Legally Protectible Interest in the Petitioner}

The party seeking declaratory relief must have what the court considers a legal interest in the controversy. In \textit{Nebraska Seedsmen Ass'n v. Department of Agriculture & Inspection},\textsuperscript{26} the plaintiff organization brought an action for a declaratory judgment alleging that a controversy had arisen between the parties regarding the

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\textsuperscript{22} Borchard, \textit{Declaratory Judgments} 76 (2d ed. 1941).
\textsuperscript{23} 149 Neb. 679, 683, 32 N.W.2d 199, 202 (1948).
\textsuperscript{24} 146 Neb. 94, 18 N.W.2d 664 (1945).
\textsuperscript{25} However, the State of Nebraska is not a necessary party in a tax assessment action. S.S. Kresge Co. v. Jensen, 164 Neb. 833, 83 N.W.2d 569 (1957).
\textsuperscript{26} 162 Neb. 781, 77 N.W.2d 464 (1956).
interpretation of the Nebraska Seed Law,\textsuperscript{27} with particular reference to the use of non-warranty and disclaimer provisions in the labeling of seeds offered for sale. The defendants asserted the right to prohibit disclaimer clauses on the containers. Apparently, however, the plaintiff organization had not been, and could not be accused of violating the interpretation that the defendants sought. The trial had resulted in a judgment sustaining the defendants' interpretation of the law. The supreme court reversed with directions to dismiss the action, and held that a declaratory judgment grants the plaintiff an opportunity to have his own rights determined, but not some other person's rights when his own are not invaded or disturbed. Even though the plaintiff alleged that it was an unincorporated association organized for the purpose of carrying on the business of promoting and improving the growing and marketing of agricultural seeds, the court found that the plaintiff did not have a right in the controversy.\textsuperscript{28} Perhaps the court ignored the fact that the members of the association had a direct interest in the result of the suit, the adjudication of which would have had a binding effect upon the members, since the prohibition of disclaimer clauses could affect the marketing of agricultural seeds.

Apparently, the issue in the Nebraska Seedsmen Ass'n case was moot or hypothetical. True, the plaintiff association would have liked to have had the rights of seed sellers determined; but the court believed that it was merely seeking advice, not trying to settle a controversy between itself and the Department of Agriculture and Inspection. Thus, an action is likely to be dismissed as failing to present a justiciable controversy if the plaintiff does not have a real interest in the asserted claim. This action probably could have been successfully brought by a seller or sellers of seeds whose right to use disclaimer or limitation of liability provisions was threatened by the statute.\textsuperscript{29}

(3) \textit{Ripeness of the Controversy}

In order to warrant a declaratory judgment, the controversy which is the subject of the action must be ripe for judicial deter-

\textsuperscript{27} \textit{Neb. Rev. Stat.} §§ 81-2135.01—46.01 (Reissue 1964).

\textsuperscript{28} 162 Neb. 781, 783, 77 N.W.2d 464, 465 (1956). The court's denial of relief was based on the fact that no other capacity was pleaded.

\textsuperscript{29} In Smithberger v. Banning, 130 Neb. 354, 265 N.W. 10 (1936), the Nebraska Petroleum Marketers, Inc. were not allowed to intervene in a declaratory action seeking to invalidate a state gasoline tax. The court found that the intervenor was not subject to the terms of the statute and furthermore, failed to allege its authority to appear on behalf of its membership.
mination; that is, the action must not be brought prematurely.\(^{30}\) It is a well established rule that the court will declare rights only under an existing situation and not under a situation which may or may not arise in the future. For example, an interested party may bring an action for the declaration of his rights so that he can determine what steps, if any, he must take under an existing statute. However, he may not challenge the validity of a law before it is enacted.\(^{31}\)

Likewise, the plaintiff who seeks a declaratory judgment concerning his rights which are not yet vested, but which could become vested, will be dismissed from the court without a hearing. Thus, in *Price v. Shiels*,\(^{32}\) declaratory relief was denied to contingent remaindermen who sought to have the terms of a will construed and their interests declared. The plaintiffs could acquire no vested interest, under the terms of the will, until the holder of the life estate died. The court held that a declaratory judgment proceeding is only available for the determination of present rights which have become fixed under an existing state of facts, and is not available for the decision or determination as to a future right or status which depends on a state of facts which are future, contingent, or uncertain.

The Supreme Court of Nebraska has employed various reasons for its findings of nonjusticiability in refusing to grant declaratory relief. Simply stated, the requirement of a justiciable controversy is a necessary condition for the exercise of judicial power. This is understandable since it is a waste of the court's time to require it to determine issues which may never arise. Though the existence of the condition of justiciability is not always easy to ascertain, it seems that an issue will be considered justiciable for purposes of a declaratory judgment if either: 1) a cause of action for coercive relief has already accrued to one of the litigants, or 2) it is likely that a coercive action will accrue if the declaration is denied. It is the policy of the uniform act to afford a remedy for the removal of uncertainty without making it necessary to await the event of the relatively certain wrong which would give rise to coercive litigation. If such facts can be shown, it is likely that the requirements of justiciability for declaratory relief have been met.\(^{33}\)

\(^{32}\) 149 Neb. 330, 31 N.W.2d 91 (1948).
\(^{33}\) The test of when a justiciable controversy exists has been stated in various terms: (before the last irrevocable step is taken which will necessitate coercive relief). JAMES, CIVIL PROCEDURE § 1.10, at 29 (1965); (a probability from human experience that danger threatens or legal rights are in jeopardy or insecure). BORCHARD, DECLARATORY JUDGMENTS
B. JUDICIAL DISCRETION TO ENTERTAIN THE PETITION

In Nebraska, the Uniform Declaratory Judgments Act has been interpreted to be a discretionary remedy, and litigants are not vested with an absolute right to a determination of the controversy existing between them. Such discretion is exercised on the basis of the facts and legal contentions of each case and after consideration of all the circumstances. The court may exercise its discretion to refuse the remedy if it appears that: 1) the judgment will not finally settle the uncertainty or controversy, or 2) the parties have an alternative remedy which would be more appropriate under the circumstances. Such discretion to deny declaratory relief is also recognized under the federal act, which makes no express provision for the practice.

(1) The Complete Termination of the Uncertainty or Controversy

The uniform act provides that a declaration may be denied when the controversy would not be finally settled. The statute states the following criterion for the exercise of discretion: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." The Nebraska courts have held that it is unlikely that a declaration will terminate the uncertainty or controversy giving rise to the proceeding, either if an interested party has not been brought into

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637 (2d ed. 1941); (if a disputed claim be accompanied by imminent litigation). 53 COLUM. L. REV. 1130 (1953).
35 "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary. The court's discretion should be exercised with caution: Jurisdiction should be assumed only where the court is satisfied that an actual controversy exists between competent parties who are before the court, and that the declaration sought will be a practical help in ending the controversy or in stabilizing disputed legal relations under the facts alleged and proved." Graham v. Beauchamp, 154 Neb. 889, 893, 50 N.W.2d 104, 107 (1951).
36 BORCHARD, DECLARATORY JUDGMENTS 296-99 (2d ed. 1941). A third ground for denying declaratory relief, sometimes used in other jurisdictions, arises where the judgment, if rendered, would serve no useful purpose. No Nebraska case was found where declaratory relief was denied for this reason.
38 NEB. REV. STAT. § 25-21,154 (Reissue 1964).
the action, or if an issue has not been raised which the court deems an important question for the complete termination of the controversy.

In Dobson v. Ocean Acc. & Guar. Corp., the plaintiff insured had been "threatened suit" by the city of Gillespie, Illinois, on the grounds that plaintiff was liable to the city, under a construction contract, for the loss the city had sustained in a previous personal injury action. Plaintiff sought a declaratory judgment against the insurer, determining that, if plaintiff were liable to the city, loss arising from such liability was covered by the defendant's policy. The court, in exercising its discretion to grant declaratory relief, held that since the issue of the plaintiff's liability to the city had not been decided and was not raised in this action, a declaratory judgment was not an available remedy. The court found that the question of plaintiff's liability to the city was necessary to the complete termination of the controversy. In Southern Neb. Power Co. v. Village of Deshler, an action was brought seeking a declaratory judgment that an ordinance was void. However, only one member of the village board was made a party defendant. The court held: "It is clear that the trial court in this case had no jurisdiction to determine any controversy between the plaintiff and the members of the board of Deshler, because the members of the board are not parties to this action." The plaintiff had failed

30 Custer Pub. Power Dist. v. Loup River Pub. Power Dist., 162 Neb. 300, 75 N.W.2d 619 (1956). "More often, however, the court dismisses the proceeding, on the ground that some designated necessary party or parties should have been heard, not only for the information of the court but because such a party might be affected by, even though not bound by, the decision; and in so conclusive a proceeding it would be neither just nor proper to render a judgment without hearing and binding such interested person. Any suggestion, of course, that interested parties could be bound by a judgment in a proceeding to which they were not parties served, with opportunity to be heard, would encounter constitutional objections." Smithberger v. Banning, 130 Neb. 354, 359, 265 N.W. 10, 12-13 (1936), court citing Borchard, Declaratory Judgments 104-06 (1934).


32 Ibid.

33 The plaintiff could not get jurisdiction over the city of Gillespie, Illinois in Nebraska. Thus, the declaratory action was of no value under these circumstances in completely settling the entire controversy. However, the defendant insurer had contracted to defend the insured in liability actions covered by the policy. To the insured, the expectation that the insurer will perform its obligations may be as important as the performance itself. See notes 78-81 infra and accompanying text.

34 Id. at 135, 264 N.W. at 464.
to make all of the members of the board parties defendant, and therefore all parties necessary to a complete termination of the question were not before the court. A final binding adjudication could not be made without their presence.45

The declaratory device is designed to provide a speedy and inexpensive method of determining disputes and one which should be liberally interpreted, and not restricted by technicalities.46 Admittedly, the requirement of a complete termination of the entire controversy serves the purpose of avoiding multiple suits. However, the parties before the court may have an important interest in settling the single issue raised. It would seem that this interest of the individual parties should be finally settled by a declaration if no harm can be done to the persons who are not parties to the proceedings. In the Dobson case, for example, the settlement of the responsibility of the insurer to the plaintiff under the insurance contract, would not have substantially affected the rights of the city to recover its claim against the insured. The declaration of that issue would have been binding only upon those who were parties to the action.

(2) Availability of Alternative Remedies

The Uniform Declaratory Judgments Act states: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."47 This raises the alternative remedy problem. It seems apparent from the language of the statute that the purpose of the declaratory judgment is to give the litigant who has a known civil remedy the alternative to choose a declaration as a substitute remedy.48 However, the Nebraska courts have held that a declaratory judgment should not be granted where an alternative remedy is available.

Thus, in Scudder v. County of Buffalo,49 where the plaintiff

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45 Other cases where declaratory judgment has been denied because all parties necessary to the termination of the controversy were not before the court: Custer Pub. Power Dist. v. Loup River Pub. Power Dist., 162 Neb. 300, 75 N.W.2d 619 (1956); Redick v. Peony Park, 151 Neb. 442, 37 N.W.2d 801 (1949); Wood Realty Co. v. Wood, 132 Neb. 817, 273 N.W. 493 (1937).


48 This was expressed to be the purpose of the Uniform Declaratory Judgments Act. Borchard, DECLARATORY JUDGMENTS, 316-18 (2d ed. 1941).

49 170 Neb. 293, 102 N.W.2d 447 (1960).
sought a declaration as to the rights of the parties growing out of an alleged mistake in the assessment of plaintiff's property, the petition was dismissed. The court pointed out that the statutes of the state provided a remedy for the petitioner in this situation,50 and held that:

Where an exclusive remedy is provided, the declaratory judgment act does not provide an additional remedy. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy. In fact, the general rule is that an action for a declaratory judgment will not be entertained when another equally serviceable remedy has been provided.51

The plaintiff in the Scudder case had alleged that the statutory remedy was not adequate to meet the situation which confronted him. However, the court apparently foreclosed consideration of the adequacy of the alternative remedy and reinforced their interpretation of the declaratory judgment act as providing an extraordinary remedy. Thus the court not only repudiated the general view,52 but in effect held that the availability of another remedy per se precludes declaratory relief.53

The Scudder case can be more easily reconciled with the interpretation given the Uniform Declaratory Judgments Act in other jurisdictions if it is expressly limited to its facts. Since a statutory remedy was available in the Scudder case, declaratory relief may be unavailable as a result of the legislature having expressly designated some other remedy as an exclusive one for certain situations. The problem is thus entirely one of statutory interpretation.54

Federal Rule of Civil Procedure 57 expressly provides: "The


51 Scudder v. County of Buffalo, 170 Neb. 293, 296, 102 N.W.2d 447, 450 (1960). (Emphasis added.)


53 See also Stewart v. Herten, 125 Neb. 210, 249 N.W. 552 (1933), where under similar facts the court held the availability of another remedy precludes declaratory relief.

54 If a statute gives a specific remedy for a specific type of action, the declaratory judgment is understandably inapplicable. However, the statute involved in Scudder provides: "Appeals may be taken from any action of the county board of equalization to the district court . . . " Neb. Rev. Stat. § 77-1510 (Reissue 1964). (Emphasis added.) Thus, it would seem that the procedure provided was not expressly intended as an exclusive statutory remedy. See York County Rural Pub. Power Dist. v. O'Connor, 172 Neb. 602, 111 N.W.2d 376 (1961), which seems to limit the Scudder case.
existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Thus, under the federal rules as well as the construction given the uniform act in the majority of other jurisdictions, the declaratory remedy is cumulative and alternative, not exclusive. Apparently the Nebraska courts in the past have viewed the declaratory judgment simply as a statutory expansion of equity jurisdiction, and thus insist that the equitable requirement of lack of another adequate remedy be maintained as a jurisdictional prerequisite for declaratory relief. However, there is no justification in the Uniform Declaratory Judgments Act for such a proposition. Since no specific provision is present in the act as to whether the action is to be brought in law or equity, it apparently was the intention of the legislature that the forum would depend on the issues involved and the relief sought. This is indicated by the flexibility of the act in providing for the use of juries for the trial of traditional jury questions. The declaratory action is a special form of action, neither legal nor equitable, but sui generis. Declaratory relief may take on the color of either equity or law, depending upon the nature of the particular facts and issues involved. It is imperative to the purpose of the declaratory action that the equitable requirement of lack of another adequate remedy not be a prerequisite for obtaining relief.

Seemingly more understandable is the restriction that a declaratory judgment action will not be entertained if there is pending other litigation in which the rights of the parties can be determined. In exercising judicial discretion to permit a new petition for a declaration by one of the parties to a pending action, the court should consider these questions: 1) Was the other action pending before the declaratory judgment proceeding was commenced? 2) Does the pending action involve the same subject matter and issues presented in the declaratory action? 3) Can these issues be tried with equal facility in the other action? If these questions are answered in the affirmative, the court will usually dismiss the declaratory action. In Phelps County v. City of Holdrege, the plaintiff county asked the court to establish its status with regard to redemption of land from a judicial sale for delinquent taxes. The court denied declaratory relief because the identical question was decided in the former independent action in the district court for Phelps County, and

65 Franklin Life Ins. Co. v. Johnson, 157 F.2d 653 (10th Cir. 1946).
68 Id. at 350-54.
69 133 Neb. 139, 274 N.W. 483 (1937).
there was no appeal. The court held that "The declaratory judgment law is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court having jurisdiction of parties and subject-matter." A declaratory judgment on the same issues involved in a pending action between the same parties will not serve a sufficiently useful purpose.

III. PARTICULAR APPLICATIONS OF DECLARATORY RELIEF

A. RIGHTS, STATUS, AND LEGAL RELATIONS

The Nebraska Uniform Declaratory Judgments Act gives to the courts within their respective jurisdictions the "... power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Accordingly, the existence or non-existence of any right, duty, power, or privilege, or any fact on which such legal relations depend, is susceptible to declaratory adjudication.

In York County Rural Pub. Power Dist. v. O'Connor, the plaintiff sought a declaration as to the reasonableness of rates for electrical services when a controversy had arisen between the public power district and its customers over a rate increase. The court reversed the defendants' demurrer and held: "The very purpose of the Uniform Declaratory Judgments Act is to provide the relief that plaintiff seeks, a declaration of the rights of the parties." The defendants had refused to pay the new rate increase fixed by the plaintiff and had remitted the sum of the previously existing rate. In addition, the defendants had threatened the plaintiff with an action for damages if the furnishing of electrical energy were discontinued. Thus, the plaintiff would be required to bring an action at each billing period for the amount due under its applicable rate. Under these circumstances, the declaratory judgment provided an ideal remedy. The right of the public power district to charge the increase in rates could be economically established or denied and the controversy finally and completely terminated by a declaration.

Determination of status is one of the most useful advantages of the declaratory action, but unfortunately Nebraska has few such

60 Id. at 139, 274 N.W. at 483, syllabus by the court.
61 NEB. REV. STAT. § 25-21,149 (Reissue 1964).
63 Id. at 609, 111 N.W.2d at 380.
cases. The status of a child with respect to its parent was held to be within the contemplation of the statute providing for declaratory judgments in *Carlson v. Bartels.* The fact of parentage, important in establishing the child's right to share in a decedent's estate, was determined by declaration. In *Baum v. Baum Holding Co.*, the rights, status, and legal relation of a holding corporation and its stockholders was found to be a proper subject for a declaration.

The declaratory action has been put to more frequent and varied uses to determine status in other jurisdictions where the uniform act is in effect. The action has been used to declare the existence and validity of both marriage and divorce, and particularly the legal effect of foreign divorces. Questions involving employment status have received declaratory determination, as well as rights and duties with regard to unemployment compensation funds. The right to membership in an organization and questions of citizenship are within the purview of the declaratory action.

B. CONTRACTS AND WRITTEN INSTRUMENTS

The Uniform Declaratory Judgments Act provides: “A contract may be construed either before or after there has been a breach thereof.” Thus, the declaratory judgment offers a remedy in the situation where there is a dispute as to rights and duties under a contract because of uncertainty. Apparently, any question that may arise under a contract, whether it be the interpretation, validity, effect, or the result produced by the contract, is a proper subject for declaratory relief. By determining these issues before breach, the declaratory judgment often enables the parties to avoid

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64 143 Neb. 680, 10 N.W.2d 671 (1943).
66 Chesny v. Chesny, 197 Misc. 768, 94 N.Y.S.2d 674 (Sup. Ct. 1950). However, a declaratory judgment action cannot be brought to set aside or modify a divorce decree valid on its face. Burgess v. Burgess, 210 Ga. 380, 80 S.E.2d 280 (1954).
67 Lane v. Lane, 182 Misc. 656, 45 N.Y.S.2d 540 (Sup. Ct. 1943).
68 Watson v. Centro Espanol de Tampa, 158 Fla. 796, 30 So. 2d 288 (1947).
70 Carr v. Union Church, 186 Va. 411, 42 S.E.2d 840 (1947).
72 NEB. REV. STAT. § 25-21,151 (Reissue 1964).
73 BORCHARD, DECLARATORY JUDGMENTS 505-28 (2d ed. 1941).
Illustrative of the use of the declaratory action in interpreting contracts are the cases of Dorland v. Dorland,\textsuperscript{75} where a marriage settlement and separation agreement was construed before a breach occurred, and E. K. Buck Retail Stores v. Harkert,\textsuperscript{76} where an action was brought by a corporation and its majority stockholders to test the validity of a corporate control agreement.\textsuperscript{77}

Declaratory judgments are of great value and widely used in interpreting insurance contracts.\textsuperscript{78} A declaration provides an escape from the dilemma often encountered by an insurance company, faced with the possibility of jeopardizing its rights by either defending or refusing to defend a suit against the insured.\textsuperscript{79} Likewise, a declaration can be a desirable procedure from the standpoint of the insured,\textsuperscript{80} whereby a speedy determination may be had of the insured’s rights under the policy.\textsuperscript{81} The parties to an insurance contract can conveniently have their uncertainties resolved by seeking a declaratory judgment.

C. TITLE AND PROPERTY RIGHTS

The disputed title or right to property, real or personal, is an appropriate subject of declaratory relief. The right or title claimed

\textsuperscript{74} Borchard, Declaratory Judgments In Indiana, 19 Ind. L.J. 175, 188 (1944). This is a particularly important factor with reference to business contracts.

\textsuperscript{75} 175 Neb. 233, 121 N.W.2d 28 (1963).

\textsuperscript{76} 157 Neb. 867, 62 N.W.2d 288 (1959).

\textsuperscript{77} Other types of contracts which have been the subject of a declaratory judgment in Nebraska include: (construction contract) Richardson v. Waterite Co., 169 Neb. 263, 99 N.W.2d 265 (1959); (will) Perigo v. Perigo, 158 Neb. 733, 64 N.W.2d 789 (1954); (lease agreement) Chesnut v. Master Laboratories, 148 Neb. 378, 27 N.W.2d 541 (1947).

\textsuperscript{78} Borchard, Declaratory Judgments (2d ed. 1941).

\textsuperscript{79} If the insurance company fails to defend the claimant’s suit against the insured, it cannot be certain that the insured will defend adequately. On the other hand, to defend the insured might be a waiver of its defense of noncoverage. In addition, to defend every action, without even questioning the extent of the insurer’s liability, would be extremely expensive and impractical. See National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N.W.2d 821 (1966).

\textsuperscript{80} It is apparent that when the legality of a life insurance policy is questioned because of alleged fraud on the part of the insured, it is extremely important to both the insured and the insurer to have this issue resolved before the death of the insured. Equitable Life Assur. Soc. of United States v. Gillan, 70 F. Supp. 640 (D. Neb. 1945).

\textsuperscript{81} Under some circumstances this may be of great importance to the insured. See Dobson v. Ocean Acc. & Guar. Corp., 124 Neb. 652, 247 N.W. 789 (1933).
may find its source in a deed, will, written contract, or other instrument. Moreover, the action may be brought by an executor, administrator, trustee, guardian or other fiduciary. Thus, in Graham v. Beauchamp, an action was brought by the guardian of the plaintiff, seeking a declaration as to the rights of the plaintiff to the ownership of certain cattle. The court interpreted the instrument involved and found that a declaration of the rights or legal relations to determine the title to personal property was a proper subject for a declaratory action.

Likewise, in Father Flanagan's Boys' Home v. Graybill, the courts were found to have the power to grant a declaratory judgment on questions of construction and validity of a will and the property rights thereunder, provided there is an actual controversy relating to the matter at issue. In addition, the Nebraska courts have found the declaratory judgment appropriate for the determination of the validity and operation of a lease, the interpretation and effect of a deed, the priority of liens on real property, the validity of a trust agreement, and controversies relating to an estate of a decedent.

In other jurisdictions the declaratory judgment has been effectively used to determine the enforceability and effect of covenants and restrictions, rights and duties in regard to easements and water rights, and ownership of patents and copyrights.

D. CONSTITUTIONALITY AND CONSTRUCTION OF LEGISLATION

Under the Uniform Declaratory Judgments Act,

Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or fran-

83 154 Neb. 889, 50 N.W.2d 104 (1951).
88 In re Reynolds Estate, 131 Neb. 557, 268 N.W. 480 (1936).
92 Treemond Co. v. Schering Corp., 122 F.2d 702 (3d Cir. 1941).
chise and obtain a declaration of rights, status or other legal relations thereunder. 93

Nebraska has had a large number of declaratory judgment cases involving various aspects of the validity or construction of statutes and municipal ordinances. The declaratory action has proven to be an important device for challenging statutory validity because of the convenience and effectiveness of determining validity before anyone has changed his position by following or ignoring a statute's provisions. 94 Illustrative of this advantage is the case of Webber v. City of Scottsbluff. 95 The defendant city had passed an ordinance prohibiting auction sales or similar activities on the streets and sidewalks of the city. The plaintiff stood to be economically damaged if he complied with the ordinance and would be subject to a fine if its provisions were ignored. A declaratory judgment was successfully brought and the ordinance was declared void. 96

In addition, the declaratory action also serves the function of challenging specific powers of public officers and agencies acting under authority of a statute. Thus, in Armstrong v. Board of Supervisors, 97 the declaratory judgment was held to be proper in an action brought by taxpayers to secure an interpretation of a statute authorizing county boards to issue and sell bonds of the county for the purpose of building a county hospital. 98

If a law has not been enforced because of serious questions as to its validity, an interested public official or governmental agency may bring declaratory action to establish the law's status before any injuries arise. For example, a declaratory action was brought by

94 Borchard, DECLARATORY JUDGMENTS 1021 (2d ed. 1941).
95 141 Neb. 363, 3 N.W.2d 635 (1942).
96 Other cases where construction of statutes were found to be proper subjects for the declaratory judgment: Turkey v. Douglas County, 133 Neb. 732, 277 N.W. 57 (1938) (constitutionality of delinquent tax law); Stanton v. Mattson, 175 Neb. 767, 123 N.W.2d 844 (1963) (validity of installment sales law); Meyerkorth v. State, 173 Neb. 889, 115 N.W.2d 585 (1962) (constitutionality of compulsory school attendance law); Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934) (action to declare tax assessment law invalid).
97 153 Neb. 858, 46 N.W.2d 602 (1951).
98 Other Nebraska cases where a declaratory action was brought to question the powers or duties of public authorities and officers: Anderson v. Herrington, 169 Neb. 391, 99 N.W.2d 621 (1959) (tax assessor); Noble v. City of Lincoln, 153 Neb. 79, 43 N.W.2d 578 (1950) (city officials); York County Rural Pub. Power Dist. v. O'Connor, 172 Neb. 602, 111 N.W.2d 376 (1961) (public power district); School Dist. of Omaha v. Gass, 131 Neb. 312, 267 N.W. 528 (1936) (school board).
the city of Omaha to test the validity of the Sunday closing law in *City of Omaha v. Lewis & Smith Drug Co.*

The declaratory judgment has been an extremely useful and popular tool in Nebraska for determining the constitutionality and proper construction of legislation, and the popularity of its use for this purpose is obvious. Experience has proven that it is the simplest way to challenge governmental action.

**IV. PRACTICE AND PROCEDURE IN THE DECLARATORY ACTION**

Rule 57 of the Federal Rules of Civil Procedure provides that "the procedure for obtaining a declaratory judgment shall be in accordance with these Rules." Likewise, the procedural aspects of the Uniform Declaratory Judgments Act differ very little from the established rules which apply to traditional actions. The declaratory action is intended to be merely a procedural device which does not change the substantive rights of the parties.

**A. Pleadings**

The pleadings used in a declaratory action are basically the same as those employed in an ordinary civil action, the single exception being that the plaintiff demands a declaration rather than a coercive judgment. The rules of pleading applicable to ordinary civil actions also apply to declaratory actions. For example, a declaratory complaint is subject to a demurrer if it fails to state a cause of action and summary judgment is allowed where only issues of law are involved.

A party seeking declaratory relief must comply with the established rules of jurisdiction, venue, and service of process which govern ordinary actions. Likewise, just as in other actions, the court will consider the effect of the statute of limitations and laches.

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90 156 Neb. 650, 57 N.W.2d 269 (1953).
100 Lickert v. City of Omaha, 144 Neb. 75, 12 N.W.2d 644 (1944).
101 *James, Civil Procedure* § 1.10 (1965).
B. TRIAL

The Uniform Declaratory Judgments Act provides for a jury trial in the same manner as in other civil actions: "When a proceeding . . . involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."\(^{105}\)

Even though the Nebraska courts have held declaratory relief to be essentially equitable in nature, the act has been interpreted to provide for a jury trial in the case of fact determinations when traditional legal issues are presented. Thus, the declaratory judgment provides for a jury when issues appear which would have been triable to a jury as a matter of right had a coercive action been brought.\(^{106}\)

There may be combined with the request for a declaration, an additional prayer for coercive relief.\(^{107}\) The plaintiff may not sufficiently establish a right to the coercive relief for which he prays, whereas the evidence may be sufficient for a declaratory judgment in his favor. In this case, a declaratory judgment will settle the controversy, even though the prayer for coercive relief is denied. In addition, whenever necessary, as when the declaratory judgment alone does not give sufficient relief or is not complied with, the petition may apply for additional relief based on the previously granted declaratory decree.\(^{108}\) Such supplemental relief is not limited to further declaratory relief, but coercive enforcement may be granted.\(^{109}\)

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\(^{105}\) Neb. Rev. Stat. § 25-21,157 (Reissue 1964). Likewise, Rule 57 of the Federal Rules of Civil Procedure provides "[T]he right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39."


\(^{108}\) "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith." Neb. Rev. Stat. § 25-21,156 (Reissue 1964).

\(^{109}\) Noble v. City of Lincoln, 158 Neb. 457, 63 N.W.2d 475 (1954).
C. Review

Both the Federal and the Uniform Declaratory Judgments Act provide that declarations are reviewable as final judgments. Likewise, just as in a coercive suit, conclusions of law and findings of fact carry the same binding effect under the principles of res judicata.

V. Conclusion

The Uniform Declaratory Judgments Act provides: "Sections 25-21,149 to 25-21,164 are declared to be remedial; their purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and are to be liberally construed and administered."

The maintaining of the declaratory action as extraordinary to existing remedies, as opposed to an alternative remedy, will seriously hamper its obvious usefulness. If liberally interpreted, however, the declaratory judgment offers many advantages over traditional actions. The declaratory action is preventive, not redressive as are actions at law, and it enables adjudication before breach of legal relations. Likewise, it is superior to the traditional action in equity which is subject to numerous technical requirements, such as the availability of a form of action. By the use of the declaratory judgment, a petitioner is able to challenge the validity of a penal statute without having to subject himself to its penalties. And finally, the declaratory action affords a speedy and inexpensive method of judicial relief from uncertainty and insecurity. The issues presented for decision are usually simple and the facts are

111 In re Estate of Reynolds, 131 Neb. 557, 268 N.W. 480 (1936).
113 "'It is hardly conceivable that any fundamental principal (sic) of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law whatever it may be determined to be, from obtaining an adjudication of their controversy in the courts without one or the other first doing something that is illegal . . . if he is mistaken in his view of the law.'" City of Lincoln v. First Nat. Bank, 146 Neb. 221, 224, 19 N.W.2d 156, 158 (1945), court citing State v. Grove, 109 Kan. 619, 623, 201 Pac. 82, 84 (1921).
115 "[B]usiness men do not want to violate the law, with its penalties. What they wish is a clarification, a guide to the meaning of the law, so that they may avoid breaking it." BORCHARD, DECLARATORY JUDGMENTS 1021 (2d ed. 1941).
often stipulated, thus greatly saving time.116

Vast areas exist in the field of law where declarations could be used reasonably and with effective results. However, it should not be thought of as a reformation of the entire legal system. On the contrary, one filing a petition for a declaratory judgment in Nebraska should be certain that he casts his case in the form of a justiciable controversy. He should anticipate the defense that the declaration will not lie as an alternative to a traditional or statutory remedy. Likewise, he will have to be prepared to cope with the jurisdictional requirements of the traditional actions, present evidence to a jury, and anticipate the common problems of appeal. In short, it is almost necessary to treat the declaratory judgment as merely another form of action.

Matthew A. Schumacher '67

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