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Bernard C. Gavit
Indiana University School of Law

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PROCEDURE UNDER THE UNIFORM DECLARATORY JUDGMENT ACT

BERNARD C. GAVIT*

Two members of the South Bend Bar, G. A. Farabaugh and Walter R. Arnold, several years ago published an article in the Indiana Law Journal in which they discussed the Indiana statute on the subject of declaratory judgments. Upon practically all of the points to which those gentlemen addressed themselves I could hope to add nothing. I have only one query as to any of their conclusions, and my main purpose is to supplement what they have done; for in their article, nor in any other that I have discovered, is there any serious discussion of the procedural problems involved. Two principal questions present themselves: first, is a jury trial necessary in every, or any proceeding under the act; and second, does the code of pleading and practice in this state apply to proceedings under the act? My query as to their conclusion is this: is it true that the act confers on the Justice of the Peace courts in Indiana jurisdiction of proceedings under the act? ²

I.

Before we can intelligibly discuss those problems, however, it is necessary to go back and look at the substantive side of the

* Professor of Law, Indiana University.

¹ The substance of this paper was originally presented at a meeting of the South Bend Bar Association in March, 1932. The Indiana Statute on the subject is found in Sec. 680.1-680.16 Burns, 1929.

² 3 Ind. L. J. 351, 444 (1928).

³ Farabaugh and Arnold came to the conclusion that the act applied to them. 3 Ind. L. J. at 361.
situation. It is impossible, as a *practical* matter, to separate substance and procedure. We do separate them as a formal matter, but that is as a classification: a mental convenience, based, of course, upon observable differences. But in all events substance precedes procedure in our *theoretical* scheme of things; and much of our procedural law is written in terms of the substantive law. For example when the Code provides that an action shall be brought "by the real party in interest" it means the person having a substantive *legal* interest. The code rule, too, that a complaint shall state the facts constituting the plaintiff's "cause of action" means that the facts showing that the plaintiff has a legal interest subject to judicial recognition are to be stated. It can fairly be said that we have about half a dozen very general rules of code pleading (all in terms of the substantive law) which cover about 90 per cent of the cases. When we have written down the rules of the real party in interest; the joinder of parties; the joinder of actions; the complaint and answer rules; the demurrer and amendment rules; we have included all of any general importance. They give the lie to the common assumption that if one knows the general rules or principles he knows the law. We could teach a ten year old boy all of these code rules on pleading, but his effective knowledge of the law would be so meagre that he would have to qualify as a "constitutional lawyer" if he could qualify at all.

The reason is that after all procedure is as broad as the entire substantive law, and that you cannot intelligibly deal with it without at the same time dealing with its substantive co-efficient. Food and man are two different things; but the latter is worse than useless without the former; and so it is with substantive and procedural law.

But in any event we have traditionally settled the substantive law on the basis of pre-existing rules. Legal interests are conceived of as preceding their judicial recognition. Today we have a school of legal philosophy which energetically denies the validity of that concept. The most notable exponent of that school is Mr. Jerome Frank of the Chicago and New York Bars. His book, *Law and the Modern Mind*, is of immense interest and helpfulness to every student of law, and every practicing attorney. His view is that the law *cannot* be defined in terms of a

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4 Those who care to pursue the inquiry further will find articles by him in 80 U. of Penn. L. Rev. 18, 233 (1931) and 26 Illinois L. R. 645, 761 (1932).
Rational Formal Science; it can only be defined in terms of its results. Thus the only law we have is that which the courts evidence in their judgments. It is a Philosophy of Behaviorism in Law; and while it emphasizes a possible point of view, the answer to his argument is that law can be defined in any way we wish to define it. When all is said and done it is difficult to conceive of a workable system of law which indulges in no pre-conceptions, and which makes no attempt to systematize, formalize and philosophize as to the results. Few lawyers and teachers have accepted Mr. Frank's position in its entirety; and we can safely go on with our postulate that substantive legal interests are pre-existent. We must not make the mistake, however, of assuming that it is anything more than a postulate; and that legal rules and principles are anything more than mental concepts, subject to change without notice whenever a change is shown to be desirable. Because a thing is new is no valid objection to it of itself, even in the law. Much of the courts' difficulties with the Declaratory Judgments Act arise out of their failure to recognize that.

This short excursion into legal philosophy is necessary at this point because we cannot discuss the problems suggested above without setting out our foundations. It is impossible to begin any place except at the beginning. It is no good trying to talk about, much less to understand, the procedure under the Declaratory Judgments Act until we have settled the assumptions and pre-conceptions upon which the talk bases its foundation. All legal talk has a background of some brand of legal philosophy and it is always well that it be articulated and expressly defined, and not left to inference and misunderstanding.

II.

Just a few additional words as to the non-procedural side of the problem. The Indiana Act is the Uniform Act, which up to 1930 had been adopted in fifteen states. The decisions from other states are therefore a valuable assistance in the discussion of the problem. The act has been held constitutional in every instance where it has been attacked (including Indiana) (an early Michigan case to the contrary has been overruled); and its constitutional validity has been assumed in a number of other cases. The attack upon it is principally the jurisdictional one,

5 The cases are collected and discussed in Professor Borchard's article cited infra. n. 10.
that it constitutes an invasion of the judicial function, being an imposition by the legislature on the courts of a non-judicial function. The important conclusion from the cases upholding its constitutionality on that score is that a fortiori the courts could have assumed the jurisdiction without the aid of the statute. There is nothing in the usual constitution or statute (and there certainly is nothing in the Indiana Constitution and statutes) dealing with the jurisdiction of our courts of general jurisdiction which can fairly be said to be a limitation which has been removed by the Declaratory Judgments Act. If it were a constitutional limitation it could not be removed by a statute. The constitutions and statutes give almost unlimited jurisdiction in law and equity (and our statute adds this: “all other causes, matters and proceedings”) and thus it is apparent that the refusal of the courts to deal with the subject-matter covered by the act was a self-imposed limitation. The courts could act, but they would not. The closest judicial expression of this proposition is to be found in the case of Guaranty Trust Co. v. Hannay. In that case Bankes, L. J., said this: “I can not doubt that had the Court of Chancery in those days (before 1852) thought it expedient to make merely declaratory judgments they would have claimed and exercised the right to do so.” Certainly if this is now a proper judicial power, it was always a proper judicial power, which the courts did not, for some reason or other, exercise. The act is therefore simply a command to them to exercise it, and consequently it is valid. Although the act says “courts shall have the power” it literally means “courts shall use the power.” It is commonly assumed that the legislature cannot tell the courts what to do; but that is not true. Every statute tells, expressly or by implication, the courts what to do (that is, what rule to apply), and the sole objection to the so-called expository or interpretative act is its impolite form (if it be not retroactive, in which case it may be invalid under the 14th amendment but not under the doctrine of the separation of powers).

The question is still open as to whether or not the United States District Court must or can follow a State Declaratory

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6 1376 Burns, 1926.
7 (1915) 2 K. B. 536, 568.
9 Time does not permit a detailed defense of that statement at this point. The statement is the result of an investigation of the hundreds of cases upon the point which the present author plans to present at a later date.
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Judgments Act; and whether or not a Federal Act would be valid. The present state of the case suggests a negative answer to both questions. The Supreme Court of the United States has gone out of its way to discourage the procedure in the Federal Courts. The first question is as to whether or not the Conformity Act compels jurisdiction. It is thought that it does not. It deals with practice and pleading; and this is a matter of jurisdiction. There is in truth considerable authority for the proposition that the equity jurisdiction of the Federal Courts cannot be increased by state legislation. But it does not follow that it cannot be increased by the courts themselves, or by Federal legislation; despite the fact that the Supreme Court has given a very narrow construction to the constitutional and statutory grant of equity power to the Federal Courts. If a Federal Court wished to take jurisdiction there is nothing to prevent it (unless the court finally indulges in a very reactionary interpretation of the judicial power clause of the Federal Constitution); and a state statute should have no more than persuasive authority upon the point.

As to whether a Federal Act would be valid turns also upon the final construction of the words “case or controversy;” and “equity” in the Federal Constitution. Despite the common assumption to the contrary it is not at all impossible to sustain a Federal act. The cases and the problem have been most adequately discussed by Professor Edwin M. Borchard of the Yale Law School,\(^{10}\) and for that reason it is unnecessary and undesirable to elaborate upon the point in this paper.

III.

The usefulness of the act can be briefly exemplified by calling attention to some of the cases which have been decided under it. Mr. Farabaugh and Mr. Arnold summarized a good many of the cases which had been decided up to the time their article was written, and I shall confine myself primarily to a few of the more interesting cases decided since that date.

The following actions have been upheld: It was assumed in *Axton v. Goodman*\(^{11}\) that it was possible to secure a declaration

\(^{10}\) In 31 Columbia L. R. 561 (April, 1931), and see Nashville, C. & St. L. Ry. v. Wallace, — U. S. —, 53 S. Ct. 345 (1933) where the Supreme Court in effect accepts Professor Borchard’s views.

\(^{11}\) 205 Ky. 382, 265 S. W. 806 (1924).
as to the rights of a political party at the polls (as to the appointment of inspectors); it was held in Craig v. Commor’s of Sinking Fund, \(^{12}\) that the court could declare the rights of public officers between themselves; in Sarner v. Kantor, \(^{13}\) the court decreed that the lesor defendant did not have a right to withhold consent to the assignment of the lease by the leasee; in City of Corbin v. Underwood, \(^{14}\) a jailer secured a decree concerning his rights against the city as to the transportation of prisoners; in Dodge v. Campbell \(^{15}\) the plaintiff secured a decree as to the validity of a former divorce decree; in Moore v. Moore, \(^{16}\) an auditor of state as an individual secured a decree as to his rights against himself as an officer; in Baumann v. Baumann \(^{17}\) a woman secured a decree that she was the wife of H, and that the defendant was not his wife; in Butterick Pub. Co. v. Fulton & Elm Leasing Co. \(^{18}\) a tenant’s right to sub-let was affirmed; in Morecraft v. Taylor \(^{19}\) the plaintiff secured a declaration that he was the illegitimate child of the defendant; in Wingate v. Flynn \(^{20}\) the court determined whether the term of a public office was six or fourteen years. There are a large number of cases where the courts have construed contracts, deeds and other written instruments.

Following are the more striking of the recent English cases. In Llandudno U. D. C. v. Woods \(^{21}\) the court decreed that the defendant clergyman was not entitled to hold services in certain places without the plaintiff’s consent; that a mortgage (not yet due) was invalid for illegality; \(^{22}\) that a sub-agent, who had bargained for a secret commission would become indebted to the principals of the agent who employed him, when and as he should receive any portion of such commission; \(^{23}\) that an organ in a mission church belonged to the plaintiff; \(^{24}\) that a certain

\(^{12}\) 203 N. Y. S. 236 (1924).
\(^{13}\) 205 N. Y. S. 760 (1924).
\(^{14}\) 221 Ky. 413, 298 S. W. 1090 (1927).
\(^{15}\) 220 N. Y. S. 262 (1927).
\(^{16}\) 147 Va. 460, 137 S. E. 488 (1927).
\(^{17}\) 228 N. Y. S. 539, 250 N. Y. 382, 165 N. E. 819 (1928-9).
\(^{18}\) 229 N. Y. S. 88 (1928).
\(^{19}\) 234 N. Y. S. 2 (1929), acc., Miller v. Currie, 242 N. W. 570 (Wis. 1932), and see note 46 Harv. L. R. 336 (1932).
\(^{20}\) 249 N. Y. S. 351 (1931).
\(^{21}\) (1899) 2 Ch. 705.
\(^{22}\) Chapman v. Michaelson, (1908) 2 Ch. 612; 1909) 1 Ch. 238.
\(^{24}\) Rawlinson v. Mort, (1905) 93 L. T. 555.
proposed act by a labor union society would be ultra vires;\textsuperscript{25} that a certain foreign judgment was invalid.\textsuperscript{26}

Practically all of the cases denying a decree involved situations where a cause of action for damages or possession had accrued.\textsuperscript{27} A decree was also denied in a case where the statute questioned had been repealed.\textsuperscript{28} In other cases it was held that the plaintiff had no legal interest to be protected.\textsuperscript{29} It has also been held in North Carolina that racial status cannot be declared.\textsuperscript{30}

It will be seen that the act has been rather extensively used, and that the cases present some novel situations. Outside of the cases construing contracts and other written instruments and declaring status the most common use of the act is in the field of public law, where a decree is sought as to the public duties of officers. If proposed official action were unconstitutional it could, before the act, be enjoined; now its validity and meaning can be determined even although a constitutional question is not involved. The possibilities in this field are immense; and the reader is referred to an article in the January, 1932 issue of the \textit{Yale Law Journal}\textsuperscript{31} by an English author, W. Ivor Jennings, entitled: "Declaratory Judgments Against Public Authorities in England" for an excellent discussion of those possibilities. The old remedies of mandate and prohibition were very inadequate and the Declaratory Judgment is a notable step forward in this field. Professor Borchard, to whom must be given much of the credit for the progress made in this field, has recently published an exhaustive article on the general subject, and the reader is referred to it for balance of the decided cases and a thorough discussion as to the theory of the act.\textsuperscript{32}

\textsuperscript{25} \textit{Cope v. Crossingham}, (1908) 2 Ch. 624, 637; (1909) 2 Ch. 148.
\textsuperscript{26} \textit{Ellerman Lines, Ltd. v. Read}, 44 Times Rep. 7.
\textsuperscript{28} \textit{Wendell v. City of Peoria}, 274 Ill. 613, 113 N. E. 918 (1916).
\textsuperscript{29} See, \textit{e. g.}, \textit{Perry v. City of Elizabethon}, 160 Tenn. 102, 22 S. W. (2d) 359 (1930); \textit{Dietz v. Zimmer}, 231 Ky. 546, 21 S. W. (2d) 999 (1930). This latter case could well have been decided the other way. See infra, n. 34.
\textsuperscript{30} \textit{Ex parte Eubanks}, 202 N. C. 357, 162 S. E. 769 (1932).
\textsuperscript{31} Vol. 41, p. 407.
\textsuperscript{32} \textit{Judicial Relief for Peril and Insecurity}, 45 Harv. L. R. 793 (1932).
Getting back to the principal problems, it seems necessary in the light of what has been said already to define the judicial function. I have come to the conclusion that the judicial function can only be defined as the power to finally recognize legal interests. Two main errors commonly creep in to the picture. First, it is commonly assumed that the judicial function is the settlement of disputes. But witness the innumerable cases in which the executive settles dispute; as for example an Industrial Board; tax commission, etc. The only distinction between the two is that a judicial settlement is final; an administrative settlement is subject to judicial review. It is true that a court can finally settle disputes as to law and fact; but a controversy was never a sine qua non of judicial action. Suppose, for example, P and D have had an automobile accident, and D admits his liability and agrees to pay the damages; P can nevertheless begin an action against him and secure a judgment. Or, suppose for example that D's note to P becomes due on June 1st; and D promises to pay on June 3rd, when he will get the proceeds of a loan; P nevertheless could sue on June 2nd and recover. Even if D had made a perfect tender the same result would follow. Most of our actions to quiet title are based upon the mere possibility of a controversy rather than a present one. The reason is that the abolition of the law of self-help made the courts the sole mechanism for the final recognition of legal rights and protected the defendant and his property against P's own enforcement of even undisputed rights. At least half of the business of the courts is a stepping stone to the collection of an admitted liability; and there is no controversy raised or settled. One is foreclosed; but that arises out of the doctrine of res judicata and the theory that judicial jurisdiction is final.

Second, it is commonly assumed that a court deals only with so-called secondary or remedial rights. In this connection we classify legal rights into primary rights and secondary rights; the first is a pre-conceived legal interest whose ownership is not based on wrongful conduct; the second is based on wrongful conduct and is usually a right to damages. Thus title to prop-

33 The detailed substantiation of this statement cannot be made at this time. The statement again is the result of a thorough investigation of the cases bearing on the point. At a future date the present author hopes to develop the proposition in detail.
tery generally; and the right to the performance of a contract are primary rights; rights to damages for trespass and for breach of contract are secondary rights. But there are innumerable cases where the courts deal with primary rights. In actions to quiet title, and most actions in rem that is true. It is true in ejectment and replevin. The wrongful conduct of the defendant in those two latter actions is not precedent to the asserted right to possession; it is simply precedent to court interference; there was thought to be no sense in rendering a judgment for possession of property against a defendant unless he have the possession wrongfully. If there were a dispute as to his future right to possession the proper action would be under the Declaratory Judgments Act, and not ejectment or replevin.

The courts have long been accustomed to settling title to real property; there is obviously no theoretical and certainly no practical reason why they should not in a given case settle the primary or property rights of parties in relation to contracts, status and public officers. The only objection is the novelty of the practice. There is no valid distinction between an action to construe a will and one to construe a contract; to declare the title to real estate and one to declare the title to personal property, tangible or intangible; to decide the questions of marriage and divorce, or legitimacy in connection with property rights, or to decide them in connection with personal rights; to decide the duties of public officers in cases involving constitutional questions, and to decide them in cases not involving constitutional questions.

The requirement that the plaintiff be legally interested expressly contained in the act disposes of all the objections raised on the basis that the court is deciding a moot case, or giving free advice. The plaintiff is legally interested if he claims any right, power, privilege or immunity against the defendant to which the substantive law gives cognizance. The basis, for example, of a voter's action to question the eligibility of a candidate for public office is the voter's legal privilege to participate in a valid election. At least the Indiana Supreme Court in the recent prosecutors case has said that every voter has such a legal privilege.34 The court in such a case should insist upon

proper parties to the action, so that the result would be res judicata. The plaintiff should sue as representative of a class; and the candidates and representatives of their party should be made defendants.

The real purpose therefore of the Declaratory Judgments Act is to give interested parties an opportunity to secure judicial (and therefore final) recognition of many legal interests with which heretofore the courts have, for no very good reason, refused to deal. Particularly it imposes on the courts the mandatory duty of giving judicial recognition to many primary and public rights and duties which previously were not subject to it. If P has a secondary right to damages for breach of contract the law compels him to seek judicial recognition of it before he enforces it; now, for example, he may secure judicial recognition of the primary rights arising out of his contract prior to breach, as a step in their final enforcement.

V.

When we come, now, to the first question suggested: that is, must there be a jury trial in any or all cases under the act, it will be seen that I have proceeded upon the assumption that proceedings under the act are essentially equitable in their nature. If that be true the answer, of course, is easy; a jury is never necessary, although there is nothing to prevent a court in any given case from taking the advice of a jury on a disputed question of fact. Whether or not that is a proper assumption depends of course upon a proper construction of the act, in the light of the decided cases.

Section 935 of the act provides that “When a proceeding under this act 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.” It is another general principle of generous proportions and it is very apparent that the authors of the act have done a very handsome job of passing the buck. It is obviously a non-committal statement which can be paraphrased to read as follows: “If the action is legal then a jury trial shall be had, if it is equitable then no jury trial shall be had.” We find similar statements in other statutes. Equiva-
lent statements in our act on the disbarment of attorneys; and on the action of partition have been construed as sanctioning a jury trial; while an identical provision in our mechanics lien statute has been construed to the contrary.

If, as has been suggested above, the first section of the act must be paraphrased to read: “Courts of record within their respective jurisdictions shall use (instead of have) the power” to render declaratory judgments it seems very apparent that a jury trial is never available as a matter of right. The statute is simply a command to the courts, as courts of equity, to exercise their jurisdiction. It is clear that the judicial power involved is not a common law one. That question must be settled (under our accepted construction of the constitutional provision as to jury trial) purely upon an historical basis. One can find no Common Law Action and very few, if any, common law precedents of any sort on the score; but the Courts of Equity in actions to construe wills; to render mandatory or restraining injunctions; to remove clouds on title, and other similar actions did exercise the power which is here involved. It seems reasonably clear that on an historical classification the power involved is equitable and not common law. This conclusion is borne out by the fact that in England the first statute and the first court rules on the subject were addressed exclusively to the Court of Chancery. Practically all of the English cases have been, and are now, brought in that court; and the few cases which we find in the other courts can be explained on the basis that as a practical matter the English courts are now quite similar to our code system in practical results, and that the Court of King’s Bench now has equity powers. After a rather thorough investigation of the English cases I can find no case involving the question of jury trial, but it certainly is fair to say that the practice under the act in England is regarded as essentially equitable.

If we regard the act as a grant of power, rather than a command to use an existing equitable power, the question of jury trial is not so easy; but the same reasons ought, it would seem, to compel the same conclusion. The action would be statutory and as to whether or not it was subject to jury trial would depend on whether or not it was essentially legal or equitable, and that in turn depends upon the historical aspects of the situation; is its character such as a court of common law, or a court of equity commonly dealt with? We have many statutory actions, and while it might be possible to rather successfully quarrel
with some of the results, on the whole, it can fairly be said that
the test suggested is the one the courts have used. We have no
express provision, for example, in our divorce, mechanics lien,
quiet title, partition and foreclosure of mortgages statutes on
the subject of jury trial, and the reader knows that in some of
those actions a jury trial is available; in others it is not. On
such a basis it would seem to follow that essentially all actions
under this act are equitable in their nature, and that a jury
trial would not be a matter of right.

I cannot find that the question has been squarely presented
for decision, but I must admit that the language of the cases is
against that result. The cases are as follows: in the leading
case of Petition of Kariker,36 the section of the statute in ques-
tion was quoted and it was said that the section avoided any
problem under the constitutional provision on jury trial, as it
saved the jury trial in a proper case. It is a reasonable infer-
ence from the language of the case that the court thought that a
jury trial was a matter of right in some cases. It cites as
authority three earlier Connecticut cases.37 Those cases, how-
ever, were decided under a very early statute, which after all
was simply a statutory action to quiet title. It was there held
that a jury trial was available because equity never had jurisdi-
cion to try title to real estate. The cases are therefore not in
point, and could today, in light of the present repudiation of that
latter postulate, be fairly said to be erroneously decided. Courts
of equity always had jurisdiction to decide title, but for a while
refused to exercise it.

In Holly Sugar Corp. v. Fritzler,38 it was said (but simply as
dictum) that the action "might have been submitted to a jury
under Sec. 9, but the defendants have waived the question." The
action was to construe a contract, and to have the court declare
that the plaintiff was not liable. Certainly there was no common
law antecedent of such an action. Apparently the court misread
the section and was under the erroneous impression that the
section affirmatively provided for a jury trial in every case. But
it says merely that an issue of fact "may be tried in the same
manner as in other civil actions." Our code defines "civil ac-

36 284 Pa. 455, 131 Atl. 265 (1926).
77 Conn. 22, 58 A. 355 (1904); Dawson v. Town of Orange, 78 Conn. 96, 61
A. 101 (1905).
38 296 P. 206 (Wyo. 1931).
tions” as both legal and equitable actions; and if we substitute those words for “civil” the real non-committal import of the statute is apparent.

There is a similar dictum in the case of Town Board of Greece v. Murry. I think those are the only cases discussing the point, and it is clear that the question is still an open one. There are no English cases on the point, but practically all the cases in that country are brought in the Chancery Division.

Two New Jersey cases also point the other way, however. In Paterson v. Currier, and Union Trust Co. v. Georke Co., it was held that an action to construe a will, where the plaintiff claimed a legal and not an equitable interest in real property devised by the will could only be maintained under the Declaratory Judgments Act in a law court. The decision is based upon the first section of the act, which provides that “courts, within their respective jurisdictions” shall have power over an action for a declaratory judgment. The specific question could probably only be presented in that form in New Jersey and the Federal Courts; but there are of course, innumerable cases in England which as a practical matter are contrary to the view expressed by the New Jersey court. A literal reading of the act suggests that result; but for the reasons heretofore advanced it is submitted that those cases ought not to be followed. They assume, in any event, that it is impossible that the Legislature had enhanced the law of the jurisdiction of the Equity Courts by giving a new equitable remedy; but that it had enhanced the jurisdiction of the Common Law Courts. That it is within the power of the Legislature to give a new equitable right and remedy is, of course, settled. Just why the New Jersey court should conclude that the Legislature could and did enhance the jurisdiction of the common law courts; but could not or did not enhance the jurisdiction of the equity courts is hard to explain.

39 223 N. Y. S. 606 (1927).
40 78 N. J. Eq. 48, 129 A. 711 (1925).
41 142 A. 566 (N. J. Eq. 1928).
42 See e. g. People, ex rel Lemon v. Elmore, 256 N. Y. 489, 177 N. E. 14 (1931). On the face of it this increases the jurisdiction of the Equity court, but only, N. B., if we assume what is certainly not true, that equitable jurisdiction was special and restricted. The only proper view of Equity jurisdiction is that it was a residuum of the judicial power after the common law jurisdictions were subtracted. Judicial power like substantive rights is a broad concept whose theoretical content is constant and infinite, regardless of its practical use from generation to generation. The legislature may deal with its exercise, but not its creation.
If the common law courts in New Jersey adopted the same reasoning as the equity courts the act means nothing, for those courts could say to the plaintiff "We never had jurisdiction to construe a will; so if you have a remedy it is some place else."

Incidentally, of course, the New Jersey cases will support Farabaugh's and Arnold's conclusion that the act gives to the justice of the peace courts in Indiana jurisdiction under the act, because they are courts of record. If the New Jersey cases fairly say that the act creates a new common law and not an equity jurisdiction, it confers on the justice of the peace court of Indiana a new kind of common law jurisdiction. If they fairly say that the Legislature cannot create a new equity jurisdiction, then they are inconclusive on that point. I suppose that this latter is all they really decide. For the reasons advanced heretofore it seems to me that the act ought to be construed not as granting jurisdiction, but as commanding the exercise of an existing jurisdiction in an existing court of equity. If that is a proper construction of the act the justice of the peace in Indiana is unaffected by the act for it is settled that he has no equity power. I find nothing in the Indiana Constitution, or in the statutes on our courts of general jurisdiction which constitutes a limitation which the present act removes. Our general statutes on jurisdiction of courts are certainly as broad as the Constitution and it is impossible to construe this act as an additional grant of power. I still think it clear that the courts of equity always had this power, and that they simply did not exercise it. The act is thus a legislative statement that they ought to exercise it. Section 6 makes the exercise of jurisdiction in any given case a matter of sound discretion, so that the ill effects of requiring a court to render a judgment upon every legal interest is mitigated. As pointed out above the English courts have expressly taken that view. Personally I should think it most unfortunate if a proper construction of the act gives jurisdiction to the justice of the peace in Indiana and also a jury trial. Much of the value of a proceeding under the act is a speedy, conclusive and intelligent decision on the point involved. Equity procedure today is much better equipped to reach that result than is the common law trial, with its delays, its inconclusiveness (because the verdict of the jury is reached only by red tape methods, and because it is possible to have so many mistakes in a jury trial), and its rather unintelligent results. Jury trial is a valid machinery in those cases involving
common standards, but most cases under this act involve essentially legal points. A disputed point of fact could always, even if the proceeding be held to be equitable, be presented to a jury for advice.

VI.

On the last question suggested; does the code of procedure apply, the answer seems to be easy; and this time sustained by the authorities. The act says nothing on the general subject; but Section 11 of the act does deal with the question of parties. It provides that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard." Under the last provision it has been held that service of notice on the attorney-general is a jurisdictional prerequisite.43

The first part of the section is in almost the identical language of the code provisions on the joinder of parties, and it is believed that it adds nothing to that requirement. (In the first reported case in Indiana decided under the act our Supreme Court cited the real party in interest statute and not Section 11.) The test is one of legal interest, rather than of actual interest, and that can only be determined in each case by a reference to the substantive law on the subject.

As to whether or not the balance of the Code on Procedure applies to an action under the act does not seem to me to be a debatable question. Our Code applies to all civil actions. It has never been questioned but that it applies to new statutory actions created after its adoption. It expressly applies to all equitable actions.

But it has been argued that the demurrer statute could not apply because "the purpose of the act was to afford relief before injury had been sustained and a cause of action arose."

It is submitted that that position is based upon the erroneous conclusion that "cause of action" in the demurrer and complaint

statutes includes only secondary rights. I have already pointed out that many actions are brought which seek the judicial recognition of primary rights. I think it very clear that we should define the phrase "cause of action" as meaning any legal interest. The requirement of the complaint statute is then that the plaintiff state the operative facts which show that he has a substantive legal interest on which he is entitled to a judicial recognition in the form of a judgment. The test of the validity of a complaint under the Declaratory Judgments Act is the same as in any other case: has the plaintiff stated operative facts showing that he has some legal interest subject to judicial recognition? It is true that he may, for example, allege that his rights under an alleged contract are uncertain; he may make no allegations as to the proper construction of the contract; the action is for the sole purpose of removing the uncertainty; still on the face of the proceeding he has necessarily alleged the facts showing a contract right, which theoretically to start with is what the judgment finally declares it to be. A demurrer for insufficient facts would challenge that right; just as it would challenge a secondary right for damages, where the facts failed to disclose affirmatively that the plaintiff in truth had the right he is attempting to assert. It is not necessary in the latter case that the plaintiff allege or prove that the defendant denies his right; and for the same reason a similar allegation should be unnecessary in an action under the act. The cases talk about the necessity of a dispute or controversy under the act; but the reason is that usually that would be necessary to the exercise of

44 See The Code Cause of Action, 6 Ind. L. J. 203, 295 (1931). Cf. Arnold, The Role of Substantive Law and Procedure in the Legal Process, 45 Harv. L. R. 617 (1932). In the article last cited, Professor Arnold defends the proposition that much is to be said for the older technic of explaining substantive results in the language of procedure. He concludes that there is support in that proposition for Dean Clark's definition of the code cause of action as the facts which can conveniently be tried in one legal proceeding. There is, however, an obvious distinction between explaining a result in terms of procedure, and in deciding substantive rights with a view to procedural convenience. It would seem quite obvious that the substantive rights of litigants are entitled to the additional considerations which we normally recognize as part of the judicial process of judging human interests. The formal distinctions between substance and procedure are reasonably clear, despite the fact that one is rather useless without the other; and the same policy obviously cannot always decide both a question of substance and one of procedure. If there is any reason at all for maintaining the formal distinction between them it is just that.
the discretionary jurisdiction granted by the act; it is not necessary to jurisdiction in the strict sense, any more than in the ordinary case to collect a debt.

It is true, too, that there are cases which hold that under the act if the parties really do not disagree on their rights, or a secondary right has arisen, the court will not render a declaratory judgment; but those cases give effect to the equity rules that equity will not do a useless act, nor will it act if a legal remedy is adequate. There is nothing in the act which requires a dispute; and in fact it gives power in any case where the decree will "terminate the controversy or remove an uncertainty;" and it must be assumed that the word "or" was used intentionally.

On the face of it the act gives the privilege of securing a judgment upon every legal interest. Thus a bank, for example, the instant a promissory note was given it, could secure a declaration that on the date agreed upon the promisor would be legally bound to repay the amount of the loan. However the far-reaching consequences of the act are limited by the practical consideration that the owners of legal interests are not going to expend the time and money to reduce their uncontroverted obligations to judgment unless there is some real occasion for that action. Section 6 expressly gives the courts some discretionary power, and common principles of equity jurisdiction would supply the others. In a given case the court could well refuse to render a decree. The fact of a present or future controversy is thus a material fact as to the court's discretionary exercise of its powers, but never a condition precedent to its jurisdiction in the strict sense of that term. And, of course, it may well be that as a matter of pleading the burden ought to be put upon the plaintiff to bring himself within both the strict and discretionary jurisdiction of the court. The cases which talk about the necessity of a controversy can easily be explained on that basis.

The point suggests another point of pleading. The law of Indiana seems settled to the effect that in an action to construe a will the question of the propriety of the plaintiff's asserted construction requires an affirmative answer. If that analogy is followed in similar cases brought under this act it will be necessary for the defendant to file an affirmative answer setting forth his construction of the instrument in question.

45 Hawes v. Keplen, 28 Ind. App. 306 (1902); Rothschild v. Weinthel, 191 Ind. 85 (1921).
There is an apparent conflict as to whether our rule on the materiality of the prayer for relief applies. But the conflict is only apparent, for the case first cited immediately hereafter did not arise in a code state.

It was held in *Aetna Life Ins. Co. v. Richmond*46 (in which case the court could not tell whether the plaintiff sought an injunction or a declaration of rights) that the complaint should have been more specific if the plaintiff wished the latter. Under our Code rule to the effect that the prayer for relief is no part of the complaint, and our statutes abolishing "the theory of the case" such a decision ought to be impossible in Indiana. A recent New York case is in accord with that conclusion.47

It was said in *Jefferson Co. v. Clinton*,48 that the act did not repeal the code of civil procedure. In this same case it was said that the counter claim statute applied to actions under the act. Previous decisions on that point are cited in the opinion. It was assumed in the cases cited in the note that a demurrer for insufficient facts was a proper procedure.49

A demurrer to an answer was assumed to be valid in the last decided Indiana case.50 Demurrers for defect of parties have been used and not questioned.51

The code and equity procedure on the joinder of actions has been applied.52

The code rules on amendment have been applied without question.53

It was held in *Morton v. Pacific Coast Co.*,54 that if the action were an action *in rem*, the general statutes on publication of notice applied, so that *non-residents* could be properly brought

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46 167 Conn. 117, 139 A. 702 (1928).
50 *Enneier v. Blaize*, 179 N. E. 783 (1932) (Ind. Sup.).
52 *Allen v. Carsted Realty Corp.*, 231 N. Y. S. 585 (1929); and *Holly Sugar Corp. v. Fritzler*, 296 P. 206 (Wyo. 1931).
54 283 P. 281 (Ariz. 1929).
within the jurisdiction of the court. In the first Indiana case on the subject it was assumed that the real party in interest statute; the answer statute; the statutes on special findings of fact and conclusions of law; all applied to a proceeding under the act. The last Indiana case was decided on a demurrer to an affirmative answer.  

I find no case where it was questioned but that the Code of Procedure applied to actions under the Declaratory Judgments Act, and it seems very clear that there can be no doubt but that it does apply.

56 Supra n. 50.