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DECLARATORY JUDGMENTS IN TEXAS — MANDATORY OR DISCRETIONARY?

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I. INTRODUCTION

Just a few years ago in the span of the judicial history of this state, the law of judgments in Texas was fairly simple. About all lawyers and judges needed to know about judgments was that one could be obtained by default if the defendant failed to answer by the appointed time on the appointed day, or that one could be earned in courtroom combat by trial "on the merits" before a judge alone or before a judge and a jury. It was also helpful, but only occasionally critically necessary, to know the difference in a general way between a judgment which was only interlocutory and

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one which was final.

Then along came Article 2524-1, Vernon's Texas Civil Statutes, providing for declaratory judgments, and Rule 166-A, Texas Rules of Civil Procedure, providing for summary judgments. These newfangled procedures for getting rid of lawsuits were not welcomed with open arms by old time litigators. They had accepted, albeit somewhat reluctantly, abolition by the 1941 "New Rules" of the general demurrer which had served well as a trap for the untrained or unwary, but acceptance of a procedure for trials by affidavit which sidestepped juries, or which did not result in judgments awarding or denying affirmative relief, was almost too much to ask.

Default judgments and judgments on the merits did not exactly fade away, but after a long educational shakedown cruise, the new judgment devices are being used with increasing frequency. Study of some of the rules governing use of these devices should be helpful. This article will deal only with declaratory judgment rules, and a discussion of summary judgment rules will be saved for another author or another day.

II. HISTORY

Declaratory relief was unknown at common law. It has been pointed out that, at common law,

> [t]he courts took no official interest in the affairs of civil life until one person had wronged another; then the object was to give relief for the injury inflicted. In other words, some violation of personal or private rights or a wrongful injury to a person must have occurred before the courts would take judicial cognizance of controversies between persons.
>
> While the declaratory judgment did not receive statutory sanction in this country generally until about 1920, it has been sanctioned in England since 1852, and in Scotland its history runs back several hundred years. Apparently its origin can be traced to the Roman civil law, and it is today part of the judicial system of many countries.[1]

Once the concept took root in the jurisprudence of this country, the Congress and many of the state legislatures embraced it in

1. 22 AM. JUR. 2d *Declaratory Judgments* § 3 (1965); *see also* 3 TEX. L. REV. 483, 484 (1925).

their statutory law.[2] The Texas Legislature adopted the Uniform Act, with some slight variations, in 1943.[3]

The march towards a nation-wide fulfillment of the concept suffered a temporary setback in 1910 by the decision of the Supreme Court of the United States in *Muskrat v. United States*.[4] As authorized by an Act of Congress, the suit was instituted by members of Indian tribes in the United States Court of Claims, with right of appeal to the Supreme Court, to determine the validity of two Acts of Congress affecting title and rights of users to lands allotted to the Indians. The Supreme Court held the act authorizing the suit and appeal unconstitutional.[5] Unconstitutionality was predicated on the constitutional provisions limiting exercise of judicial power of federal courts to "cases" and "controversies."[6] The Court, after defining the limitation on its constitutional power, said "that judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."[7] The Court opined that to entertain such actions as were there attempted, would require the court "to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution . . . ."[8]

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2. The Uniform Declaratory Judgments Act has now been adopted either in whole or with some variation in 39 states and two territories. *See* TEX. REV. CIV. STAT. ANN. art. 2524-1 (Vernon Supp. 1982) (Table of Jurisdictions Wherein Act Has Been Adopted).

3. *See id.* art. 2524-1, §§ 1-16 (Vernon 1965 & Supp. 1982). Prior to 1924 Texas courts had given declaratory judgments without "labeling them as such." 3 TEX. L. REV. 483, 484 (1925). As an interesting sidelight to the Texas Supreme Court's frequent insistence that it does not give "advisory opinions," see *In Re* House Bill No. 537 Of The Thirty-Eighth Legislature, 113 Tex. 367, 256 S.W. 573 (1923), in which the court "advised" that a house bill was unconstitutional, although its jurisdiction to rule on the question apparently had not been invoked by either an appeal or a direct proceeding and the function was one normally reserved to the Attorney General. *See id.* at 370-71, 256 S.W. at 574-75. The only critical or definitive analysis of the statute was written by Gus M. Hodges, University of Texas Professor of Law, and is available to the author of this article but is now out of print. *See* G. Hodges, *General Survey Of The Uniform Declaratory Judgments Act In Texas*, TEX. REV. CIV. STAT. ANN. art. 2524-1, at VII- XXI (Vernon 1951) (superseded). Two articles that deal with the Act and should be noted are, Gifford, *Declaratory Judgments Under The Model State Administrative Procedure Acts*, 13 HOUS. L. REV. 825 (1976); Comment, *The Binding Effect Of Federal Declaratory Judgments On State Courts*, 51 TEX. L. REV. 743 (1973).

4. 219 U.S. 346 (1911).

5. *Id.* at 363.

6. TEX. CONST. art. V, §§3, 6, 8, 16, and 18 (confer civil jurisdiction upon Texas courts in "cases" and "suits").

7. Muskrat v. United States, 219 U.S. 346, 361 (1911).

8. *Id.* at 362. The Court concluded: "we are constrained to hold that these actions pre-

In contrast, Harvard Professor Edwin Borchard advocated the adoption of the declaratory concept. Professor Borchard saw the declaratory judgment as a means whereby a plaintiff could avoid "peril and insecurity by obtaining an authoritative adjudication of his rights . . . ."[9] In this way, a plaintiff could reduce the risk of acting at his own peril, while attempting to protect his legal rights and relations. Professor Borchard concluded:

> The importance of the power to sue on the part of an endangered or potentially endangered or disputed possessor of rights is that judicial protection may be obtained before the danger has ripened into catastrophe and before the other party has commenced suit to enforce his claims.[10]

In 1933, the Supreme Court, by its decision in *Nashville, Chattanooga & St. Louis Railway v. Wallace*,[11] virtually abandoned *Muskrat* while yet paying lip service to it. The suit was for a declaratory judgment that a state taxing statute was unconstitutional. The Court stated the question before it as whether the controversy was any the less justiciable because "through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from collection of the tax."[12] The Court noted in the margin of its opinion that the Uniform Declaratory Judgments Act, or similar statutes, has been adopted in twenty-nine states and three territories, and concluded that it had jurisdiction "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy which is finally determined by the judgment below."[13]

III. The Federal Approach — Statutory and Decisional

A. *The Statute*

Because of frequent reliance by Texas courts on federal court

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sent no justiciable controversy within the authority of the court . . . ." *Id.* at 363.

9. Borchard, *Judicial Relief For Peril And Insecurity*, 45 HARV. L. REV. 793, 807 (1932).

10. *Id.* at 806.

11. 288 U.S. 249 (1933).

12. *Id.* at 262-63.

13. *Id.* at 264.

decisions in assessing their own duties and obligations in declaratory judgment suits, recognition of a vital distinction between the two governing statutes is critical to a correct understanding and application of the Texas statute.

The Congress did not adopt the Uniform Act. The controlling statute is section 2201, Title 28, United States Code Annotated, adopted in 1934. It reads:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.[14]

Section 2202, United States Code Annotated, and Rule 57, Federal Rules of Procedure, are also relevant. Section 2202 provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted . . . ."[15] Rule 57 provides that "[t]he procedure for obtaining a declaratory judgment . . . shall be in accordance with these rules . . . . The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."[16]

B. *Interpretive Decisions*

It is obvious from reading sections 2201 and 2202 of the federal statute that action by the federal courts to "declare the rights and other legal relations" of litigants and to grant other relief is strictly discretionary; the word "may" is used in its customary permissive sense.[17] It was previously thought that the terms of the act were mandatory,[18] but it was settled by the Supreme Court that it was not.[19] While it is discretionary, "[t]he discretion of the trial court is not absolute. All circuits agree that it is a sound judicial discre-

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14. 28 U.S.C.A. § 2201 (West 1982). Emphasis supplied by the author of this article unless otherwise indicated.

15. *Id.* § 2202.

16. FED. R. CIV. PROC. 57 (1980).

17. *See, e.g.*, PPG Indus. v. Continental Oil Co., 478 F.2d 674, 681 (5th Cir. 1973); Solenoid Devices, Inc. v. Ledex, Inc., 375 F.2d 444, 445 (9th Cir. 1967); Paschal v. Lykes Bros. S.S. Co., 264 F. Supp. 836, 839-40 (S.D. Tex. 1966).

18. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2759 (1973).

19. Brillhart v. Excess Ins. Co., 316 U.S. 491, 498 (1942).

tion reviewable on appeal."[20] The United States Supreme Court in *Public Affairs Associates, Inc. v. Rickover,*[21] concluded that the "Declaratory Judgments Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so . . . ." The Court added: "[o]f course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination."[22]

IV. THE TEXAS APPROACH — STATUTORY AND DECISIONAL

The Texas approach will be examined by the format used to examine the federal approach; the relevant statutory provisions will be quoted and the interpretive cases will be analyzed.

A. *The Statute*

Article 2524-1 is so brief, direct, and clear that there should be little basis for difference as to its terms or its meaning. The relevant sections of the statute are as follows:

> Section 1. 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 . . . . The declarations may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.
>
> Section 2. Any person interested under [written instruments or laws] may have determined any question of construction or validity . . . and obtain a declaration of rights . . . .
>
> Section 3. A contract may be construed either before or after there has been a breach thereof.
>
> Section 4. Any person interested as or through [a legal representative, a fiduciary, creditor, or beneficiary of an administered estate] may have a declaration of rights or legal relations in respect thereto . . . .
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> * * *
>
> Section 6. 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

20. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2759 (1973).
21. 369 U.S. 111 (1962).
22. *Id.* at 112.

rise to the proceeding.

Section 7. All orders, judgments, and decrees under this Act may be reviewed as other orders, judgments, and decrees.

Section 8 Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.

* * *

Section 10. In any proceeding under this Act the Court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just.

* * *

Section 12. This Act is declared to be remedial . . . and is to be liberally construed and administered.

* * *

Section 15. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Special declaratory judgment statutes will not be considered.[23]

A careful reading of section 1 of the state statute reflects that, unlike the federal statute, it does not purport to grant a power which may be used by the courts in their discretion to give declaratory relief; rather, while not a jurisdictional statute,[24] it confers an unlimited power to give declaratory relief in either affirmative or negative form. That such is the proper interpretation of the section is borne out by section 6 in which discretionary power is expressly conferred to "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."[25] If the power were generally discretionary, section 6 would be unneeded and surplusage. Moreover, the statute presents a subject to which the rule of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another)

23. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12 (Vernon Supp. 1982) (Administrative Procedure and Texas Register Act); *id.* art. 717m-1, §§ 1-13 (Vernon Supp. 1982) (declaratory judgment concerning validity of securities).

24. *See* Phillips v. City of Odessa, 287 S.W.2d 518, 520 (Tex. Civ. App.—El Paso 1956, writ ref'd n.r.e.); Cowan v. Cowan, 254 S.W.2d 862, 864 (Tex. Civ. App.—Amarillo 1952, no writ).

25. TEX. REV. CIV. STAT. ANN. art. 2524-1, § 6 (Vernon 1965).

seems peculiarly applicable.[26]

The clincher that the court's discretion to refuse declaratory relief is limited to section 6 situations is found in the history of the Uniform Act. An earlier version of section 6 reads as follows:

> *Discretionary.* The court may refuse to exercise the power to declare rights or other legal relations in any proceeding where a decision under it would not terminate the uncertainty or controversy which gave rise to the proceeding, or in any proceeding where the declaration or construction is not necessary, and proper, at the time under all the circumstances.[27]

As thus written, section 6 conferred a discretion to refuse to act which was virtually unlimited. As finally written and as adopted in this state, the emphasized language was eliminated and discretion to refuse to grant declaratory relief was limited as above indicated.

Hodges called attention in his article to the limitation on discretion in this language:

> Although there have been variant decisions in some jurisdictions, it is accepted that . . . the only proper grounds for exercising discretion in favor of refusing a declaratory judgment is that such a judgment would not terminate the controversy, as provided in Sec. 6 of the Act.[28]

There are other sections of the statute which confer discretionary powers, thus indicating that the general power to grant declaratory relief is mandatory and not discretionary. Section 8 confers discretionary power to grant further relief "whenever necessary or proper," and section 10 confers discretionary power in the assessment of costs and attorney's fees.

It seems obvious that such general discretion as is conferred by the statute is conferred upon litigants and not upon the courts. Sections 2 and 4 provide that "any person interested . . . may have determined any question of construction . . . ," or "may have a declaration of rights . . . " in the many areas delineated in those sections. The sections give the prospective litigant the right, at his

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26. Harris County v. Crooker, 112 Tex. 450, 248 S.W. 652 (1923).

27. Borchard, *The Uniform Act On Declaratory Judgments*, 34 HARV. L. REV. 697, 710 (1921).

28. G. Hodges, *General Survey Of The Uniform Declaratory Judgments Act in Texas*, TEX. REV. CIV. STAT. ANN. art. 2524-1, at XVI (Vernon 1951) (superseded).

discretion, to have his rights declared by the courts.[29] The expressions, "may have determined" and "may have a declaration," as used in sections 2 and 4 of the statute, interpreted in the context in which they are used, surely mean "is entitled to have determined" and "is entitled to have a declaration." Thus, except as modified in section 6, the litigant's right becomes the court's duty.

Courts of other jurisdictions interpreting the Uniform Declaratory Judgments Act have recognized and enforced the requirement of a duty to act in other than section 6 situations. In doing so in *Celina Mutual Insurance Co. v. Sadler,*[30] an Ohio Court of Appeals, after quoting the state's equivalent of section 6, said:

> The discretion thus vested in a trial court is a limited discretion and would be erroneously exercised in the event the court refused to render a declaratory judgment when the declaration otherwise comes within the scope of the Act and the judgment or decree would terminate the uncertainty or controversy.[31]

In like vein, the Superior Court of Pennsylvania recognized in *Melnick v. Melnick*[32] that its original statute's section 6, later repealed, "merely authorized the court to refuse to render a judgment, where such judgment would not terminate the controversy or uncertainty giving rise to the proceeding."[33]

The opinion of the Maryland Court of Appeals in *Robert T. Foley Co. v. Washington Suburban Sanitary Commission*[34] is far more positive in recognizing and enforcing the duty to act. In that case the plaintiffs sought a declaratory judgment that certain sewerage charges were unconstitutional and also sought a declaration that the resolutions imposing the charges were invalid as violating contractual rights. On appeal, the plaintiffs complained of the trial court's failure to declare its right with respect to the latter question. In responding to that complaint, the court of appeals said that "the circuit court did not deal with this question," and added that the circuit court's decree recited "only that the defendant's

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29. *See* Tidewater Oil Co. v. Ross, 123 S.W.2d 479, 483 (Tex. Civ. App.—Galveston 1938), *aff'd,* 136 Tex. 66, 145 S.W.2d 1089 (1941).

30. 217 N.E.2d 255 (Ohio Ct. App. 1966).

31. *Id.* at 257.

32. 25 A.2d 111 (Pa. Super. Ct. 1942).

33. *Id.* at 115.

34. 389 A.2d 350 (Md. 1978).

motion for summary judgment was granted and the plaintiffs' motion was denied."[35] The court then quoted from a prior opinion as follows:

> While a declaratory decree need not be in any particular form, it must pass upon and adjudicate the issues raised in the proceeding, to the end that the rights of the parties are clearly delineated and the controversy terminated . . . ." In the instant case, it is clear that the circuit court erred by failing to set forth in its judgment a declaration of the party's rights with regard to the issues raised.[36]

Having so held, the court vacated the circuit court's judgment and remanded the cause for the entry of a new judgment which would "include a declaration of the rights of the parties."[37]

B. *Intepretive Decisions — General*

Early on, Texas courts seized upon the beneficial purposes of the statute[38] as a sound basis for giving it a broad interpretation and application. This is no better illustrated than by the opinions in *Railroad Commission v. Houston Natural Gas Corp.*[39] and *Cobb v. Harrington.*[40]

In the first case, Houston Natural Gas took a statutory *de novo* appeal to the Railroad Commission from an ordinance of the City of Palacios reducing gas rates. After a hearing had been set by the Commission, Houston Natural Gas filed a declaratory judgment suit seeking a declaration that the Commission was not authorized by the appeal statute to use its own investigative and legal personnel, as it proposed to do, to assist in arriving at just and reasonable rates.[41] The Gas Company also sought injunctive relief. By pleas to the jurisdiction and in abatement, the Commission questioned the right to maintain the suit for declaratory relief, contending that it was only another method of obtaining injunctive relief, and also that the suit was one which merely raised questions of practice and

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35. *Id.* at 359.

36. *Id.* at 359 (quoting in part Dart Drug Corp. v. Hechingen Co., 320 A.2d 266, 274 (Md. 1974)).

37. *Id.* at 359.

38. *See* TEX. REV. CIV. STAT. ANN. art. 2524-1, § 12 (Vernon 1965).

39. 186 S.W.2d 117 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.).

40. 144 Tex. 360, 190 S.W.2d 709 (1945).

41. Railroad Comm'n v. Houston Natural Gas Corp., 186 S.W.2d 117, 122 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.).

procedure before the administrative agency.

The trial court overruled the pleas to the jurisdiction and in abatement and held on the merits that the statutes authorized the Commission "to so furnish and use its employees and their evidence in the preparation of and on the appeal and *de novo* hearing . . . ." On appeal, the Gas Company abandoned the prayer for injunctive relief. The Austin Court of Civil Appeals, in a somewhat lengthy opinion dealing with the nature of declaratory judgment actions, held that such a suit was a proper method for obtaining a construction of the statute and its validity, and that the use which the Commission proposed to make of its employees and their testimony was proper. The trial court's judgment was affirmed.[42]

Within a year after issuance of the opinion in *Railroad Commission v. Houston Natural Gas Corp.*, the Supreme Court decided *Cobb v. Harrington.*[43] Here again, the right to seek a declaratory judgment was questioned.

Harrington sought by his suit against certain state officials to obtain a declaratory judgment declaring "whether or not" he and his associates were "legally liable to pay . . . an occupation tax measured by the gross receipts of 'motor carriers' and levied by . . . Article 7066b(a) . . . ."[44] The trial court abated the suit on the ground that it was a suit against the state brought without its consent. The Dallas Court of Civil Appeals reversed the trial court's judgment and rendered judgment in favor of the plaintiff-appellants "declaring their status under the statutes involved, to the effect that, under the facts as stipulated, they neither pursue the occupation of 'motor carrier' or 'common carrier motor carrier,' nor are they liable as such for payment of the occupation tax imposed by Art. 7066b(a)."[45] The supreme court affirmed,[46] and in the course of its opinion held that a declaratory judgment action (1) "is neither legal nor equitable, but sui generis"; (2) " 'is an alternative or additional remedy to facilitate the administration of justice more readily' "; (3) " 'is an instrumentality to be wielded in the

42. *See id.* at 127.

43. 144 Tex. 360, 190 S.W.2d 709 (1945). *Cobb*, decided November 14, 1945, was decided less than one year after *Houston Natural Gas*, decided January 17, 1945.

44. *Id.* at 362, 190 S.W.2d at 710.

45. Harrington v. Cobb, 185 S.W.2d 133, 140 (Tex. Civ. App.—Dallas 1944), *aff'd*, 144 Tex. 360, 190 S.W.2d 709 (1945).

46. Cobb v. Harrington, 144 Tex. 360, 190 S.W.2d 709 (1945).

interest of preventative justice' "; (4) with a scope that " 'should be kept wide and liberal, and should not be hedged about by technicalities' "; (5) "does not supplant any existing remedy"; and (6) "is intended as a speedy and effective remedy for the determination of the rights of the parties when a real controversy has arisen and even before the wrong has actually been committed."[47]

The rules laid down in *Cobb v. Harrington* marked out very clearly the duty of Texas courts to make the Declaratory Judgments Act a useful tool in the solution of legal problems and controversies, either before or after a legal wrong has been committed. It was not contrived as a tool for use solely by the advocate to get a favorable declaration; rather, it was intended as a tool for use by the courts to make a correct declaration of the matters at issue, once jurisdiction has attached, whether the particular declaration is sought by several or none of the parties to the litigation. Such, in effect, was the holding by the supreme court in *Guilliams v. Koonsman,*[48] when, after stating the contentions of the opposing parties as to the meaning of a certain provision in a will, the court said: "[w]e do not agree entirely with either of the parties, albeit our construction of the fourth paragraph of the will is much nearer that contended for by petitioner than that of the respondent and the courts below."[49] The court then proceeded to reform the judgments of the trial court and the court of civil appeals "to decree that the true meaning and effect of the fourth paragraph of the will is . . . [a meaning which neither of the parties had sought]."[50]

In *Railroad Commission v. Houston Natural Gas Corp.,*[51] the court cited authorities which held that the taking of jurisdiction in the declaratory proceeding is within the sound discretion of the trial court.[52] No doubt the authorities on which that holding was based were responsible for the filing of a plea to the jurisdiction in that and other cases.[53] Significant, however, is the fact that, while

47. *Id.* at 367-68, 190 S.W.2d at 713 (quoting in part W. ANDERSON, DECLARATORY JUDGMENTS § 3, at 11-12 (1940)).

48. 154 Tex. 401, 279 S.W.2d 579 (1955).

49. *Id.* at 404, 279 S.W.2d at 581.

50. *Id.* at 408, 279 S.W.2d at 583.

51. 186 S.W.2d 117 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.).

52. *Id.* at 123.

53. *See* Liquor Control Bd. v. Canyon Creek Land Corp., 456 S.W.2d 891 (Tex. 1970); Cobb v. Harrington, 144 Tex. 360, 362, 190 S.W.2d 709, 710 (1945).

most of the holdings by the court of civil appeals in that case were expressly approved by the supreme court in *Cobb v. Harrington,* that particular holding was not approved.

Rules governing jurisdiction of Texas courts in declaratory judgment actions are often expressed in generalities. For example, the supreme court has held in a number of cases that the statute does not authorize the giving of "advisory opinions" in cases which do not involve a "justiciable controversy."[54] In *Board of Water Engineers v. City of San Antonio,*[55] the court said: "The expressions 'advisory opinion' and 'justiciable controversy' as here used refer to the requirements, which undoubtedly exist as prerequisite to the declaratory judgment process, that (a) there shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought."[56] A "declaratory judgment" and an "advisory opinion" were accurately distinguished in an opinion by the Austin Court of Civil Appeals in *Douglas Oil Co. v. State*[57] as follows:

> The essential difference between the declaratory judgment and the purely advisory opinion lies in the fact that the former is a binding adjudication of the contested rights of the litigants, though unaccompanied by consequential relief; whereas, the latter is merely the opinion of the judges or court, adjudicates nothing, and is binding on no one.[58]

When the courts refuse to take jurisdiction of declaratory judg-

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54. *See, e.g.,* State v. Bullock, 491 S.W.2d 659, 661 (Tex. 1973) (declaratory relief is improper where deed sought to be prevented is accomplished and declaratory judgment would not settle controversy); Fireman's Ins. Co. v. Burch, 442 S.W.2d 331, 333 (Tex. 1968) (court may not render advisory opinion on liability of party which had not yet been determined); California Prods., Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 591, 334 S.W.2d 780, 783 (1960) (where declaratory relief would not settle controversy and advisory opinion is sought, declaratory judgment is not proper).

55. 155 Tex. 111, 283 S.W.2d 722 (1955).

56. *Id.* at 114, 283 S.W.2d at 724. In Ainsworth v. Oil City Brass Works, 271 S.W.2d 754 (Tex. Civ. App.—Beaumont 1954, no writ), the court recognized that declaratory relief would be appropriate when "the fact situation manifests the presence of 'ripening seeds of a controversy.' " *Id.* at 761. Perhaps relaxing the real controversy requirement, "ripening seeds of controversy" appears when the situation indicates threatened litigation in the near future which is unavoidable. *See* R. McDONALD, TEXAS CIVIL PRACTICE § 2.05.1 (1981); E. BORCHARD, DECLARATORY JUDGMENTS 41-42 (1934).

57. 81 S.W.2d 1064 (Tex. Civ. App.—Austin 1935), *rev'd sub nom.,* Federal Royalty Co. v. State, 128 Tex. 324, 98 S.W.2d 993 (1936).

58. *Id.* at 1077.

ment actions, or, having taken jurisdiction, refuse to give declaratory relief because the controversy is moot, or too contingent,[59] or only advisory,[60] or the action is premature,[61] the ultimate and cumulative reason is that there is no "justiciable controversy" within the court's constitutional competence to try or decide. The trial court has jurisdiction to decide whether the action presents a "justiciable controversy," but if it concludes that the action does not, the only correct judgment to be rendered is one of dismissal;[62] however, a take-nothing judgment will get the same practical result.[63]

C. *Interpretive Decisions — Discretion*

It is in the field of discretion that Texas courts appear to have wandered far afield from permissible statutory powers. This deviation has resulted primarily from an acceptance of the law as announced by courts of other jurisdictions with different statutes, or from a misunderstanding of the limitation of discretion imposed by section 6 of the Texas statute.

The danger in picking up discretionary quotes from courts of other jurisdictions is apparent when they are based upon different statutory language.

As previously discussed, section 6 of the Texas Act provides discretion in which a trial court may refuse to grant declaratory relief and render a take-nothing judgment. An early example of a proper use of the discretion there conferred is found in *Town of Santa Rosa v. Johnson.*[64] The right to refuse to grant declaratory relief in that case was specifically related to the section 6 authority, as is made clear by the court's statement:

> Under the terms of section 6 of the Uniform Declaratory Judgments Act, the entry of a declaratory judgment is discretionary with the trial court . . . . A binding decree relating to the validity or invalidity of the incorporation of the Town of Santa Rosa could not be

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59. *See* Empire Life Ins. Co. of Am. v. Moody, 584 S.W.2d 855, 858 (Tex. 1979).

60. *See* Central Sur. & Ins. Corp. v. Anderson, 445 S.W.2d 514, 515 (Tex. 1969).

61. *See id.* at 515; C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2757 (1973).

62. *See* United Servs. Life Ins. Co. v. Delaney, 358 F.2d 714, 714-15 (5th Cir. 1966).

63. Puretex Lemon Juice, Inc. v. California Prods., Inc., 324 S.W.2d 449, 454 (Tex. Civ. App.—San Antonio 1959), *aff'd*, 160 Tex. 586, 334 S.W.2d 780 (Tex. 1960).

64. 184 S.W.2d 340 (Tex. Civ. App.—San Antonio 1944, no writ).

rendered in the absence of the State of Texas, represented by its proper officers.[65]

There are many other cases in which the discretionary "right of refusal" has been exercised under the express authority of section 6.[66] However, even in this situation, exercise of discretion to refuse cannot be arbitrary.[67] Moreover, the discretion granted by section 6 may be exercised to grant declaratory relief, even though some issues may remain unresolved.[68] A concomitant of the discretion to refuse is the discretion to grant.

Some courts have appropriated the language noted in *Town of Santa Rosa v. Johnson*[69] to the effect that "the entry of a declaratory judgment is discretionary with the trial court"[70] as authorizing a trial court, which has accepted jurisdiction, to decline to grant declaratory relief in other than section 6 situations.[71] The increasing tendency to do so is best illustrated in *K.M.S. Research Laboratories, Inc. v. Willingham*,[72] in which a defendant in a personal injury suit sought a declaratory judgment of non-liability by counterclaim, and the court dismissed the counterclaim on the ground

65. *Id.* at 340-41.

66. *See* Blythe v. City of Graham, 303 S.W.2d 881, 883 (Tex. Civ. App.—Fort Worth 1957, no writ) (as "proper" parties had not been joined in suit, trial court should refuse declaratory relief where controversy would not be settled); Zamora v. Zamora, 241 S.W.2d 635, 638 (Tex. Civ. App.—El Paso 1951, no writ) (while dismissal proper where declaratory judgment would not terminate controversy, trial court erred in dismissing where court properly had power to decree partition).

67. *See* Zamora v. Zamora, 241 S.W.2d 635, 638 (Tex. Civ. App.—El Paso 1951, no writ) (exercise of discretion to decline declaratory judgment must be limited to and controlled by section 6). In Southern Nat'l Bank v. City of Austin, 582 S.W.2d 229 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.), property owners were seeking injunction and declaratory relief to prevent city from enforcing certain city ordinances. The court held that the trial court erred in refusing to declare the rights of the parties and, in doing so, imposed that duty on the appellate court. *See id.* at 237; *see also* Tall Timbers Corp. v. Anderson, 370 S.W.2d 214, 217 (Tex. Civ. App.—Fort Worth 1963), *rev'd on other grounds*, 378 S.W.2d 16 (Tex. 1964).

68. *See* Southern Nat'l Bank v. City of Austin, 582 S.W.2d 229, 237 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.); Kimble v. Baker, 285 S.W.2d 425, 429-30 (Tex. Civ. App.—Eastland 1955, no writ). *But see* Harding Bros. Oil & Gas Co. v. Jim Ned Indep. School Dist., 457 S.W.2d 102, 105-06 (Tex. Civ. App.—Eastland 1970, no writ).

69. 184 S.W.2d 340 (Tex. Civ. App.—San Antonio 1944, no writ).

70. *Id.* at 340-41.

71. *See* Crawford v. City of Houston, 600 S.W.2d 891, 894 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); Southern Nat'l Bank v. City of Austin, 582 S.W.2d 229, 237 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.); Harding Bros. Oil & Gas Co. v. Jim Ned Indep. School Dist., 457 S.W.2d 102, 105 (Tex. Civ. App.—Eastland 1970, no writ).

72. 629 S.W.2d 173 (Tex. Ct. App.—Dallas 1982, no writ).

that such a declaration was not authorized. Alternatively, the court concluded that "the entertaining of a declaratory judgment rests with the sound discretion of the trial court."[73]

Examination of the opinion in *President v. Vance*,[74] upon which the court in *K.M.S. Research* relied, reveals that the court cited Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, and two federal cases for its statement that "it is well settled that a declaratory judgment always rests within the sound discretion of the court."[75] The statement cannot correctly be regarded as a controlling precedent; it is a correct interpretation of the federal statute but, as shown above, it is not a correct interpretation of the Texas statute.

V. CONCLUSION

Texas lawyers, unlike lawyers in many of the other states, need to adapt to declaratory judgment procedures which differ in some important respects from procedures in the federal judicial system. A capsuled summary of some of the features of the procedures which are similar and some which differ can be drawn from an analysis of governing statutes and their respective judicial interpretations. Witness:

1. In neither system do the courts have jurisdiction to give "advisory opinions"; they may only entertain jurisdiction in actions which involve "justiciable controversies."

2. Cases which are premature, or in which the controversy is moot or too contingent,[76] do not present "justiciable controversies" in either system.

3. A motion to dismiss for want or lack of jurisdiction is in order in both systems when the action does not present a "justiciable controversy."

4. If a prior suit is pending involving the same issues and in which full relief may be awarded, the courts of both systems will refuse declaratory relief.

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73. *Id.* at 174.

74. 627 F.2d 353 (D.C. Cir. 1980).

75. *Id.* at 364 n.76; *see also* Southern Nat'l Bank v. City of Austin, 582 S.W.2d 229, 237 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

76. Double contingency cases are too "iffy" and thus too contingent. *See* Firemen's Ins. Co. v. Burch, 442 S.W.2d 331, 333 (Tex. 1968); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2757 (1973).

5. Where such a prior suit is pending in a state court, the issue should be raised by plea in abatement just as in other cases of prior-suit pending pleas in abatement.

6. Even if an action presents a "justiciable controversy," and thus invokes the declaratory judgment jurisdiction of the federal courts, these courts may, in the exercise of sound discretion, refuse to render such a judgment.

7. The only situation in which the state courts are authorized to refuse to render a declaratory judgment in the exercise of a sound discretion, once jurisdiction is established, is where the judgment "would not terminate the uncertainty or controversy giving rise to the proceeding."

8. Trial court judgments in the federal courts granting or denying declaratory relief are reviewed on appeal solely for abuse of discretion.

9. Except in sections 6, 8, and 10, cases where review is for abuse of discretion, review in state courts should be the same as of "other orders, judgments, and decrees" for errors of law, whether in ruling on pleas to the jurisdiction or in abatement, or in rendering declarations, or in refusing to grant declaratory relief in other than section 6 situations. That review procedure should be a welcome relief from the misused "abuse of discretion" review.

10. In all cases in the state courts, discretionary and otherwise, judgments in the courts of appeal and the supreme court should be, respectively, in keeping with Rules 434 and 505, Texas Rules of Civil Procedure.

11. If the trial court has erred by dismissing for want of jurisdiction, by abating because of pendency of a prior suit, by granting or refusing to grant declaratory relief in other than discretionary situations, or by abusing its discretion in discretionary situations, a court of appeals should reverse the judgment of the trial court and "render such judgment or decree as the court below should have rendered." If a court of appeals affirms an erroneous trial court judgment, the supreme court should reverse the judgments of both courts and "render such judgment as the court of civil appeals should have rendered."[77]

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77. *See* CALVERT, *Appellate Court Judgments, or Strange Things Happen on the Way to Judgment*, 6 TEX. TECH. L. REV. 915, 921-22 (1975).