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The Declaratory Judgment as an Alternative Remedy in Ohio

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In 1933 Ohio enacted a Uniform Declaratory Judgments Act which superseded Sections 10505-1 to 10505-10 of the General Code which had empowered only the probate courts to render declaratory decrees.

The Uniform Act is as follows:

G.C. 12102-1. 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. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form or effect; and such declarations shall have the force and effect of a final judgment or decree.

G.C. 12102-2. Any person interested under a deed, will, written contract, or other writings constituting a contract, or 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 or ordinance, contract or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

G.C. 12102-3. A contract may be construed either before or after a breach thereof.

G.C. 12102-4. (Enumerates persons who may bring action.)

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G.C. 12102-5. (States that the powers of G.C. 12102-1 are not limited to the enumeration of 12102-2, 12102-3, or 12102-4.)

G.C. 12102-6. 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 rise to the proceeding.

G.C. 12102-7. (Provides for review of decrees.)

G.C. 12102-8. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefore 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.

G.C. 12102-9. 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.

G.C. 12102-10. (Relates to costs.)

G.C. 12102-11. (Defines the necessary parties.)

G.C. 12102-12. The act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

G.C. 12102-13. (Defines "persons" for purposes of the act.)

G.C. 12102-14. (Declares severability of sections.)

G.C. 12102-15. 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.

The purpose of the act is a twofold one. First, it seeks to afford a remedy in those controversies where a cause of action has not yet accrued so as to entitle the party or parties to one of the traditional remedies. It seeks to give relief in anticipation of a breach. It purports to afford a solution to controversies which exist presently but which must wait a passage of time or some action by one of the parties before adjudication is possible. It gives a party, whose rights are subject to dispute or threat, a present protection or definition of those rights in circumstances

where he would have to await an indefinite passage of time, or at the will of the other party, until an adjudication under the usual remedies would be available. Secondly, it seeks to give to parties, who might have resorted to the existing form of relief, a more expeditious and less violent form of action by way of declaration. By a simple, pacific declaration of rights it would afford an effective remedy in instances where only the violent force of ejectment or mandamus or other remedy was heretofore available. Professor Borchard, a recognized authority on declaratory judgments, says[1] "(The act) enables actions to be brought on two types of operative facts, (a) those which might also have justified an action for an executory judgment or decree, or (b) those which are not susceptible of any other relief."

This new procedural device has vast potentialities as a simple, efficacious remedy, and its introduction to our jurisprudence has been awaited with interest. It is particularly unfortunate, therefore, that it should receive a construction greatly limiting its scope at the very outset.

A recent court of appeals decision (motion to certify overruled by the supreme court), removes one of the salutary purposes of the act by holding that declarations are not available in those cases where the operative facts would justify an executory action.

In *Eiffel Realty Co.* v. *Ohio Citizens Trust Co.*[2] the court declared, contrary to the general practice of states having the same statute, that:

> The proceeding for a declaratory judgment is not a substitute or alternative for the common law or statutory actions existing when the Declaratory Judgments Act was adopted in Ohio.

In that case it was held that:

> A lessor, claiming the right to forfeit the lease and repossess the leased premises by reason of defaults of the lessee in payment of rent and taxes as required by the lease, has an adequate remedy in ejectment, and an action for a declaratory judgment to accomplish such purpose cannot be maintained.

[1] Borchard's *Declaratory Judgments*, p 24 (1934).
[2] 55 Ohio App. 1, 8 N.E. (2nd) 470 (1937).

Although the court of appeals intimated that the common pleas court refused to take jurisdiction solely on the ground that a remedy at law was available the opinion of the lower court does not restrict its holding to that single cause. The lower court enumerated four distinct points: (1) that there was a remedy at law; (2) that there would be a jury question not justiciable in a declaratory judgment action; (3) that there was a question whether forfeiture could be declared, there being some evidence of a waiver of the right of forfeiture; (4) that a pending action on the same issue would bar a declaratory judgment. After a discussion of these four points the court stated that under all these circumstances the order of the court should merely be a refusal to render a declaration on the subject. A reading of the opinion of the judge of the common pleas court leaves a real doubt as to the correctness of the court of appeals' decision that the holding of the former was based simply on the adequacy of the legal remedy.

The decision of the common pleas court with respect to the trial of facts and the pending of another action in the same controversy merits further consideration. In regard to the former the court said, "The question is, has he (the defendant) waived his right to trial by jury on the question of whether or not he is indebted to the plaintiff (for rents). I have studied the work of Professor Borchard on the subject of declaratory judgments with considerable diligence, but I have searched the pages of that book in vain for an authoritative declaration that the declaratory judgment may be used as a substitute for trial of the controversy in which parties have a constitutional right to a trial by jury." The act, rather than attempting a substitute for jury trials makes specific provision for it. G.C. 12102-9 reads, "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 an determined in other civil actions in the court in which the proceeding is pending." This provision was included so that the existence of

such issues would not defeat or bar, on constitutional grounds, an action for declaratory relief. Professor Borchard in his work on *Declaratory Judgments* on pages 120-121 states that, "There was no necessity for mention of jury trial in the Uniform Act except to give an assurance that the matter had not been overlooked and that the usual rules adopted by the state for the classification of civil issues and their trial were not intended to be interfered with. . . . The provisions for a jury trial are a safeguard against the definitive dismissal of the case when issues of fact arise the jury trial of which may be and is properly claimed, and an assurance of possible doubters that constitutional guaranties have not been overlooked."

The common pleas judge further ruled "that it is settled that a declaratory judgment proceeding will not be allowed if a suit is pending in another court on the same issue." The judge declared that a "court will refuse a declaration where another court has jurisdiction of the issue."[3] However it appears in a supplementary brief on this case that the other suit was dismissed and that the suit for declaratory judgment was based on a breach by the lessee, failure to pay rents, occurring after the dismissal of the other action. Certainly the principles relied upon was not involved as the issue was not the same nor was it pending at the time of the suit.

Does the Declaratory Judgment Act provide an alternative remedy? May the plaintiff choose between two remedies? Must he resort to the forceful procedure of existing forms of action or can he elect to have a simple declaration of his rights? Must he attempt to eject the defendant or does the Act permit him to have a definition of the rights of the respective parties so that they may peaceably settle the controversy without the use of legal force? This was the issue before the court of appeals. The Act was before the court for construction on this vital issue for the first time — Shall the Act be given a con-

[3] Pages 37-38 appellant's brief on motion to certify case No. 26433 Supreme Court of the State of Ohio.

struction which will allow it a broad scope or is it to be limited to those cases in which no adequate remedy exists in law and equity? The court of appeals of Lucas County gave the Act a narrow construction.

In reaching this decision the court relied upon cases from New York, Pennsylvania, Indiana, New Hampshire, Michigan, and Florida as authority for the proposition that a declaratory judgment is not available when there is an adequate existing remedy. The restriction imposed by this decision, the question being one of first impression in our courts, and the importance of this remedial reform are circumstances warranting a review of these authorities.

It is submitted that not only are there statutory differences distinguishing the New York Act and the Ohio Act but that the New York courts have specifically refused to deny a declaration simply because another remedy is available.

The New York Act after reciting the power of the supreme court to make declarations of rights, continues— "Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."[4] Pursuant to this clause Rule 212 was adopted and by its terms the courts are given a discretion in rendering declarations where other remedies are available.

> If in the opinion of the court, the parties should be left to relief by existing forms of action, or for other reasons, it may decline to pronounce a declaratory judgment stating the grounds on which its discretion is so exercised.[5]

Even by virtue of this rule, which does not appear in our law, the New York courts do not hold that the declaratory judgment is but a supplementary procedure and that it cannot be invoked whenever another remedy exists. The court is vested with discretion to refuse jurisdiction but it is not bound to do so.[6]

[4] Sec. 473 New York Civil Practice Act.
[5] Rules of Civil Practice of New York (1931).
[6] *Wollard* v. *Schaffer Stores Co.* 272 N. Y. 304 5 N.E. (2d) 829 (1936).

The above cited case is worthy of especial attention since it is almost identical in its facts and circumstances to the Ohio case. The court, although invested with discretion, refused to deny a declaratory judgment on the ground that an adequate remedy existed at law. There, as in the Ohio case, the plaintiff, lessor, sought a declaration of forfeiture of a lease and damages for rent, and the defendent, lessee, claimed a waiver of the right to forfeiture. It was there urged that ejectment would lie and constituted an adequate legal remedy so as to bar a declaratory judgment. This was the basis of the argument of the Ohio court. The New York Court of Appeals gave this answer to that question:

> Pursuant to section 473 of the Civil Practice Act and Rule 212 of the Rules of Civil Practice, the Supreme Court is vested with power to declare rights and other legal relations on request for such declaration, "whether or not further relief is or could be claimed," and it also has discretion (under Rule 212) to decline to pronounce a declaratory judgment if, in its opinion, the parties should be left to relief by existing forms of action. "We may not limit by judicial construction a power which the Legislature has conferred without limitation. We may not define the bounds within which that power may be exercised, except as we find such bounds implicit in the statute, read in the light of established public policy." *Westchester Mortgage Co.* v. *Grand Rapids and I. R. Co.* 246 N. Y. 194, 158 N.E. 70. While resort to the use of a declaratory judgment is usually unnecessary where an adequate remedy is already provided by another form of action "no limitation has been placed or attempted to be placed on its use." So we held in *James* v. *Alderton Dock Yards* 256 N. Y. 298, 176 N.E. 401,[7] but that judgment was necessarily reversed on its merits, for the reason that the plaintiff in no event was entitled to an equitable lien. . . . We have never gone so far as to hold that, when there exists a genuine controversy requiring a judicial determination, the Supreme Court is bound, solely for the reason that another remedy is available, to refuse to exercise the power conferred by section 473 and rule 212.[8]

The court thus proceeded to declare that plaintiff had waived his right of forfeiture but was entitled to damages for rent.

[7] This case is cited by the Ohio court as authority for its decision.
[8] *Wollard* v. *Schaffer Stores* n. 6 *supra.*

The New York practice is summarized in a digest of the law of that state as follows: "In New York State the court may exercise the power conferred upon it to make declarations, notwithstanding the fact that the situation presented admits of a conventional judgment."[9]

Prior to 1935 the Pennsylvania courts denied jurisdiction under a declaratory judgments act identical to the Ohio act when "any other established remedy was available."[9a] It was likewise denied when there was a "statutory"[9b] or an "equitable"[9c] remedy available.

However in 1935 the Pennsylvania statute was so amended as to deny the use of the declaratory action as an alternative to other remedies, thus giving statutory authority for the position taken by the courts. Section 6 of the Pennsylvania act now reads:

> Where, however, a statute provides a special form of remedy for a specific type of case that statutory remedy must be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, or an equitable remedy, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment or decree in any case where the other essentials to such relief are present, but the case is not ripe for relief by way of such common law remedy, or extraordinary legal remedy.[10]

Specifically the statute prohibits the use of the declaratory action where a special statutory remedy is available, and by inference it prohibits such action when the controversy is "ripe" for relief by common law remedies. Since this enactment the Pennsylvania court has recognized both the specific[10a] and the inferential[10b] prohibition of the statute.

[9] Carmody's "*Treatise on Pleading and Practice in New York*," Vol. 5, p. 4350. *Baumann* v. *Baumann* 226 N. Y. S. 576 is cited in regard to the above statement.

[9a] *In re Cryans Estate* 152 Atl. 675, 301 Pa. 386 (1930).

[9b] *Petition of Kahriher No. 1*, 284 Pa. 455, 131 Atl. 265 (1923).

[9c] *Appeal of Kimmell* 96 Pa. Super. Ct. 488 (1929).

[10] 1935 Pa. Laws, pp. 72, 73.

[10a] *City of Erie* v. *Phillips*, 187 Atl. 203, 323 Pa. 557 (1936).

[10b] *Allegheny County* v. *Equitable Gas Co.*, 183 Atl. 916, 321 Pa. 127 (1936).

The court of appeals relied upon *Sheldon* v. *Powell* 99 Fla. 782, 128 So. 258 (1930), as authority for the rule that "where there is another plain, adequate remedy available the statute cannot be invoked." The court was evidently under a misconception as to the holding in this case because the Florida court granted a declaration of rights of legatees under a will despite the admitted fact that another remedy was available by statute.[11] The issue was raised that the existence of the statutory remedy would exclude recourse to the declaratory action. The appellant contended that, "If appellees were entitled to any relief whatever they should have proceeded under section 3735 which is exclusive as to such matters as this. . . ." The court specifically denied this contention. . . . "We think that appellees might have proceeded under section 3735, Revised General Statutes of 1920, to have the legacy brought in question released to them, but we do not think that remedy exclusive. Chapter 7857, Acts of 1919, authorizing declaratory decrees, neither repeals, nor is it incompatible with section 3735. As to the question involved here it is merely cumulative, so the appellees had their option to pursue either remedy."

This decision permitted the declaratory action to be used alternatively to a statutory remedy and lends no authority to the rule for which it was cited by the Ohio court.

Brindley v. *Meara*, 198 N.E. 301 (Ind.), 101 A.L.R. 682 (1935), is also cited as authority for the proposition that declaratory relief is not an alternative remedy. The actual contention in the case was not whether declaratory relief could be given when another remedy is available but whether the section providing for additional relief (similar to Ohio statute) authorizes executory relief in connection with declaratory judgments or whether a separate action must be brought for executory relief. Prior to the instant case a declaration had already been granted as to the rights of an advisory board to appoint relief officials rather than the trustee,[12] and the action in the

[11] Sec. 3735 Rev. Gen. Stat. Fla. of 1920.

present case was to enjoin the trustee from exercising such power and the court was construing only that section that had to do with additional relief. The court held that the act does not authorize further executory relief since the title limits the act to the declaration of rights, etc., and since the Indiana constitution provides that no act shall be broader than the title its application is limited to declarations only. It is possible that another remedy in the nature of *quo warranto* might have been available in the first action. This destroys the authority of the case in Ohio. Its authority is further weakened when the court seemed to approve the opposite position. It said, "and there may be cases in which, notwithstanding executory or coercive relief could be claimed, it is made to appear that a declaratory judgment or decree will terminate the controversy between the parties without coercive relief. Such a case would seem to be within the purposes of the act . . ." and, "the courts had already interpreted the statutes as authorizing declaratory relief when other relief could be claimed. . . ."

It may be noted in passing that most states, having the section providing for further relief in addition to the declaration, have construed such as authorizing further coercive or executory action.[13] The apparent reason for this character of additional relief is given in *Nat'l City Bank* v. *Wagner* 243 N. Y. S. 299 (1930), which after calling attention to the English practice of combining prayers for declaratory and coercive relief, states "that a declaratory action ought, in equity, to give real relief, so that a second independent suit need not be required to be brought, when all matters can be litigated in one action." In fact no authority could be found in accord with the Indiana holding which appears to be attributable to the constitutional restriction limiting acts to the extent of their titles.

[12] *Meara* v. *Brindley* 207 Ind. 657, 194 N.E. 351 (1935).

[13] *Joy Co.* v. *New Amsterdam Co.* 98 Conn. 794, 120 Atl. 684 (1923); *Brix* v. *Peoples Mut. Life Ins. Co.* 2 Cal. (2d) 446; 41 Pac. (2nd) 537 (1935); *Beatty* v. *Chi. B. & Q. R. R.* 52 Pac. (2d) 404, 49 Wyo. 22 (1935); *Morris* v. *Ellis* 221 Wis. 307, 266 N.W. 921 Wis. (1936); *Mitchell* v. *Williambridge Mills* 14 Fed. Supp. 954 (1936).

Of the authorities relied upon by the court then, only Michigan and New Hampshire support the proposition that the declaratory judgment is not an alternative remedy in absence of specific statutory expression to that effect.

Authorities upholding the alternative character of the remedy are cited in both the majority and minority opinions.[14] To this list might be added *Hays* v. *Hays* 260 Ky. 586, 86 S.W. (2d) 313 (1935), a federal case[15] to be discussed later, and a statement from the Kansas court[16] that "relief under the declaratory judgments act should be refused because of availability of another remedy only where the court believes that more effective relief can and should be obtained by another procedure and that for that reason a declaration will not serve a useful purpose."

The majority of the Ohio court stated that the Connecticut, Virginia, and North Carolina cases, above cited, were to be explained on the grounds that the tenant was seeking a declaration as to his rights to continue as a tenant under a lease rather than the lessor seeking a termination of it. This distinction does not at all maintain the proposition that the remedy does not lie when there is another available remedy. *Sigal* v. *Wise* (Conn.) is a declaration as to a tenant's rights if a burned building is reconstructed and it does not appear whether another remedy was available or not. In *Cohen* v. *Rosen* (Va.) the court stated that the dispute might have been settled by other statutory methods but that the bill could be maintained for a declaratory judgment. The *Power Co.* v. *Iseley* case (N. C.)[17] involved the declaration of rights of a street car company under

[14] *Wollenberg* v. *Tonningsen* 8 Cal App. (2d) 722, 48 Pac. (2d) 738 (1935); *Tuscaloosa County* v. *Shamblin* 233 Ala. 6, 169 So. 234 (1936); *Sigal* v. *Wise* 114 Conn. 298, 158 Atl. 891; *Carolina Light and Power Co.* v. *Iseley*, 203 N.C. 811, 167 S.E. 56; *Nashville C. and St. L. R. R. Co.* v. *Wallace* 288 U.S. 249, 77 L. Ed. 730, 53 Sup.Ct. 345; *Cohen* v. *Rosen* 157 Va. 71, 160 S.E. 36 (1931).

[15] *Penn.* v. *Glenn* 10 Fed. Supp. 483 (1935).

[16] *Hudson* v. *Trav. Ins. Co.* 67 Pac. (2d) 593, May 1937.

[17] *See* n. 14 *supra.*

a franchise and the question of other available remedies was not raised but in *Allison* v. *Sharp*, 209 N.C. 477, 184 S.E. 27 (1936), the court allowed a bill for the declaration involving the constitutionality of a staute although there was another remedy at law available to serve this purpose, saying, "While there was another remedy at law available to them, they have challenged the constitutionality of the statute under which they contend the registrar refused them registration. Under such circumstances and conditions the Uniform Declaratory Judgment Act affords a ready means of testing its validity, as pointed out in Borchard's *Declaratory Judgments*, p. 549."

In the federal courts the view is expressed that the federal declaratory judgment procedure is an alternative remedy not to be precluded by the existence of another form of action.[18] There an action was brought against the federal tax collector to have the Tobacco Control Act and its consequent tax declared unconstitutional. In granting the declaration the court made the following statement regarding the argument that the plaintiff could have availed himself of the usual remedy, i.e., pay the tax and sue to recover the same.

> In support of the contention that the Federal Declaratory Judgment Act was not intended by Congress to be available in cases arising under the revenue laws of the United States, counsel for the defendant argue that an action for a declaratory judgment is not maintainable where

[18] *Penn.* v. *Glenn* 10 Fed. Supp. 483 (appeal dismissed) 84 Fed. (2d) 1001 (1936). In *Stephenson* v. *Equitable Life Assurance Society of United States* (1937) Fed. (2d), 5 U. S. Law Week 10-19-37, p. 13, holding the Federal Act provides an alternative remedy, Parker, C. J., said: "The fundamental error of the court below consists in assuming that a proceeding for a declaratory judgment may not be maintained where another remedy is available. There is nothing in the act which limits its application to suits in equity or which suggests that the availability of other remedies shall preclude its use. On the contrary, the provision in the first paragraph for pleading by 'declaration,' as well as by complaint or petition and the provision in the third paragraph for jury trial show clearly that declaratory judgments in legal as well as equitable proceedings were contemplated; and that the remedy provided was intended as an alternative one in cases where other remedies are available is shown by the provision of the first paragraph that such judgments may be rendered 'whether or not further relief is or could be prayed'."

there is available another adequate remedy. While some state courts have so construed their state declaratory judgment acts, such is not the general rule, and, in my judgment, unless the act is so restricted by its terms, such a construction is not justified. There is neither expressed nor implied in the Federal Declaratory Judgment Act any such restriction upon its use, and this court is not warranted in writing into it any such restriction.

The Ohio Act is so similar in terms to the Federal Act as to admit of no authority for imposing the "judicial restriction" that the federal court refused to apply.

In *Gully* v. *Interstate Natural Gas Co.*, 82 Fed. (2d) 145 (1936), although the court grants a declaratory judgment in a case of threatened tax assessment where the issues were not yet drawn so as to warrant coercive relief, the court cites *Penn.* v. *Glenn* as authority for the following statement:

> For while it may not be doubted that the Federal Declaratory Judgment Act is a purely remedial statute, and does not purport to, nor does it add to the content of the jurisdiction of national courts, it certainly does purport in cases where federal jurisdiction is present, to effect, and we think it does, effect thorough-going remedial changes, by adding to the coercive or warlike remedies in those courts by way of prevention and reparation, the more pacific and prophylactic one of a declaration of rights. When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant relief of declaration either before or after the stage of relief by coercion has been reached.

In *Western Casualty and Surety Co.* v. *Beverforden;* 17 Fed. Supp. 928 (1936), the District Court refused a declaratory judgment in which it was stated that "a declaratory judgment is intended to be supplemental" and "It is to be used when adequate relief is not presently available." But that suit was by an insurer and was instituted after a judgment was procured against the insured and just as a suit was about to be filed against the insurer so that the declaratory action would have only delayed a legal cause of action involving the same issue. The court said, "A loss has occurred. A suit is about to be filed.

The respondent has recovered judgment against the operator of one of the cars." It then quoted I *Corpus Juris Secundum*, Actions Sec. 18, p. 1028, in what seems to be the controlling reason for the holding: "Moreover the statute is not intended to delay a party in the prosecution of an accrued cause of action until the termination of the proceeding for a declaratory judgment."

Federal declarations have also been refused where statutes have by express terms forbidden resort to the declaratory judgments act as a means of testing their constitutionality. *Union Packing Co.* v. *Rogan*, 17 Fed. Supp. 934 (1937), and *Beeland Wholesale Co.* v. *Davis*, 88 Fed. (2d) 447 (Social Security Act) (1937).

Penn. v. *Glenn* has not been overruled nor distinguished and stands as the definite expression of the federal courts.

In England up to 1883 declaratory judgments could be granted only when other relief could also be awarded. In the Rules of Court of 1883 (Order XXV, Rule 5) it was provided that such relief could be granted whether executory relief was or could have been claimed, or not. This provision defining the alternative character of the remedy has been the historical practice of English courts.

The Ohio court cites an English case as an authority for its decision saying, "While the declaratory judgment has been sanctioned in England since 1852, it is sparingly used there,[19] and a wide discretion in its application is recognized." (Cites *Barraclough* v. *Brown L. R.* (1897) A.C., 615, 623; 66 L. J., Q.B., N.S., 672). Although the English statute allows discretion to refuse a declaration[20] "in any case where (it) . . . is not necessary or proper," it is recognized in England as an alternative, optional remedy. The committee on Uniform Declaratory

[19] As to the "sparing use" of the action in England the Uniform Committees reported that, "Of the official reports of cases in the chancery division in 1884, 34 per cent were declaratory actions; in 1916, based upon the cases reported in second chancery division this percentage had risen to 67 per cent." (*Handbook of the National Commissioners on Uniform State Laws* 1920, p. 179.)

[20] Section 4, English Declaratory Judgments Act.

Judgments Act which drafted the Uniform Law, stated, in its annotations defining the practice under the English act, that it "empowers the court to make a declaration where no other relief is asked for or where on the facts no substantial relief could be given."[21] Paraphrasing this statement it appears that, according to this committee, declarations could be given when other forms of relief could be had but are not requested and when no other relief could be requested. In the same citation this committee further emphasizes the alternative character of the procedure under the English practice, saying, "Frequently a declaration is asked for instead of an injunction, to settle differences over the existence of a right of way, or trespass. In *Harrison* v. *Duke of Rutland* (1893) 1 Q.B. 142 C.A., Kay L. J., said, 'It is not unusual in the Chancery Division to make such a declaration without going on to grant an injunction'. In *Ankerson* v. *Connelly* (1906) 2 Ch. 544, a declaration was made that an easement of ancient light had been extinguished. In *Gingell* v. *Stepney* (1906) 2 K.B. 468, certain hay sellers obtained a declaration, without asking for damages, that they were entitled to stand their carts in the old hay market. . . ."

Authorities who have examined into the English practice of the declaratory judgment are agreed as to its use as an alternative remedy there. It has been said that, in England, a survey of "recent decisions indicates that the normal use of the action for a declaration is in cases where 'consequential relief is or can be claimed'. . . . These cases, the common cases, of declaratory judgments, are cases in which some other remedy is or could be claimed. It is convenient for the plaintiff to say to the defendant: 'This is the law.' It is bad policy both in administration and business, to threaten a person with whom one is in dispute."[22]

[21] *Handbook of the National Conference of Commissioners on Uniform State Laws* p. 281.

[22] *Declaratory Judgments against Public Authorities in England*, by Jennings, 41 Yale Law Journal 407, 415. See also *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, by Sunderland, 16 Mich. Law Review 69, 75, 76. See Borchard on *The Declaratory Judgment as an Alternative Remedy*, 36 Yale Law Journal 403, 405.

As stated by Professor Borchard, in a great majority of cases in which declaratory judgments were issued it would have been perfectly possible to obtain another form of relief.[23]

The Ohio act differs from that of New York which, under the court rules authorized by the act, gives courts discretion to refuse a declaration when another remedy is available, and from that of Pennsylvania which bars the action when another remedy exists. The Ohio law contains no provision that vests the courts with discretion as to the granting of a declaration when another remedy is available. Contrarily the act contains certain provisions that indicate an intent that the remedy should be an alternative one. Section 12102-1 provides for declaratory judgments "whether or not further relief is or could be claimed," and "no action shall be open to the objection . . . on the ground that a declaratory judgment or decree is prayed for." The court is vested with authority to refuse a decree only in one section (12102-6) where "such judgment . . . would not terminate the uncertainty or controversy. . . . " 12102-3 permits a construction of a contract either "*before or after there has been a breach thereof.*" Of what purpose is this section as to construction after a breach which would give rise to another

[23] Borchard's *Declaratory Judgments* pp. 151-153. In *Blakeslee* v. *Wilson* 190 Cal. 479, 213 Pac. 495 (1923) a declaration for right to money was granted when plaintiff could have sued for damages. In *Sloan* v. *Longcope* 288 Pa. 196, 135 Atl. 717 (1927) a declaration of a landlord's right to possession (similar to the Ohio case) was given where plaintiff could have sued for the property, for the right of possession, or ejectment. In *Earl Russell* v. *Midhurst Rural District Council* 98 L.T.R. 530 (Ch. 1908) a declaration against defendants right to trespass was made where plaintiff could have sued for mandamus or injunction, or for damages generally. In *Sheldon* v. *Powell* 99 Fla. 782, 128 So. 258; *Allison* v. *Sharp* 209 N.C. 477, 184 S.E. 27; *Penn.* v. *Glenn* 10 Fed Supp. 483; *Wollard* v. *Schaffer Stores* 272 N.Y. 304, 5 N.E. (2d) 829; *Tuscaloosa County* v. *Shamblin* 233 Ala. 6, 169 So. 234, discussed *ante*, declarations were granted though other remedies were stated to be available. The Colorado court in *Equit. Life* v. *Hemenover* 100 Col. 231, 67 Pac. (2d) 80 (1937) gave a declaration as to rights of beneficiaries to double liability under an insurance contract where they could have sued for the amount in money. Nebraska in *State* v. *Gen. Am. Life Ins.* Co. 272 N.W. 555 (1937) granted the state a declaration as to the liability of the insurance company to a tax when the state could have sued for the taxes.

form of action, if the availability of another form of action would bar a declaratory judgment? If the legislature intended that a contract could be construed after a breach by declaration it must have meant that the remedy is an alternative to a suit for damages. Section 12102-8 provides for "further relief" which according to every available authority (excepting the Indiana act which is constitutionally limited) means the executory relief of the conventional forms of action. Why was this provision included in the declaratory judgments act if the availability of executory relief would preclude resort to such act? It cannot be presumed that the legislature would provide for additional relief to a declaratory action by way of traditional remedies, if it intended that the existence of circumstances essential to such traditional remedies would bar recourse to the declaratory action in any event. Did the legislature intend to say to petitions for declarations, "We will give further relief to your declaratory action, if necessary, through the conventional forms, but, if the conventional remedies are available you cannot bring a declaratory action?" Sections 12102-2 and 12102-15 contain the injunction that the act should be "liberally construed and administered." The terms of the act rather than warranting a narrow construction of its scope specifically enjoins such an interpretation.

The restriction imposed by the Ohio court is found nowhere in the terms of the act nor is there any suggestion of an intent to impose such a limitation. The restriction is one of judicial construction and is opposed to any legislative intent ascertainable in the law. The report of the committee on Uniform State Laws[24] which drafted the uniform act, as enacted in Ohio, manifests an intention that the law should afford a remedy similar in scope and character to the one available in England. The remedy there, as has been previously discussed, is an alternative one. The intention, to enact the English practice of alternative character, apparent in the original conception of the Uniform

[24] *See* n. 21 *supra*.

Law, is referable to the Ohio Act which is identical in its terms. The Ohio court in this instance may have exceeded the scope of judicial determination outlined by the New York court: "We may not limit by judicial construction a power which the legislature has conferred without limitation. We may not define the bounds within which that power may be exercised, except as we find such bounds implicit in the statute, read in the light of established public policy."[25]

Every existing remedy seeks an order of the court which is to be enforced against a party by the power of the state. Our procedural machinery has been predicated on the unwillingness of litigants to recognize legal rights even after they have been defined by our courts. Such a presumption is not only an affront to a great group of law-abiding citizens but it is in derogation of the society in which we live. The presumption, we believe, is a falsity of fact. Our judicial administration has found sufficient esteem among the people to make the sheriff and his writs unnecessary to carry out the courts dictates in every case. It is no exaggerated assumption that a great number of litigants need not be forced to respect legal rights and duties once they have been adjudicated. Definition of the law, rather than its forceful execution, is the object of most judicial controversies. It is confusion as to rights and duties rather than obdurate disrespect of law that gives rise to such controversies. It is well in keeping with an advancing civilization that our procedural machinery be so reformed as to afford a remedy of peaceful character to those parties that need only a definition of law to settle their disputes. The Declaratory Judgment Act as an alternative remedy performs this purpose; it recognizes that if parties desire to obey the law a definition of their rights is sufficient. As an alternative to existing remedies it enables our judicial administration to assume that the coercive power of the state need not be brought down on law respecting litigants.

It is indeed time that our judicial machinery should afford

[25] *See* n. 6 *supra.*

a more peaceful procedure for the settlement of disputes. Belligerency, vindictiveness, and threat should be discouraged by judicial machinery which would provide means to avoid those elements. By seeking a declaration a party can say to his adversary, "Let us see what the law is!" rather than the threat of, "I will have you ejected" or "I will have you enjoined." By a request for a declaration a plaintiff imposes full confidence in the defendant's respect for the law rather than threatening him with its force. The court assists parties in settling their own differences instead of invoking its processes for one of two belligerent parties. Adjudication is often sufficient. Execution is not always necessary.

A denial of the alternative character of this remedy would not only destroy its use as a pacific means of procedure but it would also curtail its utility for all other purposes. It could only be used when no other remedy is available. The jurisdiction of equity was seriously confused and curbed by the principle that it could not be invoked if a legal remedy were available. Neither the existence nor the adequacy of the legal remedy was susceptible of a guiding definition and recourse to equity was always impeded by the doubt arising as to the availability of the other remedy. The concept of extraordinary jurisdiction which occasioned this restriction in equity is not present here. But the declaratory judgment would be subjected to twice this confusion and restriction if held not to be an alternative remedy, as it would not be available if there was an existing remedy in either law or equity. Litigants would have to calculate to a nicety the availability and the adequacy of any existing form of action. Recourse to the remedy would always be discouraged by the risk that the court would refuse it because of the availability of another remedy. Petitioners would always be subjected to this defense before the merits of the controversy could be heard. A remedy so hedged by doubt and uncertainty offers nothing to parties who enter our courts for the purpose of finding certainty and definition. Is it a safe assumption that the

legislature intended to provide a remedy the jurisdiction of which would be so uncertain and the scope of which would be so circumscribed? Such an assumption is inherent in the holding of the Ohio court. In view of the broad purpose of the Uniform Declaratory Judgment Act as defined by the authorities on the subject and by a majority of courts of those states which have enacted the uniform law, and in view of the English procedure and practice upon which the uniform act was based, it is difficult to conclude that such a restriction was ever intended in the enactment of our law. The act is sufficiently broad in its terms to admit the addition of a needed procedural remedy. It is to be hoped that it may yet be given a construction that will permit a full development of its possibilities.[26]

[26] "Yet the second group of cases, where the plaintiff, though capable of suing for an executory or coercive decree, contents himself with the milder declaration of rights as adequate to his needs and purposes, though less spectacular, are entitled to equal consideration, for they manifest the important social function of deciding controversies at their inception—thus avoiding perhaps irretrievable catastrophe and enable a plaintiff to seek a mild rather than a drastic remedy, with all its consequences. They assume that the operative facts, such as a breach, which condition a traditional remedy, have occurred, and yet they recognize the value of an option in prayers for relief. They recognize that the prayer for relief does not condition or determine the cause of action and that the plaintiff, in absence of some public reason, should have a free choice of remedies. They recognize also that the same state of facts may give rise to a variety of legal interests, justifying a variety of relief, and that it is not a judicial function to force upon the claimant a drastic remedy when a mild one will satisfy. Indeed, so revealing of the utility of flexibility in judicial therapeutics has been the declaratory judgment that plaintiffs asking for coercive relief alone or for both declaratory and coercive relief in combination or in the alternative have, in the exercise of judicial discretion, been granted a declaration only as adequate relief for their needs.

"It would seem clear that in (this) group of cases the declaratory judgment is an alternative and entirely optional remedy, and that there is no justification ordinarily for the refusal of a declaratory judgment on the ground that an executory judgment was obtainable. The few courts in the United States that have so decided have overlooked or disregarded the purpose of the declaratory judgment, the practice in England and elsewhere, and the express terms of the statute in most American jurisdictions." Borchard's *Declaratory Judgments* pp. 148-149.