DECLARATORY JUDGMENT

DECLARATORY JUDGMENT — AN ALTERNATIVE REMEDY AND LIMITATION

The plaintiff brought an action for declaratory judgment under Ohio G.C. sec. 12102-1 *et seq.* to have a note cancelled and declared void as usurious because no consideration was given. The defendant contended that the bill could not be brought under the Uniform Declaratory Judgment Act because the plaintiff had another remedy. The Supreme Court held that the remedy is alternative in any case in which the court, in the exercise of its sound discretion, finds the relief sought to be within the spirit of the act and where speedy relief is necessary to the preservation of rights which might otherwise be impaired or lost. *Schaefer* v. *First National Bank of Findlay,* 134 Ohio St. 511, 18 N.E. (2d) 263 (1938).

This is the first time the problem of whether the relief under the act is alternative has been before the Ohio Supreme Court. The problem was unsettled in the lower courts. The view had been taken that the act should be liberally construed. *Kochs* v. *Kochs,* 49 Ohio App. 327, 2 Ohio O. 212 (1935); *R.K.O. Distributing Co.* v. *Realty Co.,* 3 Ohio O. 524 (1935); *Walker* v. *Walker,* 132 Ohio St. 137, 5 N.E. (2d) 405 (1936). It was early held that the remedy is alternative, *Flowers* v. *Metcalf,* 4 Ohio O. 301 (1935), but the opposite view was reached in *Eiffel Realty Co.* v. *Citizens Trust Co.,* 55 Ohio App. 1, 8 N.E. (2d) 470 (1937). There was a strong dissenting opinion in this case and the case was severely criticized. Glosser, *The Declaratory Judgment as an Alternative Remedy in Ohio* (1937) 4 O.S.L.J. 1; Note (1937-8) 5 U. of Chicago L. Rev. 143. Several courts since the *Eiffel* case have held that the remedy is alternative, and have discussed this case but have not seen fit to follow it. *Otten* v. *Cincinnati,* 10 Ohio O. 276 (1937); *Pearson* v. *Pearson,* 58 Ohio App. 503, 16 N.E. (2d) 837 (1938). In one case where the plaintiff had another remedy the court allowed the declaratory judgment without discussing the problem. *Cromley* v. *Prudential Ins. Co.,* 11 Ohio O. 49 (1936). It has been previously held that the remedy is not alternative but discretionary with the court. *U. S. Fidelity & Guaranty Co.* v. *Savoy Grill, Inc.,* 51 Ohio App. 504, 1 N.E. (2d) 946 (1936). In a recent common pleas case the same facts as in the *Schaefer* case were present and a declaratory judgment was given. *Schroeder* v. *Lewis,* 12 Ohio O. 393 (1938).

There is much confusion and conflict in the decisions in other

jurisdictions. Some courts have held the remedy is definitely alternative in one line of cases, *Tuscaloosa County* v. *Shamblin*, 233 Ala. 6, 169 So. 234 (1936); *Cohen* v. *Rosen*, 157 Va. 71, 160 S.E. 36 (1931); *Chick* v. *MacBain*, 157 Va. 60, 160 S.E. 214 (1931); *Dept. of Treas. of Ind.* v. *J. P. Michael Co.*, 11 N.E. (2d) 512 (Indiana, 1937); *Allison* v. *Sharp*, 209 N.C. 477, 184 S.E. 27 (1936), while in another line of cases they have held that the remedy is exclusive and can only be used when another adequate remedy is not available. *Bagwell* v. *Woodward Iron Co.*, 184 So. 692 (Alabama, 1938); *American Nat. Bank & Trust Co.* v. *Kirshner*, 162 Va. 378, 174 S.E. 777 (1934); *Brindley* v. *Meara*, 209 Ind. 144, 198 N.E. 301, 101 A.L.R. 682 (1935); *Green* v. *Inter-Ocean Casualty Co.*, 203 N.C. 767, 167 S.E. 38 (1932). Several jurisdictions have rather clearly taken a stand that the remedy is alternative. *Farmers & Merchants Bank* v. *Billstein*, 283 N.W. 138 (Minnesota, 1939); *Lisbon Village District* v. *Town of Lisbon*, 85 N.H. 173, 155 Atl. 252 (1931); *Kaleikau* v. *Hall*, 27 Haw. 420 (1923); *Miller* v. *Siden*, 259 Mich. 19, 242 N.W. 823 (1932). This is strikingly illustrated in Michigan where the *Miller* case was criticized by Borchard, *The Declaratory Judgment an Exclusive or Alternative Remedy* (1932) 31 Mich. L. Rev. 180, and the court took an even narrower view point in *Wolverine Mut. Mtr. Ins. Co.* v. *Clark*, 277 Mich. 633, 270 N.W. 167 (1936). A third group of courts have taken the liberal view and have held consistently that the remedy is alternative. *Wollenberg* v. *Tonningsen*, 8 Cal. App. (2d) 722, 48 Pac. (2d) 738; *Hays Committee* v. *Hays Guardian*, 260 Ky. 586, 86 S.W. (2d) 313 (1935); *Penn* v. *Glenn*, 10 Fed. Supp. 483 (1935). It is to be noted that since the *Penn* case the new Rules of Procedure for Federal Courts have been adopted, and in Rule 57 this problem has been taken care of so that as far as the Federal courts are concerned the remedy is alternative.

Other authorities are as much in disagreement as are the courts. BORCHARD, DECLARATORY JUDGMENTS, (1934), p. 147 *et seq.*; 16 Am. Jur., Declaratory Judgments, sec. 13; 1 Corpus Juris Secundum, Actions, sec. 18 (8); 114 A.L.R. 1361 (1938), and earlier annotations therein referred to; Note (1932) 32 Col. L. Rev. 536; Borchard, *Declaratory Judgments in Pennsylvania* (1934) 82 U. of Pa. L. Rev. 317; Note (1934) 44 Yale L.J. 694; Borchard, *An Indiana Declaratory Judgment* (1935) 11 Ind. L.J. 376; *Missouri Declaratory Judgment Act* (1937) 5 Kans. City L. Rev. 77.

Most of the states have reached a midway position on this question either by the direct language of their decisions or as evidenced by a

swinging from one view to the other. It would seem to this writer that the weight of authority is in accord with the *Schaefer* case, *i.e.*, that the remedy is neither alternative nor exclusive, but that it rests in the sound discretion of the court whether relief shall be given when there is another less desirable remedy and so the relief asked for is within the spirit of the act. This conclusion is arrived at by the fact that many jurisdictions have swung from one side to the other without any apparent reason except that in one case the remedy was more desirable than the coercive remedy and in another case less desirable. The fact that courts have taken a stand that the remedy is not alternative, and later given declaratory relief where another adequate remedy existed without any comment on the point; the fact that courts have taken a definite stand that the relief is alternative, and then when a close case came up justified their refusal to give the declaratory relief on some technical grounds; the very fact that the various writers have spent so much time trying to justify and distinguish these cases would tend to show that the courts have taken the view set down in the Ohio case while trying to uphold their former decisions.

The Ohio Supreme Court has laid a very flexible groundwork for a very far reaching remedy. In the face of all the clamor for procedural reform it is hoped that the bench and bar will use this remedy to cut down time and expense. The legislature has refused to define, lest the craft of man evade the definition. The bench should, in using this discretionary power, confine itself to the facts at hand and not lay down unnecessary precedents which will be binding on later equally competent courts. This decision and rule will further avoid the difficult problem with which equity has to contend of deciding what "adequacy of the other remedy" means and when it exists. ROBERT E. TEAFORD

EVIDENCE

EVIDENCE — IMPEACHMENT OF ONE'S OWN WITNESS

Defendant was charged with the crime of burglary. On trial the State introduced a witness who, before being convicted of the same crime, had made a sworn statement confessing his part in the affair and naming defendant as an associate. On the stand the witness failed to identify defendant as one of his accomplices. Surprised by this change of face the prosecutor was permitted to question the witness with regard to his previous sworn statement. In reversing the Court of Appeals which had reversed the Common Pleas Court, the Supreme Court held: