Alternative Character of the Declaratory Judgment in Ohio

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Since the decision in *Schaefer v. First National Bank of Findlay*[1] Ohio usually has been classified with the states which treat an action for a declaratory judgment as an alternative remedy.[2] In the recent case of *American Life and Accident Insurance Company of Kentucky v. Jones*,[3] a divided court settled another problem in favor of the alternative character of the action. It was there held that where a remedy is provided in a particular statute[4] for the enforcement of the statute the remedy is not exclusive but that in a proper case an action for declaratory relief may lie under the Ohio rule. There is considerable contra[5] authority in the United States on the ground that statutory action was intended to be exclusive. Judge Taft did not place his dissent upon this ground. He thought that the statutory remedy provided was an equally serviceable and speedy remedy and a declaratory action would not lie under the Ohio rule. He pointed out that the act provided that when an appeal was taken from the administrative tribunal to the Common Pleas Court it "shall be given preference over other civil cases." That proceeding was not utilized in this case. This disagreement on the application of the rule may justify a comment on the Ohio rule itself.

Early cases under the Uniform Declaratory Judgment Act,[6] which was adopted in Ohio in 1933, of which *Eiffel Realty and Investment Co. v. Ohio Citizens Trust Co.*[7] was one of the earliest,

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[1] 134 Ohio St. 511, 18 N.E. 2d 263 (1938).

[2] BORCHARD, DECLARATORY JUDGMENT 326 2d ed. (1941), 172 A. L. R. 847 at 854. (The annotator cites *Radaszewski v. Keating*, 141 Ohio St. 489, 49 N.E. 2d 167. He is apparently bothered by this case, for he added parenthetically, "but proceedings for declaratory judgment will not be entertained where another equally serviceable remedy is provided." This would seem to make the declaratory judgment an extraordinary remedy. The court did seem to approve the doctrine by its quotation from *Stewart v. Herton*, 125 Neb. 210, 249 N.W. 522 (1933).

[3] 152 Ohio St. 287, 89 N.E. 2d 301 (1949).

[4] OHIO GEN. CODE §§ 12102-1, 1345.

[5] BORCHARD, *op. cit.* note 2, pp. 342 *et seq.*

[6] OHIO GEN. CODE §§ 12102-1 to 16 inc.

[7] 23 Ohio L. Abs. 562 (App. 1937). See Glosser, *The Declaratory Judgment as an Alternative Remedy in Ohio*, 4 Ohio St. L. J. 1 (1937).

held that the remedy was not alternative. The syllabus of that case states; "The purpose of the declaratory judgment act is to supply deficiencies in practice, and not to provide remedies parallel or alternate to existing remedies." Cases from Pennsylvania, Michigan, New York and other states supporting this view are relied upon. Prof. Borchard has severely criticized these cases.[8] Judge Taylor's dissenting opinion presents a very good analysis and construction of the act.

Since the court in the *Eiffel Realty* case relied upon Pennsylvania cases among others for its rule I should like to add, parenthetically, that In Re *Kariher's Petition*[9] that court held that the declaratory remedy was not alternative "where another statutory remedy had been specifically provided for the character of the case in hand," the very proposition in which the *Jones* case came to the opposite conclusion. But in a later case, as Borchard explains,[10] *Leafgreen v. La Bar*,[11] the court "unintentionally distorted" Judge Von Moschzisker's "clear statement" as meaning that a declaratory judgment would not lie if an equally serviceable remedy was available. The judge was so distrubed by this error that after his retirement he had an amendment to Section 6 introduced into the legislature to correct it, but alterations and additions thereto in the legislature process prevented a satisfactory result.

The problem of the alternative character of the declaratory judgment came before the Supreme Court in the *Schaefer* case[12] and the *Eiffel Realty* case was modified. I do not think it is correct to say that it was overruled because Judge Williams said, "The quaere has been raised as to whether the Uniform Declaratory Judgment Act is an alternative remedy. Surely it is not alternative in the sense that the action always lies even though there may be ground for full relief in equity or a suit at law may be maintained." Contrast with this statement the view expressed by Judge Parker in *Stephenson v. Equitable Life Assurance Society*,[13] a case which has set the rule in the Federal Courts. He 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." The Federal Declaratory Judgment Act[14] of 1934 contained no express provision respecting its alternative character and the case apparently came to the District Court before

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[8] BORCHARD, *op cit.*, pp. 317 *et seq.*
[9] 284 Pa. 455, 131 Atl. 365 (1925).
[10] Note 7, *supra.*
[11] 293 Pa. 236, 142 Atl. 224 (1938).
[12] Note 1, *supra.*
[13] 92 Fed. 2d 401 (4th cir. 1937).
[14] 28 U. S. C. §§ 2201, 2202 (1946).

the Federal rules of 1936 were in effect. That court was reversed for construing the act as not an alternative remedy. Judge Parker's view is embodied in Rule 57 which now expressly provides that the existence of another adequate remedy does not preclude declaratory relief where it is appropriate. Thus in the Federal Courts the remedy is in the alternative in the sense denied by Judge Williams in the *Schaeffer case.*

It is believed that the Uniform Act manifests a purpose on the part of those who drafted it and perhaps on the part of the legislature in adopting it to permit free election of remedies by attorneys as is permitted under the Federal act. The first section of the act provides, "Courts of record within their respective jurisdictions shall have power to declare rights, status, or other legal relations whether or not *further relief* is or could be claimed." (Emphasis Supplied). The inference is clear that other relief exists. The section furthermore, provides that the proceeding is not objectionable because the declaratory relief is all that is requested. This position is reinforced by Section 8 which provides "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Hence further remedies legal or equitable certainly were available.

Professor Borchard has pointed out[15] that two explanations may be given for the court's action which reject a completely free election between declaratory judgment and other remedies, an old procedural prejudice favoring one writ for a single injury and a fear that the declaratory judgment might replace existing remedies. The courts seemed to think it desirable to check the trend toward greater election of remedies as their number increased. It does not seem that the judge should be too concerned about the door through which the litigant enters the court and when the legislature creates a new door, called the declaratory judgment, place limitations on its free use. The fact is that it is a rare case indeed wherein declaratory relief is given in which another remedy at law or in equity would not lie. Nor is there any threat that existing remedies will fall into disuse because in most cases the litigants want coercive relief.

Finally, Section 15 provides "This act shall be so interpreted and construed as to effect 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." As pointed out above both by federal rule and decisions the declaratory judgment is a freely alternative remedy.

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[15] BORCHARD, *op. cit.*, p. 318.

Having declared the sense in which the declaratory judgment was not an alternative remedy and thus free election was not the rule, Judge Williams continued; "But it is alternative in the sense that it lies notwithstanding another remedy is available in all those cases in which there is a real controversy between adverse parties in a matter which is justiciable and the court, *in the exercise of a sound discretion,* finds that *speedy relief* is necessary to the preservation of rights which might otherwise be impaired or lost. If the remedy through a declaratory judgment does not at least in part *fill the gap* between the law and equity there would be little purpose in enacting statutes providing for such procedure. However, in the *exercise of its discretion* the court may refuse a declaratory judgment when it deems the rights may be fully protected through other available remedies."[16] In the *Jones* case[17] Judge Stewart stated the same rule in these words "Whatever may be the rule in other jurisdictions it is settled in Ohio that an action for a declaratory judgment may be alternative to other remedies in those cases in which the court, in the *exercise of a sound discretion* finds that the action is within the spirit of the Uniform Declaratory Judgment Act, that a real controversy between adverse parties exists which is justiciable in character and that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost." (Emphasis Supplied).

From these two statements of the rule it is obvious that the alternative character of the declaratory judgment is dependent wholly upon the trial court's discretion, that the criterion for the exercise of that discretion is the desire for speedy relief. The court is not controlled in the exercise of its discretion by the existence or nonexistence of equally serviceable available remedies for it can if speed is required accept the case and make the declaration in either contingence.

It is believed that there is nothing in the Uniform Act that even suggests that speed is a factor in granting or withholding a declaration, nor does the act seem to place a discretion in the court in what might be called a jurisdictional sense. In fact Section 6 of the act is quite definite in this respect. It provides, "The court may refuse to 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." This is all that is said about discretion in the act. It does provide, however, in effect in Section 15 that the act shall be given a liberal construction. The Supreme Court recognized this in *Walker v.*

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[16] Note 1, *supra,* at p. 518.
[17] Note 3, *supra,* at p. 295.

Walker,[18] where Chief Justice Weygandt said, "The Declaratory Judgment Act is a salutary, remedial measure and should be liberally construed and applied, but as in the instant case it does not require the court to render a futile judgment that 'would not terminate' any 'uncertainty or controversy' what so ever."

With due respect, I submit that when the court through construction restricts the use of the declaratory judgment to satisfy the exigencies of speedy relief whether equally serviceable available remedies exist or not it is not construing the act liberally. Moreover, when the court speaks of filling gaps and the existence of other serviceable remedies it is drawing very close to a jurisdictional question. For historical reasons the court of equity should not take jurisdiction if there was an adequate remedy at law and a part of equity's job was to fill gaps in the law. No such jurisdictional question should be created with respect to the declaratory judgment by a construction of the act.

The discretion given to the court in Section 6 to grant or withhold the declaration if it would not terminate the uncertainty or the controversy presupposes the presence of all jurisdictional prerequisities. There is nothing in the act that would justify any other sort of discretion particularly one which tends to reduce the declaratory judgment to the status of an extraordinary remedy. There is no discretion to refuse to assume jurisdiction over a case which is properly before the court and which is entirely appropriate for declaratory adjudication. Such matters should be in the free choice of the attorneys as is the rule in the federal courts and in many states[19] which have adopted the Uniform act. It is concluded, therefore that the rule of the *Eiffel Realty* case has not been reversed and that Ohio can be classified with states holding the declaratory judgment an alternative remedy only with considerable reservations and explanation.

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[18] 132 Ohio St. 137, 5 N. E. 2d 405 (1936).
[19] 172 A. L. R. 847 at 854.