

Declaratory Judgments in New York

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DECLARATORY JUDGMENTS IN NEW YORK

The first discussion of declaratory judgments in this country appeared in the Yale Law Journal in 1918 in two articles written by Professor Borchard.¹ The influence of these articles has been far-reaching and since that time declaratory judgment statutes have been adopted in many states. Actions under these statutes are rapidly becoming more and more numerous. The question of the scope of the declaratory judgment statutes is therefore one of immediate and pressing importance. Lawyers throughout the country have recognized that the introduction of declaratory judgments into our system of law would make for a valuable and necessary improvement in procedure. The reports of committees of the various state bar associations have uniformly been favorable to the adoption of a declaratory judgment statute in their respective states, in one form or another.² The Commission on Uniform State Legislation has adopted and recommended to the various states a Uniform Declaratory Judgment Statute.³ This statute has been widely adopted.⁴

The New York Declaratory Judgment Statute dates from 1922 when the Civil Practice Act was adopted. Its theory is basically different from that of the Uniform Act and tends rather to follow the English view. The entire act consists of one section, Section 473 of the Civil Practice Act, which has been supplemented by five rules.⁵ The Uniform Act consists of seventeen sections and is much more detailed and elaborate in that it provides for

¹ Borchard, *The Declaratory Judgment* (1918) 28 Yale L. Jour. 1, 105. For an early English article on declaratory judgments see *Scotch Action of Declarator*, by R. S. (1849), 4 Law Mag. 173.

² See *inter alia* (1921), 44 Report of New York State Bar Ass'n 193; (1921) 27 Iowa State Bar Ass'n Proc. 80; (1920) Proc. of Tenn. Bar Ass'n 41; (1921) 46 American Bar Ass'n Rep. 386.

³ (1923) 9 Uniform Laws 87.

⁴ The following states are listed by Commissioners on Uniform State Laws as having adopted the Uniform Declaratory Judgments Act before the end of 1926: Colorado, New Jersey, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah and Wyoming.

⁵ Section 473 of the Civil Practice Act reads as follows: "The supreme Court shall have power in any action or proceeding to declare rights and

many contingencies of which the New York Act fails to take cognizance. The legislation in New York is based on the theory that the courts should be given as broad powers as possible so that their discretion under the statute be unfettered and that they should accordingly be free to work out their own rules as contingencies may arise. This has been the English development of the declaratory judgment action, and in view of its wide prevalence in England and in British Colonies generally, it must be admitted that there is a sound practical foundation on which this view may be based. The Uniform Act, however, in several sections lays down rules which are to guide the discretion of the court and so may tend to limit the usefulness and applicability of the Declaratory Judgment Act.⁶ This may partly be due to the feeling that hostile courts might unnecessarily restrict the Declaratory Judgment Statute and that these additional sections clarify points and indicate the intention of the legislature to have declaratory judgment actions considered on the merits in instances where

other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

The Rules of Civil Practice relating to declaratory judgments are:

Rule 210. **PRACTICE ASSIMILATED.** An action in the supreme court to obtain a declaratory judgment, pursuant to section four hundred and seventy-three of the civil practice act, in matters of procedure shall follow the forms and practice prescribed in the civil practice act and rules for other actions in that court.

Rule 211. **PRAYER FOR RELIEF.** The prayer for relief in the complaint shall specify the precise rights and other legal relations of, which a declaration is requested and whether further or consequential relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated.

Rule 212. **JURISDICTION DISCRETIONARY.** If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds upon which its discretion is so exercised.

Rule 213. **VERDICT OF JURY ON FACTS.** In order to settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. Such verdict shall be taken by the court before which the action is pending for trial or hearing. The provisions of sections four hundred and twenty-nine and four hundred and thirty of the civil practice act apply to a verdict so rendered.

Rule 214. **COSTS.** Costs in such an action shall be discretionary and may be granted to or against any party to an action.

* See sections 6 and 11 of the Uniform Act.

a hostile court in the exercise of its discretion might unduly limit the usefulness of the Declaratory Judgment Statute.

Generally speaking, the reception by the New York courts of declaratory judgment actions has been very favorable. In one of the first cases brought under this section the Appellate Division of the First Department has indicated that it is in whole-hearted accord with the proper use of this form of action.

“Defendants further contend that, in any event this court is without power to entertain this controversy for the purpose of rendering a declaratory judgment although the parties seek in this action an adjudication with reference to their respective rights as members of the sinking fund commission.

“Under section 473 of the Civil Practice Act it is provided: ‘The Supreme Court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this action.’ (See also, *London Assn. of Shipowners & Brokers v. London & India Docks Joint Committee*, L. R. (1892) 3 Ch. 242.)

“It would be difficult to find a more appropriate case for the application of the law permitting declaratory judgments. We are told that important public interests are involved, the speedy determination of which is imperative. It is, therefore, necessary that the respective rights of the parties be determined without delay. Their determination will probably promote the public welfare and render possible the performance of acts necessary for the advancement of the business interests of the city.

“A somewhat similar public question was heretofore disposed of under the terms of that act. (*Manhattan Bridge 3c Line v. City of New York*, 204 A. D. 89; *aff’d*. 236 N. Y. 559.)”[†]

In another case the court has gone out of its way to point out that the Declaratory Judgment Statute is of particular use

[†] *Craig v. Commissioners of Sinking Fund*, 208 App. Div. 412, 203 N. Y. Supp. 236 (1st Dept. 1924).

when a binding interpretation of a doubtful clause in a contract is desired.

"Plaintiff urges that this construction imposes upon the lessee the risk of forfeiture if he subleased and points out the practical difficulty of finding a subleasee under such circumstances. *Young v. Ashley Gardens Properties, Ltd.*, L. R. (1903) 2 Ch. Div. 112, shows the remedy. There plaintiff sought a declaratory judgment that defendant had no right to withhold consent. Cozens-Hardy, L. J. writes: 'I cannot imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order than that which has been adopted * * * in this case.' Under Section 473 of the Civil Practice Act, plaintiff may, if the facts warrant, secure a similar declaration in the instant case."⁸

In view of the general friendliness of the courts in New York toward declaratory judgment actions, a recent decision holding that no declaratory judgment action would lie where there

⁸ *Sarner v. Kantor*, 123 Misc. 469, 205 N. Y. Supp. 760 (1924).

It may be interesting to note in this connection that with the aid of the courts the Declaratory Judgment Statute can be made of unusual value in the settlement of legally doubtful questions and the general promotion of public welfare.

In a recent case Kansas City was desirous of issuing bonds for certain purposes. The problem arose as to whether the city had the power to issue the bonds in question. Because of the market situation, it was necessary to secure a prompt adjudication in order that the bonds might be issued without delay. The Attorney General therefore brought an action against the county attorney for a declaration as to whether the city had the necessary power. The court held that it had and also went on to approve of the form of proceeding for the settlement of the type of question in dispute:

"The proceedings in this case serve to illustrate operation of the declaratory judgment act. Execution of the city's internal-improvement program placed it in this dilemma: If privilege of prepayment were not written in the bonds, the city and its officers were exposed to prosecution by the state for abuse of corporate power and violation of law, and the securities might not be marketable. If privilege of prepayment were written in the bonds, a heavy financial burden would be placed on the taxpayers, perhaps unnecessarily. Formerly, the city would have been compelled to choose one course or the other, and abide the consequences. The law officers of the state could not give a binding interpretation of the statute and, because of its ambiguity could not consent to the course which the city claimed it was authorized to pursue. Therefore, a controversy existed justiciable under the declaratory judgment act. The action was commenced in the district court on February 7, 1922, and the defendant answered instanter. The cause was heard on the petition and answer, and a stipulation that the

was adequate relief at law or in equity has provoked much comment.⁹ In order to understand the significance of this decision, it is necessary to consider several introductory matters.

Both from the history of the declaratory judgment action in England and under the various statutes in this country, it is clear that the element of discretion plays an unusually important part in the determination of whether or not a court will in a given case consider the declaratory judgment action on the merits. This is particularly true in New York where the rule giving the court discretion in declaratory judgment actions is much broader than in other similar statutes in this country.

Rule 212 is as follows:

"Jurisdiction discretionary—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."¹⁰

It is therefore clear that in New York the court may refuse to consider on the merits the declaratory action for any reason that it deems proper. As has been pointed out by various writers, however, the use of discretion by the courts is not arbitrary, but has resulted in the formulation of several rules under which it is generally possible to determine whether or not in a given case the courts will consider on the merit an action for a declaratory judgment. Of course in addition to these rules there may be cases which present unusual situations based on particular facts.

pleadings stated the facts. The declaration of the district court was rendered on February 7, and the appeal was lodged in this court on February 10. This court was in session when the appeal was filed. Because of the public importance of the question involved, the cause was advanced for immediate hearing, and on February 10 it was submitted for final decision, on oral argument and briefs of counsel which accompanied the appeal papers. The city may now proceed with its improvements without any of the embarrassments, and without any of the delay which would have been encountered if the remedy of declaration of right had not been available." State ex rel. Enright v. Kansas City, 110 Kan. 603, 204 Pac. 690 (1902).

⁹Loesch v. Manhattan Life Ins. Co. of N. Y., 128 Misc. 232, 218 N. Y. Supp. 412 (1926).

¹⁰Cf. this with the relevant sections of the Uniform Act, sections 6 and 11.

Where the court feels that equitably in view of these facts no declaratory judgment action should be entertained. These cases are exceptional and arise to a greater or less extent in every form of action. Generally speaking, however, there can be no doubt but that:

"The judicial discretion in making declarations hardly constitutes any greater limitation on the rendering of declaratory judgments than that involved in the exercise of any other of the well-defined fields of equitable jurisdiction."¹¹

In order adequately to comprehend the implications of the particular rule laid down in the Loesch case it would be profitable to discuss well recognized rules under which the discretion of the court is usually exercised in declaration judgment actions. In this connection one more consideration should be pointed out. The declaratory judgment statute does not extend the jurisdiction of the court. By that is meant that if the court in question has no jurisdiction of the particular subject matter or parties involved, it cannot entertain a suit for a declaratory judgment involving that subject matter or those parties in question. This has been well recognized.

In the case of *Everhart v. The Provident Life & Trust Company*,¹² the court refused to consider a suit on the merits on the ground that it did not have jurisdiction over the subject matter, and said as follows in reference to the alternative request for a declaratory judgment:

"I have not overlooked the request of the plaintiff for a declaratory judgment if this court has no jurisdiction to grant the relief prayed for in the complaint; but in my opinion the provisions of the Civil Practice Act for a declaratory judgment have no application to the circumstances under consideration, and the same objections would apply in even greater degree to the granting of such a judgment."¹³

Another interesting illustration of this point arose in a recent Kansas case.¹⁴ An action was brought in the Supreme Court of

¹¹ Borchard, *Uniform Act on Declaratory Judgments* (1921), 34 *Harv. L. Rev.* 710.

¹² 118 *Misc.* 852, 195 *N. Y. Supp.* 388 (1922).

¹³ *Ibid.*, 855, 391.

¹⁴ *Public Service Commission v. Kansas Gas & Elec. Co.*, 121 *Kan.* 14, 246 *Pac.* 178 (1926).

that state for a mandamus or in the alternative for a declaratory judgment. The court held that mandamus would not lie. It also held that since it had original jurisdiction only in mandamus, quo warranto or habeas corpus proceedings, it would only entertain a declaratory judgment action in that type of suit where the state of facts would entitle the plaintiff to bring one of the three above mentioned proceedings.

"The request has been made, if the court shall conclude it is without jurisdiction as the matter now stands, that it render a declaratory judgment passing upon the issues of law presented. A proceeding under the declaratory judgment act (R. S. 60-3127-3132) can be originally brought in this court only where the controversy on which it is based is of such character that if it had reached a stage warranting consequential relief, the relief could be obtained through an original proceeding in this court—that is, by quo warranto, mandamus or habeas corpus."¹⁵

Several English cases bear out the same proposition. In *British South Africa Co. v. Companhia de Mozambique*,¹⁶ the court held that it would not consider on the merits an action for a declaratory judgment involving land located in South Africa since it has no jurisdiction to determine title to land in foreign countries. Illustrations of the same principle are the decisions holding that a declaratory judgment suit cannot be brought in a court to which the Declaratory Judgment Act does not extend.¹⁷

It will be noticed that these are questions not so much of the discretion of the court as of the jurisdictional limitations of the court. The two problems, however, are so closely intertwined that it is impossible and unprofitable to attempt to separate them. Where the court feels, as in the cases discussed *supra*, that it has no jurisdiction, it will of course not entertain any type of action. There are cases, however, where the question of whether the court has jurisdiction is a close one and often in this type of case a court in the exercise of its discretion will refuse to consider declaratory judgment actions on the merits when, if another form of

¹⁵ *Ibid.*, 17, 180.

¹⁶ [1893] A. C. 602.

¹⁷ E.g. in the Probate Division in England. See *De Gasquet Janes v. Mecklenburg-Schwerin*, [1914] Pr. Div. 53; *Water v. Water*, 15 P. D. 35 (1890); *Flegg v. Prentis*, [1892] 2 Ch. 428.

action had been used, the court in deciding the problem on strictly jurisdictional grounds might have entertained the action. This point will become clearer when another well settled rule is considered, to wit, that no declaratory judgment suit will be entertained unless all the interested parties are before the court. It is obvious that where there is a defect, particularly of parties defendant, no form of action will be entertained. The question, however, of how many parties need be joined, is often a close and difficult one to answer. In the solution of this problem the discretion of the court therefore comes more clearly into play. If the defect is obvious, the court will necessarily dismiss the action and tend to put it on jurisdictional grounds.

"It is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceedings, and given reasonable opportunity to appear and be heard. This firmly fixed limitation, which in effect if not technically in all cases, is a jurisdictional one, is as binding in English practice as it is with us. It is a principle safe from the reach of attack by remedial legislation because of its sound constitutional basis. The element of discretionary power is therefore really removed from the situation presented by the complaint before us."¹⁸

If, however, it is a case where the defect in parties defendant will not result in having the question litigated again or in the adjudication of essential rights of parties who have not been joined as defendants, the court may in the exercise of its discretion entertain the action. A recent New York case is an admirable illustration.¹⁹ Plaintiff and defendant were parties to a contract of sale of a printing business. The question arose as to which party was entitled to a certain sum due from the state to the printing establishment. Plaintiff brought an action for a declaratory judgment. Objection was made that the state had not been joined as a

¹⁸ *Ackermann v. Union & New Haven Trust Co.*, 91 Conn. 500, 508, 100 Atl. 22, 25 (1917).

¹⁹ *Durant v. Whedon*, 201 App. Div. 196, 194 N. Y. Supp. 126 (3rd Dept. 1922). See also *Barwick v. South Eastern & Chatham Railway Co.*, [1921] 1 K. B. 387, *Aff'g* [1920] 2 K. B. 387.

defendant. The court held that the action would be entertained in spite of the defect in parties defendant, and said in part as follows:

"It is not important the Comptroller or any officers of the state has not been made a party, since as the court said in effect in the Stannard case, presumably the comptroller, being an officer of the state government, will respect a decree determining the rights of the parties. This in conformity with the principle of the declaratory judgment which has been adopted in this state. *Civil Practice Act*, Sec. 473, Rules of Civil Practice, rules 210-214."²⁰

It is obvious that technically the state should have been joined. It is also clear that the state was not interested in the determination of which party received the payment provided there was a binding adjudication so that it would not be compelled to pay twice. It is also clear that since the Comptroller is a public official, he would probably tend to obey the mere declaration of the court, even though there was no possibility of further action being taken against him or the state in this particular suit. The court was obviously influenced by these considerations and therefore did not dismiss the action. It is very probable that if the debt had been due from a private party the complaint, in view of the defect, would have been demurrable. In respect to defect of parties the basis on which the discretion of the court generally rests is its view of the probability that the decision will finally terminate the matter and that no further litigation will arise involving the same matter. Indeed the Uniform Declaratory Judgment Act specifically authorizes the court to exercise its discretion on the basis of this very principle.²¹

Another well recognized rule is that generally the courts will not declare future rights. A recent New York case decided in the lower courts is an interesting illustration of the limits of this rule.²² The court granted a declaration in that case that a refusal to consent to a sublease unless the plaintiff consented to increase in rent was unreasonable. It refused, however, to consider what would or would not be a reasonable ground for withholding con-

²⁰ *Supra*, note 19, at page 202, 136.

²¹ Section 6 of the Uniform Declaratory Judgments Act.

²² *Dyckman v. Moore*, 76 N. Y. L. J. 2208 (Feb. 15, 1927).

sent, saying that it was impossible to anticipate what might develop in the future, for "what might constitute a reasonable ground for withholding consent cannot be defined by anticipation."²³ Even this rule, however, has its limits and in cases where all the interested parties are before the court and where a future event is certain to happen, courts will grant declaration of future rights.²⁴

Another question that has often troubled courts is whether a declaration could be granted without further relief and whether it could be granted where no further relief was possible. An unimportant New York decision has implied that no declaratory judgment would be granted where no further relief could be given.²⁵ This dictum, it is submitted, however, violates the spirit of the rules in New York governing declaratory judgments, if not their very letter.

Rule 211 reads as follows:

"The prayer for relief in the complaint shall specify the precise rights and other legal relations of which a declaration is requested and whether further or consequential relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated."

The rule requires that the complaint state whether or not further relief "is or could be claimed." It obviously contemplates therefore that suits will be brought for declaratory judgments where no further relief is possible.²⁶

²³ *Id.*

²⁴ See *Shovelton v. Shovelton*, 2 Beav. 143, 55 Eng. R. 56 (1863); *Basnett v. Moxon*, 20 Eq. 182 (1875); *Bogg v. Midland Ry Co.*, 4 Eq. 310 (1867); *Harrison v. Duke of Rutland, et al.*, 68 L. T. N. S. (1893); *Evans v. Manchester S. & L. R. R. Co.*, 36 Ch. D. 626 (1887).

²⁵ See *Gross v. Rothman*, 76 N. Y. L. J. 325 (Oct. 21, 1926).

²⁶ Section 473 also provides for declarations " * * * whether or not further relief is or could be claimed * * * ". The section in addition provides for the declaration of " * * * rights and other legal relations * * * ". These words are significant. Under the English statute it had been argued that the court could only declare "rights" and the existence of a right necessarily involved the existence of a cause of action for a judgment with further relief under the doctrine "no right without a remedy." This Hohfeldian objection is met by the term "other legal relations." Under this provision therefore courts may declare legal relationships which do not involve rights and therefore cannot possibly be the subject of further relief.

In this connection the history of the declaratory judgment action in England is significant. The statute was first introduced in 1852 and read as follows:

"No suit * * * shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."²⁷

This section was interpreted as meaning that a declaratory judgment could be granted without further relief, but only in cases where further relief was possible.²⁸ This remained the state of the law until 1883 when under the Judicature Act of 1873 Order XXV, Rule 5 of the Supreme Court Rules of 1883 was adopted. It provided as follows:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not."

The Amended Rules of 1893 added Order LIX A:

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

In spite of the express wording of these rules there was a conflict in the English courts as to whether a declaratory judgment action could be granted when no further relief could be claimed.²⁹ It was finally settled, however, by the House of Lords in the case of *Guaranty Trust Company v. Hannay*³⁰ that a declaratory judgment could be granted in that type of case. The history of declaratory judgments was admirably summarized in that case in an opinion by Pickford, L. J., as follows:

²⁷ Chancery Procedure Act (1852), Sec. 50.

²⁸ *Rooke v. Lord Kensington*, 2 K. & J. 753, 69 Eng. R. 986 (1856).

²⁹ *Austin v. Collins*, 54 L. T. N. S. 903 (1886); cf. however *Brooking v. Mandslay*, 58 L. T. N. S. 852 (1888); *Northeastern Marine Etc. Co. v. Leeds Forge Co.*, 94 L. T. N. S. 56 (1906).

³⁰ *Guaranty Trust Co. v. Hannay* [1915] 2 K. B. 536, 12 A. L. R. 1.

"* * * The history of the matter is shortly that before 1852 the Court of Chancery would not give declaratory judgments unless at the same time it gave consequential relief. In that year an Act (15 and 16 Vict. ch. 86) was passed which provided in sec. 50 that 'No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful in the Court to make binding declarations of right without granting consequential relief.' This was interpreted to mean that such a judgment could not be given unless consequential relief could also be given although in fact it was not. This may have been too narrow a construction * * * but it prevailed until 1883 when the present rule was passed * * *." ³¹

From the foregoing it is reasonable to presume that the courts in some of the jurisdictions in this country are going through the same conservative period of narrow interpretation of the scope of the declaratory judgment statute that once characterized the history of the action in England. It is anticipated and submitted, however, that in view of the tenor of the opinions in cases which have gone to the higher courts of the state, New York at least will be saved this unnecessary period of conservatism and the intention of the Legislature as to the broad scope of the statute will be given immediate effect.

In New York, however, a peculiar problem arises in connection with this right to further relief. The case of *Hahl v. Sugo* ³² has excited some apprehension in the minds of commentators that under the rule there laid down a party seeking only a declaratory judgment may thereby bar himself from any further relief on the ground that the second suit would not lie because he has attempted to split his cause of action. This possibility has been unanimously deplored ³³ and is, in the writer's opinion, very slight,

³¹ *Ibid.*, 557; 558.

³² 169 N. Y. 109, 62 N. E. 135 (1901). In this case the New York Court of Appeals held that an equitable action to remove an encroaching wall was barred by a judgment in a previous legal action to recover a strip of land. The court held that the plaintiff should have asked for all his relief in one action, since both actions were based on one state of facts and one alleged breach of duty.

³³ See *inter alia*, Medina, *New York Civil Practice Act and Rules* (1921) 21 Col. L. Rev. 113, 118; Borchard, *The Uniform Act on Declaratory Judgments* (1921) 34 Harv. L. Rev. 697, 713.

and the apprehension unfounded, as the very wording of Section 473 provides for declarations whether or not consequential relief is or could be sought. This, it is submitted, indicates that a declaratory judgment action is *sui generis* and is not to affect any further proceedings. It is also clear from the nature of the action that the purpose of the statute was not to prevent the plaintiff from subsequently obtaining further relief which he might find necessary, but merely to give him a method of settling a dispute without antagonizing the defendant or requesting more than he should find absolutely essential.

Several other considerations lead to the same result. As has been recognized *Hahl v. Sugo* is actually an authority not against splitting the cause of action, but against seeking *effective relief* in separate cause of action. Thus if the declaratory judgment were coupled with a decree or judgment for damages, a further suit for an injunction would not lie, but since a declaratory judgment itself admits no effective action against the defendant beyond declaring his legal relationships, it may very well be argued that this is not relief within the meaning of the rule laid down in *Hahl v. Sugo*.

In addition, if the rule in *Hahl v. Sugo* is held to debar one from further relief where he has already sought a declaratory judgment, the absurd situation would be presented of a plaintiff without a cause of action being able to secure relief after a declaration granted, when his cause of action did subsequently arise, whereas one with a complete cause of action would be debarred from further relief because of his having previously and prudently sought a declaratory judgment. In view of this *reductio ad absurdum*, and in view of the other considerations mentioned, it is submitted that the rule in *Hahl v. Sugo* will not be applied to actions subsequent to declaratory judgment suits. This conclusion is supported by a recent case decided in the lower courts, in which the court stated:

"The phrase 'whether or not further relief is or could be claimed', contained in Sec. 473 of the Civil Practice Act would certainly indicate that a declaratory judgment might properly be asked and granted, in order to determine, as is the purpose of this action whether another action would lie."³⁴

³⁴ *Neubeck v. McDonald*, 128 Misc. 768 (1927).

Before discussing the rule adopted in the Loesch case. One further well settled rule must be noted. The courts will not consider an action for a declaratory judgment on the merits where another special proceeding and special tribunal has been provided by statute. The cases supporting this view are numerous. A few illustrations will suffice. In *Mutrie v. Alexander*,³⁵ the High Court of Justice dismissed an action for a declaration establishing a lost will on the ground that it should have been brought in the Probate Court.

"Then it is said that the plaintiff may have a declaratory judgment, and having this his course in the Surrogate Court will be made easy. * * * But a far more serious difficulty in the plaintiff's way is this. The High Court, under the guise of a declaratory decree, must not usurp the jurisdiction conferred by the legislature upon another tribunal. *Grand Junction Waterworks Co. v. Hampton Urban District Council* (1898) 2 Ch. 331; *Attorney-General v. Cameron* (1899) 26 A. R. 103; *Barraclough v. Brown*, supra."³⁶

In *Flint v. Attorney General*,³⁷ the plaintiff brought an action for a declaration that he was exempt from service in the army. The court held that it had no jurisdiction since another type of action was expressly provided by statute.

Similarly the Kentucky court has held that an action for a declaratory judgment would be dismissed if brought in the Common Pleas Branch of the court when the statute required that it be brought in the Criminal Branch of the court.³⁸ The rule therefore is well settled that a declaratory judgment suit will not lie where a special proceeding has been provided.³⁹

³⁵ 23 Ont. L. R. 396 (1911).

³⁶ *Ibid.*, 401, 402.

³⁷ [1918] 1 Ch. 216, *Aff'd* [1918] 2 Ch. 50.

³⁸ *Hatzell v. Dover*, 208 Ky. 149, 270 S. W. 723 (1925).

³⁹ A famous case that departed from the rule laid down here is *Russian Commercial Industrial Bank v. British Bank for Foreign Trade*, 90 L. J. K. B. N. S. 1089, 19 A. L. R. 1101 (1921). The action in that case should have been brought in Chancery instead of the Commercial Court. The House of Lords decided the question on the merits partly to save the parties the expense of starting over again and bringing another appeal to the House of Lords. The wisdom of the decision is doubtful and the case has been criticized; see *Declaratory Orders in the Commercial Court* (1921) 93 *Central L. Journ.* 248. It certainly cannot be relied on as an authority.

Another aspect of this rule was pointed out in the New Jersey case of *Wight v. Board of Education*.⁴⁰ In that case an action was brought in equity for a declaration. It was dismissed on the ground that it should have been brought at law. In other words, the view of the court was that the traditional distinction between law and equity was to be maintained and that where an action would ordinarily lie at law a suit for a declaratory judgment was to be brought at law. Where an action would ordinarily lie in equity a suit for a declaratory judgment must be brought in equity.

We are now in a position adequately to comprehend the significance of the decision in the *Loesch* case. It lays down a new rule that a suit for a declaratory judgment will not be considered where there is adequate relief at law or in equity. It is probable that the court in making this decision was influenced by the decision of the Supreme Court of Hawaii in *Kaleikau v. Hall*.⁴¹ The court there reached the same conclusion and said in part as follows:

“The obvious purpose of the act is for the decision of questions which could not under the older method be brought to judicial cognizance and not to provide new or additional remedies where remedies already existed. In other words, the intent of the act is to have the courts render declaratory judgments which may guide parties in their future conduct in relation to each other with a view rather to avoid litigation than in aid of it. This is the construction placed in England on declaratory judgments where such judgments have been in vogue for more than fifty years. ‘The power to make a declaratory judgment is a discretionary one, and will only be exercised with care and caution. It will not as a rule be exercised where * * * some other statutory mode of proceeding is provided.’”⁴²

In other words, instead of making the declaratory judgment action a normal and usual form of action, these decisions tend to make it an extraordinary remedy in the nature of habeas corpus or quo warranto.

⁴⁰ 4 N. J. Misc. 820, 133 Atl. 387 (1926); See also *Tanner v. Boynton Lumber Co.*, 98 N. J. Eq. 85, 129 Atl. 617 (1925).

⁴¹ 27 Hawaii 420 (1923).

⁴² *Ibid.*, 428.

Nothing could be further from the spirit of the statute. The whole history of the use of the declaratory judgment action in England shows that the action will lie where there is adequate relief at law or in equity. In other words the point of the action is to substitute for the usual type of suit a less controversial form of action. It is apparent from the quotation in the *Kaleikau* case, given *supra*, that the court was confusing a special statutory proceeding with the normal action at law or in equity. It states that the action will not be entertained where "some other *statutory* mode of proceeding is provided," and then goes on to dismiss an action for a declaratory judgment where a normal common law remedy is the alternative. We have seen that it is a well settled general rule that where there is a special statutory remedy provided the court will not consider a declaratory judgment suit. This is an entirely different and distinct principle from holding that a suit for a declaratory judgment will not lie where there is adequate relief at law or in equity. The former carries out the intent of the statute and is in accordance with the history and spirit of this form of action. The latter is an entirely novel principle which thwarts the whole aim of declaratory judgment actions and defeats the very purpose for which it was instituted.

It is submitted that this decision is also in conflict with the express words of the Civil Practice Act and the Rules of Civil Practice. Section 473 states in part that a declaration may be given "* * * whether or not further relief is or could be claimed * * *." If further relief could be claimed it is apparent another action would lie which would request such further relief. Since a suit for a declaration can be entertained in that type of action, it is clear that the legislature intended that declaratory judgment actions might be brought where other actions would also lie. In addition, Rule 212 states in part that the court may refuse to consider the action if in its opinion, "* * * the parties should be left to relief by existing forms of actions * * *." Conversely therefore the court may entertain the action if it feels the parties for various reasons should not be left to "existing forms of action." If the courts in the *Loesch* and *Kaleikau* cases had rested their decisions on the ground that the parties should be left to existing remedies at law because of the particular facts in the instant case, there might well have been a difference of opinion as to the exercise of the discretion by the courts. There would, however, be entire unanimity as to the principle involved. The

courts, however, did not choose to adopt this view but based their decisions on the principle that the declaratory judgment action is not a normal procedure.

The entire preceding discussion has been gone into at this length in order to indicate the essence of a declaratory judgment suit and to point out that in its very nature it is a suit which was intended to be used broadly and as often as possible. Commentators have shown that the broad use of this action, does not, as courts have feared, increase litigation. On the contrary, it has lessened litigation because very seldom does a controversy, in which a declaratory judgment has been granted, again arise in the courts.

Finally the decision in the Loesch case is not only contrary to the weight of authority in England and elsewhere, but is also opposed to the principle of the declaratory judgment suit. In addition it is submitted that cases decided by the higher courts of New York show the liberal tendency of the Court of Appeals and of the Appellate Divisions of the Supreme Court in extending the declaratory judgment statute in this state to its historically accurate and presently necessary limits.

Of the value of declaratory judgments there can be little doubt. As has been said civilization may be measured by the extent to which it becomes less necessary actually to force parties to obey the decrees of courts, and to the extent to which it is necessary merely to point out what the duties and rights of parties are in order to settle a controversy effectually. It is equally obvious that the use of the declaratory judgment action tends to result in less heated conflicts and less irritation between parties. That these considerations represent the essence and spirit of the usefulness of declaratory judgments has been repeatedly stated by Professor Borchard to whom great credit must be given for his efforts to convince the bar of this country of the usefulness of this very valuable form of action.

It is to be desired and it is anticipated that the decision in the Loesch case will not prove a binding precedent, and that in New York, at least, declaratory judgments will in the near future increasingly continue to fulfill a proper and necessary function.

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