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Atrocities of Declaratory Judgements Law

William P.S. Breese

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By WILLIAM P. S. BREESE*

SINCE 1919, the various legislatures of the United States have been enacting declaratory judgment statutes,[1] though this remedy has been in use in foreign countries for many years.[2] Although the Federal Declaratory Judgments Act[3] was adopted as late as 1934, the principles underlying a declaratory judgment[4] had been recognized by the Supreme Court for many years[5] and the remedy itself had been granted in fact by the same tribunal, notably in the field of boundary disputes between states.[6] The constitutionality of the state acts was recognized in 1933[7] and of the Federal Act in 1937.[8] With the historical background that may be inferred from this brief sketch,[9] the assumption that the judiciaries of this country would have a thorough knowledge and understanding of this useful and necessary remedy would seem to be an a fortiori sequitur. Unfortunately, the converse has proved true almost without exception. The basic misconceptions and misapplications pervading our courts, as revealed in recent cases, have been classified, and the cases presented herein have been grouped upon this basis.

I. FAILURE TO APPRECIATE THE DECLARATORY JUDGMENT AS AN ALTERNATIVE REMEDY.

This heading is so broad as to include a multitude of judicial sins which will be discussed in turn. In a large measure, thanks to the determined efforts of the proponents of this remedy, the so-called "patterns of error," stemming from a recognizable source in the various jurisdictions and affecting the entire judiciary

*Graduate Student, Yale University School of Law.

[1]Senate Report No. 1005, 73rd Cong., 2d Sess., Submitted by Senator King, May 10, 1934.

[2]I.e., Scotland over 400 years, England since 1852, etc., *Ibid* n. 1 *supra*.

[3]28 U. S. C., Sec. 400. Act signed June 14, 1934.

[4]See Borchard, Declaratory Judgments, 2d Ed., (1941), pp. 25 et seq.

[5]Cf. Martin v. Hunter's Lessee, (1816) 1 Wheat. 304, 4 L. Ed. 97; Muskrat v. U. S., (1911) 219 U. S. 346, 31 S. Ct. 250, 55 L. Ed. 246.

[6]Virginia v. Tennessee, (1893) 148 U. S. 503, 13 S. Ct. 528, 37 L. Ed. 537, inter alia.

[7]Nashville, Chattanooga & St. Louis Ry. v. Wallace, (1933) 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730.

[8]Aetna Life Ins. Co. v. Haworth, (1937) 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617.

[9]*Ibid* n. 4 *supra*, Pt. I, cc. 3, 4, 5; Pt. II, c. 1.

therein,[10] have been eliminated, and at present the "atrocity" cases are chiefly occasional aberrations.

A. *Declaratory Judgment Refused When Another Remedy Available*

It is surprising that this remedy should be denied under such conditions in New York State after the case of *Woollard v. Shaffer Stores Co.*[11] There the court attempted to correct the old error established by such cases as *Loesch v. Manhattan Life Ins. Co.*[12] and *James v. Alderton Dock Yards, Ltd.*[13] This error was derived from a misconstruction of Rule of Civil Practice 212.[14] The court stated in the Woollard case:[15]

"We have never gone so far as to hold that, when there exists a genuine controversy requiring a judicial determination, the Su-

[10]See *Pennsylvania*: Source: In re Kariher's Petition No. 1, (1925) 284 Pa. 455, 131 A. 265; extended through Leafgreen v. La Bar, (1928) 293 Pa. 263, 142 A. 224; Nesbitt v. Manufacturer's Casualty Ins. Co., (1933) 310 Pa. 374, 165 A. 403; Bell Telephone Co. v. Lewis, (1934) 313 Pa. 374, 169 A. 571; Amdt. of April 25, 1935, P. L. 72, Sec. 1, 12 P. S. Sec. 836, Supp. 1935; Allegheny Co. v. Equitable Gas Co., (1936) 321 Pa. 127, 183 A. 916; inter alia. Ended by Amdt. of May 26, 1943, P. L. 645, Sec. 1, 12 P. S. Sec. 836, Supp. 1945. See *Maryland*: Source: Indian Specific Relief Act provision incorporated into Maryland Act of 1888 followed despite Maryland Uniform Declaratory Judgments Act of 1939, including part of Federal Rule 57, in Porcelain Enamel & Manufacturing Co. v. Jeffrey Manufacturing Co., (1940) 177 Md. 677, 11 A. (2d) 451; Caroline Street Permanent Building Ass'n No. 1 v. Bertie Rau Sohn, (1940) 178 Md. 434, 13 A. (2d) 616, inter alia. (See *ibid* n. 4 *supra*, pp. 325 et seq.) Ended by repeal and re-enactment of amended Uniform Declaratory Judgments Act, eff. June 1, 1945, c. 724, Laws of Md. 1945. See *New York*: Source: N. Y. Rules of Civil Practice, Rule 212, misconstrued. Followed in Loesch v. Manhattan Life Ins. Co., (1926) 128 Misc. 232, 218 N. Y. S. 412; James v. Alderton Dock Yards, Ltd., (1931) 256 N. Y. 298, 176 N. E. 401, inter alia. Corrected by Woollard v. Shaffer Stores Co., (1936) 272 N. Y. 304, 5 N. E. (2d) 829. See *Hawaia*: Source: Historical and psychological reaction from old rigid forms of action extended by misconstruction of article by Prof. Sunderland, 16 Mich. L. R. 69, 1917. (See *ibid* n. 4 *supra*, pp. 317, 318.) Followed in Kaleikau v. Hall, (1923) 27 Haw. 420; Kaaa v. Waiakea Mill Co., (1926) 29 Haw. 122. See *Federal*: Source: Liberty Warehouse Co. v. Grannis, (1927) 273 U. S. 70, 47 S. Ct. 282, 71 L. Ed. 541. Followed in Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, (1928) 276 U. S. 71, 48 S. Ct. 291, 72 L. Ed. 473; Willing v. Chicago Auditorium Ass'n, (1928) 277 U. S. 274, 48 S. Ct. 507, 72 L. Ed. 880, inter alia. Ended by Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, *ibid* n. 7 *supra*; Aetna Life Ins. Co. v. Haworth, *ibid* n. 8 *supra*. For discussion of above and for other case references, see Borchard, op. cit., pp. 172-203, 315-346; 10 Temple L. Q. 233 & 427, (1936); 31 Mich. L. R. 180, (1932); 36 Yale L. J. 403, (1927).

[11]*Ibid* n. 10 *supra*.

[12]*Ibid* n. 10 *supra*.

[13]*Ibid* n. 10 *supra*.

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

[15](1936) 272 N. Y. 304, 311 et seq., 5 N. E. (2d) 829.

preme 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."

However, in 1941, the court made the same error in *Seventy-Nine Delancey Corp'n v. Meridan Holding Corp'n.*[16] This controversy required the construction of a covenant in a conveyance of real estate and a declaration of the rights, duties and other legal relations of the parties thereunder. In this case, Defendant's predecessor had conveyed real estate to Plaintiff's predecessor. The instrument of conveyance contained a covenant by Defendant's predecessor to release Plaintiff's predecessor from certain claims for rent in return for a covenant that Plaintiff's predecessor would supply without charge hot water, steam heat and other facilities to adjacent property owned by Defendant's predecessor. It was mutually agreed that the covenant was to run with the land. Plaintiff here sought a declaration that the covenant did not inure to the benefit of Defendant, that it required the performance of affirmative acts and that it was not a covenant running with the land which would charge Plaintiff with a duty to perform. Defendant maintained the converse. In denying Plaintiff the relief sought, the court stated:[17]

"In these circumstances, where it does not clearly appear that only questions of law are involved, we deem it advisable that the parties be left to other remedies. This is not a proper case for a declaratory judgment. Rules of Civil Practice, Rule 212; James v. Alderton Dock Yards, Ltd."

It is obvious that this denial of relief before any breach of covenant had occurred would force Plaintiff to subject himself to unnecessary risks and expenses, and possibly to heavy damages, in an attempt to obtain relief and an adjudication of the controversy.

A California court erred in *Communist Party of U. S. A. v. Peek,*[18] in which case the plaintiff party sought a declaration that certain state statutes were unconstitutional in that they were discriminatory. Plaintiff alleged that defendant election official, acting under the authority of the questioned statutes, refused to insert and include the name of the plaintiff party upon the primary election ballots. The court denied the requested declaratory relief upon the ground that the Election Code provided adequate relief. The Code provided for the issuance of an order to show cause in

[16](1941) 286 N. Y. 354, 36 N. E. (2d) 619.

[17]At 36 N. E. (2d) 620. See also Miskowitz v. Starobin, (1943) 181 Misc. 445, 41 N. Y. S. (2d) 786.

[18](1942) 20 Cal. (2d) 536, 127 P. (2d) 889. Cf. Miller v. Siden, (1932) 259 Mich. 19, 242 N. W. 823, and Note 31 Mich. L. R. 180, (1932).

the alternative in such cases. The court held that the constitutionality of the statutes could be determined in the course of the hearing upon the order. The court then issued the order to show cause even though it had not been requested by the plaintiff, and denied the requested writ of mandamus which had been prayed for in conjunction with the requested declaratory relief which was also denied.[19]

This reasoning was followed, equally fallaciously, in Indiana in the case of *Burke v. Gardner*,[20] wherein the plaintiff wavered between an equitable suit for injunctive relief and a petition for a declaratory judgment. Plaintiff originally sought a declaration to determine whether or not Defendant had the right to build and use a church on a lot near the plaintiff's property, and contended that such action would be contrary to building restrictions contained in deeds to such lots. Defendant's demurrer to the complaint was sustained below and Plaintiff appealed. While the appeal was pending, Plaintiff filed a bill for a perpetual injunction which he subsequently dismissed, alleging that it was found to be premature. Defendant had purchased building materials and had given Plaintiff notice of his intention to build, but had not yet actually commenced construction of the church at the time when Plaintiff had hurriedly brought his suit for an injunction. Upon these facts, the court denied the requested declaration, yet said in a dictum that the case was suitable for an injunction. Upon these grounds the court held:[21]

"Since the remedy of injunction was available to appellants the trial court could properly hold that they were not entitled to a declaratory judgment. . . . The right of appellees over the objection of appellants to build a church on the lot and to use it for assemblage has not been decided. Since the controversy still exists, the question is not moot."

Thus the court, in denying declaratory relief, recognized an existing controversy which was a proper subject for such relief, and which could have been terminated thereby. Had Defendant ignored

[19]Cf. Kaleikau v. Hall, *ibid* n. 10 *supra*; Kaaa v. Waiakea Mill Co., *ibid* n., *supra;* Bell Telephone Co. v. Lewis, *ibid* n. 10 *supra*.

[20](1943) 221 Ind. 262, 47 N. E. (2d) 148. Cf. Leafgreen v. La Bar, *ibid* n. 10 *supra*; Nesbitt v. Manufacturer's Casualty Ins. Co., *ibid* n. 10 *supra*; Porcelain Enamel & Manufacturing Co. v. Jeffrey Manufacturing Co., *ibid* n. 10 *supra*; Caroline Street Permanent Building Ass'n v. Sohn, *ibid* n. 10 *supra*.

[21]At 47 N. E. (2d) 150. Cf. Alleghany Co. v. Equitable Gas Co., *ibid* n. 10 *supra*; Di Fabio v. Southard, (1930) 106 N. J. Eq. 157, 150 A. 248; Beatty v. Chicago, Burlington & Quincy Ry., (1935) 49 Wyo. 22, 52 P. (2d) 470.

an adverse declaration, he would have run up a bill for damages in a later action in which the declaration would have been res adjudicata.

The above-cited cases reveal the fundamental misconception that the mild, speedy, inexpensive, declaratory relief is not available where common law, extraordinary legal, or equitable remedies would lie. They are a complete denial of the alternative character of the relief afforded by the declaratory judgment.

1. *Declaratory Judgment Denied Where Other Relief Available, the Coercive Effect of Which is Believed Preferable*

In recognizing the fact that another form of relief is available, in no case yet discussed has the court adopted the attitude that coercive relief, for the sake of the coercion, is to be preferred over declaratory relief. This slightly different error has the same fundamental misunderstanding of the alternative character of declaratory relief with the addition of the court's opinion as to the need for coercive relief.

An Indiana court made this mistake in *Pitzer v. City of East Chicago.*[22] In this case, Plaintiff had been appointed a fireman by the retiring Board of Public Works and Safety of defendant City of East Chicago. He reported for duty upon the same day that the new board took office. The new board refused to recognize his appointment, and those of others in a similar situation, upon the ground that the retiring board had not had the requisite authority to make a valid appointment. Upon these facts, Plaintiff sought a declaration of his rights, status, and other legal relations. The trial court denied Pitzer the requested relief upon the ground that even if granted, it would not terminate the controversy. Thereupon, Pitzer took his case to the appellate court which affirmed the result in the trial court, and stated:[23]

". . . a cause of action justifying executory affirmative relief had accrued to them prior to the beginning of this action for a declaratory judgment. They might have maintained an action to require the city to recognize them as firemen, or an action for the salaries of which they had been deprived, or both. In those cases the courts would necessarily have determined their rights and status as prayed in the action at bar, but it would have gone further and determined the relief, if any, to which they were entitled, and would have enforced its judgment and secured the relief for them. . . .

[22](1943) 222 Ind. 93, 51 N. E. (2d) 479. Cf. Travis v. Travis, (1932) 19 D. & C. (Pa.) 505; Kalman v. Shubert, (1936) 270 N. Y. 375, 1 N. E. (2d) 470.

[23]At 51 N. E. (2d) 480.

Ordinarily an action for a declaratory judgment is appropriate only in cases where there are 'ripening seeds' of controversy which have not yet developed into a right of action for executory relief."

Thus the unfortunate fireman, and others with him, were forced to seek relief by coercive measures against an already unfavorably impressed city administration which would, if he succeeded in coercing them, become his future employers.

Indiana courts had indicated this same attitude earlier in the case of *Barnard v. Kruzan*,[24] wherein plaintiff Barnard was petitioning to intervene in an action for a declaratory judgment brought by defendant Kruzan against the City of Terre Haute. In the original action, Kruzan, as a taxpayer, sought to have a will construed under which a large sum of money was left to defendant city or to Rose Polytechnic Institute in the alternative under stipulated conditions. Kruzan alleged that the status of the fund and of possible compliance with the conditions precedent by the city were in doubt and were challenged by the party defendant Institute which was claiming the fund under the alternative legacy in the will. Upon these facts and allegations, Kruzan petitioned for a declaration to determine the status of the fund; that the defendant city had complied with the conditions precedent; and to determine the other issues necessary to terminate the controversy. Plaintiff Barnard brought his bill of intervener as a taxpayer in behalf of other taxpayers to protect their interests, claiming that, since the institution of the original action by defendant Kruzan, Kruzan had become City Comptroller and was therefore disqualified to protect the interest of the taxpayers as a representative thereof. The court below denied permission to intervene, whereupon Barnard appealed and secured a reversal granting the intervener. However, in reversing the trial court, the appellate court stated:[25]

"Both the complaint and the cross-complaint asserted the immediate right to the possession of the trust fund by the two claimants, demanded the termination of the trust and the transfer and payment of the trust fund. This did not constitute an action for a declaratory judgment. It is true that the determination of the rights of the parties under the will was necessary, but the primary purpose of both the complaint and the cross-complaint was to terminate the trust and to obtain the immediate possession of the trust fund."

By these words, the appellate court showed that it failed to understand that all that the trustee of the fund required to release the fund to the proper cestui was a declaration from the court

[24](1943) 221 Ind. 208, 46 N. E. (2d) 238.
[25]At 46 N. E. (2d) 241.

establishing which was the proper cestui qui trust upon the facts. Such a declaration might affect the future rights, duties and other legal relations of the parties involved, but it would have declared merely the existing rights and status of the parties and of the fund at the time when the action was brought, and would have granted the trustee a legally sound basis for terminating the trust under the will of the settlor.

B. *Declaratory Judgment Refused When Further Administrative Procedure Available*

In New York State, the same general mistake discussed above has been extended by the denial of declaratory relief where further administrative procedure was available. In the case of *Long Island Lighting Co. v. Maltbie,*[26] there was a dispute between plaintiff public utility and defendant Public Service Commission over the inquiry being made by Defendant into the value of certain stock held by Plaintiff and the method employed in computing same. Plaintiff owned stock in the King's County Lighting Corp'n, the value of which Defendant sought to ascertain by accounting methods with which Plaintiff disagreed, in an inquiry which Plaintiff alleged was collateral to a proceeding into Plaintiff's accounts and records. Plaintiff further alleged that this collateral inquiry was being made at their expense; that Defendant had no jurisdiction to make the inquiry; that Defendant was employing accounting methods in determining the value of the King's County Lighting Corp'n stock owned by Plaintiff which Defendant would not allow the King's County Lighting Corp'n to use in fixing the value of the same class of stock; that Defendant had no power so to do; and that, in addition to the burden of the cost of the inquiry, the cost of the defense thereof, which would necessarily ensue, would amount to the sum of $100,000. In view of these allegations, Plaintiff sought a declaration by the court that the method followed by Defendant was illegal, arbitrary, burdensome and void; that Defendant had no power to require Plaintiff to enter the stock upon its books at other than the amount paid therefor; that Defendant had no power to investigate and determine the value of King's County Lighting Corp'n stock at the expense of Plaintiff in proceedings into Plaintiff's accounts and records; that the cost of the proceeding to the plaintiff rendered the inquiry confiscatory, arbitrary and void; and that Defendant had no power to assess the

[26](1941) 176 Misc. 1, 26 N. Y. S. (2d) 452.

expense against Plaintiff. The court, in dismissing the complaint, stated:[27]

"In the procedural aspect of the motion, the facts pleaded do not show a good cause of action for a declaratory judgment. A corporation subject to the power of inquiry vested in an administrative body exercising, as this commission does, legislative and quasi-judicial functions, cannot sue the body to obtain detailed judicial rulings upon the direction that the inquiry takes within the general jurisdiction of the administrative body.

"If errors are committed in respect of a subject within the commission's jurisdiction, they are to be corrected, like the errors of the law court, upon a review of the result. . . .

"The alternative would invite an independent and converging law suit to adjudicate every debatable step of an inquiry or trial. Only where the naked jurisdiction is challenged, and not the direction of its exercise, will the court interfere to end before its conclusion a proceeding conducted without or in excess of authority.

"Since a suit in law or equity is inappropriate in any stage to review the questions here raised, nothing is added by the precipitation of remedy which is the main function of the declaratory judgment."

With the above words, the court denied Plaintiff the timely relief requested and the determination of the controversy. This forced the plaintiff to bear the expense of the inquiry and the cost of the defense therein, and to bring a coercive action against the defendant commission thereafter to settle exactly the same questions which here faced the court. An immediate declaration would have avoided delay and expense. As noted above, Plaintiff had raised the jurisdictional question inter alia. The purpose of the Uniform Declaratory Judgments Act is not the "precipitation of remedy," as understated by the court above, but is to afford a quick and inexpensive termination of controversies and to remove uncertainty and insecurity before expense, hazards, and the like have been incurred, where the requirements for a declaratory judgment have been met.

A California court erred in the case of *Monahan v. Department of Water and Power*,[28] wherein Plaintiffs were journeymen linemen of the defendant department. Plaintiffs charged that they did exactly the same work as did troublemen, who received $225.00 monthly as opposed to their $195.00 wage, and that the distinction between the two classifications of job was the mere whim and caprice of their employers. Upon these allegations, Plaintiffs sought a declaration that they were entitled to be placed upon the same

[27]At 26 N. Y. S. (2d) 457.
[28](1941) 48 Cal. App. (2d) 746, 120 P. (2d) 730.

footing and receive the same wages as the troublemen. To this complaint Defendant filed a general demurrer which was sustained by the trial court and affirmed by the appellate court. In denying the requested relief, the appellate tribunal stated:[29]

"For the court to afford relief here would not only be to put governmental executives in a strait-jacket, but would involve an altogether too complacent an attribute of superiority in the court in the handling of administrative details which have not been intrusted to them but to executives on the job. Courts should not and will not assume to control or guide the exercise of their authority. If relief be needed it should not be sought in the courts but with the body that has authority."

Having thus classified the dispute as administrative and not properly justiciable, the court further stated that Plaintiffs had no absolute right to a declaratory judgment even where there was a dispute and that discretion in entertaining jurisdiction lay in the courts. The court then further contended that there could be no reversal unless Plaintiffs proved an abuse of discretion by the trial court, which they had failed to do, and thus no reversal could be accorded. The appellate court closed their opinion by stating that a declaration here would be tantamount to a decree of specific performance which the court had no power to give since the complaint stated only conclusions of law. This confused and erroneous opinion denied Plaintiffs relief upon a justiciable controversy for which they had requested the proper remedy.

An Idaho court committed the same fundamental mistake in *Idaho Mutual Benefit Ass'n v. Robison.*[30] There, plaintiff insurance company brought an action against defendant Industrial Accident Board of the State of Idaho for a declaratory judgment construing the state unemployment compensation statute. Defendant sought to make Plaintiff pay premiums for certain agents whom Defendant alleged, and Plaintiff denied, were within the scope of the statute as applied to the insurance company. Plaintiff alleged that the statute was unconstitutional in that it made the defendant board both an investigator and trier of facts without, in the first instance, a hearing where the employer was present; that a direct appeal did not lie from orders of the defendant board covering questions under the law; that the penalties provided by the statute were so severe as to be unconstitutional; that the agents in question were not employees under the act; and that Plaintiff was not

[29]At 120 P. (2d) 734.

[30](1944) 65 Ida. 793, 154 P. (2d) 156. Cf. Erie City v. Phillips, (1936) 323 Pa. 557, 187 A. 203; Williams v. Tawes, (1941) 179 Md. 224 A. (2d) 137.

in business or a profession within the meaning of the act. The defendant alleged that the court had no jurisdiction under the Uniform Declaratory Judgments Act and that all jurisdiction lay in the defendant state board under the terms of the statute. The trial court sustained Defendant's demurrer upon the above pleadings, but upon appeal, was reversed and was found to have jurisdiction under the declaratory judgments statute. The court stated, however:[31]

"While the district court had jurisdiction to declare whether an appeal would lie directly from the board to this court and to pass upon certain constitutional questions, it did not have jurisdiction to determine whether or not appellant or its agents were within the scope of the act, since they involve fact finding. In other words we hold that the district court had jurisdiction to construe the law and to pass upon its constitutionality, but that it had no jurisdiction to investigate facts, to make findings thereon or to determine the weight of the evidence or credibility of witnesses. . . . These were questions to be determined by the Industrial Accident Board in the first instance reviewable upon appeal."

The error here made is a combination of two misconceptions. The one for which the case is here cited is that of refusing to entertain jurisdiction since further administrative procedure is possible, regardless of whether or not that procedure be a matter of fact-finding. The other mistake is that facts may not be found in an action for a declaratory judgment. This latter error is discussed below.

C. *Declaratory Judgment Refused Where Facts Must Be Found*

Two other jurisdictions have recently misconstrued the declaratory relief as precluding the remedy where questions of fact are involved which must be determined before a declaration may be granted. New York made the mistake in *Davis v. A. Davis & Sons,*[32] wherein plaintiff administratrix of the estate of her decedent husband brought an action for a reformation of contract and for a declaratory judgment against defendant company. At the time of his death, the decedent had owned one hundred and thirty-eight and eight-ninths shares of stock in the defendant corporation which were included in his estate. Defendant had fraudulently induced Plaintiff to believe that there were only one hundred and twenty-five shares representing the decedent's full interest and had caused her to sell decedent's holding for a stipulated consideration to the

[31] At 154 P. (2d) 161.

[32] (1944) 267 App. Div. 691, 48 N. Y. S. (2d) 55. See also Seventy-Nine Delancey Corp'n v. Meridan Holding Corp'n, *ibid* n. 16 *supra;* Idaho Mutual Benefit Ass'n v. Robison, *ibid* n. 30 *supra.*

defendant corporation. This sale was executed on the basis that the decedent's entire interest in the defendant corporation was the property conveyed. Plaintiff later discovered the fraud and brought the instant action to have the contract for the sale of the stock reformed by the court to include only the one hundred and twenty-five shares which had been represented by Defendant to be the full interest, to have the general release given by Plaintiff to Defendant canceled, and for a declaration that Plaintiff was the owner of thirteen and eight-ninths shares of stock in defendant corporation. The trial court granted Plaintiff's motion for examination of Defendant and denied Defendant's motion to dismiss the action. Defendant appealed and the appellate court reversed both orders of the trial court, and held:[33]

"The second cause of action which is for a declaratory judgment, as we have pointed out, is not well founded either. There it cannot be said that only questions of law are involved. The very nature of the allegations indicates beyond peradventure of a doubt that questions of fact must be determined. That being so, on the facts disclosed, plaintiff in the court's discretion should be left to her proper remedy."

Ohio was guilty of this misconstruction of the statute and of the remedy available thereunder in *Ohio Farmers Insurance Co. v. Heisel.*[34] The facts in this case showed that plaintiff insurance company had issued an automobile bodily injury and property damage liability policy to the defendant insured, whose son was driving the family car at the time of the accident in which both the son and the driver of the other car were killed. The widow of the other driver brought suit against defendant Heisel. The plaintiff here then instituted this proceeding, alleging that Heisel's son was driving the car without the knowledge or permission of his father, who was the named insured under the policy, in violation of the terms of the policy; and alleged that therefore the plaintiff insurance company was not obliged to defend Heisel in the tort action, nor would it be liable under the policy for any damages which might be found against defendant Heisel. On these facts, Plaintiff sought a declaration of its rights, duties and other legal relations, and of no liability under the policy. Defendant demurred to the complaint on the ground that no cause of action was shown, the demurrer being sustained by the trial court. The order sustaining the demurrer was reversed upon appeal by Plaintiff. This reversal was in turn reversed by the highest state court upon

[33]At 48 N. Y. S. (2d) 57, 58.
[34](1944) 143 Ohio St. 519, 56 N. E. (2d) 151.

appeal taken by Defendant. This last reversal was ordered upon the ground that Plaintiff's petition required the determination of a question of fact, i. e., was the defendant's son driving the automobile with the permission and knowledge of the defendant? The court held that under the Uniform Declaratory Judgments Act[35] in force in Ohio any question of "construction or validity"[36] of a contract could be determined either before or after the breach thereof,[37] but that the question of fact stated above was not such a question of "construction or validity" and that therefore jurisdiction could not be entertained as no cause of action had been stated. Upon these grounds, the court reversed the appellate court to affirm the order of the trial court sustaining the demurrer to the complaint.[38] This erroneous holding has been ably criticized by the leading proponent of declaratory judgments as follows:

"Even if it could be conceded that application of the company's policy to this particular case—the issue of 'coverage'—does not involve a question of 'construction or validity' under Section 2 (a view not plausible), Section 5, not cited nor quoted by the court, plus an overwhelming line of precedents, would seem to settle the matter. Section 1 . . . has been considered amply broad enough to enable insurance companies to bring an action for a declaration of non-liability where circumstances, as in this case, permit."[39]

"This was a perfect action for a declaratory judgment. . . . The ground for dismissal was one of statutory construction. . . . Section 1 . . . is practically all the power that needs to be conferred. . . . The enumeration in Sections 2, 3 and 4 does not limit or restrict the exercise of the general powers conferred in Section 1. . . . . . a petition for a declaration of no coverage in a particular case does involve the question of 'construction or validity.' "[40]

The same reasoning, applied to the same remedy that permits the determination of a question of fact in the instant case, would permit a like determination in *Davis v. A. Davis & Sons*,[41] in

[35]G. C., Secs. 12102—1 to 12102—16 incl.

[36]*Ibid* n. 35 *supra*, Sec. 12102—2: "Power to Construe, etc. 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, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

[37]*Ibid* n. 35 *supra*, Sec. 12102-3: "Before Breach. A contract may be construed either before or after there has been a breach thereof."

[38]Cf. Aetna Life Ins. Co. v. Haworth, *ibid* n. 8 *supra*.

[39]Borchard, Two Recent Declaratory Judgments, 263 Ins. L. J. 707, 708, 1944.

[40]Borchard, Declaratory Judgments, 17 Ohio Bar 507, 508, 509, 1945.

[41]*Ibid* n. 32 *supra*.

Idaho Mutual Benefit Ass'n v. Robison,[42] and in *Seventy-Nine Delancey Corp'n v. Meridan Holding Corp'n*.[43]

D. *Declaratory Relief Denied Under Discretion Granted to the Court*

The cases under this subheading reveal the basic error of failure to recognize the alternative nature of the declaratory judgment. This mistake is made under color of the discretion granted to the judiciary by the statutes.[44] California is notable for its broad application of the discretionary powers of the court.[45] In *Orloff v. Metropolitan Trust Co.*,[46] plaintiff Orloff was a creditor of the Rio Brewing Co., Inc., by virtue of the assignment of the claim of one Schinagel to whom the brewing company owed $2500 of a larger total debt. All sums over $18,000 recovered by the sale of stock were to be divided among creditors Margulis, Grossfeld and Orloff. Defendant trust company was escrow agent for the sum of money to be paid by one Garrison as the consideration and purchase price for the entire capital stock issue of the brewing concern. Notice of the assignment by Schinagel to Orloff was given to the necessary parties including Defendant in ample time. Garrison then sold his option to purchase the capital stock of the brewing company to one Grace under an agreement whereby Grace was to pay the purchase price of the stock to the defendant escrow agent. This sum was to be paid over by the trust company to all the unpaid creditors except plaintiff Orloff. Plaintiff instituted the present action on counts of civil conspiracy; money received in trust for Plaintiff; money had and received, and breach of the escrow agreement. Plaintiff requested, as additional relief, a declaration of the rights, duties, and obligations of the various parties under all the agreements including the escrow agreement. To this complaint, Defendant demurred on the ground that the acts were concluded before the complaint was filed, that Plaintiff sought a review of the acts and a declaration of a debt as due to him. The trial court sustained the demurrer and Plaintiff appealed, only to receive an affirmance of the order sustaining the demurrer to his complaint.

[42]*Ibid* n. 30 *supra*.

[43]*Ibid* n. 16 *supra*.

[44]Uniform Declaratory Judgments Act, Sec. 6: "Discretionary. 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."

[45]Origin dictum in Cutting v. Bryan, (1929) 206 Cal. 254, 274 P. 326.

[46](1941) 17 Cal. (2d) 484, 110 P. (2d) 396.

The appellate court reviewed the facts stated in the complaint and then said:[47]

"These allegations do not measure up to the requirements of an action for declaratory relief, and the superior court properly refused to exercise its power to entertain the complaint upon that count. . . . Moreover, a judgment refusing to entertain a complaint for declaratory relief is not reviewable upon appeal except for an abuse of discretion, which is not here shown."

The appellate court did not state in what way the allegations of the complaint failed to measure up to the requirements for declaratory relief, but the implication to be derived from the affirmance of the order sustaining the demurrer to the complaint upon the grounds stated above is that declaratory relief will be denied, under the discretion of the court, where the court believes a review of concluded acts and a declaration of a debt based thereon is sought. That a declaratory judgment upon such a controversy is proper is indisputable, and the appellate court, as a matter of law, could have found the abuse of the discretion granted by the statute[48] which it stated to be the requisite for a review upon appeal.

The California courts made the same mistake in *Moss v. Moss*,[49] wherein there was a controversy between plaintiff former husband and defendant former wife over a property settlement. The parties had separated, agreeing to terminate their marriage by divorce, and in contemplation thereof had entered into a property settlement whereby the plaintiff was to pay a fixed sum as support. Thereafter the divorce was obtained, and relying upon the prior agreement, the issue of the property settlement was not raised and no reference was made to the issue or to the agreement in the divorce decree. Plaintiff then suffered a loss of income and secured a reduction of the amount to be paid to his divorced wife in a modification of the former agreement. Plaintiff apparently found the payment to be burdensome and brought the instant action for a declaration that the property settlement was against public policy and void, and that therefore the contract and modification thereof were void and that he had no duties or obligations thereunder to continue the payments to his former wife. Defendant ex-wife disagreed with Plaintiff and demurred to the complaint. The trial court sustained the demurrer and Plaintiff appealed. In its opinion affirming the order sustaining the demurrer to the complaint, the appellate court found that this was a proper controversy for a

[47]At 110 P. (2d) 399.
[48]See n. 44 *supra*.
[49](1942) 20 Cal. (2d) 640, 128 P. (2d) 526.

declaratory judgment, but that it could not reverse the lower court unless an abuse of its discretion were proved. The appellate court then, admitting that the grounds for the exercise of the discretion of the lower court were not stated, hypothesized that the trial court might well have found that the parties were "in pari delicto," which it held to be an equitable doctrine which could be applied to an action for a declaratory judgment even though the latter was a remedy sui generis. The appellate court held that since the trial court properly could have considered that doctrine, even though it were not shown to have done so, there was no abuse of discretion and hence there could be no reversal. This opinion is so obviously erroneous that no comment is required.

A California court repeated this error in *Caldwell v. Gem Packing Co.*[50] In this case, plaintiff Caldwell owned a meat company which had done business with defendant meat packer. Plaintiff alleged that certain correspondence constituted a valid contract with Defendant whereby Defendant was obligated to slaughter cattle, refrigerate the meat, and provide display space and facilities to Plaintiff. Plaintiff claimed that this contract, as established by the correspondence in question, constituted a lease which had been breached by Defendant when Defendant sold the premises, wherein Plaintiff had done business, and the new owner, defendant Producers, evicted Plaintiff, causing Plaintiff to rent elsewhere and to incur other damages. Caldwell therefor brought this action for unascertained damages and for a declaration construing the correspondence as requested and determining the legal relations of the parties thereunder. The trial court denied the requested relief and was affirmed by the appellate court, which stated:[51]

"As it is discretionary with the trial court to refuse to entertain an action for declaratory judgment where it concludes its declaration or determination is not necessary or proper at the time and under all the circumstances, we are without power to review its action denying such declaration except where an abuse of discretion is shown. . . . There is no showing here that such discretion was abused. Moreover, it is plain on this record that there was no basis for declaratory relief against Producers. Accordingly, the demurrer of Producers to the court seeking declaratory relief was rightly sustained."

Since the demurrer to the complaint raised the question of law on the allegations therein as the accepted facts, there was a proper controversy and the court could have assessed the amount of

[50] (1942) 52 Cal. App. (2d) 80, 125 P. (2d) 901.
[51] At 125 P. (2d) 903.

damages suffered by Plaintiff in the event that the correspondence had been construed as requested.

Tennessee carried its discretionary power one step further in the case of *Hinchman v. City Water Co.*[52] There plaintiff Hinchman brought an action for the balance due under a contract constituting a lease for years of a tract of land, of easements and water rights, etc., and for a declaration that under the contract, defendant water company was required to renew the lease and the obligations thereunder for a period of fifty years. Defendant held under mesne conveyances a lease from Plaintiff under which it had formerly supplied water to the City of Chattanooga. The water had become polluted and unfit for use in 1912 and had not been used since then, but under the terms of the contracts and leases, Defendant was alleged to be obligated for the rents due and to renew the lease for another period. The Chancellor found for Plaintiff as to the rents due and rendered no declarations requiring Defendant to renew the lease. Both parties appealed and declarations were granted by the appellate court on the intermediate level. Upon appeal therefrom to the state Supreme Court, the Supreme Court declined a declaration in the exercise of its discretionary power, and stated:[53]

"We are not willing, however, on the record before us, to make the desired declaration that the renewal portion of the contract involved is enforceable, and that the City Water Co. as assignee is obligated to renew and pay the owners of the property $15 a day for a renewal term of fifty years.

"We are not required to consider all the objections raised by the City Water Co. to such a declaration. We decline the declaration on the facts as developed in this record."

The court assigned no reason for so declining, yet intimated that its real reason was that the water was not fit to use and that, if the declaration were granted, Defendant would be paying a large rent for a useless right and commodity. Plaintiff petitioned for a rehearing, which was denied. The court again did no more than merely refuse to make a declaration.

The above is the last case set forth representing the variations of the several courts from the fundamental theme of the declaratory judgment as an alternative remedy. As we have seen, they take many forms and in some instances, several erroneous concepts are revealed in a single case. We now turn to the second fundamental error made by the courts.

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[52](1943) 179 Tenn. 545, 167 S. W. (2d) 986.

[53]At 167 S. W. (2d) 989.

II. Failure to Appreciate the Declaratory Judgment as a Remedy Based upon a Justiciable Controversy

This erroneous construction is familiar from early state[54] and Federal[55] decisions. The courts of the various states still reveal their inability to distinguish a justiciable controversy from one which is not justiciable on each of many possible grounds.

A. *Failure to Distinguish an Advisory Opinion*

The judiciary of the State of New York occasionally fall into this error. In *Denton & Haskins Corp'n v. Taylor,*[56] plaintiff corporation sought a declaratory judgment against defendant Taylor, as head of A. S. C. A. P., that Defendant had no right after December thirty-first, 1950, to grant licenses for the non-dramatic public performance of certain musical works, the copyrights of which Plaintiffs owned. Plaintiff was assignee of the various composers concerned and, after becoming so, had joined the defendant associations and had assigned rights to Defendant in the subject works. Plaintiff contended that, since acquisition of the rights had destroyed the common law rights of the authors, the licensing rights assigned by the authors separately to A. S. C. A. P. were also destroyed and that therefor Plaintiff would be re-vested with all rights, both common law and statutory, after the above date upon which the assignment by Plaintiff to Defendant expired. Defendant asserted on the contrary that its rights were acquired both from the authors and from Plaintiff and that the expiration of the agreement with Plaintiff would not affect its rights acquired directly from the sundry authors, which rights would remain vested in Defendant after the subject date. Plaintiff asserted that it was injured in being unable to deal in the subject rights after the date mentioned and in anticipation thereof until the court terminated the controversy. Upon these facts and allegations, the court, in dismissing the action, held:[57]

[54]Anway v. Grand Rapids Ry. Co., (1920) 211 Mich. 592, 179 N. W. 350; Washington-Detroit Theatre Co. v. Moore, (1930) 249 Mich. 673, 229 N. W. 618.

[55]Liberty Warehouse Co. v. Grannis, (1927) 273 U. S. 70, 47 S. Ct. 282, 71 L. Ed. 541; Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, (1928) 276 U. S. 71, 47 S. Ct. 291, 72 L. Ed. 473; Willing v. Chicago Auditorium Ass'n, (1928) 277 U. S. 274, 48 S. Ct. 507, 72 L. Ed. 880. Cf. Nashville, Chattanooga & St. Louis Ry. v. Wallace, *ibid* n. 7 *supra;* Aetna Life Ins. Co. v. Haworth, *ibid* n. 8 *supra.*

[56](1943) ..... Misc. ....., 42 N. Y. S. (2d) 18. See also Broadcast Music, Inc. v. Taylor, (1945) ..... Misc. ....., 55 N. Y. S. (2d) 94.

[57]At 42 N. Y. S. (2d) 20.

"In seeking determination of such rights, it is merely seeking legal advice. In such circumstances an action for a declaratory judgment may not be maintained."

The court then stated that there could be no actual controversy until two events occurred: 1.) the termination of Plaintiff's membership in A. S. C. A. P., and 2.) the extension of their membership in the defendant organization by the composers of the subject works. At present, the court averred, there was merely a doubt as to Plaintiff's rights after the subject date. That this doubt created a cloud upon Plaintiff's legal relations and subjected Plaintiff to uncertainty and insecurity in business transactions from which Plaintiff was entitled to relief by a declaration, did not, apparently, impress the court.

B. *Failure to Distinguish Justiciable Controversies*

Under this subheading are grouped several failures by the courts to recognize a valid and justiciable controversy for which declaratory relief was proper and necessary. The earliest in time was that of Kansas in *City of Cherryvale v. Wilson.*[58] In this case, plaintiff city sought a declaration, against defendant land and easement holder, to establish rights and other legal relations of the parties under an agreement and a deed; to declare the agreement to be void and that Plaintiff had the right to discontinue supplying water to Defendant's land and might enter thereon and remove pipe therefrom; and requested other declaratory relief confirming Plaintiff's ownership of a tract of land purchased for a standpipe site. To simplify an involved factual situation, Plaintiff had agreed to supply water for general farm and dairy use to Defendant's grantors and had since requested permission of the defendant to cease supplying the water and to enter upon her land and remove the pipe therefrom. Defendant refused the request and the City brought the instant action as a result. Upon trial, Defendant demurred generally to the complaint, and the court's order sustaining the demurrer was affirmed on appeal. In making the affirmance, the court found no actual controversy despite the manifest difference of opinion on the ground that nowhere in the pleadings was there any showing of what Defendant asserted to be her rights nor that she threatened any action to the detriment of the plaintiff city. The controversy, according to the court, had to be made clear in the pleadings. The court said:[59]

[58](1941) 153 Kan. 505, 112 P. (2d) 111. See also Gillies v. La Mesa, etc., Irrigation District, (1942) 54 Cal. App. (2d) 756, 129 P. (2d) 941.

[59]At 112 P. (2d) 115.

"It states that plaintiff informed defendants of its intention to discontinue the furnishing of water and to remove its ten-inch pipe line and that plaintiff asked consent of the owners, and that this consent was refused. The petition then states that efforts had been made to arrive at an amicable adjustment of the claims of the parties but without success."

Surely the refusal by Defendant to consent to Plaintiff's discontinuance of the water supply and to permit Plaintiff to enter upon her land to remove its pipe therefrom was a clear assertion of her right to the water supply and to prevent the removal of the pipe line. If Plaintiff had proceeded to discontinue the water and to remove the pipe under these conditions, the City would have run the risk of heavy damages and expensive litigation to get an adjudication of its rights.

A West Virginia court was equally at fault on the case of *Crank v. McLaughlin*.[60] Plaintiff Crank was a dairy products vendor in the city of Charleston and defendant McLaughlin was state Commissioner of Agriculture. Plaintiff had established his business and operated under a municipal ordinance which required, inter alia, a city license and that all milk sold in the city must have been pasteurized in Kanawha County. Defendant had issued a state executive order abrogating these requirements. Plaintiff thereupon brought the instant action for a declaration that the action of the defendant commissioner was illegal and void, since Plaintiff had expended large sums in complying with the municipal ordinance, and that he was prejudiced in that he would be subject to heavy fines and penalties if he now disobeyed the municipal ordinance. Defendant's demurrer was overruled below, but the order of the trial court in so doing was reversed upon appeal and the action was ordered to be dismissed. The appellate court based its reversal upon the grounds that Plaintiff did not have a justiciable controversy as no right, status or legal relation had been created by the municipal ordinance, the abrogation of which by Defendant would be a valid basis for any action in which the court would be warranted in granting relief. The court further held that, while the consumers might have complained, Plaintiff had merely lost a closed market and that competition was not such prejudice as to entitle Plaintiff to seek relief, and stated:[61]

"It may be said that if the commissioner had no legal rights to abrogate and annul the ordinance as aforesaid, then any person has the right to question his action. It is true that, broadly speak-

[60](1942) 125 W. Va. 126, 23 S. E. (2d) 56.
[61]At 23 S. E. (2d) 59, 60.

ing, the acts of public officers may be questioned by any citizen affected thereby, but we think this means that it must be some character of prejudice for which he is entitled to seek redress in the courts of the land. Unquestionably, the city of Charleston would have had a right to contest the validity of the regulation of the commissioner, because its own ordinance was being set aside and annulled, and as the representative of the public in the city, would have had the right under the declaratory judgment act, or otherwise, to raise the question of the legality of the regulation.

"If these plaintiffs would be unable to vindicate their asserted rights through a process of injunction, or otherwise, they are not entitled to seek a declaratory judgment thereon."

While it is undoubtedly true that the regulation issued by the Commissioner facilitated the advent of competition for Plaintiff, it also placed Plaintiff in a position of uncertainty and insecurity. Were Plaintiff to comply with the orders of Defendant, he would do so at the risk of penalties imposed by the city for violation of its ordinance. Were Plaintiff to continue to comply with the municipal ordinance unnecessarily, he would be expending unnecessary sums of money in so doing. There were two conflicting laws, and Plaintiff had a legal interest in presenting this justiciable controversy to the court for determination. It was also error for the court to hold that, because Plaintiff did not present a case for equitable or other relief, Plaintiff did not have a case for declaratory relief.

The state of Pennsylvania is the last jurisdiction to be represented under this heading. In the case of *Blatt et ux. v. Schmidt*,[62] defendant Schmidt was a neighbor of the plaintiffs who had had the zoning of the area in which both parties lived changed by municipal ordinance from a classification as Residential D to Commercial A. Plaintiff objected and brought this action alleging that the ordinance was unconstitutional because of technical defects in its passage; that it depreciated the value of the property; and that the possible uses to which Defendant might now put his property rendered the area undesirable for residential purposes. Therefor Plaintiffs requested declaratory relief as indicated. Schmidt answered that the plaintiffs had not followed the remedy provided by statute and had presented no recognizable controversy. The court, in holding for Defendant, stated:[63]

"The law is, therefor, not clear whether there is a statutory remedy to be pursued under the Zoning Act, or whether an aggrieved citizen must depend wholly upon equity and declaratory

[62](1943) 48 D. & C. (Pa.) 43.
[63]*Ibid* n. 62 *supra* at 45, 46.

judgment procedure in order to secure relief under a zoning ordinance. It is evident that either remedy could be resorted to in a proper case.

"We do not consider this to be a proper case for declaratory judgment relief. . . . Our plaintiffs have not been hurt. . . . At most there is a difference of opinion or a disagreement over policy. . . . An ordinance may result in a controversy or in litigation, but not inevitably. Whether this one causes an actual dispute remains to be seen when Schmidt or some other neighbor asks for a permit for an 'A' commercial use or takes a similar step. . . . The petition is accordingly dismissed."

Thus the Pennsylvania court disavowed the fundamental principle of declaratory judgments law that a cloud over legal relations resulting in uncertainty and insecurity, when presented by adverse parties with legal interests, constitutes a justiciable controversy. By denying a declaration in this case, Plaintiffs' property was left subject to the whims of others in the event that they should decide to apply for commercial use permits in the future.

III. Failure to Recognize the Declaratory Judgment as a Remedy Sui Generis

There have been cases wherein declaratory relief had been denied on the basis that the plaintiff entered through the wrong door of the court under a divided system maintaining the old distinctions between law and equity.[64] The following three cases are illustrative of the occasional confusion still found in the courts as a result of their failure to recognize that this remedy is truly sui generis.

Ohio is represented in the case of *Myers v. City of Defiance,*[65] wherein plaintiff Myers sought a declaration that a municipal ordinance regulating dry cleaners was unconstitutional in that it was ultra vires, unreasonable and arbitrary, discriminatory, and designed to exclude non-residents. Plaintiff also sought such other relief as to which he might be entitled at law or in equity. The mayor of the defendant city had sought to enforce against Myers the provision of the ordinance requiring a $1,000 bond which was not applicable to residents in the same business. The trial court found for the defendant below, but was reversed upon appeal. The ordinance was declared void in its unconstitutional aspects and the

[64]See New Jersey in Paterson v. Currier, (1925) 98 N. J. Eq. 48, 129 A. 711; Wight v. Board of Educ. of Town of Westfield, (1926) 99 N. J. Eq. 843, 133 A. 387; Moresh v. O'Regan, (1937) 122 N. J. Eq. 388, 192 A. 831; New Jersey v. Moresh, (1939) 122 N. J. Law 77, 3 A. (2d) 638; Springdale Corp'n v. Fidelity Union Trust Co., (1939) 121 N. J. Law 537, 3 A. (2d) 565. Cf. Grosse Pointe Shores v. Ayres, (1931) 254 Mich. 58, 235 N. W. 829.

[65](1940) 67 Ohio App. 159, 36 N. E. (2d) 162.

mayor and the city were enjoined from enforcing the ordinance. However, in reaching this result, the appellate court stated:[66]

"An action for declaratory judgment, being a special statutory proceeding not cognizable in a court of chancery, is not such an action as may be appealed to this court on questions of law and fact under the provisions of Section 6, Article IV of the Constitution. But as the petition in the instant action, although asking for a declaratory judgment, states a cause of action for affirmative relief in equity, the action constitutes a chancery case appealable to this court on questions of law and fact, and the appeal will be so considered."

It is difficult to follow the reasoning of the court in classifying the declaratory judgment with such special statutory proceedings as divorce and annulment actions, tax proceedings, and the like, and upon that ground, denying declaratory relief in the instant case.

An Ohio court made a similar mistake in *Pioneer Mutual Casualty Co. v. Penn. Greyhound Lines, Inc., Et al.*[67] wherein plaintiff casualty insurance company was the insurer of a truck owned by Charles Baumann as named insured, which had hit a bus of defendant company, killing the driver of the bus and two passengers. The defendant here was suing said Baumann for property damage in a separate action and liability actions for the deaths were probable. Plaintiff here alleged that Baumann had made certain representations in procuring the insurance as to the driver of the truck and as to the use of the truck which were not correct, and therefor sought a declaration to determine the rights, duties and other legal relations of the parties arising out of the insurance policy and the facts here involved; that Plaintiff was under no obligation or duty to defend Baumann in any actions ensuing; and that Plaintiff was not liable to Defendant here for any adverse judgments arising against Baumann. Defendant demurred generally and specially upon the grounds that no cause of action was stated in the complaint; that there was a defect of parties in that those injured and the representatives of the decedents were not parties; and that a declaration would not terminate the controversy. The order of the trial court sustaining the demurrer was affirmed on appeal upon the defect of the parties and as the facts shown were insufficient to prove a breach of warranty. The court stated:[68]

"An action for a declaratory judgment is a special statutory proceeding unknown to Chancery and therefor does not constitute a

[66]At 67 Ohio App. 163.
[67](1941) 68 Ohio App. 139, 37 N. E. (2d) 412.
[68]At 37 N. E. (2d) 419.

chancery case within the meaning of Section 6 of Article IV of the Constitution of Ohio, and consequently the appellate jurisdiction in the trial of chancery cases conferred by the constitutional provisions upon the court of appeals does not extend to such an action.

"The main characteristic of the declaratory judgment which distinguishes it from other judgments is the fact that it conclusively declares the pre-existing rights of the litigants without the appendage of any coercive decree. Borchard, Declaratory Judgments, Preface, page 1.

"An examination of the petition and the amendment thereto discloses that the declaratory judgment sought in this case involves the same issues of fact and law as a decree of cancellation in equity involves, so that if the facts pleaded in the petition and the amendment thereto are sufficient to entitle the plaintiff to the declaration sought they are also sufficient to entitle the plaintiff to the coercive decree of cancellation in case such a decree is sought."

The court then found that since Plaintiff sought further relief and coercive relief of cancellation, which was incompatible with a declaratory judgment, the character of the action was fixed alone in chancery for cancellation and not for a declaratory judgment. Upon these grounds, Plaintiff was denied declaratory relief in a proper controversy.

A New York court made this same type of error, i.e.—based on the same fundamental misconception of the law of declaratory judgments, in the case of *Horwitz v. Stone Boulevard Corp'n.*[69] Plaintiff Horwitz had a dispute with his defendant landlord, alleging that Defendant had erected a fire escape without securing either a permit from the authorities or Plaintiff's consent; that the landlord had breached the lease in failing to decorate his premises; and that the building was not maintained in good repair and that the elevator was used for garbage disposal, etc. Upon these facts, Plaintiff sought declaratory relief and such equitable relief as to which he was entitled, desiring to be released from liability under the lease and to be reimbursed by his landlord for the inconvenience and expense of being forced to move to another location. The trial court granted Defendant's motion to dismiss the complaint for insufficiency in law, and held:[70]

"The action is brought by a tenant against his landlord for a declaratory judgment for the reason that if he should move from the premises without first securing an adjudication of his rights he would subject himself to serious liability for damages for breach of a lease. . . . Without considering whether the plaintiff has stated

[69] (1942) ..... Misc. ....., 37 N. Y. S. (2d) 670.
[70] At 37 N. Y. S. (2d) 671.

any cause of action at law, the complaint here is framed in equity and equitable relief alone is demanded. I am of the opinion that the plaintiff has an adequate remedy at law and therefor the complaint in equity will be dismissed."

It is difficult to perceive how the court could make the statements cited above and then deny the plaintiff declaratory relief. The mistake is fundamental in the law of declaratory judgments. It is obvious that, since the declaratory judgment is a remedy sui generis, the prayer for equitable relief could have been dismissed because there was adequate relief at law without dismissing the declaratory relief requested. The court itself stated the grounds for the necessity for the declaration requested.

IV. Conclusion

The cases set forth above in text and footnote are representative of the various atrocities committed in the name of declaratory judgments law. The classifications made for the purpose of presentation herein cannot be considered as exclusive, as several errors may underlie one erroneous decision, and as there may well be other variations of the above mistakes which are not here represented. The conclusion to be drawn is obvious, that many courts, primarily those of the states, on both the trial and appellate levels, fail to understand the basic and simple fundamentals of the law of this remedy in all its aspects, despite the learned and repeated efforts of the proponents of the declaratory judgment to educate and to correct the bar and the judiciary.