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DECLARATORY JUDGMENTS IN NEW JERSEY

New Jersey was the State which, by the statute of 1915¹ and the case of *In re Ungaro's Will*,² began the current movement for the introduction of the declaratory judgment into American procedure. Appreciation of its beneficent effect is attested by the fact that thirty-one American jurisdictions³ have now adopted it as an aid in the solution of contested issues of law, before one party or the other has incurred the risk of loss or damage by acting upon his own interpretation of his rights under a contract, will, statute, or other legal instrument or rela-

¹Laws 1915, c. 116 (A supplement to an act entitled "An act respecting the Court of Chancery" [Revision of 1902]), § 7: "Decree to Declare Rights. Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will, or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested." On the nature of the 1915 statute, see *Commonwealth Quarry Co. v. Gougherty*, 103 N.J. Eq. 642, 149 Atl. 356 (1930).

The Uniform Act was passed in 1924, Laws 1924, c. 140, p. 312, 1911-1924 Supp. §§ 163,351-366. Particular attention is called to § 163,362: "This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered."

²88 N.J.Eq. 25, 102 Atl. 244 (1917).

³Declaratory judgment statutes are to be found in the following states: *Arizona*, Code 1928, §§ 4385-90; *California*, Code Civ. Proc. §§ 1060-2; *Colorado*, Stat. 1923, c. 98; *Connecticut*, Gen. Stat. 1930, § 5334; *Florida*, Gen. Laws 1927, §§ 4953-54; *Indiana*, Burns' Supp. 1929, 680.1-16; *Kansas*, Comp. Stat. 1923, c. 60, §§ 3127-32; *Kentucky*, Carroll's Code of Practice, 1927, § 639a 1-12; *Massachusetts*, Laws 1929, c. 186; *Michigan*, Comp. Laws 1929, §§ 13903-9; *Nebraska*, Comp. Stat. 1929, c. 20-21, §§ 140-155; *Nevada*, Comp. Laws 1929, §§ 9440-56; *New Hampshire*, Laws 1929, c. 86; *New Jersey*, Comp. Stat. 1924, 163,351-366; *New York*, C.P.A. § 473; *North Carolina*, Laws 1931, c. 102; *North Dakota*, Comp. Stat. 11a, § 7712a 1-16; *Ohio*, Probate Code 1931, § 10505, 1-10; *Oregon*, Code 1930, 2-1401-1416; *Pennsylvania*, Cum. Supp. 1928, § 12805a 1-16; *Rhode Island*, Comp. Stat. 1923, §§ 4951-3, 4955, 4968; *South Carolina*, Laws 1922, No. 542; *South Dakota*, Comp. Laws 1929, § 2871A-P; *Tennessee*, Shannon's Code 1926, § 4726a 1-16; *Utah*, Laws 1925, c. 24; *Virginia*, Code 1930, § 6140a-h; *Wisconsin*, Comp. Stat. 1929, 269.56; *Wyoming*, Laws 1923, c. 50.

They are also found in the following: *Hawaii*, Comp. Stat. 1925; §§ 2918-2923; *Philippines*, enacted Nov. 8, 1930; *Porto Rico*, Laws 1931, No. 47, p. 378.

tion. Its history in continental Europe is ancient,⁴ and its modern utility is exemplified by the fact that approximately two-thirds of the cases in equity decided by the High Court in England are actions for a declaration of rights.⁵ A somewhat similar record may be cited for other English-speaking jurisdictions, and on the continent the declaratory form of judicial relief has acquired wide vogue in Germany, Austria, and Switzerland.⁶ Some six hundred cases in the highest state courts, since 1921, mark the progress of the movement in the United States, where it has gained increasingly popular favor, especially in New York, California, Pennsylvania, Connecticut, Kentucky, and Tennessee.

It is therefore regrettable that New Jersey, which gave birth to the modern movement in the United States, should, by judicial interpretation, have somewhat restricted a mode of relief which has proved so valuable in other jurisdictions. Apparently, this restriction has been due in part to the New Jersey distinction between law and equity, which has induced New Jersey courts of equity to construe their functions narrowly and to decline declaratory relief which they considered of a legal nature, although the issue before them involved the construction of a written instrument,⁷ although English courts of Chancery do not hesitate to grant declarations in similar cases,⁸ and although prayers for multiple relief are thereby split up, some being granted and some denied, so as to discourage resort to the remedy. To be told that on one single state of facts part of the relief must be sought in a law court, and another in a court of equity, is not conducive to the efficient settlement of disputed issues.

The courts of England and the United States have found the declaratory judgment especially useful in cases of dispute

⁴ Borchard, *The Declaratory Judgment—A Needed Procedure Reform* (1918) 28 YALE L. J. 1, 13-30.

⁵ Borchard, *ibid.* 8.

⁶ Borchard, *ibid.*

⁷ This distinction has been discussed in the following cases: *Snyder v. Taylor*, 88 N.J.Eq. 513, 103 Atl. 396 (1918); *Renwick v. Hay*, 90 N.J.Eq. 148, 106 Atl. 547 (1919); *Paterson v. Currier*, 98 N.J.Eq. 48, 129 Atl. 711 (1925); *Wight v. Board of Education of the Town of Westfield*, 99 N.J.Eq. 843, 133 Atl. 387 (1926); *Union Trust Co. v. Georke*, 103 N.J.Eq. 159, 142 Atl. 560 (1928); *Englese v. Hyde*, 108 N.J.Eq. 403, 155 Atl. 373 (1931). For discussion of these cases, see *infra*.

⁸ See critical comment upon these cases, *infra*.

with respect to status, property, written instruments, and public rights. Uncertainty and insecurity in these matters throw legal relations into doubt and, by disturbing the security of business and personal relations, unsettle social order. To settle disputes at the earliest stage of a justiciable issue rather than after violence and damage have been done is an important function of judicial tribunals. This function, which is best subserved by declaratory relief, was expressed in a recent unanimous opinion of the Connecticut Supreme Court, speaking through Chief Justice Maltbie, as follows:

“The remedy by means of declaratory judgments is highly remedial, and the statute and rules should be accorded a liberal construction to carry out the purposes underlying such judgments. One great purpose is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds, and so avoid the expense, bitterness of feeling, and disturbances of the orderly pursuits of life which are so often the incidents of lawsuits.”⁹

New Jersey courts have had occasion to consider some of the more common types of issues which are presented to courts for declaratory relief and have rendered decisions and opinions which have served well the litigants and the community.

Status. One of the most frequent uses for declaratory relief has been the determination of disputed personal status. The validity of divorce proceedings is often tested by such procedure. In a Chancery suit not directly under the statute but held sustainable under it,¹⁰ it has been held in New Jersey that a Chancery court has jurisdiction to hear on its merits a bill which asked a decree that a divorce obtained in Nevada by the defendant spouse was fraudulent because of violation of certain New Jersey statutes and also because of lack of bona fide domicile in Nevada. Courts in other States have dealt with similar issues on the merits and have passed upon the validity

⁹ Sigal v. Wise, 114 Conn. 297, 158 Atl. 891, 893 (1932).

¹⁰ Henry v. Henry, 104 N.J.Eq. 21, 144 Atl. 18 (1928).

of foreign divorces.¹¹ An issue, likewise determinable by means of a declaration but not yet tried in New Jersey, is membership in an organization¹² or the existence of the employer-employee relation.¹³

Title to property. Some interesting fact situations involving disputed title to property have presented problems requiring declaratory relief. In *Englese v. Hyde*,¹⁴ where the plaintiff vendee sought to restrain an execution sale of the property on a judgment secured against his vendor but not disclosed by search of records, Vice-Chancellor Bigelow issued a limited injunction, pending the application to a law court to determine the issue of title. The Vice-Chancellor expressed his realization of the defects of the New Jersey procedure, in the following terms:¹⁵

¹¹ *Baumann v. Baumann*, 250 N. Y. 382, 165 N. E. 819 (1929), modifying 224 App. Div. 719 (1928) and affirming 222 App. Div. 460, 226 N.Y.S. 576 (1928) (defendant had secured a divorce in Mexico and then remarried in Connecticut; court passed upon plaintiff's matrimonial status, holding that the Mexican divorce and the Connecticut second marriage were invalid); *Caesaro v. Caesaro*, 134 Misc. 88, 234 N.Y.S. 44 (1929) (declaration of status sought in counter-claim in annulment action); *Dodge v. Campbell*, 135 Misc. 664, 238 N.Y.S. 666 (1930), aff'g 128 Misc. 778, 220 N.Y.S. 262 (1927) (validity of Pennsylvania divorce tested in an action to determine right to property); *Schneider v. Schneider*, 232 App. Div. 71, 249 N.Y.S. 131 (1931) (validity of a Paris divorce); *McCalmont v. McCalmont*, 93 Pa. Sup. Ct. 203 (1928) (annulment sought because second marriage violated divorce decree); *Drake v. McLean*, [1929] 3 D.L.R. (Alberta) 159 (validity of a Reno divorce); *Buchan v. Hawkesworth*, [1925] N. Z. 231 (second marriage alleged invalid, as first wife was still alive); *Owen v. Robinson*, [1925] N. Z. 591 (validity of a Reno divorce).

¹² *Douglas v. Pittman*, 239 Ky. 548, 39 S. W. (2d) 979 (1931) (Board of Education); *Kaleikau v. Hall*, 27 Hawaii 420 (1923) (club); *Weinberger v. Ingles*, No. 2, [1918] 1 Ch. 517 (stock exchange); *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. 276; *Wolstenholme v. Amalgamated Musicians' Union*, [1920] 2 Ch. 389; *McLuskey v. Cole*, [1922] 1 Ch. 7 (union); *Murphy v. Synnott*, [1925] N. Ireland 14; *Clark v. Ferrie*, [1926] N. Ireland 1; *Humphrey v. Wilson*, 25 Brit. Col. 110 (1917); *Toews v. Isaacs*, [1929] 2 D.L.R. (Manitoba) 719; *Henderson v. Kane*, [1924] N. Z. 1073; *Perry v. Fielding Club, Inc.*, [1929] N. Z. 529.

¹³ The validity of a notice terminating employment is often tested by declaratory procedure. *Civil servants*: *Zeigler v. City of Victoria*, 30 Brit. Col. 389 (1921); *Cross v. Commonwealth*, 29 C.L.R. 219 (1921); *LeLeu v. Commonwealth*, 29 C.L.R. 305 (1921); *Trower v. Commonwealth*, 32 C.L.R. 585 (1923), 34 C.L.R. 587 (1924); *Lucy v. Commonwealth*, 33 C.L.R. 229 (1923); *Bradshaw v. Commonwealth*, 36 C.L.R. 585 (1925); *Reynolds v. Attorney General*, 29 N. Z. 24 (1909). *Teachers*: *Martin v. Eccles. Corp.*, [1919] 1 Ch. 387; *Hanson v. Radcliffe U.D.C.*, [1922] 2 Ch. 490; *Sadler v. Sheffield Corp.*, [1924] 1 Ch. 483; *Short v. Poole Corp.*, [1926] 1 Ch. 66; *Fennell v. East Ham Corp.*, [1926] 1 Ch. 641.

¹⁴ *Supra*, note 7.

¹⁵ 108 N.J.Eq. 403, 405, 155 Atl. 373 (1931).

"These cases disclose a serious defect in our judicial system. The owner of land could not ascertain or enforce his rights in the Court of Chancery because the controversy was legal and not equitable; he could not proceed in a court of law because no form of action at law permitted the adjudication of the claims of the parties until after the lien of judgment, if it was a lien, had been transformed into an absolute title. It was to remedy such situations and to provide a method whereby rights and liabilities might be conclusively ascertained in order that the parties could intelligently order their affairs, that the Legislature enacted the Uniform Declaratory Judgments Act, P. L. 1924, p. 312 (Comp. St. Supp. §§ 163-351 to 366)."

It seems hardly doubtful that in England and in other States of the United States, it would have been possible for this vendee, in a single action for a declaratory judgment, to obtain a complete determination of his rights in the light of the cloud created by the judgment creditor's demands.¹⁶

Issues involving title to property may turn on the construc-

¹⁶ Equity will investigate and declare title to land in case of controversies involving the construction of the documents of title, between the parties or those claiming under them. *Thatcher v. G. & M. Concrete Co.*, 100 Cal. App. 424, 280 Pac. 211 (1929) (plaintiff vendor sought a declaration of his interest in a gravel plant which had been consideration for the sale, after defendant vendee had sold it to a third person); *City of Paducah v. Mallory*, 225 Ky. 692, 9 S. W. (2d) 1015 (1928) (grantee sought declaration of existence of dedication to public purpose against heirs of grantor); *Reid v. Reid*, 230 Ky. 835, 20 S. W. (2d) 1015 (1929) (recorded deed did not show interest properly, so second deed was made—grantee of person holding under second deed sought declaration of title against heirs of persons claiming under first deed); *Calvary Presbyterian Church v. Putnam*, 249 N. Y. 111, 162 N. E. 601 (1928) (effect of quitclaim deed to bar reverter sought by grantee against heirs); *Nalley v. First Nat'l Bank of Medford*, 135 Ore. 409, 293 Pac. 721 (1930), 296 Pac. 61 (1931) (grantee under deed sought declaration of title against executor of grantor); *Mullens v. Mullens*, 5 Tenn. App. 235 (1927) (transferee of title held under a will sought declaration of title for purpose of securing a loan); *Master and Fellows of St. Catherine's College, Cambridge v. Rosse*, [1916] 1 Ch. 73 (mineral rights in defendant's land under statute); *Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners*, 36 C.L.R. 230 (1925), 38 C.L.R. 547 (1927) (Crown grantee sought declaration of rights in land reclaimed with consent of Crown); *Cohn v. Cohn*, 56 Nova Scotia 289 (1923) (grantee under lost deed sought declaration of title against heirs).

Equity is equally ready to investigate and declare title to land when the rights of third persons have intervened. *Mortgage situations*: *Whalen v. Strong*, 230 App. Div. 617, 246 N.Y.S. 40 (1930) (mortgagee asked declaration as to the ownership of the mortgagor to protect his interests against judgments and sales to third persons); *In re De Leeuw*, [1922] 2 Ch. 540 (plaintiff beneficiaries under

tion of a deed¹⁷ or a will¹⁸—types of issues ideal for solution by declaration. In the *Hewitt* case in New Jersey, the plaintiff claimed a reverter of title. The land in question had been given to a school board upon trusts for school and educational purposes and was about to be sold to the defendant. The plaintiff alleged that there was a breach of trust and, therefore, a reverter of title to the heirs of the grantor, in which capacity the plaintiff sued. This was denied on the merits. In the *Sternberger* case, the plaintiff executor challenged the defendant's claimed lien upon the estate, contending that the defendant had a lien only upon the eighth interest of one of the devisees. The plaintiff was deemed to have a sufficient interest in the matter to have this issue determined by judgment.

In another dispute arising out of a will the heir claimed that the defendant trustees had no title to the property and asked a declaration that a deed from his mother to her husband was void and that title remained in her until her death, when it passed to her heirs. He was not successful in establishing his case upon its merits, although the form of procedure was not questioned.¹⁹

An interesting case which involved title to property was presented in *Wight v. Board of Education of the Town of Westfield*.²⁰ Here the plaintiff, suing on behalf of himself and "others

a will asked a declaration that a foreclosure held by defendant was not valid against them—granted); *Attorney General v. Baily*, 27 Brit. Col. 305 (1918) (city, holding under defective registration after eminent domain, asked declaration of title against person taking mortgage after defective registration); *Cameron v. Mosely*, 56 Nova Scotia 300 (1923) (mortgagee asked declarations as to fraudulent transfers). *Judgment debtor situations*: *City National Bank & Trust Co. of Miami, Fla. v. Knoxville*, 158 Tenn. 143, 11 S. W. (2d) 853 (1928) (declaration of title sought by judgment debtor against the holder under an unrecorded deed). *Multiple documents of title*: *Wulf v. Fitzpatrick*, 124 Kan. 643, 261 Pac. 828 (1927) (devisee of divorced wife claimed title, which husband denied under divorce decree); *Cavin v. Little*, 213 Ky. 492, 281 S. W. 480 (1926) (effect of grant of rights in property followed by will, sought by remainderman); *Ohio-Kentucky Coal Co. v. Auxier*, 239 Ky. 442, 39 S. W. (2d) 662 (1931) (right to oil and gas under deed reservations); *Dobek v. Jennings*, 23 Alberta 306 (1927) (claim of title by continued possession against transferee of holder of unregistered title); *Waldon v. Rostrevor Estates, Ltd. (In Liquidation)*, 38 C.L.R. 280 (1926) (vendee sought declaration of right to buy and title with notice of his rights against subsequent vendee); *McCrae Mining Co. v. Township of Bucka*, 58 Ont. L. R. 453 (1926) (plaintiff sought declaration that tax deed did not pass title to mining rights)

¹⁷ *Hewitt v. Camden County*, 7 N.J.Misc. 528, 146 Atl. 881 (1929).

¹⁸ *Sternberger v. Tunison*, 92 N.J.Eq. 159, 111 Atl. 309 (1920).

¹⁹ *Hallanan v. Hamilton*, 104 N.J.L. 632, 142 Atl. 27, 346 (1928).

²⁰ *Supra*, note 7.

similarly situated," asked declarations fixing the time at which certain property had vested in the defendant and what liabilities attached to the plaintiff by virtue of an assessment. In February, 1923, at the annual school meeting it was voted to buy the property in question. When the holding company delivered the deed, it was found to contain clauses subjecting the property to an easement and to the duty to pay certain assessments. The defendant borrowed the money to pay for the land. Thereafter the Attorney General ruled that the defendant had not been properly authorized to secure this loan. When an assessment was made against the property for improvements and after the Attorney General had expressed doubts as to the liability of the property for such levies, the plaintiff instituted this action. The court held that the time of vesting of title was a legal question and that certiorari was the method by which the validity of the assessment must be tested, thereby ruling that the plaintiff had come to the wrong court. Assuming that the ambiguities and insufficiencies of the pleadings, which were pointed out by the court, could be cured, it would seem that, so far as English procedure is concerned, a court of equity, confronted with a deed appearing to impose such duties, would readily pass upon the liability for taxes²¹ and

²¹ The view taken by the New Jersey courts in this case finds some support in two decisions on the duty to pay taxes arising under leases in New South Wales. *David Jones Ltd. v. Leventhal*, 40 C.L.R. 357 (1927) (landlord tax); *Prescott v. Perpetual Trustee Co.*, [1928] New South Wales 324 (land tax). It is to be noted, however, that these decisions were not based on like fact situations and carried strong dissents, and that the narrow construction of the statutory provisions for declaratory relief in New South Wales has been subjected to criticism. *Walsh v. Alexander*, 16 C.L.R. 293, 304-5 (1913); *Canonba Rabbit Board v. Goldsbrough, Mort & Co.*, 5 New South Wales Rep. 1, 7-8, 9, 10-11 (1904).

In contrast to this view, one party to a contract has been allowed to seek a declaration as to the duty to pay taxes imposed by the contract. *Leases*: *Bodega Co. Ltd. v. Read*, [1914] 2 Ch. 283, 757 (deductions for increase in license fee); *In re Salter and Awdry's lease*, [1921] 2 Ch. 141 (tithes); *Banner Coal Co. v. Gewais*, 18 Alberta 535, 545 (1922) (special case to determine statutory duty to pay school tax); *Henderson v. Gurr*, 32 N. Z. 785 (1913) (rates). *Employment contracts*: *Meek v. Port of London Authorities*, [1918] 1 Ch. 415, [1918] 2 Ch. 96 (income tax on salary). The declaration is also used to establish tax exemption by reason of the use of the property as against the taxing unit. *President, etc., of the Shire of Nunawading v. Adult Deaf and Dumb Society of Victoria*, 29 C.L.R. 98 (1921) (charitable purposes); *Wellington Harbour Board v. Union Steamship Co. of New Zealand*, 32 N. Z. 766, 33 N. Z. 442 (1913) (liability for wharf rates of ships which carried mail for only a portion of their trip); *Public Trustee v. Hutt River Board*, 34 N. Z. 753 (1915) (property acquired by the Crown through foreclosure); *Perpetual Trustees, Estate & Agency Co. v. Mavor etc. of the City of Dunedin*, 34 N. Z. 877 (1915) (part of the building

the time at which title had vested,²² as incidents of the construction of the deed.

Important questions involving the construction of contracts have come up for consideration. New Jersey courts have permitted the use of the declaration to establish the continued existence of disputed contractual duties.²³ In one case the plaintiff city had contracted for its water supply with a third company which by contract supplied the defendant company. Later the plaintiff secured the assignment to itself of the contract—an act which, the defendant contended, relieved the defendant of further obligation—and the defendant gave notice of termination. The declaration which the plaintiff secured on the merits prevented a rupture of the economic fabric of the contract, whereas, had the issue been raised after breach, it might not have been possible to patch up again the sundered

used for religious purposes); *Public Trustee v. Chairman, etc., of the County of Waipawa*, [1921] N. Z. 1104 (property left to Crown under will); *Mayor, etc., of Stratford v. The King*, [1926] N. Z. 316 (property owned by the Crown but under lease to administrative agent); *Re Assessment of Halifax Branch of Navy League of Canada*, 59 Nova Scotia 212 (1927) (continued exemption when charitable work was taken over); *Hodge v. City of Moose Jaw*, 19 Sask. 369 (1925) (part of building used for religious purposes). It may also be used to determine tax questions arising upon the administration of an estate. In *re Succession Duty Act and Inverarity*, 33 Brit. Col. 318 (1924); *Fowkes v. Minister of Finance*, 38 Brit. Col. 395 (1927) (succession duty on stock); *Daly v. State of Victoria*, 29 C.L.R. 491 (1921) (gifts under a will); *Erie Beach Co. v. Attorney General*, [1929] 2 D.L.R. 754, [1930] 1 D.L.R. (Ontario) 859 (death duty on stock). It may even be used to challenge the validity of the taxing statute. *Mason v. City of Victoria*, 26 Brit. Col. 418 (1917) (ordinance invalid, therefore assessment on plaintiff's property void); *Little v. Attorney General*, 30 Brit. Col. 343, 31 Brit. Col. 84 (1922) (liquor tax); *Universal Film Mfg. Co. v. New South Wales*, 40 C.L.R. 333 (1927) (*ultra vires* income tax); *Shilleto Drug Co. v. Hanna*, [1931] 3 D.L.R. (Alberta) 567 (invalid ordinance); *McLeod v. City of Windsor*, 52 Ont. L. R. 562 (1922) (income tax).

The propriety of the use of the declaratory judgment in such cases has been commented upon in *Canadian Northern Pacific Ry. v. City of Vernon*, 26 Brit. Col. 222, 225 (1918); *Bowman v. Attorney General*, 38 Brit. Col. 1, 2 (1926) (probate duties on realty).

²² Tax cases may turn upon the time when title vested or was divested and equity will determine such questions. *Vaughan v. Attorney General*, 20 Alberta 924 (1924) (tax exemption claimed on the ground that deceased no longer owned the property but had sold it, the title being held in escrow pending payment); *Granby Consolidated Mining, Smelting & Power Co. v. Attorney General*, 31 Brit. Col. 262 (1922) (time when right to make certain tax deductions expired); *Attorney General for Ontario v. National Trust Co.*, [1931] 1 D.L.R. 354, [1931] 2 D.L.R. 712, [1931] 3 D.L.R. (Ontario) 689 (date of gift for purposes of succession duty).

²³ *Mayor and Council of Bayonne v. East Jersey Water Co.*, 108 Atl. 121 (N.J. 1919).

relations; the plaintiff's rights were stabilized and protected against the defendant's claim of the right to repudiate.

A somewhat similar case involving the construction of corporate rules has also arisen in New Jersey.²⁴ When the plaintiff assembly was admitted to the convention by the defendant association, a by-law was passed requiring an assembly to have twenty-five members in order to send delegates to the convention. Prior to the plaintiff's joining, the defendant had permitted assemblies to send delegates whether or not they had twenty-five members. It was held that the plaintiff had been admitted upon different terms and that the defendant could not change its contract with the original assemblies without affecting vested rights,²⁵ and the defendant received declarations to that effect. Here again, in making disputed relations certain, the declaratory judgment served a pacific and stabilizing purpose.

Contracts for the sale of land offer a peculiarly delicate problem for declaratory procedure. The rock upon which negotiations often split is the marketability of title. Without regard to the sale situation, the declaratory judgment has been adopted in American practice as the practical way of establishing the existence²⁶ or non-existence²⁷ of restrictive covenants or the

²⁴ *St. John's Baptist Ass'n v. Ukrainian National Ass'n*, 105 N.J.Eq. 69, 146 Atl. 886 (1929).

²⁵ Further consideration of the use of the declaratory judgment in case of problems concerning the effect on vested rights of changes in by-laws will be found in *United Order of Forresters v. Miller*, 178 Wis. 300, 190 N. W. 198 (1922) (insurance, corporation claimed that rights were not vested); *Grainger v. Order of Canadian Homes Circles*, 31 Ont. L. R. 461, 33 Ont. L. R. 116 (1914) (beneficiary sought declaration that by-laws affecting his vested rights were invalid—injunction denied but declaration given).

²⁶ *Bristol v. Woodward*, 251 N. Y. 275, 167 N. E. 441 (1929). See also *Mayner v. Payne*, [1914] 2 Ch. 555; *Ives v. Brown*, [1919] 2 Ch. 314.

²⁷ *Hess v. Country Club Park*, 296 Pac. 300, 2 P. (2d) 782 (Cal. 1931) (lapse of restriction by change of neighborhood); *Village of Grosse Pointe Shores v. Ayres*, 254 Mich. 58, 235 N. W. 829 (1931) (conditions imposed by defendant as to water systems, etc., were alleged to be void); *Voegler v. Alwyn Improvement Co.*, 247 N. Y. 131, 159 N. E. 886 (1928), rev'g 220 App. Div. 829, 222 N.Y.S. 918 (1928) (restrictions in deed creating an easement in favor of defendant were not enforceable—denied on merits); *Evangelical Lutheran Church v. Salem*, 254 N. Y. 161, 172 N. E. 455 (1930) (plaintiff's right to build a church in a restricted neighborhood, only one landowner objecting); *McCarter v. New Rochelle Homestead Co.*, 139 Misc. 672, 249 N.Y.S. 23 (1931) (defendant vendor who was no longer a property owner in the neighborhood, no longer had an interest in enforcing restrictions as to residential use—granted); *Barmack v. Barwick*, 8 D. & C. 479 (Pa. 1927) (plaintiff seller relieved his own doubts, the fears of a title guaranty company and the refusal of defendant purchaser to take

validity of proposed action with respect to land subject to restrictions.²⁸ When, however, a prospective purchaser refuses to take title because of objections to restrictions, *etc.*, and the contract is in danger of irreparable violation, the use of the declaratory judgment is not so well established in the United States as it is in England.²⁹ In *Di Fabio v. Southard*,³⁰ the holder of the land subject to restrictive covenants found that his prospective purchaser would not take because of an alleged violation of the rules as to the building line. He secured waivers from the original grantor and from all but one of the holders of the restricted land. He then sued the dissenter for a declaration that there was no violation of the restriction. The court dismissed the bill on the ground that he was not entitled to relief because he had no rights against the defendant, and pointed out that his remedy was specific performance against the purchaser. Under the English procedure just mentioned, the plaintiff could have had his relief, so far as the procedural question was concerned, by joining as parties defendant the dissenting landowner and the reluctant purchaser in a suit for a declaration of the state of the title. In a parallel case involving encroachment upon an alleged public way, in upholding declaratory

by declaratory judgment that an 1814 covenant restricting types of buildings to be erected was personal and did not run with the land).

²⁸ One and Three William Street Building Co. v. Gardens Corp., 133 Misc. 790, 233 N.Y.S. 473 (1929), 232 App. Div. 58, 248 N.Y.S. 743 (1931); *Garden v. Lancaster County*, 290 Pa. 448, 139 Atl. 154 (1927); *Brown v. Levin*, 295 Pa. 530, 145 Atl. 593 (1929); *Hoffman's Petition*, 7 D. & C. (Pa. 1926).

²⁹ Questions of construction, which do not deny the existence or validity of the contract and which arise on points of law disputed between the vendor and purchaser alone, are heard under vendor and purchaser summons under the Law of Property Act 1925, § 49 (15 Geo. V, c. 20), which was based upon the earlier statute 37 & 38 Vict. c. 78, § 9 (1874). When third persons are in a position to question title, the procedure is by originating summons for a declaration of title, joining such other persons in interest. See *In re Nichols' and Von Joel's Contract*, [1910] 1 Ch. 43, 101 L.T.R. 839; DANIELL, *CHANCERY PRACTICE* (8th ed. by S. E. Williams and F. Guthrie-Smith, London, 1914) II, 1936-1941; MARCY AND DODD, *THE LAW AND PRACTICE APPERTAINING TO ORIGINATING SUMMONS* (London, 1889) 173-177.

Such situations have been solved by declaratory judgments in the following cases: *Kraft's Appeal*, 303 Pa. 1, 154 Atl. 19 (1931) (subject to a mortgage, suit between mortgagee who is selling and mortgagor); *Barmack v. Barwick*, 8 D. & C. 479 (Pa. 1927); *In re Morel and Chapman's contract*, [1915] 1 Ch. 162 (charges under a will); *Re Toronto General Trusts Corp. and Crowley*, [1928] 4 D.L.R. 609 (effect of restrictive covenants as to the nature of buildings made in prior grants).

³⁰ 106 N.J.Eq. 157, 150 Atl. 248 (1930).

relief, the court said:³¹

"In an action for specific performance as between a vendor and purchaser the Court was compelled to determine the validity of the vendor's title, and so pass it on, even to an unwilling purchaser, without any binding decision protecting the purchaser from subsequent litigation with a possible claimant. Upon the passing of the Vendor and Purchasers Act the same practice prevailed under its provisions. It merely simplified the procedure as between the vendor and purchaser, and left the situation substantially the same. To obviate this, Rule 602 was enacted, providing that 'when upon an originating notice under the Vendor and Purchasers Act it appears that some third person is or may be interested in the question raised, the Court may require notice to be given to such person so that the question may be determined not only as between vendor and purchaser, but as to bind such third person.'

"Since the passing of this Rule the practice has been to give notice to all adverse claimants, so that the purchaser is protected not merely by the opinion of the Court as to the state of title, but by a decision binding upon the adverse claimants, so that, whether a decision is right or wrong, the matter becomes *res judicata*, and the purchaser is completely protected."

The imperfections of specific performance in such situations have been clearly recognized in a recent New Jersey decision.³² The declaration secured upon a suit for a declaration of title in which the parties to the contract and all adverse claimants are joined fixes the question of title beyond all possibility of question and does so in a single suit.

In so far as the court in the *Di Fabio* case held that the plaintiff had no present right against the defendant, the deci-

³¹ Re Goldenberg and Glass, 56 Ont. 414, 417 (1925).

³² Brezinski v. Breves, 109 N.J.Eq. 206, 156 Atl. 429 (1931). Here an executor vendor sought specific performance. The defense was bad title, on the ground that the will did not give a power to sell. Before dismissing the bill, the court remarked: "The only parties to this suit are the executors and the vendee. No one claiming an interest in the real state under the will can be concluded by a decree in the cause; and therefore there should not be a decree for specific performance unless the power of sale is so clear that it cannot be plausibly contested in another action."

sion turned largely upon the conclusion reached in *Tanner v. Boynton Lumber Co.*³³ In that case the defendant had secured a judgment on a mechanic's lien on the plaintiff's property and against the contractor who had built for the plaintiff. The defendant held security from the contractor. The plaintiff sought a declaration that the defendant be required first to look to the security obtained from the contractor and that he be subrogated to the rights of the defendant against the contractor. In denying the relief asked, the court held that the defendant creditor was entitled under statute to an election as to the property against which to take execution on his judgment and that the plaintiff was not yet in a position to ask relief against the creditor, and would not be until he was forced to pay the judgment. But if there had been an actual or potential demand from the creditor which the debtor felt unwarranted, the declaratory judgment should be at his service to relieve his anxiety and uncertainty by determining the exact extent of his obligation to his creditor. This type of case is not unknown.³⁴ Whether the right had already been determined in the suit on the mechanic's lien is an independent question, but the issue whether the plaintiff was subrogated to the rights of the defendant

³³ 98 N.J.Eq. 85, 129 Atl. 617 (1925).

³⁴ *Mortensen v. Johnson*, 110 Conn. 221, 147 Atl. 705 (1929) (plaintiff contractor sought a declaration against his subcontractor for a determination of their liability for the satisfaction of a compensation award and liabilities for future payments for the death of a laborer—granted); *In re Rogerstone Brick & Stone Co., Ltd.*, [1919] 1 Ch. 110 (plaintiff creditor sued for a declaration of his rights of priority. Defendant R, lessee with power to build, issued eight debentures to secure building funds, which were secured by all property except book debts, and agreed not to grant any priorities. Plaintiff held one of these debentures. When these funds proved insufficient, with the consent of seven debenture holders, defendant R mortgaged the property, which mortgage was later assigned to B, one of the debenture holders. On bankruptcy, the receiver sold some of the property and had agreed with B as to its distribution, when plaintiff began this action. Dismissed); *McCullough v. Marsden Estate*, 14 Alberta 94 (1918) (plaintiff, whose trust funds were used to pay off a mortgage, sued to determine rights in land. The land had been held originally by F and S, subject to one mortgage. F transferred to S, who imposed another mortgage. After the death of F and S, F's executors secured a declaration that F had a half interest in the land, which was to be treated as a lien. Plaintiff had sued S's administrator and had been subrogated to the position of the mortgagees. Plaintiff then sought determination of priorities between the lien and the rights he received); *Dominion Iron & Steel Co. v. Canadian Bank of Commerce*, [1928] 1 D.L.R. (Nova Scotia) 809 (plaintiff debtor had issued two sets of debentures and had given defendant N, also a debenture holder, personalty to secure advances. The receiver had sold securities and was ready to pay advances, when plaintiff sought a determination of priorities. The court remarked, "The plaintiff corporation is thus directly interested in having the question of priorities determined.")

against the contractor seems hardly future or uncertain, for the plaintiff, like any surety, had a present interest in knowing his legal relations to the defendant and the contractor, even though the money amount could only be determined subsequently.³⁵

Two interesting cases arising out of conflicting claims under a mortgage were decided in *Calverley v. Ventnor Building & Loan Association*³⁶ and *Baumann v. Naugle*.³⁷ In the former the plaintiff mortgagor asked a declaration that a purchaser had, by purchase on execution of judgment against the mortgaged property, assumed the mortgage debt to the defendant. The plaintiff sought to escape liability to the defendant by seeking a judicial declaration of the liability of a third person—a use to which the declaratory judgment has frequently been put.³⁸ In the latter case McVoy had contracted to buy land from Baumann. After his agreement to assign this contract to the plaintiff, McVoy assigned to his wife. Then Baumann refused to complete the contract by conveyance and conveyed to his own wife, the defendant, who, in turn, sold to Cooley, taking back a purchase-money mortgage. Mrs. McVoy sued the Baumanns and Cooley for specific performance and secured a decree which was recorded. Cooley never conveyed. The plaintiff thereafter instituted this suit for specific performance against the McVoys and Mrs. Baumann. Mrs. Baumann filed a cross-bill alleging that the sums owing under the mortgage were due and unpaid and asked a determination of her

³⁵ *A. E. Joy Co. v. New Amsterdam Casualty Co.*, 98 Conn. 794, 120 Atl. 684 (1923); *Town of Greece v. Murray*, 130 Misc. 55, 223 N.Y.S. 606 (1927).

³⁶ 107 N.J.Eq. 214, 151 Atl. 609 (1930); rev'g 105 N.J.Eq. 159, 147 Atl. 33; (1929).

³⁷ 96 N.J.Eq. 183, 125 Atl. 489 (1924); aff'd 97 N.J.Eq. 110, 127 Atl. 263 (1925).

³⁸ *Cloverdale Union High School District v. Peters*, 88 Cal. App. 731, 264 Pac. 273 (1928) (plaintiff sought to establish that defendant had no right to claim salary under an alleged contract); *Kendall v. San Pedro Lumber Co.*, 98 Cal. App. 242, 276 Pac. 1042 (1929) (plaintiff trustee sought to establish that he did not owe a certain creditor a certain sum); *Redebiaktiebolaget Argonaut v. Hani*, [1918] 2 K. B. 247 (plaintiff sought to establish that defendant, an alleged undisclosed principal, had no standing or claim); *In re North Eastern Insurance Co.*, [1919] 1 Ch. 198 (receiver sought to establish the non-existence of certain claims pressed by debenture holders, on the ground that they were invalid); *St. Catherine v. H.E.P. Commission*, [1928] 1 D.L.R. 598, [1928] 3 D.L.R. 200, [1930] 1 D.L.R. (Ont.) 409 (plaintiff sought to establish that it was under no duty to pay defendant road builders); *Wellington City Corp. v. Compton*, [1916] N. Z. 779 (plaintiff sought to establish that it was under no duty to compensate defendant for improvements).

rights under the mortgage. The court dismissed the cross-bill on the ground that the pleadings presented no question of construction of any written instrument and that the proper procedure was a foreclosure action, pointing out that the pleadings did not set forth a claim against the property as held by the defendants. But for the defects of pleading, the defendant should have been able by declaratory relief to secure a decision upon the validity of her mortgage and the rights and duties arising under it.³⁹

Leases have come up for construction in *McCrory Stores Corporation v. S. M. Braunstein*,⁴⁰ and *Union Trust Co. v. Goerke*.⁴¹ In the former case the plaintiff lessee was bound by a clause in the lease to pay the increase in taxes on and after October 27, 1920. Plaintiff contended that this meant any

³⁹ The duty of a transferee to pay the mortgage has been defined by declaratory judgment. *MacClintock v. Frame*, 98 Cal. App. 338, 276 Pac. 1033 (1929) (mortgagor sought a declaration of obligations of his transferee as to mortgage); *Kraft's Appeal*, 303 Pa. 1, 154 Atl. 19 (1931) (mortgagees who had exercised right of sale were in doubt as to whether certain encumbrances were discharged); *Moore v. Oyer*, 21 Northampton 345 (Pa. 1928) (declaratory procedure held the proper method for settling priorities in advance of sale); *Trusts & Guarantee Co., Ltd. v. Monk*, 21 Alberta 151 (1924) (mortgagee sued, by special case); *Perpetual Trustees, Estate and Agency Co. of New Zealand v. Elworthy*, [1926] N. Z. 621 (plaintiff, who was the trustee succeeding the administrator who had agreed to a renewal of a mortgage, sought to determine whether the renewal bound him—the property was estate property). In *Kraft's Appeal*, *supra*, 6-7, the court remarked: "So, also, if there is a real doubt as to the encumbrances which will be discharged by the sale, the matter ought to be determined preliminarily, when reasonably possible, as usually may be done by a proceeding under the Declaratory Judgments Act."

The declaration may also be used to establish the status of the mortgage. In *re Monolithic Bldg. Co.*, [1915] 1 Ch. 643 (first mortgagee sought to establish priority for his mortgage, which, through error, had not been registered); *Ipswich Permanent Money Club Ltd. v. Arthy*, [1920] 2 Ch. 257 (second mortgagee sued to establish his right to payment as against an estate, an expectancy in which had been mortgaged—the first mortgage being undisclosed); *Beamish v. Whitney*, [1908] 1 Ir. R. 38 (representatives of the mortgagee sought to have it declared that a mortgage was valid and subsisting—denied because the case turned on facts); *Wallace v. Fogarty*, [1926] Ir. R. 255 (mortgagee sought declaration of the validity of the mortgage); *Heavener v. Loomis*, 34 C.L.R. 306 (1924) (solicitor who had paid judgment for client sought declaration that he was entitled to the benefit of a mortgage given by his client to the plaintiff in that suit, now defendant); *Graham v. Hammill*, 35 Manitoba 510 (1926) (plaintiff sought a declaration that he had an equitable charge in defendant property); *Nuku v. Phillips*, [1920] N. Z. 446 (mortgagor sought declaration of the invalidity of a mortgage or alternatively his right to redeem); *Mortleman v. Public Trustee*, [1927] N. Z. 642, [1928] N. Z. 337 (mortgagee sued mortgagor to discover the effect of his sale of the equity of redemption and then an agreement to renew).

⁴⁰ 102 N.J.L. 590, 134 Atl. 752 (1926).

⁴¹ 103 N.J.Eq. 159, 142 Atl. 560 (1928), *aff'd* 105 N.J.Eq. 190, 147 Atl. 439 (1929).

assessment made after October, 1920, while defendant held that it meant taxes falling *due* after that date. The Court of Errors and Appeals passed on the constitutionality of the Declaratory Judgments Act. In upholding its constitutionality, agreeing in this respect with the highest courts of sixteen other states⁴²—in the rest constitutionality has not been questioned—the court relied upon an earlier case, involving in fact not a declaratory judgment, but in effect an advisory opinion, a device quite different.⁴³ It is perhaps unnecessary to quarrel with a correct result, even if it is reached on inappropriate grounds. In the *Union Trust Co.* case the executor of one of the lessors sought declarations as to the duty to remove encroachments, restoration of the building, and construction of the terms of the lease. The lease provided that there should be connections between buildings. Defendant lessees had placed numerous connections between the buildings, which, plaintiff contended, were in excess of the lease permission. The court granted on the merits all the prayers except that requesting the determination of a forfeiture. This was denied on the ground that law alone could give such relief. It is unfortunate that one of several prayers was singled out for denial because it was legal in character. The grant of the other prayers doubtless adequately determined the issue but it may be observed that English courts of equity have granted declarations to the effect that particular acts constituted forfeiture.⁴⁴

⁴² See Borchard, *The Constitutionality of Declaratory Judgments* (1931) 31 COL. L. REV. 561. Since that article was published, the constitutionality of the declaratory judgment has been upheld in the following cases: *Lynn v. Kearny County*, 121 Neb. 122, 236 N. W. 192 (1931); *Faulkner v. City of Keene*, 155 Atl. 195 (N.H. 1931); *Holly Sugar Corp. v. Fritzler*, 42 Wyo. 446, 296 Pac. 206 (1931).

⁴³ *In re Public Utility Board*, 83 N.J.Eq. 303, 84 Atl. 706 (1912). For criticisms, see Borchard, *op. cit.* 574-6.

⁴⁴ In describing the relief which could be granted if the lessee refused to accept the tender of the building erected to take the place of the building destroyed by fire, in *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 525, 140 Atl. 506 (1928), Chief Justice Moschzisker said: "Lessor can also have a further declaration as to its rights consequent upon a refusal by defendants to accept the kind of building tendered; and this latter declaration must be, as found by the court below, that the lease is at an end and plaintiff can repossess itself of the demised premises."

In a like manner, in construing leases, particularly in actions for possession and declaration of forfeiture, Chancery courts have been willing to give declarations as to forfeiture. *Ewart v. Fryer*, [1901] 1 Ch. 499, [1902] A. C. 187 (in this case, Kekewich, J., said, [1901] 1 Ch. 499, 507: "I do not feel that evidence

The existence of an easement was determined by the construction of deeds in the case of *Renwick v. Hay*.⁴⁵ Plaintiff and defendant, owners of adjoining land, got into a dispute over the right to use certain rights of way over the land. The right was referred to in the many transfers in which the land had been involved. On the defendant's motion to strike out the bill in equity brought by the plaintiff, which was in the nature of a bill of peace, the court held that there was no precedent for it in equity but that, in view of the lack of remedy at law and in view of the Act of 1915, the court had jurisdiction to consider it. In the course of its remarks upon this statute, the court said:⁴⁶

"The chancellor drew attention to the fact that the statute provides that it should be liberally construed, and that what the legislature meant by 'a right cognizable in a court of equity,' in his judgment, was a right over which, in and of itself, the court had jurisdiction and that it was intended that the jurisdiction should be exercisable where the right was present, although an accompanying circumstance, the presence of which theretofore alone permitted the right to be heard, was absent . . . The right asserted by the complainant is, I think, one cognizable in equity within the meaning of

is sufficiently plain on that point [fair rent], and I must refer it, and declare that the plaintiffs are entitled to recover as on forfeiture"); *Edwards v. Fairview Lodge*, 28 Brit. Col. 557 (1920) (lessor sued—the lease contained a covenant against use of premises as a dance hall, which the lessor claimed had been breached); *Re McKay*, 51 Ont. 86 (1921) (lessor sued—lease contained a provision for forfeiture in case of bankruptcy. During the term, the lessee became bankrupt and a trustee took over the property. Lessor had notice and had accepted rent. When the lessee and the trustee requested permission to assign the remainder of the term, lessor refused and began this action in bankruptcy); *Mulcahy v. Hoyne*, 36 C.L.R. 41 (1925) (lessor's assignee secured, on counter-claim, a declaration that the lease had been determined, on the ground that the lessor had lost his liquor license in violation of a lease covenant); *Liddle v. Rolleston*, [1919] N. Z. 408 (negative declaration for defendant lessee on counter-claim in suit on lease containing a special clause regulating lessor's right to terminate); *Puhi Maihi v. McLeod*, [1920] N. Z. 372 (lessor sued to establish forfeiture through breach of covenant to repair); *Ripeka Te Peehi v. Hutchison*, [1921] N. Z. 758 (lessor sued to establish breach of covenant of title, on the ground that lessee had contested title by suing on a claim to timber-cutting royalties).

The same has been true in cases involving the forfeiture of realty received under a conditional gift in a will. In *re Haynes*, 37 Ch. D. 306 (1886); In *re Gibbons*, [1919] 2 Ch. 99, [1920] 1 Ch. 372; In *re Wilkinson*, [1926] 1 Ch. 842; *Walcot v. Botfield*, 2 Eq. R. 758, 69 Eng. Repr. 226 (1854); *McQuade v. Morgan*, 39 C.L.R. 222 (1927); In *re Andrews*, [1911] N. Z. 43.

⁴⁵ 90 N.J.Eq. 148, 106 Atl. 547 (1919).

⁴⁶ *Ibid.* at 156-8.

the statute. Equity has jurisdiction to settle conflicting rights in common easements . . . It likewise has jurisdiction to settle title, and to ascertain the extent of a legal right and enforce or protect it, in a manner not obtainable by legal procedure . . . The ultimate relief asked for by complainant in this suit can be obtained only in this court. If, before this court can act, there must be a jury trial, then adequate provision is made therefor in section 8. In the instant case, although proceedings cannot be brought at law to settle the title because the facts which would warrant such an action are not present, yet, under the provisions of section 8, notwithstanding the absence of the facts which would give a court of law original jurisdiction, an issue may be made up and sent to law for determination, and upon the coming in of the judgment at law, upon the issue made up in this court, this court may proceed to give the equitable relief appropriate. I am not determining that this case is one requiring a jury trial. If this court may act under its ordinary jurisdiction, then it seems to me that, there being no method by which the rights of the parties can be settled at law under the ordinary practice, the court may proceed without a jury trial."

The relief which the court here supports has met elsewhere with approval both in the assertion⁴⁷ and the denial⁴⁸ of easements.

A contract for the sale and installation of heating apparatus in a house contained a clause by which the purchaser, in the event of the seller's assignment of the contract, waived his de-

⁴⁷ *Kowalski v. Mather*, 112 Conn. 594, 153 Atl. 168 (1931) (declaration sought of the nature and extent of the user); *Cory v. Davis*, [1923] 2 Ch. 95; *Swan v. Sinclair*, [1924] 1 Ch. 254; *Sorensen v. Young*, 27 Brit. Col. 335 (1919); *Hogg v. Low*, [1928] 4 D.L.R. 315, [1929] 3 D.L.R. (Sask.) 725; *Freeman v. Township of Camden*, 41 Ont. 179 (1917); *Nantais v. Pazner*, 59 Ont. L. R. 318 (1926); *Carpet Import Co. v. Beath & Co.*, [1927] N. Z. 37; *Bevan v. Tatum*, [1927] N. Z. 909.

⁴⁸ *Merino v. Fish*, 112 Conn. 557, 153 Atl. 301 (1931) (injunction and declaration of plaintiff's rights sought by defendant); *Hansford v. Jago*, [1921] 1 Ch. 322; *Long v. Gowlett*, [1923] 2 Ch. 177; *South Eastern Ry. Co. v. Cooper*, [1924] 1 Ch. 211 (use claimed to be restricted to agricultural use); *Clark v. Barnes*, [1929] 2 Ch. 368; *Yandama Pastoral Co. v. Mundi Mundi Pastoral Co.*, 36 C.L.R. 340 (1925); *Dabbs v. Seaman*, 36 C.L.R. 538 (1925).

fenses against the assignee, especially by reason of defective installation. A purchaser of such apparatus, payable by instalments, having been notified of such assignment by the seller and realizing that if he defaulted in an instalment, the whole balance due would become at once payable, brought an action against assignor and assignee before the next instalment date for a declaration that the waiver of his defenses against the assignee was invalid as against public policy. Judge Eldredge in the Supreme Court for Camden County assumed jurisdiction over this action by way of anticipatory defense and held the waiver enforceable.^{48a} The device of debtor suing creditor to avoid peril is not uncommon.^{48b}

Statutes. In several cases the plaintiffs have been in doubt as to their own, or the defendant's, powers under statutes or ordinances, and have sought to clarify the legal position by seeking declarations against the challenging defendants. In *Town of Kearny v. Mayor, etc., of the City of Bayonne*⁴⁹ the defendant had agreed to furnish water to the other defendants—a ship building corporation and a blast furnace company, both residents in the plaintiff city. The defendant had secured its water system by purchase from the New York and New Jersey Water Company, including the private rights of way and buildings in the plaintiff city. The plaintiff had had a contract with this company for its water supply, a contract which made reservations of the right to supply certain other consumers. In order to supply these new consumers, the defendant had altered the existing pipe lines. The plaintiff then denied the right of the defendant to make such contracts without its consent. In remarking upon the right to a present determination although the contract between the defendants did not call for immediate execution, the court said:⁵⁰

“Aside now from the provisions of this act I think that Kearny is entitled now to an injunction to prevent Bayonne from furnishing the inhabitants of Kearny with water, although Bayonne does not intend to com-

^{48a} *Elzey v. Ajax Heating Co.*, N. J. Advance Reports, v. 10, pamphlet 13, p. 281, 158 Atl. 851 (1932).

^{48b} Borchard, *Judicial Relief for Peril and Insecurity* (1932) 45 HARV. L. REV. 793, 832.

⁴⁹ 90 N.J.Eq. 499, 107 Atl. 169 (1919).

⁵⁰ *Ibid.* at 503.

mence until December, 1920, if, in fact Bayonne has no such rights. Bayonne has clearly indicated what she intends doing. I think this is a case in which it is eminently proper that the rights of the parties should be fixed at this time. The respondent Bayonne ought not to be permitted to enter into transactions involving the expenditure of the moneys without a determination of its challenged rights. The extent to which the English courts have gone in entertaining bills to declare rights is indicated by the article published in the New Jersey Law Journal, vol 42, p. 102, pamphlet April, 1919. This court has construed its powers under the Chancery Act of 1915 to declare rights liberally. *Renwick v. Hay*, 90 N. J. Eq. 148; *Re Ungaro*, 88 N. J. Eq. 25; *Trenton Trust and Safe Deposit Co. v. Cook*, 88 N. J. Eq. 516."

It is proper to observe that courts may often find lacking one or more of the technical grounds upon which injunctions are conditioned, but may nevertheless issue a declaration, which serves fully to clarify the legal position, thus constituting a conclusive determination of the rights of the parties. That is all the warning they need, for to defy a declaratory judgment knowingly is to invite disaster.⁵¹ The remedy available in case of breach of its authority by an administrative authority has been tersely defined by the High Court of Australia, as follows:

"The right of the plaintiffs to sue was challenged; but if a public body transgresses its statutory powers the Attorney General on behalf of the public, whether private injury has been alleged or not, has the right to complain and to obtain a declaration to that effect and *if necessary an injunction.*"⁵² (*Italics supplied.*)

⁵¹ *Erwin Billiard Parlor v. Buckner, Sheriff*, 156 Tenn. 278, 300 S. W. 565 (1927); *Evans v. Manchester, Sheffield & Lincolnshire Ry.*, 36 Ch. D. 626 (1887); *London Association of Shipowners, etc. v. London & India Docks*, (C. A.) [1892] 3 Ch. 242; *Attorney General v. Guardians of the Poor of Merthyr Tydfil Union*, (C. A.) [1900] 1 Ch. 516; *Deep Creek Gold Dredging Co. v. Gympie Quartz Crushing Battery Co.*, 8 Queensland L. J. 131 (1897).

⁵² *Commonwealth v. Australian Commonwealth Shipping Board*, 39 C.L.R. 1, 8 (1926). Plaintiff administrative body has been allowed to seek declarations of the invalidity of administrative regulations or of statutes against another administrative body. *Guardians of the Poor of Gateshead Union v. Durham County Council*, [1918] 1 Ch. 146 (exclusion from school of certain children

In *Trenton Saving Fund Society v. Wythman*⁵³ the plaintiff corporation desired to determine its legal status under certain appointments made by depositors in view of a statute. By its charter the plaintiff was authorized to keep a book in which depositors were to enter the names of persons who were to inherit in the event of the depositor's death. Thereafter the Wills Act was passed, containing no general or special repealer. Defendants were the heirs of the depositors, who did not appear, and the Attorney General, who did not answer and who was adjudged an unnecessary party. The case was decided upon its merits and the plaintiff was enabled to proceed securely without fear of challenge by depositors or by the State. The question of the effect of subsequent statutes upon corporate powers is not one to be lightly dismissed, and the wholesome effect of a judgment which defines the scope of the change *before* any of the interested parties have altered their position to their detriment is clear.⁵⁴

from cottages maintained by plaintiff); Attorney General v. Guardians of the Poor Law Union of Tynemouth, [1930] 1 Ch. 616 (resolution cancelling loans which had been made upon promise of repayment and which had been partly paid); Attorney General for Queensland v. Attorney General for Commonwealth, 20 C.L.R. 149 (1915) (invalidity of a federal statute taxing leasehold estates); Commonwealth v. Queensland, 29 C.L.R. 1 (1920) (state income tax statute); Victoria v. Commonwealth, 38 C.L.R. 399 (1926) (federal road aid statute); Commonwealth v. South Australia, 38 C.L.R. 408 (1926) (invalidity of state statute taxing oil production and sale); Attorney General for Ontario v. Attorney General for Canada, [1931] D.L.R. 297 (certain provisions for licenses under the Insurance Act, 1927). Contracts made by administrative bodies have been construed by declaratory judgments sought by other administrative bodies. Attorney General v. Ealing Corp., [1924] 2 Ch. 545 (no right to make a contract concerning its plant); Commonwealth v. Australian Commonwealth Shipping Board, 39 C.L.R. 1 (1926) (defendant's authority to contract); Mayor, etc., of Miramar v. The King, 28 N. Z. 727 (1909) (effect of provision in contract between plaintiff and Wellington Harbour Board as to plaintiff's power to do certain things); Petone Borough v. Lower Hutt Borough, [1918] N. Z. 844 (power to vary contract prices). For detailed discussion of the use of the declaratory judgment in such situations, see W. Ivor Jennings, *Declaratory Judgments Against Public Authorities in England* (1932) 41 YALE L. J. 407.

⁵³ 104 N.J.Eq. 271, 145 Atl. 462 (1929), rev'd 106 N.J.Eq. 93, 148 Atl. 662 (1930).

⁵⁴ *Bartlett v. Lily Dale Assembly*, 139 Misc. 338, 249 N.Y.S. 482 (1931) (subsequent regulation of voting, etc.); *In re Windermere District Gas & Water Act 1862 to 1928*, [1931] 1 Ch. 558 (payment due on preferred stock upon winding up); *Merritt v. Niagara, St. Catharines & Toronto Ry.*, [1931] 1 D.L.R. 371, [1931] 2 D.L.R. 161 (continued existence of a franchise); *Currie v. Harris Lithographing Co.*, 40 Ont. 290 (1917) (constitutionality of a state statute on extra-provincial corporations, right to hold land); *Kircaldie v. Bank of New Zealand*, 33 N. Z. 737 (1913) (shareholder's rights, especially with regard to new stock).

Statutes regulating union churches in Canada presented several cases of this

A less complicated fact situation on the construction of a statute was presented in *In re Freeholders of Hudson County*.⁵⁵ There the plaintiffs sought to secure a declaration of the unconstitutionality of a statute regulating elections, on the ground that it deprived the qualified voters of their constitutional right to vote. The court questioned the applicability of the declaratory judgment statute in cases "where the end sought to be attained concerns the invoking of the power of this court to declare a legislative enactment unconstitutional by means of an advisory opinion, or by a judgment declaring what the prospective rights of individuals are under the assailed statute, in the absence of a real controversy between them."⁵⁶ However, the court overcame its scruples by considering it a contested issue involving an important public question and the right of the plaintiffs to vote, and rendered a declaratory judgment a few days before the election. The use of the declaratory judgment to establish the invalidity of statutes has been common in other jurisdictions.⁵⁷ In commenting upon such an issue, in the face of the charge that there was no cause of action in the absence of proof of infringement, Mr. Justice Isaacs of New Zealand remarked:

"In the absence of judicial decision condemning the statutory provision, it is unquestionable that very large numbers of persons will be harassed—improperly, on the assumption—and will be sought to be coerced into submission. In these circumstances the right of the Attorney General of the Commonwealth to institute the action is not open to doubt. He is not

type. *Cameron v. St. Luke's Presbyterian Church*, [1927] 2 D.L.R. 760, [1929] 3 D.L.R. (N.S.) 497 (procedure in voting on the union); *Griffiths v. Fraser*, [1928] 2 D.L.R. 540 (possession of records); *McLean v. Ballantyne*, [1928] 4 D.L.R. (Ont.) 37 (possession of records); *Ferguson v. McLean*, [1931] 1 D.L.R. (N.B.) 61 (possession of records).

⁵⁵ 105 N.J.L. 57, 143 Atl. 536 (1928).

⁵⁶ *Ibid.* at 58.

⁵⁷ For discussion of the use of the declaration to establish the constitutionality of statutes, see Borchard, *The Constitutionality of Declaratory Judgments* (1931) 31 COL. L. REV. 561, 586 ff. Attention is also called to the following: *Attorney General for Queensland v. Attorney General for the Commonwealth*, *supra* note 52; *Victoria v. Commonwealth*, *supra* note 52; *Commonwealth v. South Australia*, *supra* note 52; *Attorney General for Ontario v. Attorney General for Canada*, *supra* note 52; *Brandon v. Municipal Commissioners*, [1931] 3 D.L.R. 397 (invalidity of tax statute in a province on the ground that it did not impose direct taxes).

bound to wait until the coercion has actually commenced, nor is he bound to leave the vindication of the Commonwealth authority to individuals."⁵⁸

Wills. As might be expected, a number of cases have arisen involving the construction of wills. Some have been brought by executors to determine their powers⁵⁹—a use to which the declaratory judgment has frequently been put⁶⁰—others to determine the rights of beneficiaries, devisees, and claimants against the estate.

In *In re Ungaro's Will*,⁶¹ the first case under the 1915 Act, there was presented a petition by a devisee for a declaration whether a certain claim to support given in the will to plaintiff's

⁵⁸ *Commonwealth v. Queensland*, 29 C.L.R. 1, 13 (1920). Cf. *Butler, J.*, in *Terrace v. Thompson*, 263 U. S. 197, 216, 44 Sup. Ct. (1923); *Pierce v. Society of Sisters*, 268 U. S. 510, 45 Sup. Ct. 571 (1925); *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114 (1926); *Colonial Sugar Refining Co. v. Attorney General*, 15 C.L.R. 182 (1912).

⁵⁹ *Snyder v. Taylor*, 88 N.J.Eq. 513, 103 Atl. 396 (1918); *Strong v. Dann*, 90 N.J.Eq. 329, 108 Atl. 86 (1919) (executors were authorized to acquire trust shares given under will by way of advancements within their discretion—executors sought a declaration of their right to pay the whole amount at once, a request having been made—granted); *Johnson v. Talman*, 99 N.J.Eq. 762, 134 Atl. 357 (1926) (executors sought a declaration of their power to sell certain estate property which they had contracted to sell, their power to do so being challenged by the lessee who was also a beneficiary—granted).

⁶⁰ *Power to sell*: *Owen v. Owen's Executor*, 236 Ky. 118, 32 S. W. (2d) 731 (1930); *In re Kidd's Estate*, 293 Pa. 21, 141 Atl. 644 (1928); *Kollier's Estate*, 12 D. & C. 185 (Pa. 1928); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924); *Yates v. Yates*, 33 N. Z. 281 (1913); *In re Williams*, [1922] N. Z. 530. The power to sell is tested in British procedure by vendor and purchaser summons, for examples of which see: *In re Mayor, etc.*, of Plymouth and Walter, [1918] 2 Ch. 355 (administrative power to sell without consent of a certain body); *In re Hailes and Hutchinson's contract*, [1920] 1 Ch. 233 (under a will); *In re Chaplin and Staffordshire Potteries Waterworks Co., Ltd.'s contract*, [1922] 2 Ch. 825 (mineral rights without consent of the court); *Re Reynolds and Harrison*, 51 Ont. 123 (1921) (power of the vendor's executor); *Re Caltin and Reid*, 54 Ont. 1 (1923) (power of the executor of the trustee). *Power to lease*: *Marshall's trustee v. Marshall*, 225 Ky. 168, 7 S. W. (2d) 1062 (1928) (long term lease in case of a trust for life); *In re Bourke*, 29 N. Z. 594 (1909) (lands not subject to lease). *Power to mortgage*: *Ainslie v. Trustees, Executors & Agency Co. Ltd.*, 31 C.L.R. 122 (1922) (authority to mortgage as including the right to invest proceeds); *Cousins v. McIlvride*, [1912] N. Z. 1104 (power to mortgage given if income of trust estate was not sufficient to give an annuity). *Other situations*: *Leonard v. Leonard*, 201 N.Y.S. 113 (Sup. Ct. 1923) (under a partnership agreement); *Abbott v. Union Trust Co. of Australia*, 41 C.L.R. 375 (1928) (right to exercise an option); *Re Bingham*, [1931] 1 D.L.R. (Ont.) 248 (right to hold securities under a direction to sell and invest); *Maloney v. Scoular*, [1911] N. Z. 18 (right to change business into a private business); *Hammond v. Browne*, [1916] N. Z. 577 (right to continue a credit arrangement); *McGruer v. Gresham*, [1927] N. Z. 704 (loan as an investment).

⁶¹ *Supra* note 2.

brothers constituted a charge on the real estate. The court suggested that if the bill were amended so as to make the brothers parties—all the parties in interest being necessary to a declaratory judgment—a declaration would be issued.

In *Snyder v. Taylor*⁶² the executors of one of the devisees under a gift to a class asked a declaration as to the disposition which he was privileged to make of money in his hands derived from a gift under the will, which contained words of reverter in case the devisee died without issue. Plaintiff's testator had died without issue. The court concluded that this was a legal, and not an equitable, question, because the plaintiff did not seek the construction of his testator's will, but rather of his duties as governed by the will under which the testator took,⁶³ but issued the declaration sought on the ground that the defendants, the surviving devisees under the gift, joined in asking construction and that they were asserting an equitable right. The use of the declaration to settle questions caused by the death of the devisee is no novelty⁶⁴ and its utility is too obvious to require comment.

*Sternberger v. Tunison*⁶⁵ demonstrated the use of the declaration by an executor to free from clouds the title to estate property which he wished to sell. In that case, lien proceedings had established a lien against the interest of one of the beneficiaries. The plaintiff executor claimed that this lien should apply only to the interest of the beneficiary and not to the estate property. In so holding on the merits, the court pointed out that the plaintiff executor had sufficient interest to maintain the suit because he was empowered to sell and the time for sale had come.

The terms of gift, as expressed in a will, are not always

⁶² *Supra* note 59.

⁶³ On the court's remark that the first will was not before the court, compare *Cassidy v. Stuart*, [1928] 3 D.L.R. (Ont.) 879.

⁶⁴ Among the many cases in which the executor sued for a declaration in such situations, the following may be cited as particularly interesting and closely related to this problem: In re Thomas, [1921] 1 Ch. 307 (gift to a class, lapsed shares to go X—X received one lapsed share and then died without leaving a will—suit by X's administrator); In re Whiston, [1923] 2 Ch. 253, [1924] 1 Ch. 123 (property was left to son who, to testator's knowledge, had been reported killed in action); In re Jones, [1925] 1 Ch. 340 (the sole beneficiary predeceased testator); In re Graham, [1929] 2 Ch. 127 (gift of a life interest to testator's parents, remainder to her husband but if he predeceased her parents, then to certain children—husband survived the parents but predeceased the testatrix).

⁶⁵ 92 N.J.Eq. 159, 111 Atl. 309 (1920).

sufficiently clear so that the executor is sure that his proposed distribution conforms to the will. In order to proceed safely in making the distribution, particularly in cases where there are several complicated interests given, the executor finds in the declaration the protection which he desires. Such a judgment protects him against future challenge by any beneficiary or heir. In *Kutschinski v. Bourginynon*⁶⁶ the plaintiff executor was confronted with the disposition of a gift, the beneficiary of which had died during the testator's life. The will contained no residuary clause. The executor sought a declaration of the rights of the various claimants, all of whom were made parties defendant. The declaration in favor of the heirs at law settled the question of title beyond doubt and in a single suit.

The executor is not the only one, however, who may seek the construction of a gift, for the remedy is also open to the beneficiary, as was shown in *Miers v. Persons*.⁶⁷ In that case, the beneficiary, who had been given a life estate in a trust fund, sought the construction of ambiguous terms in the will which governed the class entitled to take upon the termination of the life interest. It is to be observed that the court fixed both the terms and scope of the gift, the time the classes were determined, and the person in whom the property vested. In contrast to this case, construction was denied the petitioning beneficiary on the ground that the case was not ripe for decision in *Potter v. Watkins*.⁶⁸ There the plaintiff had been given a life estate in a portion of the income of trust funds in lieu of dower, but this gift had been rendered precarious by the instruction that the trustees had the power, in their discretion, to use the trust income to pay off encumbrances on the trust property. There was a gift over of the income and corpus of the trust estate to certain children when they reached twenty-one. Holding that these trusts were valid, the court refused a declaration, on the ground that the interests under the trusts were vested and the children could not be bound at that time by a declaratory decree as to plaintiff's possible interests upon reversion, which might or might not occur. This decision is in harmony with the British and American decisions which refuse to make declarations as to

⁶⁶ 102 N.J.Eq. 89, 139 Atl. 596 (1927).

⁶⁷ 92 N.J.Eq. 17, 111 Atl. 638 (1920).

⁶⁸ 99 N.J.Eq. 538, 134 Atl. 84 (1926).

future rights,⁶⁹ though sometimes present rights may depend upon foreseeable contingencies and may be declared accordingly.

In *Paterson v. Currier*,⁷⁰ cited with approval in *Englese v. Hyde*,⁷¹ the problem had developed beyond the point of debate between persons directly concerned in the will. There the plaintiff sought a declaration of the title which the devisee under the will had received and passed to him. When the plaintiff, who was in possession under a deed purporting to give a fee, applied for mortgage loans, his title was held uncertain and the loans refused. The plaintiff then sought a declaration of title as against the executor of the will. The court denied the relief sought, on the ground that title to land, a purely legal question, was in issue.⁷² The plaintiff subsequently perfected his title, not by resorting to law, but by an uncontested bill to quiet title, a remedy which is really declaratory in nature.⁷³ It is suggested that the relief for the construction of a will sought in the original petition should have been granted, the deed being merely the conduit of title. It is hardly doubtful that the declaratory procedure would have been used in British jurisdictions⁷⁴

⁶⁹ *Gabriel v. Board of Regents of Colorado University*, 83 Colo. 582, 267 Pac. 407 (1928); *Ackerman v. Union & New Haven Trust Co.*, 90 Conn. 63, 96 Atl. 149 (1915); *Von Roy v. Hoover*, 96 Fla. 194, 117 So. 887 (1928); *Allen v. Carsted Realty Corp.*, 133 Misc. 359, 231 N.Y.S. 585 (1928); *Brown's Estate*, 289 Pa. 101, 137 Atl. 132 (1927); *Brewer v. Prested*, 11 D. & C. 103 (Pa. 1929); *Re Fremie's contract*, [1895] 2 Ch. 256, 778; *N. E. Marine Engineering Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324, *aff'd* [1906] 2 Ch. 498; *Re Staples*, [1916] 1 Ch. 322.

⁷⁰ 98 N.J.Eq. 48, 129 Atl. 711 (1925). For additional facts, not given in the report, we are indebted to the attorneys for the plaintiff, Seymour & Seymour.

⁷¹ *Supra* note 7.

⁷² The court relied chiefly upon *Hart v. Leonard*, 42 N.J.Eq. 416, 419, 7 Atl. 865 (1886), which classifies the cases in which equity will act to protect a legal title. That case cites as the second class of cases in which equitable relief is available: "2. Cases where the legal right is admitted, and the object of the suit is the same (to ascertain the extent of the right and enforce or protect it in a manner not attainable by legal procedure)." It is to be observed here that plaintiff is in possession and therefore cannot use ejectment, that no action upon which to base a trespass has occurred, and that the declaratory judgment statute has expressly removed the objection that no further relief is sought.

⁷³ *Borchard, The Declaratory Judgment—A Needed Procedural Reform* (1918) 28 YALE L. J. 1, 30-32.

⁷⁴ In *re Constable's Settled Estates*, [1919] 1 Ch. 178 (tenant for life under trust); In *re Llanover Settled Estates*, [1926] 1 Ch. 626 (persons to take title under Settled Land Act, 1925); In *re House*, [1929] 2 Ch. 166 (persons entitled to receive vesting deed); In *re Price*, [1929] 2 Ch. 400 (tenant for life sued for a declaration to determine in whom title had vested under modern statutes);

and in many American jurisdictions.⁷⁵ It is to be regretted that, in view of the circumstances, the court did not follow the liberal view taken in *Renwick v. Hay*.⁷⁶

Procedure. It will be seen that the main restrictions upon declaratory relief in New Jersey arise out of the rigid distinction which courts of equity have maintained between equitable and legal relief. Inasmuch as one of the advantages of the suit for a declaration is the conclusive determination of disputed issues, the suggested division of prayers between separate courts constitutes a serious handicap to litigants. Whether they approach first a law court or first an equity court, they cannot have any assurance that the issue will be completely determined. This procedural problem has been directly discussed in seven cases in New Jersey, in two of which the court has found equitable reasons for issuing the requested declarations.⁷⁷ The five in which equity refused to act and left the parties to their remedies at law, are fundamentally concerned with the title to

McBride v. Sandland, 25 C.L.R. 69, 372 (1918) (claim of title subject only to defendant's tenancy from year to year); Furphy v. Nixon, 37 C.L.R. 161 (1925) (contract for sale of land, plaintiff sued to establish interest); Meisner v. Mason, [1931] 2 D.L.R. (Nova Scotia) 156 (title received under a deed); Maritime Nail Co. Ltd. v. Gregory, 49 New Brunswick 296 (1922) (effect of deed from children of X); Williams v. Williams, [1923] N. Z. 15 (extent of plaintiff's interest under a deed poll); Kirk v. Greaves, [1924] N. Z. 260 (executors sued to determine whether they were justified in transferring to son, in view of a deed from father to son).

The declaration may also be used to establish defendant's no-right in land. Jones v. McClean, [1931] 2 D.L.R. (Manitoba) 244; Shinbane v. Minuk, 36 Manitoba 530 (1927).

⁷⁵ *Dispute on interest in realty arising on the death of the beneficiary:* Corn v. Roach, 225 Ky. 725, 9 S. W. (2d) 1074 (1928) (interest held by the widow); Jackson v. Ku Klux Klan, 231 Ky. 370, 21 S. W. (2d) 477 (1929) (son's interest asserted by his widow). *Dispute on an interest in realty arising under a deed from the devisee:* Long v. Uhle, 8 D. & C. 671 (Pa. 1927) (widow's interest under will); Mullens v. Mullens, 5 Tenn. App. 235 (1927) (deed from devisees—plaintiff was anxious to secure a loan); see also Morris v. Morris, 13 D. & C. 634 (Pa. 1930), in which the court said: "The remedy sought under this act is probably the most convenient and satisfactory one that exists at present for determining the matter in controversy. An action for ejectment might be a proper and convenient remedy, but, in the end, it would turn upon the construction of the paper writings or the two wills to be construed by the courts under the submission in this case." *Dispute on an interest in land arising on the incapacity of the beneficiary:* Connor's Estate, 302 Pa. 545, 153 Atl. 730 (1931) (lunatic); see also In re Lund, [1915] 1 Ch. 744, [1915] 2 Ch. 345 (bankruptcy).

⁷⁶ *Supra* note 45.

⁷⁷ *Renwick v. Hay*, *supra* note 45 (easement); Snyder v. Taylor, *supra* note 59 (duties of executor of the devisee of a gift which was subject to a possible reverter).

reality—the question of title arising at the time of the sale of the land,⁷⁸ after a transfer of possession,⁷⁹ upon denial of tax liability,⁸⁰ or the assertion of a forfeiture.⁸¹ In all these cases the issue turned primarily upon the construction of documents, some of which, such as wills, are peculiarly within equitable jurisdiction. Courts in code states or in states where courts have been granted both jurisdictions have no such difficulty. But it is worthy of note that courts of equity in England, though quite familiar with the nature of equitable jurisdiction, do not appear to have encountered the difficulties which have bothered the New Jersey courts and have rendered declarations in the very types of cases and prayers which the New Jersey courts have refused.⁸²

The splitting of relief⁸³ in a single action, requiring two concurrent proceedings and leaving a petitioner in doubt, exposes the defects, it is submitted, of a system maintaining an impregnable distinction between courts of equity and courts of law, limiting each to specific forms of relief. Although the distinctions between law and equity are maintained elsewhere, both in the matter of separate courts and in the administration of judicial relief, no other courts than those of New Jersey, and possibly New South Wales,⁸⁴ seem troubled by the difficulties of rendering declaratory judgments of all kinds in courts exercising equitable jurisdiction.

In *Hannan v. Wilson*,⁸⁵ the vendor had secured specific per-

⁷⁸ *Di Fabio v. Southard*, *supra* note 30.

⁷⁹ *Englese v. Hyde*, *supra* note 14; *Paterson v. Currier*, *supra* note 70.

⁸⁰ *Wight v. Board of Education of the Town of Westfield*, *supra* note 20.

⁸¹ *Union Trust Co. v. Goerke*, *supra* note 41.

⁸² See the individual discussion of these cases *supra*.

⁸³ See *Englese v. Hyde*, *supra* note 14, and *Union Trust Co. v. Goerke*, *supra* note 41.

⁸⁴ The provision of the Equity Act, 1901 (No. 24) § 10, which was to take the place of the usual English provision on declarations was amended by Administration of Justice Act, 1924, § 18, by substituting for "without granting any consequential relief" the phrase "whether any consequential relief is or could be claimed." The need for this more expansive form was commented upon in *Walsh v. Alexander*, *supra* note 21; *Canonba Rabbit Board v. Goldsbrough, Mort & Co.*, *supra* note 21.

The division is clearly shown in *David Jones Ltd. v. Leventhan*, *supra* note 21; *Langman v. Handover*, 43 C.L.R. 334 (1929); *Prescott v. Perpetual Trustee Co.*, *supra* note 21.

⁸⁵ 101 N.J.Eq. 743, 139 Atl. 165 (1927), *rev'd* 100 N.J.Eq. 463, 136 Atl. 499 (1927).

formance of a contract for the sale of land. When the defendant did not complete the payments required by the decree, instead of taking proceedings in contempt or by way of sequestration under statute, the vendor sought a declaration of the time at which title vested in the defaulting purchaser in view of certain statutory provisions as to the effect of a decree of specific performance. In reversing on the merits the holding of the lower court that the decree effected a transfer of title, the Court of Errors and Appeals criticized the *form* of the declaration requested and made the following recommendation:⁸⁶

"The appropriate relief, in addition to remedies provided by section 46 (of the statute in question), or perhaps as an alternative to them, would be to apply to the Court of Chancery for a decree declaring the contract void for the vendee's default, and freeing complainant from all obligations thereunder."

It has been observed that all parties in interest are necessary before the court will exercise its discretion to grant a declaration.⁸⁷ When there is no party defendant, an action is properly dismissed. In *In re Bell*,⁸⁸ the plaintiff confused the action for a declaration with a request for something analogous to an advisory opinion. Courts can of course decide only contested issues and not render *ex parte* opinions on the law.

⁸⁶ *Ibid.* at 750.

⁸⁷ *Bills dismissed, or ordered amended, for want or defect of defendants.* (1) New Jersey cases: *In re Bell*, 2 N.J.Misc. 370 (1924) (deed, no defendants joined); *In re Ungaro's will*, *supra* note 2. (2) Other American cases: *Morton v. Pacific Constr. Co.*, 36 Ariz. 97, 283 Pac. 281 (1929) (paving contract—defect); *Ackerman v. Union & New Haven Trust Co.*, 90 Conn. 63, 96 Atl. 149 (1915) (no adverse claimants); *H. C. Heller & Co. v. Hunt Forbes Constr. Co.*, 222 Ky. 564, 1 S. W. (2d) 970 (1928) (validity of waivers by property owners in connection with bonds, defect); *Bach v. Grabfelder*, 233 App. Div. 773, 250 N.Y.S. 552 (1931); *Schoen's Petition*, 6 D. & C. 256 (Pa. 1925) (defendants must be notified to appear as parties; *cf.* *Grant v. Knareborough, U.D.C.*, [1928] 1 Ch. 310, in which there is discussion of the plaintiff's right to a declaration in view of the withdrawal of the defense entered by defendant); *In re Jenkins Township Fire Truck*, 25 Luzerne 144 (Pa. 1928) (right to make a special levy, defect).

Distinction should be carefully made between lack of parties defendant and lack of knowledge of the identity of the defendants. Declaratory relief should not be denied because the plaintiff does not know the identity of the defendants; see *Lyon's Adm'r v. Greenblatt*, 213 Ky. 567, 281 S. W. 487 (1926) (construction of will, unknown heirs); *In re Chillagoe Railway & Mines Ltd. Trust Deed*, 46 Times L. R. 242 (Ch. 1930) (lost bond holders).

⁸⁸ *Supra* note 87 (plaintiff sought a declaration as to the construction of a deed in her chain of title but cited no one as defendant).

The purpose of the declaratory judgment—which may be combined with requests for additional forms of relief in one set of prayers—is to terminate an issue and enable doubtful or disputed questions of law to be determined before irretrievable acts have been committed by one side or the other, inflicting loss or damage. As Representative Gilbert of Kentucky picturesquely described declaratory relief:⁸⁹

“Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step.”

But it would be wrong to assume that a declaratory judgment can be rendered only where no other form of relief is available. It is not an extraordinary remedy, nor is it any more equitable than legal. It is an alternative remedy. If a plaintiff wishes only the milder relief of a declaration of his rights—which binds him and his adversary as conclusively as any other judgment—why should he be forced to the harsher coercive relief of damages, specific performance, or injunction? He should be the judge of the nature of the relief he desires and if the court has before it a contested issue, all necessary parties, and jurisdiction of the subject matter, and believes that its decision will conclusively terminate the dispute, it should not hesitate to issue the declaration. The disposition of some of the courts in Pennsylvania and New Hampshire⁹⁰ to regard the declaratory judgment as an extraordinary remedy, grantable only where no other relief is available, is distinctly contrary to authority and good practice, and would constitute an unfortunate and gratuitous limitation upon a form of judicial relief which has rendered effective service to society in most parts of the civilized world.

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⁸⁹ 69 CONG. REC. 2108 (1928).

⁹⁰ *Lisbon Village District v. Town of Lisbon*, 155 Atl. 252 (N.H. 1931), followed in *Baker v. Goodale*, 157 Atl. 885 (N.H. 1932); *In re List's Estate*, 283 Pa. 255, 129 Atl. 64 (1925); *Dempsey's Estate*, 288 Pa. 458, 137 Atl. 170 (1927). This is to be distinguished from the situation in which a statute has established a special and exclusive remedy—in which declaratory relief will not lie. *Pasmore v. Oswaldtwistle U.D.C.*, [1898] A. C. 387; *Wolverhampton New Waterworks Co. v. Hawkesford*, 6 C. B. (N.S.) 336 (1859); but note the liberal application of this rule in *Fort France Pulp Co. v. Spanish River Pulp & Paper Mills Co.*, [1928] 1 D.L.R. 753, [1929] 4 D.L.R. 192, [1931] 2 D.L.R. 97.