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the judge rather than the prosecutor. Of course, separate trials may not be ordered when the evidence will be repetitious, the multiplicity of trials vexatious, or when the multiplicity will enable the prosecution to use the experience of the first trial to strengthen its case in a subsequent trial.<sup>50</sup>

The actual holding in *Waller* is both logical and clearly stated. However, the same transaction concept of double jeopardy may well have opened a veritable Pandora's Box of legal problems and collateral issues that could have both immediate and profound effects on the administration of criminal justice in Louisiana. The best solution to the problems posed by this concept seems to be the proposal by the American Law Institute in their Model Penal Code which requires the joinder of all known offenses in a single trial.<sup>51</sup>

W. John English, Jr.

#### DECLARATORY RELIEF IN LOUISIANA: THE POTENTIAL FOR PROCEDURAL MISUSE

Developers purchased an option on a large tract of land to be exercised by the payment of almost a million dollars and the execution of a note and mortgage for the balance of the sale price.<sup>1</sup> At the instance of developers the land was rezoned to permit construction of apartments, a shopping center, and other non-residential uses. Area residents filed suit seeking a declaratory judgment that the ordinances under which the tract was rezoned<sup>2</sup> were unconstitutional. Developers responded by filing

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50. *Id.*

51. ALI MODEL PENAL CODE § 1.07 (1962):

"(2) *Limitation on Separate Trials for Multiple Offenses.* Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

"(3) *Authority of Court to Order Separate Trials.* When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires."

1. Cost of the option itself was \$40,000. Developers shortly thereafter expended more than \$200,000 in engineering and consulting fees. The option was to be exercised by the payment of \$910,000 and the execution of a mortgage for \$3,850,000. Total outlay for the completed development was estimated to be approximately \$100,000,000.

2. Baton Rouge, La., Ordinance 2317, June 11, 1969; Parish of East Baton Rouge, La., Ordinance 3095, June 11, 1969.

a "Motion to Dismiss for Improper Use of Declaratory Action," alleging the suit put a cloud on their title and prevented them from obtaining further financing. They maintained that plaintiffs should have sought injunctive relief which would have allowed speedy disposition of the suit, thereby preventing a large financial loss to the developers.<sup>3</sup> This procedure, however, would have necessitated posting of security by plaintiffs<sup>4</sup> and exposed them to liability for damages for the wrongful issuance of an injunction.<sup>5</sup> The trial court upheld developers' exception<sup>6</sup> but the First Circuit Court of Appeal reversed and held, despite developers' showing of injury, plaintiffs were entitled to declaratory relief and could not be compelled to seek relief through speedier procedural methods. *Villa del Rey Citizens Association v. City of Baton Rouge*, 233 So.2d 566 (La. App. 1st Cir. 1970).<sup>7</sup>

Since a companion suit in which injunctive relief was sought resulted in a declaration that the ordinances were constitutional, the court was spared from rendering a decision actually allowing the harmful effects claimed by developers.<sup>8</sup> Yet, it is submitted that the instant decision indicates a need for reappraisal of the available methods of relief which allow plaintiffs the capability of inflicting substantial injury by invoking the slowest possible judicial procedure. In effect, *Villa del Rey* allows irate plaintiffs the possibility of winning their suit by capitalizing on inertia and unavoidable delay in the adjudicatory process rather than by a judicial pronouncement on the merits of their plea.

In view of this development, a review of the availability of declaratory relief in Louisiana seems to be in order. It should be noted initially that the history of the judicial acceptance of declaratory relief in Louisiana is not unlike other states.<sup>9</sup> In

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3. The option was to expire in October, 1969, and thus would have lapsed before the constitutional status of the ordinances could be determined with any degree of finality.

4. LA. CODE CIV. P. art. 3610.

5. LA. CODE CIV. P. art. 3608.

6. The court reasoned that plaintiffs were "perverting the declaratory judgment statutes" and ordered the plaintiffs to amend their petition to provide for summary procedure or suffer a nonsuit. *Villa del Rey Citizens Ass'n v. City of Baton Rouge*, 233 So.2d 566, 567 (La. App. 1st Cir. 1970).

7. Somewhat the inverse situation was presented in *West v. Winnsboro*, 252 La. 605, 211 So.2d 665 (1968). Defendant in that case urged that injunctive relief from a Sunday-closing law should not lie because declaratory relief was available to plaintiff, but the court held otherwise, opining that declaratory relief was inadequate.

8. *Smith v. City of Baton Rouge*, 233 So.2d 569 (La. App. 1st Cir. 1970).

9. See, e.g., E. BORCHARD, *DECLARATORY JUDGMENTS* 317-37 (2d ed. 1941).

spite of the pleas of commentators<sup>10</sup> and some individual judges,<sup>11</sup> judicial acceptance of declaratory relief was hesitant and even grudging. Even after the legislature provided for declaratory judgments,<sup>12</sup> the supreme court in *Burton v. Lester*<sup>13</sup> announced that declaratory relief was unavailable where the plaintiff could pursue another remedy. This case was severely criticized<sup>14</sup> and legislatively overruled by the adoption of article 1871<sup>15</sup> of the Code of Civil Procedure. Based in part upon Federal Rule 57,<sup>16</sup> article 1871 provides in part that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." This phrase serves to limit severely the ability of the judiciary to deny declaratory relief; its effect was quickly recognized.<sup>17</sup>

Subsequent to the enactment of article 1871, the Louisiana courts have exhibited great sympathy for requests for declaratory judgments.<sup>18</sup> In fact, it is submitted that the court in the instant case adopted an overly restrictive view of its discretion to deny declaratory relief. Under the facts presented, it could have easily declined declaratory relief within the proper bounds of its discretion.

Before discussing in detail the statutory limits on judicial discretion, it should be noted that the effect of the instant decision appears to be contrary to the reasons for which adoption of

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10. H. McMAHON, LOUISIANA PRACTICE § 2 (1939).

11. Lee, *The Declaratory Judgments Act*, 20 TUL. L. REV. 566, 567 (1946).

12. La. Acts 1948, No. 431, §§ 1-16; La. Acts 1948, No. 22, §§ 1-16. These two Acts were codified in LA. R.S. 13:1431-46 (1950) and were repealed by La. Acts 1960, No. 32, § 2. The subject matter was then transferred to LA. CODE CIV. P. arts. 1871-79, 1920, 2164, 1880-81, 5251, 1882-83, and the old LA. R.S. 13:4246 (1950) was omitted.

13. 227 La. 347, 79 So.2d 333 (1955).

14. *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Civil Procedure*, 17 LA. L. REV. 379, 382 (1957).

15. LA. CODE CIV. P. art. 1871: "Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree."

16. FED. R. CIV. P. 57: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. . . ."

17. *Orleans Parish School Bd. v. Manson*, 241 La. 1029, 1035 n. 1, 132 So.2d 885, 887 n. 1 (1961).

18. See, e.g., *West v. Winnsboro*, 252 La. 605, 211 So.2d 665 (1968), and cases cited therein. See also *Plebst v. Barnwell Drig. Co.*, 243 La. 874, 148 So.2d 584 (1963), in which the court approved the use of declaratory judgments in zoning suits.

the declaratory judgment statutes was urged. Judge Elmo P. Lee of the United States Court of Appeals for the Fifth Circuit stated in a 1946 address:

"[The Uniform Declaratory Judgments Act] disposes of disputes in their initial states before conflicts become bitter and business relations are impaired. . . . The Act affords a *speedy and inexpensive method of adjudicating legal disputes.*"<sup>19</sup> (Emphasis added.)

Similarly, Dean McMahon urged adoption of a declaratory judgment statute because:

"[I]f before injury has been inflicted, the parties could obtain a decision of questions in dispute, much of the undesirable features [sic] of present day litigation might be eliminated."<sup>20</sup>

The court of appeal in the instant case stated that its discretion to deny declaratory relief was "based primarily on the authority granted in article 1876 of the Code of Civil Procedure which provides that a court may refuse to render a declaratory judgment if such judgment would not terminate the uncertainty or controversy giving rise to the proceeding."<sup>21</sup> However, article 1871 provides that the "existence of another adequate remedy does not preclude a judgment for declaratory relief *in cases where it is appropriate.*"<sup>22</sup> (Emphasis added.) Because the legislature has provided by statute that the circumstances described in article 1876 render declaratory relief inappropriate does not mean no other situations exist in which the granting of such relief might be of doubtful propriety.<sup>23</sup> Fortunately, the notion of a more general discretion has survived, as illustrated by

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19. Lee, *The Declaratory Judgments Act*, 20 TUL. L. REV. 566, 567 (1946).  
20. H. McMAHON, LOUISIANA PRACTICE § 2 (1939).

21. LA. CODE CIV. P. art. 1876: "The court may refuse to render a declaratory judgment or decree where such judgment or decree, if rendered, would not terminate the uncertainty or controversy giving rise to the proceeding." See *Wilshire South Ass'n v. Jefferson Parish Zoning App. Bd.*, 181 So.2d 866 (La. App. 4th Cir. 1966) in which the court refused to render declaratory relief when it found that such a judgment would not end but rather would foster more litigation. Several of the individual plaintiffs had initiated suits for damages and the Association had withdrawn its requests for damages and an injunction. The court also sympathized with the trial court's apprehension of mootness since the building had been completed since the filing of the suit.

22. LA. CODE CIV. P. art. 1871.

23. The court in *Villa del Rey* said its discretion was based "primarily" on LA. CODE CIV. P. art. 1876.

*Rogers v. Louisiana State Board of Optometry Examiners*,<sup>24</sup> in which the Third Circuit Court of Appeal said:

"In order for an action to be maintained under the act, however, it must be based on an actual controversy and, even when such a case is presented, the grant or refusal of declaratory relief is a matter of judicial discretion."<sup>25</sup>

Since article 1883 of the Code of Civil Procedure provides that the articles on declaratory judgments in that Code should be construed to "harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees,"<sup>26</sup> it is worthwhile to investigate the experience of the federal courts with respect to judicial discretion in denying declaratory judgments. It appears that the federal judiciary was quick to recognize that declaratory procedures might be abused.<sup>27</sup> They have denied declaratory relief when inappropriately used to gain procedural advantages,<sup>28</sup> such as when suit was brought for a declaration of non-liability in a district far removed from a potential plaintiff's evidence and witnesses.<sup>29</sup> Furthermore, it has been explicitly recognized that the beneficial purposes of declaratory judgments may be aborted *when used to secure delay*.<sup>30</sup> Declaratory relief has also been denied when a response at that time by a defendant was "inconvenient."<sup>31</sup> Perhaps most pertinent to the problem discussed herein is the federal notion that declaratory relief may not be denied simply because an alternative remedy exists, but dismissal has

24. 126 So.2d 628 (La. App. 3d Cir. 1961). At the time the suit was initiated, the Code of Civil Procedure was not in force. Plaintiff argued that the modified provisions concerning declaratory judgments were persuasive in his case, and it was in this context that the court discussed them.

25. *Id.* at 634. In *Mitchell v. Louisiana State Board of Optometry Examiners*, 182 So.2d 825 (La. App. 3d Cir. 1961), declaratory relief was granted, but the Third Circuit Court of Appeal in dictum reaffirmed the principle of judicial discretion in one of the few Louisiana cases dealing with this problem.

26. LA. CODE CIV. P. art. 1883: "Articles 1871 through 1882 shall be interpreted and construed so as to effectuate their general purpose to make uniform the law of those states which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees."

27. E. BORCHARD, *DECLARATORY JUDGMENTS* 312-13 (2d ed. 1941).

28. *Cf. Eccles v. Peoples Bank*, 333 U.S. 426 (1948). *See also Shell Oil Co. v. Frusetta*, 290 F.2d 689 (9th Cir. 1961); *Franklin Life Ins. Co. v. Johnson*, 157 F.2d 653, 656 (10th Cir. 1946); Note, 51 *YALE L. J.* 511, 515 (1942).

29. *American Ins. Co. v. Bradley Mining Co.*, 57 F. Supp. 545 (N.D. Calif. 1944).

30. *American Auto. Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939).

31. *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1169 (7th Cir. 1969), *cert. denied*, 395 U.S. 959 (1969).

been deemed appropriate *when the alternative remedy was preferable*.<sup>32</sup>

While it would therefore appear that a court could muster considerable authority for denying declaratory relief under the facts presented in *Villa del Rey*, it would also appear that forcing plaintiffs to proceed by use of injunctive procedures is far from an ideal solution. As the plaintiffs pointed out, security is required for injunctive proceedings under article 3610 of the Code of Civil Procedure.<sup>33</sup> Although the amount of the bond is within the discretion of the court,<sup>34</sup> and damages for wrongful issuance of a temporary restraining order or preliminary injunction are not mandatory<sup>35</sup> and have been denied,<sup>36</sup> other cases exist in which damages have been awarded.<sup>37</sup> Were security to be required in all cases it is conceivable that prospective plaintiffs might be unduly dissuaded from bringing suit even when their interest in doing so is entirely legitimate.<sup>38</sup>

The problem presented by the instant case can be reduced to the following: if landowners are allowed to request declaratory relief only, they can preclude developers from obtaining financing and force loss of the option and connected expenses. If, on the other hand, landowners are forced to utilize injunctive relief, security requirements and exposure to liability may preclude their bringing suit to protect their legitimate interests.

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32. *Employers' Liab. Assurance Corp. v. Mitchell*, 211 F.2d 441, 443 (5th Cir. 1954), *cert. denied*, 347 U.S. 1014 (1954); *Phoenix Ins. Co. v. Harby Marina, Inc.*, 294 F. Supp. 663, 664 (N.D. Fla. 1969); *Allstate Ins. Co. v. Philip Leasing Co.*, 214 F. Supp. 273, 275 (W.D. S.D. 1963); *Sears, Roebuck & Co. v. Buce*, 197 F. Supp. 136, 139 (N.D. Ala. 1961); *Allstate Ins. Co. v. Thompson*, 121 F. Supp. 696, 700 (W.D. Ark. 1954).

33. LA. CODE CIV. P. art. 3610: "A temporary restraining order or preliminary injunction shall not issue unless the applicant furnishes security in the amount fixed by the court, except where security is dispensed with by law. The security shall indemnify the person wrongfully restrained or enjoined for the payment of costs incurred and damages sustained." See *Duvigneaud v. Marcello*, 136 So.2d 176 (La. App. 4th Cir. 1962).

34. *Glidden v. Loe*, 192 So.2d 633, 634 (La. App. 2d Cir. 1966).

35. *Amacker v. Amacker*, 146 So.2d 672, 677 (La. App. 1st Cir. 1962); *Muller v. Buckley*, 143 So.2d 231, 232 (La. App. 4th Cir. 1962). The latter case points out that damages were formerly mandatory under LA. CODE OF PRACTICE art. 304 (1870).

36. *Mecom v. Mueller*, 235 So.2d 597 (La. App. 4th Cir. 1970); *Muller v. Buckley*, 143 So.2d 231 (La. App. 4th Cir. 1962).

37. *Danzie v. Rutland*, 232 So.2d 303 (La. App. 2d Cir. 1970); *Shanks v. Callahan*, 232 So.2d 306 (La. App. 1st Cir. 1969).

38. Admittedly, security requirements naturally tend to dissuade suits, regardless of whether they are well-founded and in good faith. The court in *Villa del Rey* recognized that "[t]he interest of the plaintiffs in bringing this action is uncontested. It is only the procedural device they have elected to use that is objected to." 233 So.2d 566, 567 (La. App. 1st Cir. 1970).

It is submitted that any ultimate solution to this and similar problems must come from the legislature. Perhaps a rule similar to Federal Rule 57, which permits expeditious hearings in suits for declaratory relief upon motion of one party, should be enacted.<sup>39</sup> Commentators have suggested other, more comprehensive remedial procedures.<sup>40</sup> It is submitted that until such a fundamental legislative change occurs, the judiciary must balance the equities in the individual situations with which they are confronted. In so doing the courts should be cognizant of the potential for procedural abuse inherent in such situations and act within permissible limits to preclude improprieties.

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INSURANCE: THE OMNIBUS CLAUSE AND  
SECOND PERMITTEES

Randy Carroll had an automobile which he bought and maintained with his own funds, but which was registered under the name of his stepfather and insured under his stepfather's policy. Randy let a friend borrow the car to go on a double date; the friend loaned the car to the boy with whom he was double dating, who wrecked the car through his own negligence. Randy and the second permittee did not know each other. When the owner and the collision insurer of the other vehicle involved in the accident sued the second permittee and his father, they pleaded the liability insurer of the car and their own liability insurer. The Supreme Court of Louisiana *held*, since the second permittee did not have the permission of the named insured, neither insurance company was liable.<sup>1</sup> *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 230 So.2d 253 (1969).

*Czarniecki* presents the problem of the application of the om-

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39. FED. R. CIV. P. 57 provides in part: "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. . . ." This would not necessitate the furnishing of security as required by LA. CODE CIV. P. art. 3610.

40. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2401 (1958), in which the author advocates a speedy review system for administrative decisions.

1. Neither insurer was found liable for the collision itself; however, State Farm was held liable for attorney's fees because of its duty to defend. The issue of an insurer's duty to defend is not discussed in this casenote. Also, the court found Randy to be in the position of the named insured although his stepfather was the policyholder. The court spent little time on this point and so must have been satisfied that there was no fraud. The issue of who is the named insured is not discussed in this casenote.