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PROCEDURE: THE APPLICATION OF THE UNIFORM DECLARATORY JUDGMENTS ACT IN MONTANA

On February 13, 1935, Montana became the twenty-first State to adopt the UNIFORM DECLARATORY JUDGMENTS ACT.[1] Durthe first six years after the adoption of this act, the Montana Supreme Court considered only five cases[2] which asked for or involved declaratory judgments. In none of these cases did the Court discuss the history, general provisions, or the purposes of the UNIFORM ACT. Two of these cases do not mention the UNIFORM ACT,[3] while two cite the act by its CODE sections[4] and one case mentions it by name.[5] None of the cases are digested in the GENERAL DIGEST or in MONTANA AND PACIFIC DIGEST under Key Number 6 of the title "Actions" where cases involving declaratory judgments are supposedly digested. SHEPARD'S MONTANA CITATIONS cites three[6] of the cases under CODE section 9835.1-16; and according to SHEPARD'S PACIFIC REPORTER CITATIONS only one[7] of the five cases has been cited in cases[8] involving declaratory judgments.

The purpose of this article is to review briefly the history, general provisions and purposes of declaratory judgments, and to note the application of the UNIFORM ACT in the Montana cases.

A brief history of declaratory judgments has been given in these words: "A declaratory judgment or decree is not an

[1]R. C. M. 1935, §§9835.1 to 9835.16; see UNIFORM LAWS ANNOTATED No. 9 (1940 Cumulative Annual Pocket Part p. 70)

[2]Toole County Irrigation Dist. v. State (1937) 104 Mont. 420, 67 P. (2d) 989; Tongue River and Yellowstone River Irrigation Dist. v. Hyslop et al. (1939) 109 Mont. 190, 96 P. (2d) 273; Mulholland v. Ayers et al. (1940) 109 Mont. 558, 99 P. (2d) 234; Blackford v. Judith Basin County (1940) 109 Mont. 558, 98 P. (2d) 872; State ex rel. Butte Brewing Co. v. District Court (1940) 110 Mont. 250, 100 P. (2d) 932.

[3]Tongue River and Yellowstone River Irrigation Dist. v. Hyslop et al. (1939) 109 Mont. 190, 96 P. (2d) 273; Mulholland v. Ayers et al. (1940) 109 Mont. 558, 99 P. (2d) 234.

[4]Toole County Irrigation Dist. v. State (1937) 104 Mont. 420, 67 P. (2d) 989; State ex rel. Butte Brewing Co. v. District Court (1940) 110 Mont. 250, 100 P. (2d) 932.

[5]Blackford v. Judith Basin county (1940) 109 Mont. 558, 98 P. (2d) 872.

[6]Toole County Irrigation Dist. v. State (1937) 104 Mont. 420, 67 P. (2d) 989; Mulholland v. Ayers et al. (1940) 109 Mont. 558, 99 P. (2d) 234; State ex rel. Butte Brewing Co. v. District Court (1940) 110 Mont. 250, 100 P. (2d) 932.

[7]State ex rel. Butte Brewing Co. v. District Court (1940) 110 Mont. 250, 100 P. (2d) 932.

[8]Maryland Casualty Co. v. Tighe et al. (1940) 115 Fed. (2d) 297, 298; Maryland Casualty Co. v. United Corporation of Mass. et al. (1940) 35 Fed. Supp. 570, 572.

American conception; it originated in the classical Roman law, has been used in Scotland for four centuries, and has been adopted and extensively used in England and other European and Spanish American countries.'"[9] As to its history in this country it has been said: "In this country the idea of declaratory judgment is of comparatively recent development. The general movement for the adoption of such statutes began around 1919, when statutes of this nature were enacted in Florida, Michigan, and Wisconsin. Subsequently, a UNIFORM DECLARATORY JUDGMENTS ACT was prepared providing that courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed, that no action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for, that the declaration may be either affirmative or negative in form and effect, and that such declarations shall have the force and effect of a final judgment or decree.'"[10]

The UNIFORM ACT, which has now been adopted in twenty four states[11] in addition to Montana, provides generally for the power to

> " . . . declare that any person interested under a deed, will, written contract, or other instrument in writing constituting a contract, or whose rights, status, or other legal relations are affected by contract, etc., may have a determination of any question of construction or validity arising under such contract, etc., and obtain a declaration of rights, status, or other legal relations thereunder; that construction of a contract may be determined either before or after the breach thereof; that the court may refuse to render a declaratory judgment where such judgment would not terminate the uncertainty or controversy; that issues of fact may be tried by a jury as in other civil actions; that all persons who have or claim any interest which would be affected by the declaratory judgment shall be made parties, and no declaration shall prejudice the rights of persons not parties to the proceeding; and that the act is remedial in nature to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.'"[12]

[9] 1 C. J. S., *Actions* §18, p. 1021.
[10] 16 AM. JUR., *Declaratory Judgments* p. 275.
[11] Alabama, Arizona, Colorado, Idaho, Indiana, Maryland, Minnesota, Missouri, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.
[12] 123 A. L. R. 279, 300 (1939).

These provisions have now been construed and interpreted in many cases. In 1934 Borchard[13] wrote: "Since the formal adoption of declaratory judgment statutes in the United States after the war, some twelve hundred reported cases have been decided in the United States."[14] From these cases it will be noticed that a declaratory judgment involves no coercive or executory relief.[15] A "cause of action" in the sense in which that term is ordinarily used is not essential for jurisdiction. However, it is essential that there be adverse parties, a real and justiciable controversy and a judgment which is *res judicata* of the points involved.[16]

In none of the Montana cases did the Court discuss any of these essential elements. It merely reviewed the declarations made by the lower courts. In *Toole County Irrigation District v. State*,[17] which is the first case citing the UNIFORM ACT, the irrigation district desired a declaration that its levies of irrigation assessments were valid liens upon land owned by the State of Montana. On the pleadings in the case the lower court made such a declaration. The UNIFORM ACT was mentioned in this manner: "Defendants elected to file no further pleadings and allowed a declaratory judgment to be entered against them. See section 9835.1 et seq., Rev. Codes." There were adverse parties in the case, the irrigation district claiming the right to levy the assessments and the State claiming that the irrigation district could not levy the assessments. The question was not a moot question, which could not be decided under a declaratory judgments act. As the Court said: "It is not to be assumed that the State will not find some means to discharge the lawful assessments levied against its property; rather the contrary assumption should be made." The judgment of the Court was determinative of the issue presented, and the case seems to have been a proper one for declaratory relief.

In *Tongue River and Yellowstone River Irrigation District v. Hyslop et al.*,[18] the factual situation and the questions were nearly the same as in the *Toole County* case. The Court said: "Plaintiff sought a *judgment declaring* that the assessments are good and valid and that they constitute a first and prior lien upon the lands." (italics supplied) In reviewing the lower

[13]Hotchkiss Professor of Law, Yale University, Co-Draftsman of UNIFORM DECLARATORY JUDGMENTS ACT and of the Federal act.
[14]Borchard, *The Uniform Declaratory Judgments Act*, 18 MINN. L. REV. 239, 268 (1934).
[15]Brindley v. Meara (1935) 209 Ind. 144, 198 N. E. 301, 101 A. L. R. 682.
[16]Petition of Kariher (1925) 284 Pa. 455, 131 A. 265.
[17](1937) 104 Mont. 420, 67 P. (2d) 989.
[18](1939) 109 Mont. 190, 96 P. (2d) 273.

courts declaration, the Supreme Court limited the rule in the *Toole County* case and said that state-owned lands were not subject to assessments by irrigation districts unless they were privately owned when the district was formed as was true in the *Toole County* case.

In *Mulholland v. Ayers*,[19] a State Senator in an action against the Governor of the State and others, desired a declaration to the effect that a certain election law was unconstitutional and that he was still the Senator from his county. In this case the Court said: "He brought this action to enjoin defendants from taking the necessary steps to fill the vacancy supposed to exist because of the provisions of Chapter 116, Laws of 1937, and sought a *declaratory judgment* declaring the meaning, scope and application of that chapter." (italics supplied) The Court held that plaintiff was still the Senator from his county but reversed the lower court in its holding that the law was unconstitutional[20] and supported its decision on the ground that the election law in question did not apply to municipal elections.[21] The essential elements of a declaratory judgment action were present in that there were adverse parties, there was a real controversy as to the proper construction of the election law, and finally, the declaration was *res judicata* as to the question involved.[22]

[19](1940) 109 Mont. 558, 99 P. (2d) 234.

[20]Justice Erickson in a dissenting opinion held that the election law in question was unconstitutional.

[21]Ch. 116, LAWS OF MONTANA 1937, seemed to provide that if plaintiff filed for another office, the one he was then holding would *ipso facto* become vacant and that some other person would have to be appointed or elected to fill the vacancy. Plaintiff had waged an unsuccessful campaign to be elected mayor of a municipality.

[22]Copy of complaint in this case furnished to the writer of this comment by counsel for plaintiff shows that plaintiff alleged that if a vacancy existed, it was the duty of the defendant as the Governor of the State to proclaim an election to fill such vacancy and that plaintiff believed and therefore alleged that unless enjoined the Governor would do so and that therefore plaintiff wanted this uncertainty removed. Some courts seem to require more facts to be shown for a justiciable controversy. In Adams v. City of Walla Walla (1938) 196 Wash. 268, 82 P. (2d) 584, where a labor union desired the uncertainty created by an anti-picketing ordinance removed by having the ordinance declared unconstitutional, the court refused to take jurisdiction. It said: "No strike or restraint by the city of patrolling or loitering, pursuant to the ordinance in question, has been alleged, nor has any actual enforcement thereof with respect to appellants, been shown. There is nothing alleged but a remote, contingent peril to appellants. Any decision at this time, in the absence of any controversy, would be purely academic." Langer v. State (1939) 69 N. Dak. 129, 284 N. W. 238; McDermott v. State et al. (1938) 197 Wash. 79, 84 P. (2d) 372. But see BORCHARD, DECLARATORY JUDGMENTS (1934) p. 303 where he says: "How many facts are necessary in a particular case depends upon the nature of the issue involved."

In *Blackford v. Judith Basin County*,[23] a former owner of land wanted a declaration to the effect that he was entitled to repurchase his land from the county by paying the taxes, penalties, and interest instead of the advertised price. The court said: "This is an appeal by the defendants . . . from a judgment of the district court of that county under the Declaratory Judgments Act." The defendant county contended that the law allowing plaintiff to purchase his land below the advertised price was unconstitutional, but the Court declared that the law was constitutional and that plaintiff did not have to pay the taxes for the two years during which the county held the title. Here the essential elements for declaratory relief were present and the case seems clearly within the scope of the act.

In *State ex rel. Butte Brewing Co. v. District Court*[24] an insured desired a declaration that an insurance policy and an indemnity policy covered a personal injury and obliged the insurers to defend an action to recover damages. The Court said: " . . . an action was instituted in the district court of the above named county by the brewing company against both the insurance and the indemnity company under the Uniform Declaratory Judgments Act (secs. 9835.1 to 9835.16, Rev. Codes), to have determined whether the defendants, therein, or either of them, were liable to defend the McCulloh action." The Supreme Court sustained the lower court in holding that the insurance company was liable to defend and that the indemnity company was not liable to defend. The parties were adverse in this action,[25] there was a real controversy over the interpretation of the word "unloading" as used in the policies, and the decision was *res judicata* on the question of the coverage of the policies.[26]

[23](1940) 109 Mont. 558, 98 P. (2d) 872.
[24](1940) 110 Mont. 250, 100 P. (2d) 932.
[25]Some courts seem to take the position that they have no jurisdiction unless the injured party be made a party to the action. Maryland Casualty Co. v. Consumers Finance Service (1938) 101 Fed. (2d) 514; Dobson v. Ocean Accident & Guarantee Corporation (1933) 124 Neb. 652, 247 N. W. 789; Updike Inv. Co. v. Employers' Liability Assurance Corp. (1935) 128 Neb. 295, 258 N. W. 470. But see Borchard, *Declaratory Judgments and Insurance Litigation*, 34 ILL. L. REV. 245, 266, (1939) where he says: "The important question is whether the adjudication would have substantial effect in terminating the controversy; that leaves room for judicial discretion as to who must be joined."
[26]In 123 A. L. R. 279, 300, it is said: "The decisions under the state declaratory judgment acts appear to be in some conflict in the application of such acts as to the questions with respect to insurance policies. This conflict is perhaps explicable by the variance in statutory provisions, the fact that considerable discretion is permitted to or assumed by the courts in granting or denying relief, and the different factual situation involved."

So the Montana Court has used declaratory judgments to determine the validity of irrigation assessment liens on state-owned lands, to determine the constitutionality and application of an election law as it affected an office holder, to determine the constitutionality of a tax statute, and to determine the rights of an insured as against the insurers. These cases show some of the specific instances in which declaratory judgments may be used, and also some of the purposes for having such an act.

Borchard has listed fourteen purposes.[27] Some of these purposes, as for instance, "to afford a speedy and inexpensive method of adjudicating legal disputes," is well illustrated by the Montana cases. Another writer[28] has said that one of the purposes of the act was to give a person a chance to remove the hazard of acting upon his own interpretation of his obligations. This writer quotes a Congressman as saying: "Under the present law you take a step in the dark and then turn on the light to see if you have stepped in a hole. Under the declaratory judgment law you turn on the light and take the step."[29]

Sunderland emphasized the social purpose behind declaratory relief in these words:

> "There is no doubt that the personal animosities developed by litigation are serious drawbacks to the usefulness of the courts . . . Parties hesitate to resort to the courts because they shrink from a state of war with their neighbors or business associates. But if the courts could operate as diplomatic instead of belligerent agencies, less hesitation would be felt over recourse to them, and less strain would be put upon the friendly relations of the parties. To ask the court merely to say whether you have certain contract rights against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war: the former assumes that both parties wish to do right, the latter is based on an accusation of wrong. A request for a declaration of right plainly implies full confidence that the defendant will promptly and voluntarily do his duty as soon as the court points it out to him. It indicates a willingness to rely on the defendant's sense of honor, as a sufficient remedy. It makes the law suit a co-operative proceeding in which the "court merely assists

[27]Borchard, *The Uniform Declaratory Judgments Act*, 18 MINN. L. REV. 239, 257-260 (1934).
[28]Appleman, *Jurisdicitional Conflicts in Declaratory Judgment Actions*, 29 KY. L. J. 48 (1940).
[29]Appleman, *op. cit. supra* note 28 p. 49.

the parties to settle their differences by stating to them the rules of law which govern them.'"[30]

So Montana in adopting the UNIFORM ACT has made possible the realization of the benefits to be derived from declaratory judgments. One might query, however, whether or not it is being used as extensively by the members of the Montana bar as it might be used; and it is suggested that a full discussion of the act by the court in cases where declaratory relief is asked might promote greater awareness by the bar of the possibilities under it and fuller realization of the benefits to be derived from it. Furthermore, careful consideration of the act is necessary if it is to accomplish its purpose of uniformity in decisions in States adopting it. And in conclusion, it would be well to keep in mind a warning given by Borchard, the leading authority in this field of the law, when he said:

"But the declaratory judgment is not intended as a sedative to enable fearsome people to 'sleep o'nights', or to enable or permit the courts to decide abstract, hypothetical, or academic questions. The court must be alert to establish the fact that the issue is contested, that the parties have an adverse legal interest in its adjudication, and that by the decision a practical end in clarifying, quieting, and stabilizing the legal position will be subserved. This purpose may not appear on the face of the pleadings, but it is the duty of the judge to call for sufficient facts to enable him to determine the intent and objectives of the suit and to satisfy himself that a useful purpose is served by making a declaration of rights.'"[31]

—Jerome Paulson.

PROCEDURE: SUBSTITUTED SERVICE ON DOMICILIARY BY NOTICE OUTSIDE THE STATE

In Volume I of the *Montana Law Review*[1] the suggestion was made that probably the United States Supreme Court would uphold substituted service upon a domiciliary in any action in personam, even though he be outside the state, provided he receives actual notice—this, by virtue of the extraterritorial authority of a state over her domiciliaries.

[30]SUNDERLAND, CASES AND MATERIALS ON JUDICIAL ADMINISTRATION (1937) p. 317.
[31]Borchard, *op. cit. supra* note 27, p. 260.

[1] McNamer, *Substituted Service on Resident Motorists*, 1 MONT. L. REV. No. 1, p. 51 (1940).