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NOTE AND COMMENT

57

And still their devious course pursue
To keep the path that others do.

But how the wise old wood-gods laugh,
Who saw the first primeval calf!
Ah! many things this tale might teach;
But I am not ordained to preach.

THE APPLICATION OF THE UNIFORM DECLARATORY JUDGMENTS ACT IN MONTANA

In 1922 the Uniform Declaratory Judgments Act¹ was drafted by the Commissioners on Uniform State Laws. Although several states had adopted a declaratory act of this nature prior to this time, the majority have since adopted the Uniform Act as drafted by the Commissioners. Up to March 1943, the Federal Government² and all but eight states³ had adopted declaratory judgments acts with more than three thousand cases having been adjudicated under the provisions of such acts. According to an eminent authority⁴ on the subject, more declaratory judgments were rendered in the seven year period from 1934 to 1941 than in the time prior to 1934, indicating the increasing awareness by bench and bar of its value as a judicial remedy.

Montana in 1935 became the twenty-first state to adopt the Uniform Act⁵ but since its enactment the Montana Supreme Court has only considered eleven cases⁶ which asked for or involved declaratory judgments. Whether these eleven cases represent the total need for declaratory judgments can, of course, only be a matter of conjecture, but when compared with the extensive use made of it in other jurisdictions it would seem that members of the bar have not taken full advantage of the Act.

¹See Uniform Laws Annotated No. 9 (1940) Cumulative Annual Pocket Part p. 70.

²48 STAT. 955 (1934), 28 U.S.C. §400 (1940).

³Arkansas, Delaware, Georgia, Illinois, Iowa, Louisiana, Mississippi, Oklahoma.

⁴BORCHARD, DECLARATORY JUDGMENTS (2nd ed. 1941) p. vii.

⁵R.C.M. 1935 §§9835.1-9835.16.

⁶Toole 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. 578, 98 P. (2d) 872; State ex rel. Butte Brewing Co. v. District Court (1940) 110 Mont. 250, 100 P. (2d) 932; Vantura v. Mont. Liquor Control Board (1942) 113 Mont. 265, 124 P. (2d) 569; Gullickson v. Mitchell (1942) 113 Mont. 359, 126 P. (2d) 1106; Pollard v. Mont. Liquor Control Board (1942) 114 Mont. 220, 131 P. (2d) 974; Bottomly, Atty. Gen. v. Meagher County (1943) 114 Mont. 220, 133 P. (2d) 770; State ex rel. Davidson v. Ford, Gov. (1943) 115 Mont. 165, 141 P. (2d) 373; Carey, State Treas. v. McFatrige et al. (1943) 115 Mont. 278, 142 P. (2d) 229.

A brief discussion of the Act and its application in Montana for the first five years after its enactment is presented in a comment published in Volume II of the MONTANA LAW REVIEW.⁷ The writer there dealt with five cases in which he pointed out that "in none of these cases did the Court discuss the history, general provisions or the purpose of the Uniform Act." That statement is still applicable to all the cases that have subsequently been brought under the Act. However, it was the conclusion of the writer that the issues raised in each case presented a proper cause for a declaratory judgment. In those cases the Declaratory Judgments Act was used "to determine the validity of irrigation assessment liens on state owned lands, to determine the constitutionality and application of election laws 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."

Since that time the Declaratory Judgments Act has only been used to determine the construction and constitutionality of statutes. That declaratory judgments are especially appropriate for the settlement of such questions is attested by numerous authorities⁸ and the wording of the Act⁹ itself. The Act states that

"any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the statute . . . and obtain a declaration of rights, status or other legal relations thereunder."

⁷Paulson, *The Application of the Uniform Declaratory Judgments Act in Montana*. 2 MONT. L. REV. 106 (1941).

⁸"If legal powers of the government or officials are challenged by the persons affected or if an official . . . is left in dilemma because of doubt and fear of exercising powers which may expose him to personal liability . . . the state has an interest in removing the doubt before disaster has occurred." Borchard, *Judicial Relief for Peril and Insecurity* (1932) 45 HARV. L. REV. 793, 796

⁹"The procedure is peculiarly appropriate to public laws, because specific relief is generally unnecessary against a great public authority which is extremely unlikely to break the law deliberately." Jennings, *Declaratory Judgments Against Public Authorities in England*. (1932) 41 YALE L. J. 407, 412

"The state has a special responsibility . . . to supply the simplest possible procedure for the clarification of the rules by which governmental bodies and public officers are guided and to make it as easy as practicable for the individual who is subject to its jurisdiction to ascertain his public status, rights, duties, liabilities, privileges or immunities." Ellingwood, *Declaratory Judgments in Public Law* (1934) 29 ILL. L. REV. 1,30.

⁹R.C.M. 1935, §9835.2.

NOTE AND COMMENT

59

Borchard¹⁰ in his treatise on DECLARATORY JUDGMENTS emphasizes the value of the declaratory judgment as applied to this particular subject with this statement:

"In the twentieth century, with its kaleidoscopic changes and the resulting necessity of ever new legislation to maintain the social equilibrium, there has been a special need for a speedy determination of the meaning of legislation in its application to individuals; and in countries which permit constitutionality to be raised, there has been an ever increasing challenge to the validity of legislative acts."

Numerous cases¹¹ brought under the Act admit that declaratory judgments are an answer to this challenge,¹² but at times the question arises whether an advisory opinion or declaratory judgment is desired as to the meaning of the statute.¹³ This difficulty is caused not by the similarity between advisory opinions and declaratory judgments but by a failure of courts to look past the prayer for relief to the substance of the action to determine

"whether the plaintiff or defendant have a sufficient and adequately conflicting legal interest to justify the rendering of a judgment and whether the judgment applies to a concrete factual issue—in other words whether there is a justiciable controversy."¹⁴

The Montana Supreme Court, with possibly one exception, has not been confounded by this matter and has given the Act the liberal construction enjoined upon the court.

¹⁰Borchard, *op. cit. supra* note 4, p. 765.

¹¹*School District v. Sheridan Community High School* (1930) 130 Kan. 749, 288 P. 733; *Wingate v. Flynn* (1931) 256 N.Y. 690, 177 N.E. 195; *Held in Wingate v. Flynn, supra*, that public officers are entitled to have their legal duties judicially determined by a proceeding for declaratory judgment; that in this way only can disastrous results of well intentioned, but illegal, acts be avoided with certainty. See also cases collected in 12 A. L. R. 84; 19 A. L. R. 1132; 50 A. L. R. 51; 68 A. L. R. 126; 87 A. L. R. 1236.

¹²"Declaratory judgment proceedings have frequently been employed to determine questions as to construction or validity of statutes, ordinances and other governmental regulations." 16 *Am. Juris.* pp. 296, 297, §24; see also §45 and 46, pp. 318, 319.

¹³"Controversies involving the interpretation of statutes may be settled under the declaratory judgment law, but those controversies must include rights claimed by one of the parties and denied by the other and not be merely as to the meaning of the statute." *William v. Flood* (1928) 124 Kan. 728, 262 P. 563 *Liberty Warehouse Co. v. Grannis* (1927) 273 U. S. 70, 47 *Sup. Ct.* 291; *Revis v. Daugherty* (1926) 215 Ky. 823, 287 S. W. 28; *Garden City News v. Hurst* (1929) 129 Kan. 365, 282 P. 720; Borchard, *op. cit. supra* note 4, p. 72.

¹⁴Borchard, *op. cit. supra* note 4, p. 76.

In *Vantura v. Montana Liquor Control Board*,¹⁵ Vantura desired a declaration as to the construction of statutes pertaining to liquor license fees. He maintained that as he lived in a town of less than two thousand he was only subject to a payment of a fee of \$200.00 as was specified by statute.¹⁶ The Liquor Control Board, on the other hand, contended that although his place of business was in a town of less than two thousand, it was also within a radius of five miles of a city of ten thousand and he therefore should pay a fee of \$600.00.¹⁷ The Court declared "we think *upon*¹⁸ the reading of the entire Act taken as a whole . . . the five mile rule does not apply to an applicant who is situated within the boundary of a city or *incorporated*¹⁹ town, the license fee for which is definitely fixed by the Act."

The aftermath of this case was *Pollard v. Montana Liquor Control Board*.¹⁹ Because the Court in the Vantura case had decided that the five mile rule did not apply to incorporated towns, the Board concluded that it did apply to unincorporated towns and demanded that plaintiff and others who had been brought in as defendants pay a fee of \$600.00. Pollard brought action under the DECLARATORY JUDGMENTS ACT to secure from the Court a declaration of whether or not the statutes differentiated between incorporated and unincorporated towns in fixing the fee. After deciding that such a distinction was not intended, the Court then defined the word "town" as used in the Act to determine if the licensee operated in a "town" or rural area.

The questions in these cases were not moot or fictitious. There were real adverse parties with conflicting claims that had arisen because of the uncertainty of the statutes in question. Ordinarily, before a cause of actions exists one party must suffer a wrong at the hands of another. This element, it is true, was lacking in these cases, but its very absence proclaims the value of the declaratory action. Pollard or Vantura were not required to first submit to the Board's interpretation of the statutes, pay the \$600.00 and then trust that they might obtain a refund after a more circuitous and litigious route had obtained for them what they claimed the statute meant. As a matter of fact, if they had neglected to protest payment under this latter procedure, their only hope of a refund would have been by legislative enact-

¹⁵(1942) 113 Mont. 265, 124 P. (2d) 569.

¹⁶Ch. 163, LAWS OF MONTANA 1939; Ch. 84, LAWS OF MONTANA 1937.

¹⁷Ch. 221, LAWS OF MONTANA 1939.

¹⁸Italics mine.

¹⁹(1942) 114 Mont. 44, 131 P. (2d) 974.

NOTE AND COMMENT

61

ment.²⁰ Thus, the Declaratory Judgments Act was of definite value to the litigants in these two cases in that it speeded up the administration of justice and reduced the expense of litigation.

While the Vantura and Pollard cases represent actions for declaratory judgments by individuals to secure the meaning of statutes, another very common use of the declaratory judgment is "where the government or governmental officer has decided upon a given course of action and wishes a judicial opinion as to the permissibility of the end desired or the necessity of going about it in a particular way. If the official has taken some action and the validity of this action is challenged so as to establish an issue, it is a clear case for declaratory judgment. If, however, the official asks for a declaration concerning the legality of his proposed official conduct it is very probable that he is asking for nothing more than an advisory opinion."²¹

This writer submits that in the case of *State ex rel Davidson v. Ford*²² an advisory opinion was what the plaintiff was really seeking. In this case an original proceeding was brought by the state on the relation of Davidson and others, individually and as the Veterans Welfare Commission against Governor Ford to obtain a declaration as to the validity of a recent statute.²³ The Bill in question not only provided for an appropriation for the Veterans Welfare Commission, but in addition, provided that the Commission was to allow claims in the same manner as other claims against the state were allowed. To this latter feature the Commission objected because it made the administration of its office more burdensome. To relieve itself of this burden it sought to have this part of the act declared unconstitutional on the ground that the Bill contained more than one subject not clearly expressed in its title.²⁴ The Court, without discussing the propriety of the declaratory judgment as applied to a case such as this, declared that "so long as the incidental provisions of an appropriation bill are germane to the purposes of the appropriation it does not conflict with any constitutional provision."

A closer analysis of the relief sought would have revealed to the Court that the relators, rather than seeking a declaration that would adjudicate a controversy arising under the statute,

²⁰In *re Pomeroy* (1915) 51 Mont. 119, 115 P. 333; *First National Bank v. Sanders County* (1929) 85 Mont. 150, 279 P. 247.

²¹Ellingwood, *Declaratory Judgments in Public Law* (1934) 29 ILL. L. REV. 1,30.

²²(1943) 115 Mont. 165, 141 P. (2d) 373.

²³House Bill 151, LAWS OF MONTANA, 1943.

²⁴MONT. CONST. Art. V, §23.

were really seeking a declaration that would relieve them of onerous duties imposed by the statute. They had neither taken any action nor had threatened to take any action that was challenged by another. It is a general rule in declaratory actions as in executory relief that courts will not pass on the constitutionality of an act unless conflicting claims arise thereunder, but conflicting claims are not raised by merely naming an executive officer of the state charged with the duty of enforcing the laws.²⁵ The Declaratory Act,²⁶ it is true, does state that where a statute is alleged to be unconstitutional the Attorney General of the state is to "also" be served with a copy of the proceedings, but this has not been interpreted to mean that by this simple expedient a controversy can be created. This result is supported by the view in many cases that the Attorney General is not considered as a "necessary" party to actions such as this.²⁷ One writer²⁸ suggests that the word "also" as used in the statute indicates that the Attorney General was not necessarily to be considered the real adverse party. Several courts have attempted to justify declaratory actions of this character where public interest has been sufficiently involved or where an exigency demanding immediate judicial attention was present.²⁹ Although the facts do not emphasize the exigency of the present case so as to justify granting a declaratory judgment,—if it can be justified on this ground,—an exigency may have existed inasmuch as the Court took original jurisdiction of the case. In the three cases remaining to be discussed the Court was careful to point out that it accepted original jurisdiction of a proceeding under the Declaratory Judgments Act because of the emergency presented and the consequent inadequacy of ordinary appellate

²⁵A public officer cannot transform a request for judicial advice into a declaratory action by making the attorney general of the state a defendant to the action when the latter has no duties to perform that are connected with the questions put by the plaintiff. *Revis v. Dautherty*, *op. cit. supra* note 13, *Perry v. City of Elizabethton* 160 Tenn. 102, 22 S. W. (2d) 354; 68 A. L. R. 132; *Ellingwood*, *op. cit. supra* note 21, p. 20.

²⁶R.C.M. 1935, §9835.11.

²⁷*Hessick v. Moynihan* (1927) 83 Colo. 43, 262 P. 907; *Little v. Smith* (1927) 124 Kan. 237, 257 P. 959; *Evans v. Baldrige* (1928) 294 Pa. 142, 144 Atl. 97.

²⁸*Ellingwood*, *op. cit. supra* note 21, p. 186.

²⁹In some instances courts have entered declaratory judgments as to the validity of statutes notwithstanding the seeming absence of a justiciable controversy. Thus where the court thought the declaration sought was really advisory it accepted jurisdiction because of the desirability of a speedy pronouncement by the court as to the validity of the statute. *State ex rel. Miller v. State Board of Education* (1935) 58 Idaho 210, 52 P. (2d) 147; *State ex rel. Enright v. Kansas City* (1922) 110 Kan. 603, 204 P. 690; 114 A. L. R. 1364.

procedure. This case, therefore, might be in accord with a minority that do grant declaratory judgments of an advisory character when special circumstances warrant doing so.

In *Gullickson v. Mitchell*²⁰ the Governor had appointed Gullickson as "acting" Attorney General to replace Bonner who had entered the armed services. Gullickson undertook his duties as "acting" Attorney General, but Mitchell as Secretary of State refused to attest acts of Gullickson as "acting" Attorney General, claiming that the law creating the office of "acting" Attorney General was unconstitutional. The Court declared, "What is authorized is the appointment of an Attorney General of indefinite tenure within the elected term and not the existence of two officers one who is the 'Attorney General' although detached from duty and another who is 'Acting Attorney General'." Thus with this declaration of constitutionality a controversy was settled and each officer was informed as to his official status.

In *Bottomly, Attorney General v. Meagher County*,²¹ one William Gaspar, a resident of Meagher County, died leaving property to escheat to the state. The state claimed the funds from Gaspar's estate under a constitutional provision²² directing that the funds be paid into the public school fund while the county claimed the fund by virtue of a recent legislative act²³ that provided such funds were to be paid into the county general fund. From this brief statement of the facts it is clear that a controversy existed and that the attorney general as legal representative of the state, enjoined to protect its interest, was entitled to a declaratory judgment to determine the constitutionality of the statute.

The final case for consideration is *Carey, State Treasurer v. McFatridge*.²⁴ In this case the Montana Liquor Control Board had received an offer from a liquor producer for the sale of fifteen thousand cases of whiskey, but one of the terms of sale required that the Board advance \$10.00 a case to be paid the seller through the First National Bank of Chicago. The Board, concluding that it did not have authority to make the advance, conceived a plan whereby sundry retail liquor dealers might advance the money while the Board would negotiate the transaction. The money was paid to the Board who deposited it with

²⁰(1942) 113 Mont. 359, 126 P. (2d) 1106.

²¹(1943) 114 Mont. 220, 133 P. (2d) 770.

²²MONT. CONST. ART. XI §2.

²³Ch. 104, LAWS OF MONTANA, 1939.

²⁴(1943) 115 Mont. 278, 142 P. (2d) 329.

the plaintiff, the State Treasurer. The Board then purchased the liquor and caused a draft to be drawn upon the State Treasurer who refused to honor it, contending that the procedure followed by the Board to obtain the liquor was irregular and that he could not honor the draft as the money was to be deposited in a bank not approved or bonded for the deposit of public funds. Under this state of facts the Treasurer sought a "declaratory judgment to determine his duties, obligations and status with regard to the draft presented him for payment." The court declared that the procedure adopted by the Board was lawful; that the money was "not to be deposited with the bank as public funds but would be paid to the bank for immediate delivery to the sellers under the terms of the contract." Here again the essential elements for declaratory relief were present and the case seems clearly within the scope of the Act. If the declaratory judgment had not been available to the parties to this action wherein they were able to obtain an immediate judicial pronouncement as to the course they sought to follow, it is doubtful if such a beneficial transaction could ever have been concluded.

It will be noticed in these cases that the court only declared the rights of the litigants. Further relief would be superfluous as it would hardly be necessary that an officer or department of the government be coerced into obedience to the law, once they knew its meaning as determined by the court.⁶⁵ Normally, a declaration is all that is necessary for the "act proceeds on the theory that men in their business relations are generally honest and that they are willing to discharge their obligations when they are authoritatively informed as to what those obligations are."⁶⁶ However, coercive relief may be demanded either in association with or as a supplement to declaratory relief, should the declaration not be observed.⁶⁷ On the other hand,

⁶⁵"We do not, however, deem it necessary to grant the injunctive relief requested. Respondents admit that the issue presented is essentially one of law. We are certain that when the law is settled it will be obeyed by responsible public officials; that an injunction would be nothing more than a mere formality, and that it is not necessary for one branch of the government to restrain another in order to obtain obedience for declared law." *Stratton v. St. Louis S. W. R. Co.*, 232 U. S. 10.

⁶⁶Potts, *Some Practical Uses of the Declaratory Judgment Law* (1943) 22 TEXAS LAW REVIEW 309, 326.

⁶⁷"Under Section 8, if the losing party fails to respect the rights as declared by the court, the court may grant such further relief as may be necessary and proper. The sword of justice is always at hand, but it is not exhibited or brought into use until the need of it arises." Potts, *op. cit. supra* note 36, p. 310.

this course of procedure may be followed for the reason that if the coercive relief be denied the court can still proceed with the substantive issues and grant a declaration that may for all practical purposes produce the same result.⁸⁸

Thus, though the declaratory judgment may at first blush seem only to declare rights, it in reality does much more:

“It enables disputes to be determined in their incipency before they have grown into devastating battles. . . . A decision is obtainable without the prior necessity of a purported violation of law or precarious leap in the dark. . . . It enables the citizen to avoid the extraordinary legal remedies and injunctions that have accumulated so vast a cargo of technicalities that the complainant desirous of challenging an administrative power or privilege finds himself frequently engulfed in a procedural bog which bars him from his goal.”⁸⁹

“And, most important of all, since no wrong is charged against the defendant and no damages are asked for, there is present in most such cases a notable absence of the bitterness and hostility frequently present in ordinary damage suits and the litigants are able to continue their business relations.”⁹⁰

Arthur Martin

⁸⁸State ex rel. Smith v. Board of Commissioners of Shawnee County, (1931) 132 Kan. 233, 294 P. 915. (quo warranto plus declaration asked; quo warranto denied, declaration granted.)

In a case where the sewer of a municipal corporation emptied into that of another under an agreement held ultra vires, the court considered the great inconvenience of suddenly closing a sewer in daily use and refused the injunction, but declared the plaintiff's right to relief with leave to apply for an injunction after a reasonable time, should the defendant fail to make other arrangements. *Islington Vestry v. Hornsey U. D. C., C. A.* (1900) 1 Ch. 695.

⁸⁹Borchard, *op. cit. supra* note p. XV.

⁹⁰Potts, *op. cit. supra* note 36, p. 326.

MONTANA AND THE FEDERAL JUDGMENT LIEN

Does the judgment of a federal court rendered in Montana become a lien as soon as docketed by the clerk of the Federal court? Must a title searcher in Montana go to the office of the Federal District Court to be sure there is no judgment lien against his property? These questions indicate the murky¹ atmosphere surrounding Federal judgment liens in this state since the decision of *Rhea v Smith*.²

¹WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1940) dark; obscure; thick or impenetrable.

²*Rhea v. Smith* (1927) 47 S. Ct. 698, 274 U. S. 434, 71 L. Ed. 1139.