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## Declaratory Judgment Act-What Constitutes a Controversy Within the Scope of the Act

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*Declaratory Judgment Act—What Constitutes a Controversy Within the Scope of the Act*—In 1912, the defendant entered into a contract with Stoughton A. Fletcher and Albert E. Metzger under the terms of which she leased to them certain real estate in the city of Indianapolis for a term of ninety-nine years. The lessees assigned their interest to the plaintiff, the Fletcher Savings and Trust Building Company who, in turn, sublet the real estate and building, which it had erected thereon, to its coplaintiff, the Fletcher Savings and Trust Company, for a period of fifteen years, or until January 1, 1934. Under the covenants of this lease the lessees agreed to pay any taxes, assessments, benefits or rates levied by virtue of a local, state or national authority upon the real estate or buildings, or which might be assessed upon the right of the lessor to receive the rentals thereunder during the lease. After the 1913 income tax law was enacted by Congress, a controversy developed between the plaintiffs and defendant as to whether or not the duty rested on the plaintiffs, as lessees, to pay the income taxes charged against the rents received by the defendant from the plaintiffs. For the purpose of obtaining a declaratory judgment or decree respecting the duties and obligations of the respective parties, the plaintiffs filed a complaint, alleging these facts, to which the defendant demurred for want of a jurisdiction and insufficiency of facts to state a cause of action. This demurrer was overruled, whereupon the defendant filed an answer, to the second, third, and fourth paragraphs of which the plaintiffs demurred for insufficiency of facts. These demurrers were sustained. Upon the issues thus formed the cause was tried, resulting in a judgment for the plaintiffs. Defendant then filed a motion to modify the judgment, which was overruled, and a motion for a new trial, which was also overruled. The defendant then appealed, contending, among other things, that no actual controversy within the purview of the Declaratory Judgment Act was shown by the pleadings or proof. Held, where landlord and tenants

Ins. Co. of Wis. v. Glidden Co. (1931), 52 S. Ct. 69 (Held statutory arbitration due process of law).

<sup>14</sup> Camors-McConnell Co. v. McConnell (1905), 140 Fed. 412; Hadley-Dean Plate Glass Co. v. Highland Glass Co. (1906), 143 Fed. 242; Northwestern Consol. Milling Co. v. Callam (1910), 177 Fed. 786.

<sup>15</sup> McNear Inc. v. Am. & British Mfg. Co. (1919), 42 R. I. 302, 107 Atl. 242.

<sup>16</sup> Continental Wall Paper Co. v. Voight & Sons Co. (1907), 212 U. S. 227.

disagreed as to whether tenants under a ninety-nine year lease were required to pay landlord's income tax in respect to rents, a "controversy" within the Declaratory Judgment Act was presented.<sup>1</sup>

With the adoption by Minnesota in 1933, there are now thirty states and three territories which have adopted in one form or another the procedure for declaratory judgments, eighteen of which have adopted the Uniform Act.<sup>2</sup> It has been said that the purpose of a declaratory judgment is to serve as an instrument of preventive justice and adjudicate rights or status of parties without the necessity of previous crime, violence or breach,<sup>3</sup> and to relieve litigants of the common law rule that no declaration of rights may be judicially given unless a right has been violated, for which relief may be granted.<sup>4</sup>

Indiana adopted the Uniform Declaratory Judgment Act<sup>5</sup> in 1927. Section 1 of the Act provides: "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. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree." Section 2 provides that, "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract of franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." Section 3 provides that, "A contract may be construed either before or after there has been a breach thereof." Section 5 provides that, "The enumeration in Sections 2, 3 and 4 does not limit or restrict the exercise of the powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." Section 6 provides that, "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Section 12 provides that, "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."

There has been very little use of the Uniform Declaratory Judgment Act in Indiana to date. In *Robinson v. Moser*,<sup>6</sup> an action was brought under the act by a prosecuting attorney to determine whether a statute postponing elections of successors to prosecuting attorneys having commissions expiring in December, 1931, until the general election of 1932 was constitutional. In *Zoercher v. Agler*,<sup>7</sup> the leading Indiana case, it was held that taxpayers could maintain an action for declaratory judgment to determine the legality of a tax levy. The court said, concerning the question of what constituted a "controversy," that "The person bringing the action must have a substantial present interest in the relief sought, such as, there must exist not merely a theoretical question or controversy but a real or actual controversy, or at least the ripening seeds of such a controversy, and that a question has arisen affecting

<sup>1</sup> *Owen v. Fletcher Savings and Trust Bldg. Co.* (1934), 189 N. E. 173 (Ind. App.).

<sup>2</sup> *Bochard, Uniform Declaratory Judgments Act* (1934), 18 Minn. L. Rev. 239.

<sup>3</sup> *Sheldon v. Powell* (1930), 99 Fla. 782, 128 So. 258.

<sup>4</sup> *De Charette v. St. Mathews Bank and Trust Co.* (1926), 214 Ky. 400, 283 S. W. 410.

<sup>5</sup> *Burns' Ann. Ind. Stat. (Supl. 1929)*, secs. 680.1 to 680.16.

<sup>6</sup> (1931), 203 Ind. 66, 179 N. E. 270.

<sup>7</sup> (1930), 202 Ind. 214, 172 N. E. 186.

such right which ought to be decided in order to safeguard such right." And in *Enmeier v. Blaize*,<sup>8</sup> the latest reported case until the principal case, an action was brought by the clerk of a circuit court to determine his rights and status as affected by an act of the General Assembly.

In general, it may be said that to invoke the jurisdiction of the court it is essential that there be involved a genuine existing controversy calling for the adjudication of present rights. It is contemplated that the parties to the proceeding shall be adversely interested in the matter as to which the declaratory judgment is sought, and their relation thereto such that a judgment or decree will operate as *res judicata* to them.<sup>9</sup> However, an interesting development of this proposition has been made in Pennsylvania, where it has been held that the court has jurisdiction either where there is an actual controversy, or if there exists the ripening seeds of such a controversy.<sup>10</sup> The distinction made is that if the differences between the parties concerned, as to their legal rights, have reached the stage of antagonistic claims, which are being actively pressed on one side and opposed on the other, an actual controversy appears; but where claims of the several parties in interest, while not having reached that active stage are nevertheless present and indicative of threatened, apparently unavoidable litigation in the immediate future, the ripening seeds of a controversy appear.<sup>11</sup> Apparently, the Indiana courts also have adopted this position.<sup>12</sup> It would seem that this position is the better, as probably some of the older cases have used the word "controversy" in the common law sense where a primary right has already been invaded. Such a view, of course, defeats the very purpose of the Declaratory Judgment Act.

In spite of the view that the Declaratory Judgment Acts should be liberally interpreted,<sup>13</sup> an examination of the recent cases shows that in a large number of them the courts are compelled to refuse to determine controversies which are not real. Moot or theoretical questions cannot be litigated under such acts;<sup>14</sup> nor can actions be brought merely to secure free advice where there is no present existing controversy.<sup>15</sup> Most courts also have stated that they will not render declaratory judgments contingent on future and uncertain events,<sup>16</sup> but a few have pointed out the desirability of granting a contingent declaratory judgment where it will be of value as a guide to the present conduct of the parties.<sup>17</sup> Professor Borchard, an enthusiastic proponent of the Uniform Declaratory Judgment Act, observes in a recent article<sup>18</sup> that,

<sup>8</sup> (1931), 203 Ind. 475, 179 N. E. 783.

<sup>9</sup> *Holt v. Custer County* (1926), 75 Mont. 328, 243 Pac. 811; *Patterson v. Patterson* (1926), 144 Va. 113, 131 S. E. 217; *West v. Wichita* (1925), 118 Kan. 265, 234 Pac. 978; *Stinson v. Graham* (1926), (Tex. Civ. App.) 286 S. W. 264; *Washington-Detroit Theater Co. v. Moore* (1930), 249 Mich. 673, 229 N. W. 618.

<sup>10</sup> *Kariher's Petition* (1925), 284 Pa. 455, 131 Atl. 265; *In Re Pittsburgh's Consol. City Charter* (1929), 297 Pa. 502, 147 Atl. 525.

<sup>11</sup> *In Re Cryan's Estate* (1930), 301 Pa. St. 386, 152 Atl. 675.

<sup>12</sup> *Zoercher v. Agler* (1930), 202 Ind. 214, 172 N. E. 186.

<sup>13</sup> *Burns' Ann. Ind. Stat. (Supl. 1929)*, sec. 680.12; *Tennessee Electric Co. v. Hannah* (1928), 157 Tenn. 582, 12 S. W. (2d) 372.

<sup>14</sup> *Kelly v. Jackson* (1925), 200 Ky. 815, 268 S. W. 539; *Miller v. Miller* (1924), 149 Tenn. 463, 261 S. W. 965; *Garden City News v. Hurst* (1929), 129 Kan. 365, 282 Pac. 720.

<sup>15</sup> *Post v. Metropolitan Casualty Ins. Co.* (1929), 227 App. Div. 156, 237 N. Y. S. 64; *Diety v. Zimmer* (1929), 231 Ky. 546, 21 S. W. (2d) 999.

<sup>16</sup> *Lumms, Declaratory and Interpretive Judgments in Massachusetts* (1929), 14 *Mass. L. Q.* 1; *Tanner v. Boynton Lumber Co.* (1925), 98 N. J. Eq. 85, 129 Atl. 617; *Nashville Trust Co. v. Dake* (1931), 162 Tenn. 356, 36 S. W. (2d) 905; *Sheldon v. Powell* (1930), 99 Fla. 782, 128 So. 258; *Kariher's Petition* (1925), 284 Pa. 455, 131 Atl. 265.

<sup>17</sup> *Murray Motor Co. v. Overby* (1926), 217 Ky. 198, 289 S. W. 307; *Miller v. E. and M. Theater Corp.* (1929), 134 Misc. 634, 235 N. Y. S. 595.

<sup>18</sup> *Bochard, Declaratory Judgments in Federal Courts* (1932), 141 *Yale L. J.* 1195.

"It goes without saying that a court can and should always refrain from deciding a particular issue before there is any necessity therefor,<sup>19</sup> and that it is the court's function to establish in the case before it not only the existence of the procedural and substantive prerequisites of justiciability, but also the existence on the record of sufficient facts to pass upon the issue and make the decision *res judicata* in the case. If there are insufficient facts, the judgment may be withheld as in effect an advisory opinion or involving a moot case, and on actions for declaratory judgments courts have, as a rule, been alert and astute not to render advisory opinions, or decide abstract or hypothetical questions or moot cases."<sup>20</sup>

Another development of litigation under the declaratory judgment statutes has been that such a judgment is usually denied where a specific statutory remedy for a special type of case has been provided.<sup>21</sup> However, as Professor Bochard again so aptly points out,<sup>22</sup> the occasional suggestion in Pennsylvania,<sup>23</sup> Hawaii,<sup>24</sup> Michigan,<sup>25</sup> and elsewhere<sup>26</sup> that a declaratory judgment will not be rendered merely because another common remedy is available is an error of law and a flat contradiction of the express words of the statute, which says, "whether or not further relief is or could be claimed."<sup>27</sup>