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DECLARATORY JUDGMENTS - JUSTICIABLE CONTROVERSY

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DECLARATORY JUDGMENTS — JUSTICIABLE CONTROVERSY — The governor of Wisconsin instituted a declaratory proceeding against the secretary of state. The governor wanted to determine his power to make ad interim appointments to allegedly vacant statutory offices and to positions incumbents were holding over. Prior to this action he had made no appointments to these offices, for the secretary of state had advised him that he would not honor the commissions, or audit and pay the expense account of such appointees. The governor claimed that the alleged conduct of the secretary of state prevented him from securing suitable persons to fill these offices. The court *held* that the governor was not entitled to a declaratory judgment since there was no gubernatorial appointee who could presently assert a legally protective interest, and the mere difference of opinion did not make a "justiciable controversy." *State ex rel. La Follette v. Dammann*, (Wis. 1936) 264 N. W. 627.

The declaratory judgment provides a flexible means of administering justice, which is especially adaptable to modern controversies.¹ Its use in the public law field furnishes a simple procedure for an individual or governmental body to determine its public status, rights, duties, liabilities, privileges, or immunities.² The courts have gradually recognized the convenience and practicability of the declaratory judgment procedure, but they have found difficulty in agreeing upon a satisfactory and workable definition of a "justiciable controversy" as between the parties to the action.³ A few courts have given a very narrow definition, being influenced by some of the language of the federal courts relating to the term "case or controversy" found in the Constitution of the United States and by the traditional conception of a "cause of action."⁴ The refusal of relief in the instant case until the governor had made his appointments is indicative of this strict view. There would, of course, have been no ordinary remedy at law or equity until the appointments were made, but it does not necessarily follow that a controversy had not already arisen. Declaratory relief has been granted to an appointee or incumbent seeking to determine the title to an office,⁵ or the term and status of an office,⁶ or the fees arising therefrom,⁷ for in these situations all the requirements of justiciability seem to be fulfilled. The declaratory judgment has been invoked in behalf of officers or governmental bodies seeking to ascertain their respective powers

¹ Sunderland, "The Types of Controversies in Which Declaratory Judgments Have Been Rendered," 4 MICHIGAN JUDICIAL COUNCIL REPORTS 55 (1934).

² Borchard, "Judicial Relief for Peril and Insecurity," 45 HARV. L. REV. 793 at 839 (1932); Ellingwood, "Declaratory Judgments in Public Law," 29 ILL. L. REV. 1 (1935).

³ Borchard, "The Constitutionality of the Declaratory Judgment," 31 COL. L. REV. 561 at 610 (1931); 87 A. L. R. 1213 (1933); Ellingwood, "Declaratory Judgments in Public Law," 29 ILL. L. REV. 1 at 17 (1935).

⁴ Ellingwood, "Declaratory Judgments in Public Law," 29 ILL. L. REV. 174 at 213 (1935).

⁵ *Hay v. White*, 201 Ind. 425, 169 N. E. 332 (1929) (claimant sought to determine his right to the office of mayor against a rival and the acting mayor); *Enmeier v. Blaize*, 203 Ind. 475, 181 N. E. 1 (1931) (clerk of court applied for a declaratory judgment against his successor and the attorney general that his successor was not entitled to assume office until a later date); BORCHARD, DECLARATORY JUDGMENTS 402, 609 (1934).

⁶ *Fox, Dist. Atty. v. Ross*, 7 D. & C. (Pa.) 263 (1926) (an appointed district attorney determined the length of the term of his office); BORCHARD, DECLARATORY JUDGMENTS 352 (1934).

⁷ *Norton v. Saline County Commissioners*, 118 Kan. 659, 236 P. 819 (1925) (attorney general determined his right to a fee, which was contested by the board of county commissioners); *Wire v. Edwards County Commissioners*, 131 Kan. 725, 293 P. 753 (1930) (mileage expense of the sheriff was declared); *City of Corbin v. Underwood*, 221 Ky. 413, 298 S. W. 1090 (1927) (jailer wanted to determine his right of compensation); *Nichols v. Board of Education*, 232 Ky. 428, 23 S. W. (2d) 607 (1930) (clerk wanted to determine his right to extra compensation); *Hawkins v. Fiscal Court of Caldwell County*, 233 Ky. 432, 25 S. W. (2d) 1015 (1930) (sheriff's right to statutory fees for arrests).

relative to the construction or operation of statutes or constitutional provisions;⁸ or seeking to determine the validity of tax assessments and tax statutes;⁹ or seeking to determine their own powers in respect to other matters.¹⁰ Many cases

⁸ State ex rel. Hopkins v. Grove, 109 Kan. 619, 201 P. 82 (1921) (determination of defendant's eligibility to the position of city commissioner before it came time for him to assume office); School District No. 6 v. Rooks County Comrs., 115 Kan. 631, 223 P. 818 (1924) (determination of school district's power under a statute to levy an assessment); State ex rel. Brown v. Lutz, 116 Kan. 621, 227 P. 334 (1924) (application of the county attorney for the determination of the term of office of the appointee to the office of county treasurer); State ex rel. Finch v. Eustace, 117 Kan. 746, 233 P. 109 (1925) (declaratory judgment at the instance of the county attorney of the rights of an osteopath under the statute); Nuetzel v. Bradsby, 205 Ky. 130, 265 S. W. 503 (1924) (determination of the power of the county clerk to print ballots for several election districts on a single sheet); Nuetzel v. Will, 210 Ky. 453, 276 S. W. 137 (1925) (determination of the validity of the proposed typographical arrangement of the ballot to be issued by the county clerk); Lewis v. Coleman, 233 Ky. 266, 25 S. W. (2d) 390 (1930) (action by the incumbent secretary of state against the state auditor to determine the amount of his salary); City of Sturgis v. Christenson Bros. Co., 235 Ky. 346, 31 S. W. (2d) 386 (1930) (determination of the validity of a contract made by a city to issue bonds under two apparently conflicting statutes); Dean v. Board of Education of Harrodsburg, 247 Ky. 553, 57 S. W. (2d) 477 (1933) (determination at the instance of a school district whether a certain property was included within a school district); People ex rel. Stalter v. Lynch, 245 N. Y. 534, 157 N. E. 847 (1927) (determination of the right of a defeated candidate to be declared elected if the winner was ineligible); Winegate v. Flynn, 139 Misc. 779, 249 N. Y. S. 351 (1931) (determination of the term of a surrogate's office under the constitution); Multnomah County Fair Assn. v. Langley, 140 Ore. 172, 13 P. (2d) 354 (1932) (determination at the instance of a county fair whether a proposed game of chance would amount to a lottery); Powers v. Vinsant, 165 Tenn. 390, 54 S. W. (2d) 938 (1932) (declaration at the instance of the state board of dental examiners that under a state statute the students in a dental clinic had no right to charge fees). See Sunderland, "The Types of Controversies in Which Declaratory Judgments Have Been Rendered," 4 MICHIGAN JUDICIAL COUNCIL REPORTS 63 (1934).

⁹ Washington County High School District v. Board of County Commissioners, 85 Colo. 72, 273 P. 879 (1929) (whether funds already raised by a school district could be used for a certain purpose); Secretary of State v. Potter, 252 Mich. 460, 233 N. W. 380 (1930) (determination whether a certain tax provision should be applied to certain property); Milwaukee County v. City of Milwaukee, 210 Wis. 336, 246 N. W. 447 (1933) (determination of county's right to make proposed sales of delinquent taxes).

¹⁰ City of Stamford v. Town of Stamford, 100 Conn. 434, 124 A. 26 (1924) (determination of the duty to repair a bridge as between city and township); Yale University v. New Haven, 104 Conn. 610, 134 A. 268 (1926) (determination of the power of aldermen to authorize a bridge); State ex rel. Mellott v. Wyandotte County Commissioners, 128 Kan. 516, 279 P. 1 (1929) (determination whether the county treasurer or the board of county commissioners had the power to designate a bank for deposit of county funds); Harrod v. Hoover, 209 Ky. 160, 272 S. W. 400 (1925) (determining which of two boards had the power of appointing a superintendent of school); see Sunderland, "The Types of Controversies in which Declaratory Judgments Have Been Rendered," 4 MICHIGAN JUDICIAL COUNCIL REPORTS 77 (1934); BORCHARD, DECLARATORY JUDGMENTS 351 (1934).

have held that the power of a municipality to issue proposed bonds may be determined in a suit for a declaratory judgment brought before any bonds are issued, against contesting public officials or citizens or taxpayers.¹¹ The declaration usually determines the validity of the proposed bonds, the use to be made of the proceeds thereof, and the rights of bondholders.¹² Cases of this type can not be distinguished in principle from the instant case, where the governor wanted to determine his power of appointment.

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¹¹ BORCHARD, DECLARATORY JUDGMENTS 353 (1934).

¹² *City of Stamford v. Town of Stamford*, 107 Conn. 596, 141 A. 891 (1928); *State ex rel. Enright v. Kansas City*, 110 Kan. 603, 204 P. 690 (1922); *State ex rel. Griffith v. Davis*, 113 Kan. 584, 217 P. 903 (1923); *State ex rel. Smith v. Saline County Comrs.*, 128 Kan. 437, 278 P. 54 (1929); *Waller v. Union County*, 223 Ky. 636, 4 S. W. (2d) 414 (1928); *City of Louisville v. Board of Education*, 229 Ky. 325, 17 S. W. (2d) 210 (1929); *Muskegon Heights v. Danigelis*, 253 Mich. 260, 235 N. W. 83 (1931); *County of Bay v. Hand*, 257 Mich. 262, 241 N. W. 256 (1932). See Sunderland, "The Types of Controversies in Which Declaratory Judgments Have Been Rendered," 4 MICHIGAN JUDICIAL COUNCIL REPORTS 91 (1934).