DECLARATORY JUDGMENTS AGAINST PUBLIC AUTHORITIES IN ENGLAND

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The original function of the courts in England was to enforce the laws. Their process led to the exertion of force against an individual or his property. But during the nineteenth century there came a realization of the fact that the average man does act according to law when he knows what the law commands him to do. He will fulfil his duties and will limit himself to his rights when he knows what they are. But so great is the complexity of modern law that the citizen is unable to determine his rights and duties in any situation which is even a little out of his normal course of life. What he needs is some system which will enable him to ascertain his legal position so that he may act accordingly. No doubt there is also the citizen who will not obey the law even when he knows it. There is the criminal, there is the deliberate or negligent tort-feasor, and there is the person who finds it more convenient to break contracts than to carry them out. But it is not necessary to assume, and indeed it is not true, that every citizen who disputes about the nature of his duties is anxious to avoid fulfilling them. It is more likely that he is not fulfilling them because he does not know what they are.

The giving of advice on these matters is the duty of the legal adviser. The ordinary man has his solicitor whom he consults as occasion requires. Great corporations and unincorporated societies employ full-time solicitors. Where the law is at all complicated the solicitor refers to a barrister. Some great corporations and unincorporated societies retain barristers so as to have such more expert advice always available. In the great majority of cases this advice is sufficient, for the law is settled and can be definitely ascertained by reference to the proper sources. But no system of law can be absolutely comprehensive. New situations arise for which no law is provided; the application of known rules of law to new facts may be uncertain; even the facts themselves may be disputed. In such circumstances the law will be what the highest tribunals determine and the facts will be as the judge sees them. The advice of the lawyer

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will be opinion only; he will have to forecast what at a later stage a judge is likely to decide. He cannot say, "This is the law"; he can only express the opinion that the House of Lords would decide so-and-so.

The common law had no remedy for this state of affairs. It could only give damages where an illegal act had been committed or some person had refrained from carrying out his legal duty. Courts of equity went further by compelling the performance of duties by means of orders for specific performance, mandatory injunctions, and bills of account, and by restraining by injunction the commission of illegal acts. All these are remedies. They compel the defendant to carry out his legal or equitable obligations. If he refuses he can be committed for contempt or execution can be levied against his property. But it is rarely necessary to proceed that far. In the great majority of cases it is not the fear of committal or execution which makes the defendant obey the order. He obeys because he now knows the law. Before the decision he disputed the interpretation which the plaintiff placed upon the law; there is now no chance of dispute. Thus the procedure in equity and especially the procedure in suits for injunctions was more often than not aimed chiefly at determining a point of law. It was the declaration of the law which was sought by the parties; the relief was ancillary. In most cases the relief is quite unnecessary. The parties merely dispute as to their relative legal positions; they can carry out the law in their own way once they know what it is. Consequently, even assuming that an injunction or some similar remedy is available in every case, it is not necessary. The essence of the procedure is the declaration of the law and the ascertainment of the facts.

That this is true as a general statement is shown by the rapid growth of arbitration. The parties intend to carry out their legal duties, but they dispute as to their extent. They agree to submit the problem to an independent arbitrator. In most cases the law is certain and the arbitrator has only to apply it to the facts which he determines. In other cases he has to determine the law also. But where the law is uncertain this procedure has defects. For the law then is what the arbitrator says, and one of the parties may feel that a judge would have ruled differently from the arbitrator. What the parties desire, therefore, is a determination by a judge, who by law has authority to declare the law. They do not want specific performance or injunction or an account. They want only a declaration as to the law and its application to the facts.

The need for some proceeding leading to a declaration is thus evident, even if we assume that some remedy is available. But in many cases it is not. For some reason it may not be desir-
able to grant an injunction;\footnote{Examples in public law will be found below.} in some cases it may not be legally possible to grant one. Yet serious injustice may result if the courts cannot declare the law.

II

The need for some procedure leading to a declaration of law was for these reasons strongly felt in England by the middle of the nineteenth century. In consequence, power for this purpose was given to the Court of Chancery by the Chancery Procedure Act, 1852, whereby it was provided:

"No suit in the said Court [of Chancery] shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations without granting consequential relief."\footnote{15 & 16 Vict. c. 86, § 50 (1862).}

This did not give the court authority to give a declaratory judgment whenever it was sought by a plaintiff. Indeed, in \textit{Rooke v. Lord Kensington},\footnote{2 K. & J. 753; 25 L. J. Ch. 795 (1856). See also Bristow v. Whitmore, 4 K. & J. 743; 1 Johns 96 (1858).} it was held that a declaration could be made only in a suit in which the plaintiff might have other equitable relief—though this decision has been criticised.\footnote{James, L. J., in Cox v. Barker, 3 Ch. D. 359, 370 (1876).} Nevertheless, even within these limits, the procedure proved valuable. Thus, orders were made declaring English law for the information of a foreign court,\footnote{Hope v. Hope, 4 De G. M. & G. 327; 23 L. J. Ch. 632 (1854).} that the plaintiff was entitled to specific performance of a contract made with the Crown, though the court could not give a mandatory decree,\footnote{Being a proceeding against the King, who cannot be ordered by his own Courts.} that marriage articles should be interpreted in a certain way, the court not desiring to direct a settlement in order to save expense,\footnote{Byam v. Byam, 19 Beav. 58; 24 L. J. Ch. 209 (1854).} that the plaintiff had a lien on a testator’s real estate,\footnote{Norman v. Johnson, 6 Jur. (N. S.) 905 (1860).} and so on.

By the Judicature Act, 1873,\footnote{36 & 37 Vict. c. 66, § 16 (1873). See now Supreme Court of Judicature (Consolidation) Act, Section 32, 1925.} the jurisdiction of the Court of Chancery was transferred to the High Court; such jurisdiction to be exercised so far as regards procedure and practice in the manner provided by the Act and Rules, and where no special provision was contained in the Act or Rules, as nearly as might
be in the same manner as before. Power was given to the Rules Committee by the Judicature Act, 1875, to make rules regulating practice and procedure of the court. The Rules Committee has exercised this power to make rules for the making of declarations. There are now three Rules dealing with the matter.

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

"The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby."

This third rule applies, it will be seen, only where the parties agree to state a case. But by another rule it is provided,

"If it appear to the court or a judge, that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or arbitrator, the court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

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10 Section 23.
11 38 & 39 Vicr. c. 77, § 17 (1875).
12 This provision is now to be found in Section 99 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, whereby, "Rules of court may be made under this act for the following purposes:
(a) For regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal and the High Court respectively in all causes and matters whatsoever in or with respect to which those courts have for the time being jurisdiction."
13 Order XXV, rule 5; a modification of Section 50 of the Chancery Procedure Act, 1852.
14 Order LIVA, rule 1.
15 Order XXXIV, rule 1.
16 Order XXXIV, rule 2.
This rule is often used in commercial cases for the decision of preliminary points of law; it is not often used in other cases because if the question of law is raised on the pleadings, it is preferable to raise an objection in point of law (which takes the place of the old demurrer). But it does enable one party to have a special case stated, with the consent of a judge, in spite of the opposition of the other party. Moreover, the procedure of special case stated has been applied by a number of statutes. An official referee to whom a question has been referred by a court may state a special case for a judge. Arbitrators or an umpire acting under a submission to arbitration may, unless the submission expresses a contrary intention, state an award as to the whole or any part thereof in the form of a special case for the opinion of a court; and any question of law arising during the arbitration proceedings may be submitted in the form of a special case. Any question of rating law may, with the consent of a judge, be submitted to the Divisional Court in the form of a special case stated under the Baine's Act after notice of appeal from the assessment committee has been given to quarter sessions. The procedure for determining questions of law relating to national health insurance under the National Health Insurance Act, 1924, is by way of special case stated. And under the Audit (Local Authorities) Act, 1927, when an appeal against a surcharge by a district auditor is made to the Minister, the Minister may, and shall if so directed, state a case for the opinion of the High Court on a point of law. Cases are also stated by courts of quarter sessions and petty sessions to the Divisional Court, but though the form of the judgment is declaratory, so that the case has to be remitted to the lower court whenever it is held to have been wrongly decided, in substance it is an appeal, and need not be further considered in this paper.

17 Under Order XXV, rule 2; ANNUAL PRACTICE (1931) 571.
18 Section 94 of the Supreme Court of Judicature Act, 1925. See also Order XXXVI, rule 52.
19 Section 7 of the Arbitration Act, 52 & 53 Vict. c. 49 (1889).
20 Section 19 of the Arbitration Act.
21 12 & 13 Vict. c. 45, § 11 (1849).
22 See also Local Government Act, 1888, section 29, 51 & 52 Vict. c. 41; Local Government Act, 1894, section 70, 56 & 57 Vict. c. 73; London Government Act, 1899, section 29, 62 & 63 Vict. c. 14. All these related to the transfer of property under these Acts and enabled a special case to be stated in the event of a dispute. See also section 115 of the Housing Act, 1925, 15 & 16 Geo. V, c. 14, now repealed.
23 Section 89. See Order LVB, rules 1-11.
It will be seen that the declaratory judgment is an instrument of considerable importance in English legal procedure. It is constantly used in the courts, and especially in the Chancery Division. But most of the cases arise upon actions for declarations under the first of the rules set out above (Order XXV, rule 5). The procedure by way of case stated is comparatively unimportant. It is usually difficult to obtain the statement of an agreed case,25 and though references from arbitrators are common, they raise different questions from those arising on actions for declarations. This last procedure is becoming more and more common; nearly all the cases decided on the great Property Legislation of 1925 are brought upon originating summons26 with the purpose of obtaining a declaration. The subject is, in fact, so vast that it is desirable to limit our consideration to one branch of the law only, namely, that branch which relates to proceedings against public authorities. It is not that the procedure in this branch is substantially different from that used in other branches. The law is the same, but the procedure is peculiarly appropriate to public law, because specific relief is generally unnecessary against a great public authority, which is extremely unlikely to break the law deliberately; and moreover there are problems raised in public law which do not appear elsewhere. We shall limit ourselves, therefore, to the action for a declaration under Order XXV, rule 5, and shall consider only its use against public authorities.

The procedure, it will be seen, depends entirely upon a rule made by the Rules Committee under statutory authority. The authority is only to make rules for practice and procedure “in causes and matters whatsoever in or with respect to which the High Court and the Court of Appeal have for the time being jurisdiction.”27 The difficult question of law is, therefore, whether it is legally possible for the Rules Committee to give the courts authority to make a declaratory judgment even where consequential relief could not be claimed. But it is only the exceptional cases which come within this provision, and in order to study the working of the system in public law it is desirable first to examine the use of declaratory judgments where some consequential relief could be given. It will suffice for this pur-
pose to take the decisions in which declarations are claimed and which have been reported in the law reports during the past three years. These will not be cases in which the use of the declaration has given rise to any argument; they will be cases reported because other points of law have been raised in them. But we may regard them as typical instances of the procedure.

The defendants in *Crediton Gas Co. v. Crediton Urban Council*\(^2^{9}\) had given notice to terminate an agreement for the supply of gas. The plaintiffs sought a declaration that the contract was perpetual. It is clear that an action for damages could have been brought; but there was no damage until the notice had terminated, and the action, if brought before the termination of the notice, would have been in essence an action for a declaration. It is not likely that specific performance or an injunction would have been given. It was therefore more convenient to sue for a declaration which was, in fact, all that the plaintiffs wanted.

In *Manchester Corporation v. Audenshaw Urban Council*\(^2^{9}\) the plaintiffs sought a declaration that under a local act they were bound to maintain a road in such a state of repair as would have been suitable for traffic when the act was passed in 1878 and not, as the defendants contended, so as to make it suitable for modern motor traffic. No other remedy was open to the plaintiffs except (possibly) injunction. But the Corporation could have made default and proceedings could then have been taken by the defendants. The dispute was brought to an end by the action for a declaration.

In *Davies v. Ripon Corporation*\(^2^{9}\) the plaintiff sought a declaration that the defendants were not entitled to lay, maintain, or repair gas and water pipes on the plaintiff's land, an order to remove the pipes, and an injunction to restrain them from using them. The substance of the action was the determination of the point of law, since no one expects a corporation to continue to use pipes after the user has been declared illegal.\(^3^{1}\)

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\(^2^{9}\) [1928] Ch. 447.

\(^2^{9}\) [1928] Ch. 763 (C. A.).

\(^2^{9}\) [1928] Ch. 884.

\(^3^{1}\) In London County Council v. Greenwich Borough Council, [1929] 1 Ch. 305, the plaintiffs sought a declaration that a site was a disused burial ground, and an injunction to restrain the defendants from building on it. The declaration was made, and an injunction to restrain building and a mandatory injunction to pull down existing buildings granted.

In *Hoskyns-Abrahall v. Paignton Urban Council*, [1929] 1 Ch. 375, the plaintiff claimed a declaration that a burial vault was her property and that by-laws of the Council conflicting with her property were void, and an injunction to restrain the defendants from interfering. The defendants counterclaimed for a declaration that the plaintiff was not entitled to open the vault save for the purpose of interment, and subject to the by-laws,
In Attorney-General v. Leeds Corporation\textsuperscript{32} the attorney-general at the relation of a ratepayer\textsuperscript{33} of Leeds sought a declaration that the Corporation was not entitled to run omnibuses beyond the city boundary and an injunction. A declaration was given in a modified form; the Corporation then gave an undertaking in the terms of the declaration and it was not considered necessary to grant an injunction.

In Field v. Poplar Borough Council\textsuperscript{34} a local government officer sought a declaration that a resolution of the Council reducing his salary was \textit{ultra vires}, an injunction to restrain the defendants from acting upon it, a declaration that he was entitled to be paid a certain salary so long as he held the office, and arrears of salary. Since it is unlikely that an injunction in the terms of the second declaration would have been granted, the plaintiff was able to have his future rights declared in a manner which would have been otherwise impossible but for Order XXV, rule 5.\textsuperscript{35}

In Attorney-General v. Birkenhead Corporation\textsuperscript{36} the attorney-general sued at the relation of a ratepayer claiming (1) declarations that (a) resolutions of certain councils were void, (b) it was not lawful to act upon such resolutions, (c) certain decisions of the Council were void; and (2) an injunction to restrain the defendants from acting on the resolutions. An injunction was refused on the ground that there was no evidence of a general desire to oppress persons or to put the resolutions into effect. A declaration in a modified form was granted.

In Attorney-General v. Tynemouth Guardians\textsuperscript{37} the attorney-general sued at the relation of Tynemouth Corporation (which was by statute to take over the assets of the defendants at a

\textsuperscript{32}[1929] 2 Ch. 291.
\textsuperscript{33}The attorney-general sued because the relator was not injured except as ratepayer. In other words, he was in no different position than any other member of the public. The action had, therefore, to be in the name of the attorney-general, whose function it is to act as guardian of the public on behalf of the King.
\textsuperscript{34}[1929] 1 K. B. 750.
\textsuperscript{35}See Section I, \textit{supra} note 13.
\textsuperscript{36}27 L. G. R. 192; J. P. 33 (1929).
\textsuperscript{37}[1930] 1 Ch. 616.
subsequent date) for (1) a declaration that a resolution of the defendants cancelling debts due to them was *ultra vires*, (2) an injunction to restrain them from acting on it, and (3) a mandatory injunction to order them to take steps to recover the balance of sums due.

In *Attorney-General v. Sunderland Corporation* the attorney-general sued at the relation of a ratepayer for (1) a declaration that the defendants were not entitled to provide a parking-place for cars on a certain piece of land, and (2) an injunction.

This survey of recent decisions indicates that the normal use of the action for a declaration is in cases where "consequential relief is or could be claimed." Sometimes the plaintiff adds a request for a declaration as ancillary to a request for consequential relief. Sometimes the basis of the action is a desire to have the law determined, so that the request for consequential relief is ancillary, and the gist of the action is the request for a declaratory judgment. In these cases counsel is following the advice of the *Annual Practice*: "The plaintiff should always claim in the one action every kind of relief to which he is entitled—be it damages, or an injunction, a declaration, a mandamus, or a receiver." But sometimes this advice is not followed. The plaintiff is well aware that the defendant will carry out the law, but he wants it ascertained; a declaratory judgment is all that is needed, and therefore all that the plaintiff asks. This is particularly true in public law; where the defendant is a great public authority it is futile, except in extreme cases, to ask for consequential relief. Sometimes, indeed, the obvious method of enforcement is not by judicial decree. Many public authorities are under the control of some higher public authority. What the plaintiff wants, therefore, is a statement of law by a competent tribunal, so that if necessary the competent administrative authority may enforce it. For instance, in *Attorney-General v. Merthyr Tydfil Union* the relator (on whose behalf the attorney-general sued) alleged that the Guardians of the Union were granting poor relief illegally. The attorney-general therefore asked for a declaration and an injunction. The injunction was not granted, but if it had been granted the method of enforcement would nevertheless have been a surcharge by district auditors. "The plaintiffs ask the Court to state the law for the guidance of the tribunal which has to deal with the administration of the poor-rate", observed

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38 [1930] 1 Ch. 168 (C. A.).
39 *Annual Practice* (1931) 370.
40 This is particularly true of local government. See Jennings, Principles of Local Government Law (1931) c. V (Central Control).
41 [1900] 1 Ch. 516.
42 See Jennings, Poor Relief in Industrial Disputes, 46 Law Quarterly Review (1930) 225-234.
counsel in his speech to the court.\textsuperscript{43}

These cases, the common cases, of declaratory judgments are cases in which some other remedy is or could be claimed. The parties desire a declaration because it is convenient for them to have a declaration in a certain form, with the approval of the court. It is convenient for the plaintiff to say to the defendant: “This is the law”. It is bad policy, both in administration and in business, to threaten a person with whom one is in dispute. One keeps firmly to one’s opinion and asks the court to confirm it, believing that the other party will do what is right if he is proved to be wrong. The declaratory judgment is the symbol of the twentieth century conception of the law.

At the same time, there is a substantial dispute between the parties. We are assuming for the moment that some other remedy is or could be given. That remedy will not be given unless there is a controversy. Given that there would be a “case or controversy” if some other remedy were sought, it would seem to be difficult to deny that there was a “case or controversy” where the judgment was declaratory only. The form of the judgment does not alter the nature of the dispute.

IV

This is not, however, the only class of cases covered by the Rule. A declaratory judgment may be made “whether any consequential relief is or could be claimed, or not.” This raises at once the questions of the nature of a declaratory judgment and the validity of the Rule. The Rules Committee has power to make rules for practice and procedure \textit{in all causes and matters in or with respect to which the High Court and the Court of Appeal have for the time being jurisdiction}. If the action for a declaration extends the jurisdiction of the court, the Rule is invalid.

To say what is the jurisdiction of the High Court is a most difficult task. It is, of course, defined by statute\textsuperscript{44} since it was the creation of statute. But this definition refers only to the jurisdiction of the old courts of common law and equity. Speaking generally, and subject especially to modifications which have been made by statute, the High Court may decide any matter which could have been decided by one of the old courts before 1873.\textsuperscript{45} But this in fact means that the jurisdiction of the High Court is unlimited except in special matters specially excepted by law. The old rule was that a plea to the jurisdiction of a superior court had to be specially pleaded, whereas special plead-

\textsuperscript{43} At 534.

\textsuperscript{44} Supreme Court of Judicature (Consolidation) Act, 1925 sections 18-25.

\textsuperscript{45} Ibid. section 18.
ing was unnecessary when the objection was to the jurisdiction of an inferior court. Hence “nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so”. Thus the High Court has a general jurisdiction. This does not mean that it can take cognizance of matter which has not been taken away by law: it does not mean that the courts can usurp a legislative or an administrative authority. It means only that where there is a dispute about a right, the superior courts have cognizance of it unless the contrary can be shown.

“If the right exists, the presumption is that there is a court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King’s court of justice. In order to oust jurisdiction it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other court.”

The manner in which this general jurisdiction will be exercised depends upon the law of procedure for the time being. Since 1873 the Rules Committee has had power to legislate on this subject. It follows that the Rules Committee can provide the method by which disputes relating to existing rights may be determined, but cannot create new substantive rights. Provided that there is a dispute about legal rights it seems to follow that a rule providing for declaratory judgments is intra vires, even though no consequential relief could be claimed. But there must be a dispute about legal rights; the function must be a judicial one. This principle was laid down by the Court of Appeal in London Association of Shipowners and Brokers v. India Docks Joint Committee where a declaration was sought that certain regulations were invalid, and an injunction restraining the defendants from enforcing them. On the special facts a declaration was given, but the main argument turned on the position of a co-plaintiff who had suffered no injury by the regulations. “The P. & O. Co. is not like the Attorney-General”, said Lord Justice Lindley, “and is not entitled to sue on behalf of the public for the purpose of preventing the defendants from exceeding their statutory powers irrespective of any particular

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46 Peacock v. Bell, 1 Wms. Saund. 75 r (1667), quoted by Willes, J., in advising the House of Lords in Mayor of London v. Cox, L. R. 2 H. L. 239, 259 (1886), and approved by the House of Lords in that case and by the Judicial Committee of the Privy Council in Board v. Board, [1919] A. C. 956. See also Jennings v. Hankyn, Carth. 11 (1741); Mostyn v. Fabrigas, 1 Sm. L. C. 662, 675 (1774), per Lord Mansfield; Earl of Derby v. Duke of Athol, 1 Ves. Sen. 203 (1748) per Lord Hardwicke.


48 [1892] 3 Ch. 242.
injury to any particular individual. The P. & O. Co. must show that it is aggrieved before it is entitled to any declaration or relief in an action brought by itself." 49 And Lord Justice Bowen said: "In order to succeed, the Plaintiffs are bound to show that the Defendants have either infringed some legal right of the Plaintiffs, or of some one or more of the Plaintiffs, or that the Defendants threaten to infringe some such right".50

The point was, however, more directly raised in Guaranty Trust Co. of New York v. Hannay & Co.51 Proceedings had been taken in the United States on a bill of exchange; it was admitted that English law applied. The defendants in that action, which was still proceeding, then took action in the High Court, asking for declarations to the effect that they were not liable on the bill and for injunctions. The case came before the Court of Appeal as an action for declarations only, it being assumed (though Lord Justice Pickford obviously doubted on this point) that no consequential relief could be claimed. No declarations were given, but the court investigated the whole question of their powers. There were really two questions: the first was, does the rule give authority to make a declaration where it was not ancillary to putting some rights in the person asking the declaration? And the second was: if the rule does permit such a declaration, is it ultra vires? The Court of Appeal, by a majority, answered the first question in the affirmative, and the second in the negative. The reasons given by the majority, Lord Justice Pickford and Bankes, were not in every respect the same. But essentially they come to this. The word "jurisdiction" is used in two senses: in the first the expression that the court has no jurisdiction means that it cannot deal with the subject-matter of the action, no matter by whom and in what form it is raised; in the second sense it means that the court can deal with the subject-matter, but through the development of the rules of law and equity it does not choose to deal with it in the particular form in which it is raised. The first sense is the only correct one; in that sense the Rules cannot increase the jurisdiction. The second sense merely refers to practice and procedure, and in this sense the jurisdiction can be enlarged. For "the mere fact of being entitled to a right does not give a cause of action, which only arises when there is interference, actual or threatened, with the right, and in that case there is a right to relief, in the first case by damages or injunction or both, or possibly by specific performance, and in the latter by injunction".52 But where there is a substantial dispute about a right,

49 Ibid. 257.
50 Ibid. 261.
51 [1915] 2 K. B. 536.
52 Ibid. 558.
a declaration can be made.

“There is, however, one limitation which must always be attached to it, that is to say, the relief must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible.”

But no declarations were made because, as Lord Justice Pickford put it, the plaintiffs in this action were trying to avoid being defendants in the action in New York; or, as Lord Justice Bankes put it, because they were merely asking the court to provide evidence for their proceedings in New York.

Finally, the matter came before the House of Lords in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade. This was an action for a declaration that the respondents were entitled to possession of certain pledged bonds on paying the sum borrowed. The object of the action was to have the law determined without bringing a redemption action. For in such an action the plaintiffs would have been ordered to pay in rubles or in sterling according to the decision of the court. But while the plaintiffs were prepared to pay in rubles to get the bonds, they preferred not to have the bonds than to pay in sterling. The House sustained the power to make a declaration, but the majority thought that this was not the sort of case in which it ought to be made. The power of making declaration “is a very wide power, and it is obvious that it is one that should be exercised with the utmost caution.” The Order was not intended to enable the mortgagor to pick out one point on which it might be convenient for him to know the law and ask the court to decide it in this summary way by declaration.

Thus, the court has power to make a declaration limited only in these respects: first, the matter must not have been withdrawn from its jurisdiction; secondly, it must be a dispute relating to the legal rights of the parties; and thirdly, the remedy is discretionary, and where consequential relief could not be given the power should be exercised with extreme caution. “In my opinion”, said Lord Sterndale in Hanson v. Radcliffe Urban Council, “the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost

53 Ibid. 572.
54 [1921] 2 A. C. 438.
unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide.”

But the value of the remedy is shown by that very case. An employee of the Council sought a declaration that notice given by the Council to terminate her appointment was invalid and inoperative and her engagement unaffected, and also an injunction to restrain the defendants from acting on the notice. Lord Justice Warrington said:

“Here is a public body, entitled under certain circumstances to interfere with the rights of other persons. It does so with no authority. It seems to me it would be nothing short of a disaster if the Court had no power to make a declaration upholding the rights of those other parties and restraining that wrongful interference.”

It has been indicated that jurisdiction has in some cases been taken away from the High Court. This is especially true of public law, where the judicial control has in many matters been vested in courts of summary jurisdiction or in administrative tribunals. The general proposition that the High Court has no power to make a declaration in such circumstances was laid down by the House of Lords in *Barraclough v. Brown.*

This began as an action for the recovery of the expense of removing a vessel from a canal; but the matter was within the jurisdiction of a court of summary jurisdiction. It was argued that nevertheless the court could make a declaration for the guidance of the inferior court. But it was held that, though the House might accede to the suggestion if it were necessary to do justice, there was nothing in the Rule to give the court this jurisdiction. In any case, the Rules Committee had no power to deal with such cases, since they were not within the jurisdiction of the court.

But courts of equity had been in the habit of granting injunctions to restrain inferior courts from dealing with cases which were alleged to come within their jurisdiction. In other words, the Court of Chancery had taken upon itself to interpret the extent of the inferior courts’ powers. It was not necessary to plead to the jurisdiction in the inferior court, the prospective defendant might instead apply for an injunction in the Court of Chancery. In *Grand Junction Waterworks Co. v. Hampton*

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55 [1922] 2 Ch. 490, 507.
56 Ibid. 508.
57 [1897] A. C. 615; followed in Baron Reitzen de Marienwert v. Administrator of Austrian Property, [1924] 2 Ch. 282, where the inferior court was an administrative tribunal.
58 Lord Auckland v. Westminster District Board of Works, L. R. 7 Ch.
Urban Council it was argued that, in spite of *Barracough v. Brown*, a declaration might be given in such circumstances. The court agreed, adding, however, that the jurisdiction was to be exercised with extreme caution and in very special cases only.

There has been a tendency to extend this to any case in which for some reason it is not desirable that the question should be left to be decided by the inferior court. Thus in *Islington Vestry v. Hornsey Urban Council* a declaration was granted that the plaintiffs were entitled to relief in respect of the use of their sewer by the defendants. This case is also an illustration of the value of the declaratory judgment. The plaintiffs sought an injunction, but it was quite impossible for the defendants at once to cease using the sewer. If they did, they would have been unable to dispose of the sewage and so would have committed nuisances. The court therefore gave a declaration, with liberty to apply for an injunction if the defendants did not provide their own sewer within a reasonable time.

In *Elsdon v. Hampstead Corporation* an owner of houses in a new street obtained a declaration that a revised apportionment of expenses of making up the road was invalid, although such matters could be determined by courts of summary jurisdiction. In *Barwick v. South Eastern and Chatham Railway* the circumstances were rather peculiar. Certain land having been reclaimed from the sea, the railway company under statute claimed a compulsory lease. But before the lease was granted the Government took possession under wartime powers. Where the Government is in occupation no local rates are payable, since the Rating Acts do not bind the Crown. But it is customary to make a payment in lieu of rates. The overseer of the parish accordingly put in a claim, but it was refused on the ground that the land was not in his parish. No remedy lay against the Crown, nor could the assessment committee, the tribunal which normally decided rating questions, determine the question. The overseer therefore sought a declaration against the railway company on the ground that it was not a stranger, but was interested in the question. This declaration was granted, it being “necessary in order to do justice”.

597 (1871); criticised in *Kerr v. Preston Corporation*, 6 Ch. D. 463 (1876); *Stannard v. Vestry of St. Giles, Camberwell*, 20 Ch. D. 190 (1882).


60 [1900] 1 Ch. 695. But see *Clark v. Epsom Rural Council*, [1929] 1 Ch. 287, where the circumstances were slightly different and the court refused a declaration.

61 [1905] 2 Ch. 633.

Subject to the qualifications already set out, the court has discretion to make a declaration even where no consequential relief could be claimed. But so far nothing has been said about the group of cases wherein this right has proved to be most useful in public law. It is well known that no action lies against the Crown for any tort of a public servant. An action lies against the public servant if he personally commits the tort, but not if it was committed by some person under his control. On the other hand, no action for breach of a public contract lies against a public officer, though a petition of right may be addressed to the Crown, and will be tried by the court if the royal fiat is obtained. These rules being most inequitable, all sorts of devices have been tried for getting round them. Among them the action for a declaration has been used.

In Dyson v. Attorney-General the plaintiff sought a declaration that certain requisitions issued by the Commissioners of Inland Revenue were illegal. It is clear that no other action lay against either the Crown or the commissioners. If a declaration could not be granted the plaintiff's only remedy would be to refuse to carry out the requisitions and to deny their validity on being sued for a penalty. In the meantime, thousands of less bellicose taxpayers would have answered them. "It would be a blot on our system of law and procedure", said Lord Justice Farwell, "if there were no way by which a decision on the true limit of the powers of the commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty." And in the substantive action Lord Justice Fletcher-Moulten said:

"It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty. There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this."

Partly for this reason, but mainly because the attorney-general has for centuries been the proper officer to protect the King's rights in chancery, the court made the declaration. They spe-

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64 Dyson v. Attorney-General, supra note 63, at 420.
65 [1912] 1 Ch. 158, 168.
cially guarded themselves, however, against the supposition that in every case where a person was likely to be made defendant he could make himself plaintiff by bringing an action for a declaration.

A very similar case was *Grant v. Knarcsborough Urban Council*, where, however, the attorney-general was not a party. The complaint was that certain forms issued by the defendant were *ultra vires* and void. The defendants withdrew their defence, but the plaintiff wished to have a declaration of invalidity; he did not, therefore, move for judgment in default of defence, but produced his evidence. Thus, he obtained a decision on a point of law although he no longer had any complaint.

The real basis of the decision in *Dyson v. Attorney-General* was the defendant's special position as protector of the King's rights. There was no such argument in *China Steam Navigation Co. v. Maclay*. This was an action against the shipping controller for a declaration that in spite of a requisition of the ship under the Defence of the Realm Act a voyage on which the ship was engaged was for the owner's benefit. The defendant could not have been sued in tort, if one was committed, because it was not proved that he himself made the requisition. A declaration was granted on the ground that an officer of state has to justify an act which is unlawful, and this justification can be inquired into by the courts. It was attempted to carry the principle a step further in *Bombay and Persia Steam Navigation Co. v. Maclay* where a direction of the shipping controller caused loss to the plaintiffs. It was not alleged that the direction was unlawful, so that the claim was based on contract. But in the case of contract or money liability apart from tort there is no question of suing the public officer, who is merely an agent for the Crown. What the plaintiff was seeking in this case was to establish his right against the treasury by suing a public officer in his own name. Justice Rowlatt refused to make a declaration. The earlier case against the shipping controller was of a different nature; and the *Dyson* case was decided on the special position of the attorney-general. It was suggested that this defect might be cured by adding the attorney-general as a co-defendant. But if this were done the procedure by petition of right would never be used. For the attorney-general could hardly refuse to appear, whereas no petition of right could be brought without the Crown's *fiat*.

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66 [1928] Ch. 310.
69 But this does not mean that an action for a declaration cannot be brought where a petition of right would lie. Electrical Development Co. of Ontario v. Attorney-General for Ontario, [1919] A. C. 667. See also Hosier
Our examination of the English decisions leads us to the conclusion (1) that the court can make a declaratory judgment as an alternative remedy in any case where other relief might be claimed; and (2) that even where no consequential relief could be claimed the court can make a declaration provided that (a) the jurisdiction of the court has not been excluded, (b) there is a real dispute as to legal or equitable rights between the parties to the action, and (c) the remedy is discretionary, and will not be granted in such cases save with extreme caution.

Within these limits the remedy has proved most valuable. Expressions of approval by judges of the Supreme Court have already been quoted. To these may be added the verdict of Lord Justice Atkin (as he then was) in *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.:

"I have no hesitation in saying that this is precisely the kind of case in which the Court has power to grant relief by way of declaratory judgment, and I should be sorry to cut down a jurisdiction which was a most valuable addition to the existing powers of the Court... The Court has power to make a declaration whenever it is just and convenient."  

It is not for an English lawyer to attempt to interpret the American Constitution. But if it is decided that an action for a declaration is not a "case or controversy" the Supreme Court will be depriving the American legal system of a possible procedure of a most valuable kind. It cannot be said that the judges in England regard such an action as anything but a "case or controversy". "Surely," said Lord Justice Banks, "a declaration by the High Court of Justice of a plaintiff's rights in a dispute between him and his employer is of itself a granting of relief at least as great as a conviction of the employer in a Court of summary jurisdiction."  

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70 [1921] 1 K. B. 616, 630.