DECLARATORY JUDGMENTS IN ADMINISTRATIVE LAW

EDWIN M. BORCHARD

The declaratory judgment, now adopted in thirty-three American states and territories, has demonstrated its value in the speedy and effective determination of numerous controversies involving status, contracts and other written instruments, and property relations. Its utility in the adjudication of conflicting claims between the citizen and the administration, however, a field of litigation to which it is admirably suited, has not been fully appreciated. It is not merely its speed, inexpensiveness, and efficiency which commend the judicial declaration of rights in administrative law, nor yet the fact that it enables disputes to be determined in their incipiency before they have ripened into full-grown destructive battles, and that a decision is obtainable without the prior necessity of a purported violation of law or precarious leap in the dark. It is rather the fact (1) that administrative officials in the performance of their duties or in challenges to the validity of their acts require no coercive remedies or sanctions, but merely a declaration of their legal relations, in order to remain, or be kept, within the bounds of legality; and (2) that the procedural vehicles by which administrative acts are submitted to judicial review, namely, the extraordinary legal remedies and injunction, have accumulated so vast a cargo of technicalities that the citizen desirous of challenging an administrative power or privilege finds himself frequently engulfed in a procedural...
bog which bars him from his goal. Nor has the officer under present practice any effective method of himself raising the issue of legality when challenged, but must await the litigating initiative of his adversary.

With the growing complexity of government and the constantly increasing invasions of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly upon questions of law involving the line marking the boundary between private liberty and public restraint, between private privilege and immunity, on the one hand, and public right and power, on the other, makes this field of controversy peculiarly susceptible to the expeditious and pacifying ministrations of the declaratory judgment. It is manifest that, when the cumbersome and technical writs of certiorari, injunction, mandamus, quo warranto, habeas corpus, prohibition, are directed against public bodies and officials, what is really sought is an adjudication on the law, establishing and determining their powers and privileges. Yet under the antiquated common law notion that courts exist only for purposes of compulsion and condemnation, disputes as to legal rights had perforce to be framed in the guise of combats looking to coercion of the defendant. The technicalities with which the law and its practitioners traditionally endow its instrumentalities have encrusted these extraordinary remedies for controlling the administration with a mass of procedural refinements alien to their original purpose and crippling to their efficiency for a twentieth century society, so that a citizen seeking a declaration of the illegality of an administrative act often finds himself enmeshed in the intricacies of certiorari, injunction, mandamus, quo warranto, habeas corpus, or prohibition, and may never reach the substantive goal he has in view. At all events, he has often been forced into a mystic maze, whereas he wished merely to ascertain whether the regulation or order served upon him, or to which he had been subjected, is valid or not, or, if valid, what it means.

The inconvenience and inexpediency of these coercive remedies against public officials, with all their pitfalls and expense for the complaining citizen and the administration as well, are heightened by the fact that, under a more efficient procedure, they would in most cases be quite unnecessary, for very few officials are likely to violate
their duties and exceed their powers, when these are conclusively delimited and declared by the decision of a court. The reluctance of courts to *mandamus* or enjoin officials, often for sound reasons, is an indication of their special position—a fact which makes a declaration of their duty as effective as a command to perform it or an injunction not to transgress. Execution is not necessary to give conclusive effect to judgments declaring the powers and disabilities of public officials and bodies. With respect to the administration as a defendant, a declaration of the law is all that the litigating citizen desires or needs, and procedural obstacles placed in the way of such adjudication constitute an impairment and impeachment of the administration of justice.

In his dealings with the Government, the citizen desires, and should have, the speediest and most inexpensive method of raising questions, which for the most part will be of law, going to the validity or the construction or interpretation of an administrative order. The avalanche of legislation and administrative decree which characterizes modern government has brought in its train an increasing number of commissions and officials whose powers, as they affect private activity, are a constant source of objection, doubt, debate, and dispute. For the more speedy and convenient settlement of difference, administrative tribunals in growing number have been established, for under a constitutional government, the jurisdiction and powers of official bodies are always a subject of judicial challenge and review. Hence, the constitutionality of statutes and ordinances and the validity and legality of administrative action thereunder are a constant subject of litigation. The fact that doubt and uncertainty as to the law need no longer, by the aid of the declaratory action, be clothed in the guise of hostility and combat, is one of the many advantages of the action for a declaration of rights. And one of its exceptionally valuable functions lies in the fact that it enables not only the individual to raise the question of the validity of governmental action without purporting first to violate an

---

order and expose himself to penalty, but it enables the administration itself to raise the question of its own powers, when challenged, without running the risks entailed by precipitate action on the assumption of legality, subsequently established as mistaken.

It is hoped by the present article to indicate the extent to which the declaratory action has been employed in the United States and elsewhere to challenge the validity or interpretation of administrative action. We shall deal with attacks upon the powers of administrative bodies or officers, whether raised by affected individuals or by the government or competing bodies, with the powers of administrative officials when raised by themselves, with rights and duties asserted against them, including the right to public office, with the citizen's privileges and immunities, with the administration's own claims upon private individuals, with taxation and its many incidents, and with elections.

PUBLIC POWERS AND DISABILITIES

The powers of administrative bodies may be brought into question either by an individual directly affected, by the Attorney-General acting on behalf of the public at the relation of an aggrieved party or member of the public, by a taxpayer in many jurisdictions, or by some other administrative body challenging the jurisdiction or exercise of powers by the defendant official or board. It will be observed that in many of the cases one or more of the extraordinary remedies, such as quo warranto, injunction, mandamus, or certiorari, would have lain, and it is not unusual to combine injunction or mandamus with a request for a declaration.

The question of law is submitted in varying forms, depending somewhat, although not exclusively, upon the goal sought. Occasionally, the issue will suggest the frank doubt and uncertainty of the petitioner, public or private, who, demonstrating his need for a declaration, will merely ask for a construction of the statutory powers of the defendant. The effort is not necessarily to establish that the defendant is without the power to act as he claims, but to determine what are his official powers, general or specific, or in which of two or more bodies a certain power, such as a power of approval, is vested. For example, Yale University, desiring to

2State ex rel. Mellott v. Board of Com'rs of Wyandotte County, 128 Kan. 516, 279 Pac. 1 (1929) (County Attorney against County Commissioners and Treasurer, to determine defendants' power over the deposit of county funds and their disburse-
erect an arch across a street in New Haven by which two of its buildings would be connected, yet fearing to proceed against conflicting claims that the structure was not permissible without the consent of the Board of Aldermen and other administrative bodies, brought, instead of *mandamus* for a permit against some selected official, an action for a declaratory judgment whether the Board of Aldermen or some other municipal body had the power to permit the construction or whether the plaintiff was privileged to proceed without special permission.\(^3\) Private claimants, for their own security and protection, occasionally require a declaration of the powers of a doubting, questioning, or contesting official defendant, whose activity they invoke.\(^4\)

In all these cases, as in those to follow, the issue is likely to turn on a matter of statutory construction; but as the point placed in issue is the power or disability to perform specific acts or else the validity or interpretation of administrative action, and only indirectly the statute itself, the subject may conveniently be here discussed. Again, instead of challenging the administrative activity itself, as such, the validity or legality of its result may be the point in direct issue for declaration, *e.g.*, that public bonds, resolutions, contracts, notices, *etc.*, are illegal or, if the action is initiated by...
the issuing body, legal. The jural relation involved may not always be clearly stated in the petition, or may be stated in combined or alternative form that defeats exact classification. For example, the plaintiff's privilege to act without interference may appear as the administration's no-right to prevent, e.g., to refuse a permit, or its duty to grant it. The defendant-commission's activities may be challenged in the guise of its duties, no-rights, disabilities, or liabilities, or of the plaintiff's rights, privileges, powers, and immunities, or some combination of these jural relations. The following classifications have usually selected for topical treatment the principal jural relation involved, and the use of the term "powers" is an alternative for jurisdiction and statutory authority.

While the ascertainment of the extent of public powers for purposes of certainty and security accounts for numerous cases, especially when instituted by the administration itself, very frequently the issue is raised, in the form of an attack upon, or challenge of, a power, already exercised or prospective, at private or public initiative. The challenge may go to the jurisdiction of the administrative body or to its exercise of functions in general or particular. In Anglo-American jurisdictions, administrative tribunals have not yet obtained the authority to issue declarations as such, though the effect of their ruling is often purely declaratory; but in several of the states of Germany, such as Württemberg, Baden, Hamburg, and Bremen, the general power to render declaratory judgments is vested in administrative courts. In Prussia, Bavaria, and Saxony, a special power to render declaratory relief is embodied in certain statutes, relating in the main to disputes arising out of the care of streets, highways, watercourses, and the delimitation and distribution of communal burdens of many kinds. There is manifest a growing tendency by statute and decision to expand the power of administrative tribunals to render declaratory judgments.6

The question whether the administrative authority has or had jurisdiction over the issue is, as a rule, purely a question of law and

6TRAUM, DIE FESTSTELLUNGSKLAGE UND IHR ZULÄSSIGKEIT IN DEN VERWALTUNGSSTREITVERFAHREN PREUSSENS, BAYERNS, Sachsens, WÜRTTEMBERGS UND BADENS. D.I.S.S. HEIDELBERG (1926); SEDEL, DIE FESTSTELLUNGSKLAGE IM CIVIL- UND VERWALTUNGS-PROZESS (1893). See also Prussia, Oberverwaltungsgericht (Feb. 20, 1919), 20 Das RECHT no. 394; Hamburg OVG. Dec. 29, 1922, 23 HANSEAT. RECHTSZET. 196; Prussia, 78 OVG. 350-351 (Jan. 11, 1923) (enumerating several statutes in which administrative courts are authorized to make declaratory judgments). The ruling that these decisions are not limited by all the requirements of a declaration under § 256, C.P.O., is criticized by TRAUM, op. cit. supra, at 62 et seq.
lends itself more readily to speedy determination by declaration than by the more involved methods of certiorari, injunction, quo warranto, or prohibition. In Australia and New Zealand, the matter has frequently arisen with respect to the jurisdiction of the arbitration and conciliation tribunals for industrial disputes, where it is presented by way of case stated for the opinion of the High Court. The authority of other boards and commissions has been similarly questioned. The issues have involved the validity of the constitution of the court or commission, its jurisdiction over parties or subject-matter, and its power to undertake specific acts. With the rapid growth in governmental control of industry in the United States, the necessity for the speedy adjudication of administrative issues between private industry, labor, and the administration will inevitably

6Waterside Workers' Federation of Australia v. J. W. Alexander, Ltd., 25 C. L. R. (Aust.). 434 (1918) (because President appointed for seven years only).


Merchant Service Guild of Australasia v. Commonwealth Steamship Owners' Ass'n, 27 C. L. R. (Aust.). 560 (1920) (whether court had power to do more than fix minimum wage, etc.); Water side Workers' Federation of Australia v. Commonwealth Steamship Owners' Ass'n, 28 C. L. R. (Aust.). 209 (1920) (power to do certain things with regard to minimum wage payments); British Imperial Oil Co. v. Federal Com'rs of Taxation, 35 C. L. R. (Aust.). 422 (1925) (power of tax Board of Appeal in considering evidence, making assessments and forming independent opinion); Morgan v. Rylands Bros., 39 C. L. R. (Aust.). 517 (1927) (that certain award was not award of Conciliation Committee); New Zealand Educational Institute v. Marlborough Ed. Board, 28 N. Z. 1091 (1909) (term of employment of teachers by Board); In re New Zealand Educational Institute, 30 N. Z. 858 (1911) (authority of Board of Education to exclude from high schools children below certain standard); Co-operative Fruitgrowers of Otago v. Central Produce Mart, Ltd., [1918] N. Z. 610 (interpretation of rules of savings society, concerning power to loan and borrow money); Cunningham v. Takapuna Tramway & Ferry Co., [1921] N. Z. 22 (interpretation of Order in Council to construct tramway, validity of delegation to defendant, service to be given, and making of by-laws); Sarten v. Aotea Dist. Maori Land Board, [1922] N. Z. 585 (whether native, by leasing, could render himself landless and board's powers in confirming leases); In re Otago & Southland Brick, Tile & Pottery Makers' Award, [1926] N. Z. 321 (whether arbitration court could make award as to maximum working hours beyond those named in statute).
arise. It might be well to adopt the simplest procedural devices for bringing such issues to determination, both within the administrative hierarchy and on appeal to judicial review.

More frequently the question arises on direct attack upon the exercise of specific powers, either with or without a request for a restraining order or injunction or other coercive relief, or by asserting the invalidity or illegality of the resulting act as *ultra vires*. The complainant may be the individual or corporation, private or public, immediately affected by the challenged administrative act, or else a taxpayer as a member of the public, or the attorney-general as a representative of the public interest. As already observed, the narrow point raised—may involve and conclusively determine a much wider issue and will often turn on the construction or interpretation of a statute.

Administrative boards, commissions, officials, and corporations have thus been challenged by interested parties with respect to their power to invade, take, use, or burden the plaintiff's land, to interfere with the plaintiff's business by imposing restrictions, to levy or assess unjustifiable burdens or charges, to do specific acts in exer-

---

30Genders v. London County Council [1915] 1 Ch. 1 (to take whole property only, not merely a part); Davies v. Ripon Corp., [1928] Ch. 384 (to lay, maintain, or repair gas and water pipes); Earl Russell v. Midhurst Rural D. C., 98 L. T. R. 530 (Ch. 1908) (that privilege of taking stone limited and no-right to store materials on land); Ovenstone v. Dundee Dist. Committee, [1919] 2 Scot. L. T. 35 (to take stone from land for replacing highway); Boland v. Canadian Nat. Ry. Co., 86 Ont. L. Rep. 683 (1925) (to expropriate); Adelaide Corp. v. Attorney-General for South Australia, 45 C. L. R. (Aust.). 517 (1931) (to excavate a certain plot of ground to erect comfort station; turned on issue whether plot was a “public street” under statute); Ellis v. Chairman of Hutt County, 29 N. Z. 558 (1910) (to order removal of dam); Smith v. Attorney-General, 31 N. Z. 509 (1912) (to expropriate); Lillicrap v. Invercargill City Corp., [1932] N. Z. 734 (to require a certain width for streets, which would have compelled plaintiff to surrender more land than he wished); State Advances Sup't v. Auckland City Corp., [1932] N. Z. 1709 (to refuse to supply water until conditions met).

31Jewell Tobacco Warehouse Co. v. Kemper, 206 Ky. 667, 268 S. W. 324 (1925) (change of business practices); Dowdy v. City of Covington, 237 Ky. 274, 35 S. W. (2d) 304 (1931) (registration of moving van operators); Peninsular & Oriental Steam Navigation Co. v. The King, [1901] 2 K. B. 686 (to provide certain accommodations for lascars); St. James's Hall, Ltd. v. London County Council, 93 L. T. R. 98 (C. A. 1900) (to serve a second notice to make alterations); Jones v. Metropolitan Meat Industry Board, 37 C. L. R. (Aust.). 252 (1925) (to regulate disposal of offal, fix prices, etc.).

32Morse v. Ouse Drainage Board, [1931] 1 K. B. 109 (to levy distress on goods outside defendant's jurisdiction); Gresham L. Ass'ce Soc. v. Attorney-General, [1916] 1 Ch. 228 (tax valuation agreement binding, and no—right to make higher levy); New York L. Ins. Co. v. Public Trustee, [1924] 1 Ch. 15, rev'd, [1924] 2 Ch. 101 (to impose charge of confiscation upon proceeds of policies payable by plaintiff to beneficiaries of insured persons); Baron Reitzes de Marienwert v. Administrator of Austrian Property, [1924] 2 Ch. 282 (to confiscate his property, claimant alleging himself a citizen of Poland by place of birth of father); Spooner Oils, Ltd. v. Turner Valley Gas Con-
cise of their public functions, such as making or altering contracts, fixing or reducing salaries or rates, refusing permits or licenses, and miscellaneous acts. In many of these cases, an action for damages might have been possible, especially where contracts were broken, but in some of these no damages could be immediately established, nor were damages as important as rectifying the unlawful administrative act. Nor is specific performance or injunction readily granted against the administration, so that the simple declaratory adjudication of the illegality of the act complained of was the most assured and effective remedy available.

Town of Kearny v. Mayor of City of Bayonne, 90 N. J. Eq. 499, 503, 107 Atl. 169, 170 (1919) (to enter into contract to supply water to corporations in Kearny. Power sustained, with remark: "The respondent Bayonne ought not to be permitted to enter into transactions involving the expenditure of the moneys of the public without a determination of its challenged rights"); Crediton Gas Co. v. Crediton U. D. C., [1928] Ch. 447 (to give notice that contract was terminated, since it is alleged perpetual); Gilleighan v. Minister of Health, [1932] N. Z. 965 (to impose municipal abattoir charges designed to create depreciation, sinking, and building fund).


Electrical Development Co. of Ontario v. Attorney-General for Ontario [1919] 1 A. C. 687 (to divert water for water power); Gateshead Union v. Durham County Council, [1918] 1 Ch. 146 (to exclude certain children from school); Hearts of Oak Ass'ns Co. v. Attorney-General, [1931] 2 Ch. 370 (to hold public hearing on plaintiffs' affairs); Kilwinning Parish Council v. Cunningham Combination Poorhouse Committee, [1909] 1 Scot. L. T. 205 (to combine certain public offices); Re Land Registry Act, [1929] 3 D. L. R. (B. C.) 723 (to register conveyance under power of sale in mortgage); Committee of Fruit Marketing v. Collins, 36 C. L. R. (Aust.), 410 (1925) (to hold itself out as sole seller of fruit or to divert fruit to itself); Christchurch Drainage Board v. District Land Registrar, [1925] N. Z. 842 (to refuse to register deed). See Kabadian v. Doak, 65 Fed. (2d) 202 (App. D. C. 1933), where the defendant's power to deport plaintiff aliens was attacked by writ of prohibition. This was denied, because habeas corpus was considered proper. What plaintiffs alone needed was a declaration of rights, yet they were tripped because they selected the wrong vehicle for redress.
The Attorney-General as representative of the public has frequently had occasion to challenge by declaration the validity or legality of administrative acts. A taxpayer alone in many jurisdictions is not a proper party plaintiff for this purpose, so that the law-enforcing officer has generally in English-speaking countries the authority to challenge, by *quo warranto* and other extraordinary remedies but also by the more convenient declaration, the legality of administrative action. In the few illustrations here cited, the declaration has been employed to claim the disability to undertake specific acts, such as carrying on certain types of business, incurring certain expenses, or performing certain acts or functions.

In most states of the United States, and practically always in American municipalities, a taxpayer is deemed to have sufficient legal interest to prevent by injunction the improper or illegal expenditure of public funds, without invoking the actual or *pro forma* aid of an attorney-general as party plaintiff. *A fortiori*, therefore, he has sufficient interest to request declaratory relief against such expenditure or activity, whether in the form of a proposed or signed contract, or otherwise. Question may be raised, however, whether, 

---

1Attorney-General v. Fulham Corp., [1921] 1 Ch. 440 (to carry on a laundry business); Attorney-General v. Liverpool Corp., [1922] 1 Ch. 211 (to carry on business of wiring houses); Attorney-General v. City of Leeds, [1929] 2 Ch. 291 (to run omnibuses beyond city limits; injunction also asked, but refused); Attorney-General v. Smethwick Corp., [1932] 1 Ch. 562 (to carry on bookbinding business).

2Whithorne v. Turner, 155 Tenn. 303, 293 S. W. 147 (1927) (County Judge sues to establish invalidity of appropriations increasing County Superintendent's salary); Attorney-General v. Thomson, [1913] 3 K. B. 198 (to defray expenses of defending their judgment as compensation authorities); Attorney-General v. Liverpool Corp., *supra* note 17 (to use capital for unpermitted business); Attorney-General v. Merthyr Tydfil Union, [1900] 1 Ch. 516 (to establish and maintain relief yards for able-bodied miners capable of supporting themselves—but injunction denied); Attorney-General v. Guardians of the Bedwellty Union, 44 Sol. J. 328 (Ch. 1900) (same); Attorney-General v. Bermondsey Guardians, 40 T. L. R. 512 (Ch. 1924) (same; jurisdiction held not ousted, although Auditor had charged Guardians with improper expenditure); Attorney-General v. Poplar Guardians, 40 T. L. R. 752 (Ch. 1924) (same).

3City of Louisville v. Board of Education, 229 Ky. 325, 17 S. W. (2d) 210 (1929) (to use funds raised "to erect" school-house, to "furnish and equip" it); Attorney-General v. Shoreditch Corp., [1915] 2 Ch. 154 (to enter into certain lease with defendants); Attorney-General v. Westminster City Council, [1924] 1 Ch. 437, aff'd, [1924] 2 Ch. 416 (to use library building for administrative purposes); Attorney-General v. Sunderland Corp., [1930] 1 Ch. 168 (to provide a parking place for cars at certain place); Commonwealth v. Australian Commonwealth Shipping Board, 39 C. L. R. (Aust.) 1 (1926) (that agreement was *ultra vires* and expenditure of capital improper); Attorney-General *ex rel.* Cooke v. Wellington City Corp., [1916] N. Z. 981 (to keep a separate account for its tramway expansion).

4Jones v. City of Corbin, 227 Ky. 674, 13 S. W. (2d) 1013 (1929) (validity of contract for leasing waterworks, to be paid for in certain ways); Kirkpatrick v. City Board of Ed. of Russellville, 234 Ky. 856, 29 S. W. (2d) 565 (1930) (validity of
after the project has been begun—when on suit for injunction a more definite interest in the plaintiff than that of a general taxpayer has been required—a taxpayer's declaration is similarly obtainable.

It is believed that the question of "legal interest" is in principle independent of the form of relief prayed, and that, while the equitable conditions of injunctions are not required for a declaration, there is no reason to suppose that declaratory relief justifies any modification of the requirements of the forum in the matter of "legal interest" in the action.

Instead of alleging the disability of the administrative official to undertake a specific act, it is quite as common for the complainant (victim, attorney-general, or taxpayer) to demand a declaration that the resulting instrument—resolution, regulation, notice, or order, etc.—is ultra vires and void. The issue will in general involve statutory construction, as in the cases already mentioned. The attack may go to the corporate resolution as such or, for example, to a bond issue floated as a consequence, or to administering a financing plan for school—taxpayer's action; Bridges v. Scott County Bd. of Ed., 235 Ky. 141, 29 S. W. (2d) 594 (1930) (same); Button v. Trimble County Bd. of Ed., 235 Ky. 771, 32 S. W. (2d) 345 (1930) (validity of school merger); Holman v. Glasgow Graded Common School Dist., 237 Ky. 37, 34 S. W. (2d) 733 (1931) (validity of plan for organizing non-profit corporation to build school, to be paid for by bond issue and liquidated, as means of escaping District's debt limit); Godsey v. Board of Ed. of Ludlow, 238 Ky. 17, 36 S. W. (2d) 656 (1931) (alleged disability to convey funds to bank as trustee in connection with plan as in preceding cases); Lynn v. Kearney County, 121 Neb. 236, 236 N. W. 192 (1931) (to contract for roads with adjoining township); Ward v. Klamath County, 108 Ore. 574, 218 Pac. 927 (1923) (to contract for courthouse on leased land); Paterson v. Karori Borough, [1917] N.Z. 675 (whether defendant could create a sinking fund for purchase of equipment or only to service bonds. Apparently taxpayer's action). The interest of a taxpayer in the proper expenditure of federal moneys is too "minute and indeterminable" to enable him to raise the issue judicially. Massachusetts v. Mellon, 262 U. S. 447, 487, 43 Sup. Ct. 597, 601 (1923).


Pollard v. City of Norwalk, 108 Conn. 145, 142 Atl. 807 (1928) (statutory conditions not observed [taxpayer]); State ex rel. Baird v. Board of Com'rs of Wyant-
trative regulations, notices, orders, or specific acts, such as an attempted requisition, an award, agreement, sale, registration, seizure.

ADMINISTRATION SEeks DECLARATION OF ITS OWN DISPUTED POWER

Administrative authorities find in the declaration a protection against mistaken or illegal conduct and against the resulting pend-
alties and attacks. In general, the traditional law compels an officer to be his own constructionist, and whether he acts, because he assumes he is lawfully authorized thereto, or fails to act, because he assumes he is not, he exposes himself to serious risks in either case, and stakes his security on the accuracy of his guess. This is neither wise nor sufficient administration, for the public, for the officer, or for the individual citizen directly affected. While injunction has offered slight relief for these dilemmas, its scope is limited. The declaratory judgment shows the way out. It is hardly possible to measure completely the social advantage accruing from the opportunity to secure a conclusive adjudication upon contested official action before rather than after it is undertaken. The conditions of justiciability are naturally demanded, to avoid any question of rendering merely advisory opinions. But the decision when made between the plaintiff administrative authority, bringing to issue his own power or privilege to act, and an interested opponent, serves to clarify the legal position and averts the danger of incurring a criminal penalty, dismissal, or an action in tort, and the deleterious public consequences of wrongful official acts.

Perhaps the most frequent occasion for obtaining the protection of a judicial determination of the validity of proposed administrative action lies in connection with the raising and spending of public money. Leaving aside for the moment the problems involved in the exertion of the taxing power, usually brought to issue by the affected taxpayer, administrative authorities have found it exceedingly helpful to raise promptly the disputed question of their statutory power to borrow money, including the legal conditions of a loan, or to spend money. Thus, the power to issue bonds for special purposes, the use and disposition of funds in particular ways, the chargeability of the expenditure to particular appropriations, and the conditions of spending have frequently been the subject of declaratory action. Again, the power to regulate public property is often adjudicated. Officials contemplating arrests, levies, and other invasions of privacy have found it useful to adjudicate their privilege before rather than after the invasion. The administration's power to demolish or erect buildings, to sell or lease or otherwise deal with private property, or exercise other privileges is occasionally raised by declaration. The administration sometimes prefers to initiate proceedings determining its power to dismiss or transfer its
employees. In all these cases, the exceptional advantages of declaratory relief will be readily apparent.

The borrowing power often needs advance determination because of statutory limitations on indebtedness and on the purposes for which loans may be raised and because the validity of any resulting bond or promise to pay depends upon an exact compliance with the technical requirements of the law. Thus, issue has been raised, especially under the wide powers of the New Zealand Act, as to the conditions and terms of borrowing and the purposes of borrowing.

In the expenditure of money, detailed questions of authority arise, questions which must, if trouble is to be avoided, be decided before the expenditure is undertaken. The issues may relate to questions of the use of funds for particular purposes, matters of auditing or charging expenditures against special funds or appropriations, the allocation of costs between different authorities, and

---

\[\text{In re Gore Borough Council, 29 N. Z. 192 (1910) (to borrow without calling election); Mayor of Invercargill v. Walker, 32 N. Z. 628 (1913) (to borrow certain sum without notice or further poll); In re McCarthy; 34 N. Z. 930 (1915) (to make advances and borrow money without court order); Gisborne Borough v. Auckland Prov. Patriotic & War Relief Ass'n, [1916] N. Z. 218 (whether, after getting authority for thirty-year loan, plaintiff could contract for ten-year loan, on which lender insisted); Takapuna Borough v. Australian Mut. Provident Soc., [1916] N. Z. 256 (whether authority to borrow had been properly obtained and whether defendant could safely lend); Pukekohe Borough v. Bank of New Zealand, [1916] N. Z. 926 (to borrow on overdraft).}\\]

---


---

\[\text{City of Louisville v. Board of Education, 229 Ky. 325, 17 S. W. (2d) 210 (1929) (whether board may use funds raised "to erect" schoolhouse, to furnish and equip); Petition of Dunmore School Dist., 25 Lack. Jur. 170, 38 York Leg. Rec. 80 (Pa. 1924) (to use bond-money to pay teachers' salaries); In re Jenkins Township Fire Truck, 25 Luz. Leg. Reg. Rep. 144 (Pa. 1928) (to repair fire truck out of new funds, beyond statutory limit for fire protection); Woodside's Petition, 77 Pittsb. Leg. J. (O. S.) 8 (Pa. 1928) (that expense of audit by plaintiff county comptroller was legal); In re Waganui Boro. Council Tramways Extension Special Loan, [1922] N. Z. 500 (whether funds raised for eight purposes could be expended for less than eight); Tauranga Boro. Corp v. Attorney-General, [1927] N. Z. 875 (whether two shops could be erected as integral part of library, for which loan was raised).}\\]

---

\[\text{State Highway Com'n v. Coleman, 236 Ky. 444, 33 S. W. (2d) 318 (1930) (Commission against Auditor, to determine debits on appropriations and financing of Commission); The Oregon, the Cairnsmore and the Gundia, [1921] P. 224 (Exchequer seeks declaration whether sums paid for wrongful seizure and premiums on insurance were chargeable to Naval Prize Fund); The Adolph, [1920] P. 333 (same; for necessaries, towage, dock dues, wages, etc.); Mayor of Wellington v. Attorney-General, 32 N. Z. 1175 (1913) (whether interest earned on loan fund was part of capital or usable for interest and other service charges on loan).}\\]

---

\[\text{Waller v. Union County, 223 Ky. 636, 4 S. W. (2d) 414 (1928) (county sued}
DECLARATORY JUDGMENTS IN ADMINISTRATIVE LAW

questions of form and classification.38 Whereas issues directly challenging statutes are not here discussed,39 the questions presently considered place more directly in issue the validity and extent of administrative authority thereunder, raised by the official body itself.

Administrative officers often have occasion to assert or to question their power to make payments of a particular kind, under special conditions40 or to certain persons;41 to demand or require taxes, rates, fees, deposits, or other money;42 and to control the road commissioners to determine which authority must pay for rights of way, and whether county bond proceeds available; Oroua Land Drainage Board v. Sluggish River Drainage Board, 32 N. Z. 802 (1913) (financial obligations of each district for obligations of old one from which they had been formed); Bruce County v. Lakes Drainage Dist., [1918] N. Z. 805 (whether costs of erecting new canal, instead of repairing old one, could be thrown on defendant); Waimairi County v. Paparua County, [1919] N. Z. 83 (apportionment of costs in “maintaining” road).

City of Chester v. Woodward, 13 D. & C. 201 (Pa. 1929) (whether improvement bonds issued based on special assessments was “incurring” or “increasing” indebtedness, requiring approval of certain administrative official. See opinion of Fox, J., and note, at 203: “Considerable delay may be caused in the various steps of certification and appeal as provided for in the Act of 1927. . . . Avoidance of delay is within the spirit of the [declaratory judgments] act. It is important to the many municipalities within the Commonwealth to have this controversy decided at an early date.”)

These cases will be discussed elsewhere.

West Midlands Joint Electricity Authority v. Pitt, [1932] 2 K. B. 1 (plaintiffs’ power to determine method of compensation to defendant for rights of way); In re Australian Metal Co., Ltd., 33 C. L. R. (Aust.) 329 (1923) (whether certain claimants against company under alien property sequestration were entitled to interest); Wellington City Corp. v. Compton, [1916] N. Z. 779 (validity of street plan and defendant landowner’s right to obtain compensation); Auckland Harbour Board v. Rex, [1919] N. Z. 419 (duty to pay for land taken, without deduction for payments to lessee).

Graham v. England, 154 Tenn. 435, 288 S. W. 728 (1926); State ex rel Barham v. Graham, 161 Tenn. 557, 30 S. W. (2d) 274 (1930) (comptroller of state, not knowing to which of three competing judges to pay salary of office, sued for declaration of his duty, thus obtaining protection against erroneous payment); Wimbledon & Putney Commons Conservators v. Tuely, [1931] 1 Ch. 190 (plaintiffs’ power to pay future pensions to different classes of employees, which would affect amount of taxes to be levied. Defendants, representative of taxpayers); Wellington Harbour Board v. Solicitor-General, 31 N. Z. 1008 (1912) (whether plaintiff could make provision for retiring allowances of special employees).

Chesapeake & Ohio R. R. Co. v. City of Morehead, 223 Ky. 698, 4 S. W. (2d) 726 (1928) (a contractor had refused to proceed with public improvements until the city’s power to levy an assessment on Railroad had been made clear. Railroad had dedicated land to city and claimed future tax exemption, whereupon city sued for declaration); Lewis, Sec. of State v. Oscar C. Wright Co., 234 Ky. 814, 29 S. W. (2d) 566 (1930) (whether plaintiff may permit filing of amended articles of incorporation, authorizing issue of no-par stock and allocation of proceeds of sale as directors decide); Johnson City v. Clinchfield R. R. Co., 163 Tenn. 332, 43 S. W. (2d) 386 (1931) (whether taxes were collectible in district annexed by statute); Ford Shipping Line, Ltd. v. Superintendent of Mercantile Marine, 29 N. Z. 679, 683 (1910) (deposit for medical expenses of seamen. Suit by shipping line to recover. Dictum: “The question appears . . . to be one of those in which the Marine Department might well consider the advisability of obtaining conclusive adjudication under the . . . Declaratory Judgments Act, 1908’’); Wellington Harbour Ferries v.
distribution or deposit of public funds. The power to contract obligations and to limit or ascertain their extent is occasionally placed in issue by a city or administrative authority.

Administrative officials not infrequently seek a declaration of their challenged power to regulate particular industries or property and, in order to escape the consequences of mistake, to take action cutting off private rights, such as the sale of land or personality for delinquent taxes, the power to take land for alleged

Wellington Harbour Board, 29 N. Z. 729 (1910) (to make distinctions as to fees payable by ferries using various routes and wharves); Mayor of Wellington v. Attorney-General, 33 N. Z. 392 (1913) (whether plaintiff could recover money due under tax statute; whether instalments so recoverable); Southland Elec. Power Board v. Attorney-General, [1926] N. Z. 408 (plaintiff's power to levy special taxes without regard to benefit, and without describing boundaries of property assessed).

Vaihemo County Council v. Auditor-General, [1921] N. Z. 233 (proper distribution of fees between district and county); Auckland City Sinking Funds Com'rs v. Mayor of Auckland, [1922] N. Z. 48 (proper distribution of sinking fund); Huntly Town Board v. Registrar of Supreme Court of New Zealand, [1924] N. Z. 897 (distribution of proceeds of sale of property sold for non-payment of taxes); In re Application of School Dist. of Steelton, 31 Dauph. Co. Rep. 75 (Pa. 1927) (whether statutory limitations of deposits in single depositary applied to sinking fund of district). See Kan. Acts 1933, c. 164, § 4, providing that county treasurer, before prorating back to taxing districts amounts tied up in closed banks, shall seek a declaratory judgment against all the taxing districts determining the amount due.

"Fidelity Nat. Bank & Trust Co. v. Swope, supra note 1 (action by city to establish special assessment and improvement bonds issued thereunder); City of Sturgis v. Christenson Bros. Co., 235 Ky. 346, 31 S. W. (2d) 386 (1930) (whether subsequent statute prevented the issue of bonds as planned); City of Muskegon Heights v. Danigelis, supra note 23 (validity of bonds for relief of the destitute).

"Hadham Rural D. C. v. Crallan, [1914] 2 Ch. 138 (that plaintiff was privileged to refuse to supply water beyond amount agreed when contract was concluded); In re Deleckman, by [1918] 1 Ch. 331 (comptroller of leases enemy property seeks, after liquidation, to determine whether there are any obligations which lessor could under lease require of him in future); Manchester Corp. v. Audenshaw U. D. C., [1928] Ch. 127 (that they were bound only to maintain road in condition of repair in 1878, when statute passed, and not in condition to sustain modern traffic. No other remedy here available to plaintiffs); Broadview v. Saskatchewan Co-op. Creameries, [1928] 1 D. L. R. (Sask.) 1119 (plaintiff town seeks declaration that it is not obliged to furnish defendant electric power under contract, as it was ultra vires); In re Australian Metal Co., 29 C. L. R. (Aust.) 347 (1921) (Comptroller of Enemy Property sues to determine whether a certain claim against his controlled liquidated firm should be admitted by him); Mayor of Karori v. Australian Mut. Prov. Soc., 30 N. Z. 438 (1911) (whether bond form could be changed by mayor, after election); Petone Borough v. Lower Hutt Borough, [1918] N. Z. 844 (whether city could vary contract price owing to increased rates).

"Truro Corp. v. Rowe, [1901] 2 K. B. 870, rev'd, [1902] 2 K. B. 709 (to regulate oyster fisheries and lease land, and to nullify defendant's alleged customary privilege of user. Trespass sued for, but only declaration given); Port of London Authority v. Cairn Line of Steamships, Ltd., [1913] 1 K. B. 497 (that plaintiffs have sole privilege of weighing and measuring grain discharged on certain docks. Injunction also asked, but refused, because the court "had no doubt that the defendants would comply with the declaration"); Thames Conservators v. Kent, [1918] 2 K. B. 272 (plaintiff's power to regulate and restrict the use of towpaths); Attorney-General v. Sewell, 88 L. J. K. B. 425 (1919) (certain promenade was a public highway); Preston Corp. v. Pyke, [1929] 2 Ch. 338 (control of burial ground, involving construction of deeds); Magistrates of Edinburgh v. Officers of State, 4 S. 319 (Scot. 1825) (declarator of magistrates' jurisdiction under Crown charter).

"State ex rel. Milwaukee County v. City of Milwaukee, 245 N. W. 447 (Wis. 1933)
public purposes, to demolish or remove private buildings, to enter upon land, seize property, levy execution, arrest a delinquent person, or commit other acts which, if not sanctioned as valid, would entail serious consequences for the mistaken official.

The power to undertake public works, enter into contracts, or carry on enterprises of various kinds is frequently placed in issue, not only by a taxpayer or other challenger, but by the administrative authority itself.

(power to make tax sale on certain date); Mitchell v. Hayes, [1926] N. Z. 262 (register's power to make further sales of lots, although tax lien satisfied by sale of two, in order not to compel two mortgagees to bear entire burden); Devonport Borough Council v. Quartley, [1930] N. Z. 884 (whether registrar could sell certain land for taxes).

4Johnsonville Town Board v. Futter, 30 N. Z. 490 (1911) (to take land out of plaintiff's district and erect a septic tank system); Smith v. Attorney-General, 31 N. Z. 509 (1912); Solicitor-General v. Cave, 31 N. Z. 614 (1912); Attorney-General ex rel. Waitotara County v. Reid, [1920] N. Z. 563 (to appropriate land as "road," and that intention to take had not been abandoned).

4Ruislip-Northwood U. D. C. v. Lee, 145 L. T. R. 203 (K. B. 1931) (to demolish certain structures as "temporary buildings" under statute); Devonport Corp. v. Tozer, [1902] 2 Ch. 182 (injunction that defendant remove structures on alleged highway, or declaration that plaintiffs privileged to remove; special statutory tribunal deemed to have jurisdiction).


Aronowitz v. Industrial Utilities Corp., 5 D. & C. 633 (Pa. 1925) (defendant sheriff seeks declaration whether he is privileged to levy execution as demanded by plaintiff judgment-creditor).

Huber, Tax Collector v. Weakland, 7 D. & C. 496 (Pa. 1925) (doubtful of his power to arrest, after finding no property on which to levy school tax, plaintiff seeks declaration); The Countess, [1921] P. 279, aff'd, [1922] P. 41 (to detain a ship until certain charges were paid).

Australian Commonwealth Shipping Board v. Federated Seamen's Union, 36 C. L. R. (Aust.) 442 (1925) (to have defendant's registration as an employee organization cancelled).

Mansfield Boro. School Dist. v. Mansfield High School Ass'n, 9 D. & C. 113 (Pa. 1926) (that plaintiffs privileged to rent a school building for forty years); Port of London Authority v. Cairn Line of Steamships, Ltd., supra note 46 (sole privilege to weigh and measure grain on certain docks); West Midlands Joint Electricity Authority v. Pitt, [1932] 2 K. B. 1 (to maintain electric lines); The King v. Paulson, 15 Ex. C. R. 252 (Can. 1914) (that mining leases had been validly cancelled); Commonwealth & Central Wool Committee v. Colonial Combing, Spinning & Weaving Co., 31 C. L. R. (Aust.) 421 (1922) (executive powers to make contracts and with whose approval); Mayor of Miramar v. The King, 28 N. Z. 727 (1909) (power to construct and lease tramways); Manukau Water-Supply Board v. Attorney-General, 29 N. Z. 438 (1910) (to erect certain buildings); Mayor of North-East Valley v. Attorney-General, 29 N. Z. 1088 (1910) (to unite two boroughs into
The power to appoint, transfer, and retire its own employees may be raised by the employing administrative board as a method of averting a contest with other authorities or a suit for damages or other sanction by the aggrieved employee.

PRIVATE RIGHTS AND PUBLIC DUTIES

It has already been observed that in an action against the Government or an administrative department for money or other property or to establish rights of other kinds, a declaration serves the same purpose as coercive relief, for when an adjudication of an administrative duty has been obtained, it is rarely conceivable that coercion to compel performance of that duty is required. Hence, the practice is growing of impleading the administration by declaratory suit to establish rights against it. This procedure has, in fact, made inroads upon the doctrine that the Crown in British jurisdictions can be sued only by petition of right, for in ever larger measure the subject has been enabled to secure a declaration of the Crown's statutory powers and duties. The only limitation is that actions to declare the subject's right to damages or to property have been closely watched, so as not to permit declaratory relief to usurp the primary functions of a petition of right or to escape its necessity in contract cases. Yet the increasing number of statutes permitting suit in tort against the Government may in time reduce the scope of the petition of right and enlarge the scope of declaratory relief, for restrictions on suit in contract can hardly be justified when those in tort have been lifted.


67See cases infra notes 118, 119.

The right to the return of deposited money or to compensation for breach of contract or in quasi-contract or tort has occasionally been pursued by declaratory action, with varying, but, on the whole, useful, results. These included claims for reimbursement of losses sustained through governmental inaction or delinquency, or for reimbursement of money erroneously paid to, or expended on behalf of, the administration.59 Probably the most effective

59Burnham v. Bennett, 141 Misc. 514, 517, 252 N. Y. Supp. 788, 793 (1931) (plaintiff, whose land had been expropriated for a park and who had secured a judgment against the state, found that the funds appropriated for these expropriations were exhausted. She did not enter judgment on appeal, as interest would cease to run in 30 days. State officers contended the judgment was therefore defective, and she sought declaration of her rights. The court remarked: "Plaintiff demands a declaratory judgment defining her rights. She contends that mandamus is not an adequate remedy as she must enter her judgment to bring mandamus and thus, after thirty days, and during the litigation which would necessarily ensue, due to the attitude of the officials of the state, she would lose her interest. The action is not in effect an action against the state. Rolston v. Missouri Fund Comrs, 120 U.S. 390, 7 S. Ct. 599, 30 L. Ed. 721. I think plaintiff may have her rights defined before she enters her judgment, so that she may collect her award, without loss of interest"; Hosier Bros. v. Earl of Derby, [1918] 2 K. B. 671 (plaintiff sought declaration that he was entitled to compensation for use of machinery leased to Crown, improper under terms of the lease, and other declarations construing the contract. Action not maintainable against servant of Crown; only remedy petition of right); Bombay & Persia Steam Navigation Co. v. MacLay, [1920] 3 K. B. 402 (plaintiffs sought declaration that they were entitled to compensation for losses arising under certain war regulations and assessment of amount. Declaration denied in absence of statute making defendant liable); Elsdon v. Hampstead Corp., [1925] 2 Ch. 633 (plaintiffs, owners of houses abutting on G Gardens, sought declaration that resolution revising apportionment of paving expenses was invalid, injunction, and repayment of funds. When the original apportionment was made, S property was included as benefited; but when holders of S property objected, defendant accepted their view and passed the new resolution. Declaration granted, with liberty to apply for injunction and repayment); Plean Colliery Co. v. Stirlingshire County Council, [1931] S. C. Scot. 117 (plaintiff claimed declarator that, not having recovered from rents a named proportion of the occupiers' rates paid by it, it was entitled to repayment under certain statutory provisions. Issue arose because some of the houses were unoccupied and because some of the rents were not paid in full); O'Donoghue v. Roche, [1927] I. R. 152 (plaintiff sought declaration that he was entitled to return of deposit, injunction, and orders. Under statute, candidates for Parliament were required to deposit £150 with defendant, pending election returns. L and G had made the deposit on plaintiff's behalf and the money had been returned to them); Qu'Appelle Long Lake & Saskatchewan R. R. & Steamboat Co. v. The King, 7 Ex. C. R. 105 (Can. 1901) (petition of right based on an alleged breach of contract for a grant by the Crown. Crown was ready to make the grant, but issue arose as to whether the lands designated satisfied the purpose. Granted); Minister for Home and Territories v. Lazarus, 26 C. L. R. (Aust.) 159 (1919) (special case to determine which of two dates was to be used in fixing value of land for compensation); Weldon v. Smith, 34 C. L. R. (Aust.) 29 (1924), rev'd 30 C. L. R. (Aust.) 34 (1922) (plaintiff claimed declaration that he was entitled to compensation for losses occasioned by defendant's negligence. Defendant administrative officer was charged with storing wheat. Denied, because government had not assumed degree of care sufficient to charge it); Smith v. William Charlick, Ltd., 34 C. L. R. (Aust.) 38 (1924) (plaintiff asked repayment declaration that government was not entitled to surcharge or retention of certain sum, and account. Plaintiff had contracts for sale of wheat by government at various prices and had received delivery. When government changed price under statutory authority, plaintiff paid only when threatened with discontinuance of business. Denied on appeal); Nott Bros. & Co.
way for an officer to sue for his salary\textsuperscript{60} or for his pension\textsuperscript{61} or for compensation for particular services rendered, including the method of determining it.\textsuperscript{62} is by declaration. In these cases it serves merely

v. Barkley, 36 C. L. R. (Aust.) 20 (1925) (plaintiffs caused a special case to be stated to determine whether they were entitled to repayment of duty paid on artificial flowers imported from France, duty having been levied under statutes); Hume Steele, Ltd. v. Attorney-General for Victoria, 39 C. L. R. (Aust.) 455 (1927) (summons by lessees to determine whether they could, on resumption of land by the Crown, recover compensation for five types of losses, in view of lease stipulations); Beauchamp-Platts v. Budgett, 33 N. Z. 1502 (1914) (plaintiff receiver sought declaration construing statutory provisions as to destitute persons. Defendant had not paid sums due on maintenance order issued against him. He had funds in the hands of the Public Trustee which plaintiff wished to reach).

\textsuperscript{60}Lewis v. Coleman, 233 Ky. 266, 25 S. W. (2d) 390 (1930) (plaintiff Secretary of State sought declaratory judgment fixing the amount of salary due. Defendant Auditor contended that a certain statute repealed the former provision and reduced it); Easton Councilmen's Salaries, 8 D. & C. 752 (Pa. 1926) (plaintiff officers sought declaration fixing their salaries. Defendant Comptroller contended that salaries were fixed by 1923, not 1925, ordinance); Stevens v. Hampstead Borough Council, [1929] 2 Ch. 239 (plaintiff sued for "full regular pay," alleging it included all war raises. Defendant by way of counterclaim asked declaration that it meant pay as of time of enlistment. Declaration granted defendant); Macdonald v. The King, [1930] 3 D. L. R. (Manit.) 465 (plaintiff sought declaration, on petition of right, fixing salary due him. Issue was term of office—life or period for which appropriations were made); Leyden v. Attorney-General of the Irish Free State, [1926] Ir. R. 334 (plaintiff teacher sought declaration that an arbital award was binding on defendant and that she was entitled to certain pay, a 1923 order being invalid. Salary differences were arbitrated 1917-20. After transfer to Free State jurisdiction in 1923, a reduction was ordered. Granted); Woods v. Dublin Corp., [1931] Ir. R. 396 (plaintiff nurses sought declarations fixing right to certain rate of pay. Issue turned on validity of changes made in hospital charter and a 1926 reduction order); McDougall v. Attorney-General, [1925] N. Z. 104 (plaintiff railway employee sought declaration fixing his right to certain rate of pay. Denied because Crown not bound by declaration and plaintiff had relief under special statutes); Merrington v. Auckland Education Board, [1931] N. Z. 342 (plaintiff teacher sought declaration fixing salary, due him in a position to which he was transferred, under statutes).

\textsuperscript{61}Hammond v. London County Council, [1931] 1 Ch. 540 (plaintiff sought declaration that a certain term should be included in computing his pension. This term had been spent in acting as substitute for man in service); Cahill v. Attorney-General, [1925] 1 Ir. R. 70, 64 Ir. L. T. 55 (1930) (plaintiff police officers sought declarations of their rights to pay, promotion, and pension under the treaty between Great Britain and Ireland. Issue turned on meaning of "officer" and "tenure"); Byrnes v. Limerick County Council, [1932] Ir. R. 653 (plaintiff clerk claimed declaration that he was entitled to certain superannuation allowance. He had retired for ill health in 1925. Defendant claimed that his rights were regulated by 1927 resolution. Granted); Attorney-General for Victoria v. Roberts, 46 C. L. R. (Aust.) 1 (1931) (plaintiff teacher sought declaration that he was entitled to pension under certain statute. Issue turned on plaintiff's status during a certain period); Reichsgericht III (July 10, 1914) 190-4; Soergel, Rechtsprechung (1915) 482 (declaration permitted to establish that plaintiff had claimed pension in due time); 92 RG. 377 (April 12, 1918) (action for widow's pension—executory as to amounts due, declaratory as to future. Declaratory action allowed, because there could be no execution against the Reich); 129 RG. 31 (May 13, 1930) (grammar school teacher sued Prussia for declaration as to term used in fixing his pension. Declaratory action allowed under benevolent interpretation); 133 RG. 313 (Sept. 29, 1931) (plaintiff municipal officer, who had renounced pension rights on retiring, sought declaration that he could not renounce his rights as a public officer and that the renunciation took place during mental illness. Granted).

\textsuperscript{62}Wire v. Board of Com'rs of Edwards County, 131 Kan. 725, 293 Pac. 753 (1930) (plaintiff sheriff sought declaration fixing compensation for serving warrants. Issue: compensation for actual mileage traveled or distance of points from county seat).
as an alternative to coercive relief and accomplishes the same purpose. But occasionally, it performs a more valuable function in enabling an officer to assert his claim to salary or pension, when he contemplates some action which might deprive him of it, permitting him thus to place in issue his alternative rights and to avoid a possibly fatal step by securing an adjudication upon its effect before actually embarking upon it. Thus, Judge Criswell, having been retired on statutory pay but under a covenant with the Auditor-General that he would hold himself in readiness to perform certain judicial duties until his death, desired to enter practice without losing his rights under the compensation statute. Proving the seriousness and imminence of his plan, he sought, against the Auditor who claimed that his pension would be forfeited, a declaration that he retained his status as a retired judge and his pension or, in the alternative, that it was suspended only during actual practice, as the court in fact decided. The light was turned on, and the leap in the dark made unnecessary. The right to poor relief, to claim money collected by the state, or to revalorize public bonds has been successfully invoked by suits for declarations.

The right to specific relief, such as a land grant, a patent, City of Corbin v. Underwood, 221 Ky. 413, 298 S. W. 1090 (1927) (plaintiff jailer claimed declaration of his rights to reimbursement for expenses of transporting and guarding prisoners for trial, in view of certain statutes); Nichols v. Board of Education of Danville, 232 Ky. 428, 23 S. W. (2d) 607 (1930) (plaintiff, clerk of county court, sought declaration fixing his right to compensation for making out tax bills for defendant); Hawkins v. Fiscal Court of Caldwell County, 233 Ky. 432, 25 S. W. (2d) 1015 (1930) (plaintiff peace officers sought declaration fixing their right to fees for arrests under prohibition statute in cases in which the fine was worked out in street labor, defendant having refused them in such cases); Moore v. Moore, 147 Va. 460, 137 S. E. 488 (1927) (mandamus to compel issuance of warrant, compensating plaintiff for work under statute regulating inheritance taxes. Court held that declaratory judgment procedure was available, because statutory construction was involved); Millar v. Rex, 49 Ont. L. Rep. 93 (1921) (petition of right to recover compensation for services rendered in connection with a purchase, which was regulated by statute. Issue: title searching unnecessary); Auckland Gas Co. v. Auckland City Corp., [1922] N. Z. 1041 (plaintiff sought declaration fixing its right to compensation for concreting roads. When defendant paved streets, plaintiff voluntarily moved its pipes from the road to the sidewalks in order to render access easier).
or a certificate from a public utility commission, has been asserted by declaratory action. In the last case, the advantage of such relief was demonstrated in the fact that the commission refused to issue such a certificate except upon compliance with a condition—a covenant in advance to charge only certain rates, unreviewable as such—which the utility considered illegal. Instead of incurring the dangers of proceeding without the certificate or the disadvantages of complying with the alleged illegal exaction, the plaintiffs were able to secure an adjudication of their right to the certificate, the invalidity of the regulations being determined before rather than after their enforcement. In other cases, the right to the delivery of jewelry, withheld by the police on a contested claim for charges, the right to a supply of water under named conditions, the right to the renewal of a franchise or to undertake specific acts, if necessary at defendant's expense, have all been adjudicated by declaration.

While right and duty are correlative terms, the issue between the individual and the administration is quite commonly presented in the form of a demand for a declaration of the administration's duty to maintain or repair public works, such as bridges, roads, watercourses, drains, etc., or to do specific acts, such as to accept

60Tennessee Eastern Elec. Co. v. Hannah, 157 Tenn. 582, 12 S. W. (2d) 372 (1928) (defendant unsuccessfully contended that Chancery Court had no jurisdiction in declaratory action to determine validity of regulations).
61Peoples' Credit Jewelers, Ltd. v. Melvin, [1933] 1 D. L. R. (Ont.) 598. See also The Alwina, [1916] P. 131, in which the Crown asked condemnation of a neutral ship released on bail, but defendant instead received "declaration of the right to restitution" on payment of costs, etc.
62Henderson v. Oroville-Wyandotte Irrig. Dist., 207 Cal. 215, 277 Pac. 487 (1929) (court drew distinction between validity of order of Railroad Commission, which lower court could not pass upon, and interpretation of the order); Dankert v. Oroville-Wyandotte Irrig. Dist., 211 Cal. 87, 293 Pac. 785 (1930) (mandamus dismissed, because above declaratory action pending); Oddenino v. Metropolitan Water Board, 1914 2 Ch. 734 (right to be supplied, at named rate. Defendant's counterclaim for declaration that rate for commercial use differed, granted); Barrett v. Ilkeston Corp., [1917] 1 K. B. 827 (same).
63Manhattan Bridge Three-Cent Line v. City of New York, 204 App. Div. 89, 198 N. Y. Supp. 49, aff'd, 238 N. Y. 559, 142 N. E. 283 (1923) (that provision for renewal was part of original grant, and not subject to procedure for appraisal for new term).
64Gillow v. Durham County Council, [1911] 1 K. B. 222 (to cause school to be cleaned and charge expense to local authority). See also Faber v. Gosworth U. D. C., 88 L. T. R. 549 (Ch. 1903) (to connect plaintiff's land with defendant's sewer. Dismissed, because statute provided for arbitration).
65Attorney-General v. Sharpness New Docks, [1914] 3 K. B. 1 (to maintain and repair bridges in condition to bear ordinary traffic); Attorney-General v. Scott, [1905] 2 K. B. 160 (counterclaim against injunction for declaration that council under duty to maintain road in condition to stand strain of locomotive. Denied, because it would not here serve useful purpose); City of Mankato v. Board of
from plaintiff a lower rather than higher contribution to a retirement fund, to submit a scheme for free education and admit plaintiff's children as free pupils, to accept transfer by sale of a certain school, to make or register leases, to assume payment of taxes under a contract, to take by eminent domain land which by zoning provision has been made useless for building, and miscellaneous acts.

Public Rights and Public Duties

Administrative boards and officials frequently sue each other for a declaration of their respective rights and duties. It is evident that such officials require only adjudication, not coercion, in order to establish and perform their statutory duties, and that the simplest procedure for achieving the desired goal is the best. Hence, the common use of the declaration in such controversies. The right to make collections or exact taxes or to be reimbursed for funds spent on behalf of the defendant-body, to receive penalties or revenues

Com'rs of Jewell County, 125 Kan. 674, 266 Pac. 96 (1928) (to designate roads); Prussia, OVG. (Feb. 25, 1909), 31 PREUSS. ÖBERVERWALTUNGSBLATT 445 (duty to maintain road declared, but not how to maintain it, matter for police); Joseph Crosfield & Sons, Ltd. v Manchester Ship Canal Co., [1904] 2 Ch. 123 (to maintain certain depth of water in Mersey river and that it had not been maintained); Heaver v. Fulham Borough Council, [1904] 2 K. B. 383 (that certain pipe drain is a sewer, and defendants under duty to repair. Denied on merits); Thompson v. Waku-puaka Drainage Board, [1929] N. Z. 548 (to keep drains clear).

Foster v. Ames, 116 Conn. 505, 165 Atl. 609 (1933) (whether, in view of reduced salary, board must accept from teacher percentage of reduced salary instead of original salary).

In re Tutira Block, 28 N. Z. 505 (1908) (prohibition requested, but declaration granted); Mann, Crossman & Paulin, Ltd. v. Registrar, [1918] 1 Ch. 202 (refused to register because of doubt as to validity of term. Held, lease valid).

New Haven Water Co. v. New Haven, 106 Conn. 562, 139 Atl. 99 (1927) (whether rates fixed or alterable, and defendant's duty to pay certain federal income taxes).

Auckland City v. One Tree Hill Borough, supra note 2 (whether plaintiff or defendant authority has the right to collect taxes on certain property located on the boundary between them). The celebrated claim of the Commonwealth of
collected by defendant,83 to bear or share the expenses of poor relief or other public services84—have all been conveniently settled by declaration. The conflicting claims of public authorities to specific property or funds,85 or the demand that the defendant—board

Australia to be reimbursed for the interest payments made on behalf of defaulting New South Wales was adjudicated on a motion by the Attorney-General for a declaration. Ex parte Attorney-General for Commonwealth, 47 C. L. R. (Aust.) 58 (1932). The state denied the debt and entered a claim for set-off for sums withheld from state. Declaration granted under the Finance Act of 1932; no jurisdiction of set-off.

83The King v. Melbourne Corp., 27 C. L. R. (Aust.) 387 (1920) (penalties); Jefferson County v. Gray, Sheriff, 198 Ky. 600, 249 S. W. 771 (1923) (issue: whether the revenues collected must be turned over to county every sixty days or every two months). In Board of Supervisors of Amherst County v. Combs, State Comptroller, 169 S. E. 589 (Va. 1933), mandamus to distribute motor fuel tax among counties, both mandamus and declaration refused; assumpsit recommended. Cf. The Anichab and other Craft, [1921] P. 218 (suit by Exchequer against Fleet to determine right to proceeds of German vessels seized in prize in African ports—whether droits of Crown or of Admiralty).

84Attorney-General v. Hornsey Borough Council, [1927] 1 Ch. 331 (plaintiff asked a declaration that defendant was liable for the repair of a certain bridge, and under a duty to keep it in repair); Reigate Corp. v. Surrey County Council, [1928] Ch. 359 (special case, to fix defendant's duty under statute to contribute to cost of repair of a tunnel on a road, which had become a main road in 1923. Prior to 1923 it was treated as a district-assisted road and defendant made voluntary contributions. When it became a main road, plaintiff claimed power of maintenance, thus charging defendant with contribution); Old Kilpatrick Parish Council v. Kilmarnock Parish Council, [1929] S. C. 651 (Scot.) (plaintiff sought declarator that on certain dates RH had a parochial settlement in defendant parish and that his wife and children were then destitute and entitled to relief from defendant, and repayment of sums expended by plaintiff. RH had deserted his family after moving them from defendant to plaintiff parish. He later returned to defendant and received sick relief); Re Township of Pickering & County of Ontario, [1930] 1 D. L. R. (Ont.) 820 (town appealed from an order refusing to declare a bridge a county bridge. Under statute, bridges of certain dimensions were to be treated as county bridges. Issue: meaning of length of bridge); Town of Lunenberg v. Municipalpalty of Lunenburg, [1932] 1 D. L. R. (N. S.) 386 (plaintiff sought declaration that defendant was joint tenant or tenant in common of certain building and mandamus to force contribution to repairs. Plaintiff had erected a courthouse and under statute assigned defendant rooms, for which defendant had paid. Courthouse had been destroyed by fire, and dispute arose as to duty to repair); Township of Kenyon v. Township of Charlottsburgh, 53 Ont. R. Rep. 22 (1917) (plaintiff sought declaration that certain roads were boundaries between plaintiff and defendant and that both plaintiff and defendant were liable for their maintenance); South Canterbury Hosp. & Charitable Aid Board v. Hawke's Bay Hosp. & Charitable Aid Board, 31 N. Z. 958 (1912) (plaintiff sought declaration fixing district liable to support of two children); Mayor of Auckland v. Mayor of Mount Eden, 33 N. Z. 97 (1914) (plaintiff sought to fix defendant's liability to contribute on a population basis to the equipment and maintenance of a morgue to be erected in Auckland); Palmerston North Kairanga River Board v. Mayor of Palmerston North, 33 N. Z. 513 (1914) (plaintiff sought to determine its powers with respect to levying rates, particularly with respect of unimproved lands. Defendant had right to take minerals in such lands); Mayor of Stratford v. The King, [1926] N. Z. 316 (plaintiff sought declaration fixing its right to levy certain tax on property leased to Telegraph Dept., which had originally been held under Crown lease by private persons, in view of certain statutes); BAYERISCHES OBERLANDESGERICH (Nov. 21-Dec. 4, 1911), Das Recht (1912) no. 623 (plaintiff community sought declaration fixing defendant community's duty to assist, by means of certain services without charge, in the erection of buildings).

85Port of London Authority v. Canvey Island Com'rs, [1932] 1 Ch. 446 (title to
or—official undertake specific acts, such as disconnect sewers, approve plans, make valuations, or take particular steps to hold elections can in no other way be determined more efficiently.

Public officials charged with a duty or challenged may initiate the action for the declaration of their duty. As already observed, it is a matter of judicial indifference as a rule whether a person allegedly charged with duty is sued by the claimant for performance or for a declaration of right to performance or whether the party charged sues his opponent for a declaration that he is not under a duty, as claimed. Even doubt justifies resort to an action, provided there are divergent claims. Thus, public officials have sought by declaration to determine their duty to draw vouchers for money paid them by mistake, to file reports and in what detail, to resubmit for voting a plan of municipal consolidation, to admit a claim for compensation for expropriated land. So, public bodies or officials have sought declarations of their freedom from a claimed duty to pay money or assume obligations, even where this required them to assert the invalidity of their own ordinance or contract.

--Islington Vestry v. Hornsey U. C., [1900] 1 Ch. 695 (disconnect sewer, injunction asked, but declaration only issued); London County Council v. Port of London Authority, [1914] 2 Ch. 362 (defendant's duty to certify plaintiff's plans for storm water outlet); Wanganui County v. Valuer-General and Wanganui Hosp. Board, [1933] N. Z. 173 (duty of valuer to report in certain ways capital value of taxable property in plaintiff county).

--Thomas, Mayor v. Covell, Clerk, 119 Kan. 684, 240 Pac. 574 (1925) (mandamus for "declaratory judgment" that defendant under duty to print ballot, refused for alleged illegality of demanded form); School Dist. of Union Township v. Walton, 76 Pittsb. Leg. J. (O. S.) 257 (Pa. 1928) (duty of defendants to place on ballot question of increasing indebtedness, refused for plaintiff's alleged lack of authority).

--Miller v. Limon Nat. Bank, 88 Colo. 373, 296 Pac. 796 (1931).

--Holland, Jailer v. Fayette County, 240 Ky. 37, 41 S. W. (2d) 651 (1931) (also, what supplies he was bound to furnish and limit of compensation. This action followed entry of an order against him by fiscal court).


--Chairman of County of Kairanga v. Bannister, 33 N. Z. 1184 (1914) (plaintiff administrative officers sought to determine the validity of a second claim for compensation for land expropriated, when the first claim had been submitted to the proper statutory procedure and then adjourned to permit settlement).

--City of Milwaukee v. Chicago & N. W. R. Co., 201 Wis. 512, 230 N. W. 626 (1930) (plaintiff sought declaration fixing its duty to maintain certain bridges. In 1901, plaintiff and defendant agreed for the lowering of the tracks at certain points, defendant to erect the necessary bridges and city to maintain them, except for paint. City questioned the validity of the contract); Manchester Corp. v. Audenshaw U. D. C., [1928] Ch. 127 (plaintiff, charged with upkeep, sought declaration
Title to public office. Possibly the most convenient way to establish the right to an office is by declaration, a method open to the questioned incumbent himself and not involved in the technicalities of *quo warranto*, which as a rule is available only to the attorney-general or some conflicting claimant to the office in question. The right to appointment or promotion or the method of appointment is frequently raised by declaration.\(^93\) Changes in statutes or alleged disqualifications frequently create doubts and uncertainties which induce either the incumbent\(^94\) or the employing authority or at-determining the extent of its duty to repair—condition as of time of building or condition required by modern traffic); Broadview v. Saskatchewan Co-op. Creameries, *supra* note 45 (in 1925, plaintiff had agreed to furnish defendant's assignor with electricity for 10 years. Plaintiff now contends that the agreement was *ultra vires* and received a declaration to that effect); St. Catharines v. Hydro-Elec. Power Com'n, [1930] 1 D. L. R. (Imp.) 409, *aff'd* [1928] 3 D. L. R. (Ont.) 200, *aff'd* [1928] 1 D. L. R. (Ont.) 598 (plaintiff sought declaration that it was not indebted to defendant in connection with a given project, return of debentures deposited, and order for destruction. In 1917, plaintiff approved a railway scheme designed by defendant administrative body and issued the bonds required by statute. In 1920, the work was discontinued. In 1922, statutes regulated the return of money deposited. Dismissed on merits); City of Swift Current v. Leslie, 9 Sask. 19 (1916) (plaintiff sought declaration that it was not liable in damages for failure to fulfill agreement and that the agreement was void, judgment setting aside award); New South Wales v. Commonwealth (No. 1), 46 C. L. R. (Aust.) 155 (1932) (plaintiff sought declarations of the invalidity of the financial agreement enforcement statutes of 1932, under the constitutional provision as to contracts between states and the Commonwealth on state debts).

\(^{93}\) *Monckton v. Commonwealth*, 27 C. L. R. (Aust.) 149 (1920) (plaintiff claimed a declaration that he was entitled to appointment to certain civil service position on or before certain dates on which other persons had received appointment, and order for payment or difference in salary. Plaintiff had taken an examination for a higher position and seen two persons with lower ratings appointed to fill vacancies); *Death v. Railway Com'r for New South Wales*, 27 N. S. W. St. R. 187 (1927) (plaintiff, a civil servant, sought to establish his right to promotion under a 1912 statute, his contention having been upheld on administrative appeal but his superiors refusing to act thereon. Denied); *Gaudin v. Auckland Education Board*, 33 N. Z. 132 (1914) (plaintiffs sought a declaration construing the statutory provisions as to presentation of names for appointment).

\(^{94}\) *Hay v. White*, 201 Ind. 425, 169 N. E. 332 (1930) (plaintiff sought declaration fixing the person entitled to hold office as mayor. Defendant asserted that neither candidate for office was eligible. One candidate had received a certificate of election; both had taken oath of office); *Douglass v. Pittman*, 239 Ky. 548, 39 S. W. (2d) 979 (1931) (plaintiffs, members of Board of Education, sought declaratory judgment determining status of defendant members, charging that they had disqualified themselves by their business connections and had caused illegal appointments to the board); *Fitzgibbon v. Attorney-General of the Irish Free State*, [1930] Ir. R. 49 (plaintiffs, civil employees, sought declaration that they were entitled to pension under statutes and treaty between Great Britain and Ireland. Issue: plaintiffs' status as public servants, because their salaries, as tipstaves and clerks in court, had been paid in part by litigants); *Cassidy v. Attorney-General of the Irish Free State*, [1930] Ir. R. 65 (plaintiffs, civil servants, sought declarations that prior to 1922 they were writing clerks on permanent official staff and as such entitled to office for life, that they were entitled to compensation for their discharge in 1926, and that the compensation given them was insufficient. Their positions had been abolished by statute in 1926).
torney-general to place in issue the incumbent's right to hold the office. Again, the issue is often presented in the form of a request for a declaration that the officer's discharge was unlawful, and that he is still entitled to hold the office from which he has been ousted.

The term of the office, placed in doubt by a new statute threatening to shorten or change it, has on several occasions been put to the test by a suit of the incumbent against a challenging claimant, elected to the office, or against officials authorized to hold a new election for the office. The issue usually involves the construction of a statute.

Cloverdale Union High School Dist. v. Peters, 88 Cal. App. 731, 264 Pac. 273 (1928) (that defendant is not principal of plaintiff's high school); State ex rel. Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1921) (whether defendant could hold office of city commissioner, depending on question whether his employer, Railroad, held a "franchise" from the city, within meaning of statute); Everett v. Griffiths, [1924] 1 K. B. 941 (that defendant disqualified from sitting as member of Board of Guardians).

Hanson v. Radcliffe U. D. C., [1922] 2 Ch. 490 (plaintiff assistant teacher sought a declaration that notice by defendant of termination of service was invalid. Plaintiff's contract was with a board of managers, which had refused to give this notice, coupled with an offer to reappoint at a reduced salary, on the defendant's request); Lonsdale v. Attorney-General, [1928] Ir. R. 35 (1930) (plaintiff, clerks of Peace and Crown, claimed declarations that they had held such office, and were entitled to hold it for life, that upon their discharge in 1926 by the Free State they were entitled to fair compensation. Issue: "fair compensation" and its calculation under statutes); Zeigler v. City of Victoria, 30 B. C. 389 (1921) (plaintiff claimed a declaration that his dismissal as fire captain was invalid or damages for wrongful dismissal); Cross v. Commonwealth of Australia, 29 C. L. R. (Aust.) 219 (1921) (plaintiff claimed a declaration that his commission in the army had not been validly cancelled and order for payment of salary. Plaintiff had been dismissed for publication of an objectionable article); Le Leu v. Commonwealth, 29 C. L. R. (Aust.) 305 (1921) (plaintiff, civil servant, claimed a declaration that he was entitled to retain his office until it was terminated in accordance with a state statute and that he had been wrongfully deprived of it, reinstatement, and damages); Trower v. Commonwealth, 32 C. L. R. (Aust.) 585 (1923), aff'd on re-argument, 34 C. L. R. (Aust.) 587 (1924) (plaintiff claimed a declaration that he was still an officer of the public service and entitled to hold it until it had been terminated by law, and that he had been wrongfully deprived of it. Case arose on transfer of service from state to commonwealth); Lucy v. Commonwealth, 33 C. L. R. (Aust.) 229 (1923) (plaintiff claimed a declaration that he was wrongfully deprived of his office in the public service and that he was entitled to retain it until it was terminated by law); Bradshaw v. Commonwealth, 36 C. L. R. (Aust.) 585 (1925) (plaintiff claimed a declaration that the order retiring him was void and that he was entitled to hold his office, and damages. Case arose as to power to retire, after transfer from state to commonwealth service).

Robinson v. Moser, 179 N. E. 270 (Ind. 1931) (plaintiff sought declaratory judgment fixing his term as prosecuting attorney. He had been elected in 1928 for a 1930-1931 term. In 1929, a statute was passed changing election period. After 1930 elections, defendant claimed the office); Enmeier v. Blaize, 202 Ind. 688, 181 N. E. 1 (1932) (plaintiff clerk of court sought declaration of his rights and duties under statute. Issue: beginning of defendant's term of office, in view of 1929 statute. Defendant had been elected in 1930); Wingate, Surrogate v. Flynn, Sec. of State, 139 Misc. 779, 249 N. Y. Supp. 351 (1931) (plaintiff-surrogate sought declaratory judgment fixing his term of office as 6 or 14 years. Plaintiff had been elected in 1925. At the same election the surrogate's term was increased to 14 years. Defendant, charged with preparing ballots, did not intend to list plaintiff's office as vacant in 1931); Nova, County Judge v. Flynn, Sec. of State, 139 Misc. 783, 249 N. Y.
Somewhat unusual was the dilemma of the Pennsylvania county sheriff who was forbidden by the state constitution to hold any federal office, whereas by executive order of the President state sheriffs were designated as prohibition officers. He obtained a declaration to the effect that while sheriff he could not act as federal prohibition officer, whereas if he resigned he also could not so act, for he would then have ceased to be a state officer. 98

**INDIVIDUAL PRIVILEGES AND IMMUNITIES**

The imposition of governmental requirements as a condition of the exercise of private rights, such as engaging in business, erecting buildings, or using public facilities, is an inherent element of modern government. Such requirements are frequently accompanied by the sanction of a criminal penalty for violation. But in a constitutional government, only legal demands need to be obeyed, and the question arises whether the legality of the particular requirement can be put to the test only after it has been imposed and observed, or, in event of refusal to obey, only on the suit for a criminal penalty, or in the alternative, in advance of enforcement. Speed is here a factor and it is a sound view that the administration should not be unduly hampered by the courts in the enforcement of its demands. Hence, the injunction has been frequently invoked as a method of testing legality in advance of enforcement; but as we have observed on another occasion, 99 the injunction has had to be either abused beyond all its normal functions or else it has been refused, either because a criminal act was in question or because the conditions of an equitable proceeding were not present, 100 the issue going off on the propriety of injunctive relief rather than on the validity of the challenged statute, regulation, or order. In some cases, as in the protest against allegedly illegal taxes, injunction is prohibited on principle, the taxpayer having only the option to pay and sue for

Supp. 356 (1931) (same situation as in Wingate v. Flynn, supra, except as to county judge); Fox, Dist. Atty. v. Ross, 7 D. & C. 263 (Pa. 1926) (plaintiff sought declaration fixing his term as district attorney. He had been appointed on resignation of the duly elected officer. Defendant had filed *mandamus* for election of a district attorney at next election, thus making a difference of about one year in the term).

98 Starrett's Petition, 9 D. & C. 430 (Pa. 1926). It is not clear whether any defendant appeared to oppose the petition. If none did, no decision should have been rendered, for it was then an advisory opinion only.

99 Borchard, *The Constitutionality of Declaratory Judgments* (1931) 31 Col. L. Rev. 561, 589; see also Note (1932) 41 Yale L. J. 1195, 1200.

recovery of the tax or to refuse to pay and have his property dis-
trained or suffer arrest. These crudities constitute an indictment
of the procedural resourcelessness of a legal system which could
apparently discover no way to enable the individual to secure a
prompt adjudication upon the legality of the administrative require-
ment without entangling him in a procedural quagmire and then
leaving it uncertain whether and when the substantive issue would
be reached. The declaratory judgment has shown the way out.

Attention may be called to the New Zealand Declaratory Judg-
ments Act, which enables any person who has done, or desires
under a claim of privilege to undertake, any act the legality of
which depends upon the construction or validity of any statute,
regulation, or local by-law, or indeed of any written instrument,
to obtain against a qualified opponent a declaratory judgment on
the construction or validity of the order or instrument in question.
This, in effect, has been the construction placed upon declaratory
actions in other jurisdictions by means of which the individual,
threatened by the imposition of governmental demands and re-
quirements, such as license, fee, tax, or police-power restriction,
may put to the test the legality of the restriction, without risking
the penalties of disobedience or the hazards and expense of injunc-
tion. Thus, business men notified to change their methods of
doing business and threatened with a criminal penalty for violation
have claimed a declaration of their privilege to conduct their busi-
ness free from the requirement and penalty and have obtained a
conclusive construction of the administrative order before changing

---

301See Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 53
Sup. Ct. 345 (1933). Under Tennessee law one cannot enjoin a tax collection; but
one can now have a tax demand declared invalid, which is all the relief needed.
302Edw. VII, no. 220 (1908) § 3 reads: “When any person has done or
desires to do any act the validity, legality, or effect of which depends on the con-
struction or validity of any statute, or any regulation made by the Governor in
Council under statutory authority, or any by-law made by a local authority, or
any deed, will or document of title, or any agreement made or evidenced by writing,
or any memorandum or articles of association of any company or body corporate,
or any instrument prescribing the powers of any company or body corporate; or
“Where any person claims to have acquired any right under any such statute,
regulation, by-law, deed, will, document of title, agreement, memorandum, articles,
or instrument, or to be in any manner interested in the construction or validity
thereof,

“Such person may apply to the Supreme Court by originating summons return-
able in the said Court for a declaratory order determining any question as to the
construction or validity of such statute, regulation, by-law, deed, will, document
of title, agreement, memorandum, articles, or instrument, or of any part thereof.”
303See Borchard, Judicial Relief for Peril and Insecurity (1932) 45 Harv. L.
Rev. 793, 839.
the status quo, while yet averting the risks and precarious outcome of a bill of injunction. Thus, they have claimed the privilege of conducting their business free from the requirement of a license or deposit or other government control.

The liberty to erect and demolish structures or works free from the restrictions of zoning or building permits or ordinances has been most conveniently asserted by declaration, for here injunctions against refusal of a permit are difficult and mandamus is not likely to be granted when discretion may remain even after adjudication of the constitutional or legal invalidity of the governing statute or administrative regulation. The privilege of erecting a filling station as planned and the claim that the zoning ordinance, on the basis of which a license had been refused, was not thereby violated, was successfully asserted in a leading New Hampshire case. Yale

University asserted its privilege of erecting across a street and without a permit a bridge connecting two of its buildings, but, admitting its doubt, wisely sought a declaration of its privilege or, in the alternative, a declaration as to whose authority was necessary to the purpose.\footnote{In a recent North Carolina case,\footnote{In a recent North Carolina case,} in which a most competent opinion was rendered, a street railway company was authorized by a public utility commission to tear up part of its tracks and substitute motor bus service. It thereupon made a contract with the city for such substitution. Taxpayers and city officials then threatened the company that if it removed the tracks it would subject itself to a suit for damages, that its franchise would be forfeited, and that the contract was illegal. Faced by this attack, fearing to incur the dangers threatened, and preferring an adjudication before rather than after the taking of irretrievable steps, the company brought a successful action against the challengers for a declaratory judgment that the contract was legal and that it was privileged to tear up the tracks without danger of incurring the penalties and losses threatened.}

Individuals desirous of exercising privileges in public places or in particular circumstances against adverse claims of administrative authorities, have asserted their privilege to use the highways for markets,\footnote{Individuals desirous of exercising privileges in public places or in particular circumstances against adverse claims of administrative authorities, have asserted their privilege to use the highways for markets, as reporters to enter public buildings and secure information, to go to certain schools, as licensee, to catch both fish and small game and not merely fish, to use certain profes-} as plaintiffs property was unaffected by certain zoning ordinance, which could not be applied retroactively). In Weigand v. City of Wichita, 118 Kan. 265, 234 Pac. 978 (1925), the plaintiff was held to have insufficient interest, because he alleged that the ordinance might interfere with uses that he might desire to make of his property. The suit was premature.\footnote{Yale University v. City of New Haven, supra note 3. See also S. S. Kresge Co. v. Railroad Com'n, 204 Wis. 479, 235 N. W. 4 (1931) (in which plaintiffs, having been refused permission to erect a new building for an old one in a stream claimed non-navigable, sought declaration); Grand Junction Waterworks Co. v. Hampton U. D. C., [1914] 2 Ch. 331 (privilege to erect engine-house, without defendant's consent. Refused, special tribunal had jurisdiction); Jackson v. Knutsford U. D. C., [1914] 2 Ch. 686 (after offering to rebuild condemned structure on condition, plaintiffs claim privilege to use existing building, without interference).}\footnote{Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N. W. 838 (1929) (plaintiff's property was unaffected by certain zoning ordinance, which could not be applied retroactively). In Weigand v. City of Wichita, 118 Kan. 265, 234 Pac. 978 (1925), the plaintiff was held to have insufficient interest, because he alleged that the ordinance might interfere with uses that he might desire to make of his property. The suit was premature.\footnote{Yale University v. City of New Haven, supra note 3. See also S. S. Kresge Co. v. Railroad Com'n, 204 Wis. 479, 235 N. W. 4 (1931) (in which plaintiffs, having been refused permission to erect a new building for an old one in a stream claimed non-navigable, sought declaration); Grand Junction Waterworks Co. v. Hampton U. D. C., [1914] 2 Ch. 331 (privilege to erect engine-house, without defendant's consent. Refused, special tribunal had jurisdiction); Jackson v. Knutsford U. D. C., [1914] 2 Ch. 686 (after offering to rebuild condemned structure on condition, plaintiffs claim privilege to use existing building, without interference).}\footnote{cf. Morton v. Pacific Constr. Co., 36 Ariz. 97, 283 Pac. 281 (1929); cases discussed in Borchard, supra note 103, at 808 et seq.}\footnote{Carolina Power & Light Co. v. Iseley, 203 N. C. 811, 167 S. E. 56 (1933); cf. Morton v. Pacific Constr. Co., 36 Ariz. 97, 283 Pac. 281 (1929); cases discussed in Borchard, supra note 103, at 808 et seq.}\footnote{Gingell, Son & Foskett, Ltd. v. Stepney Borough Council, [1908] 1 K. B. 115.}\footnote{Journal Printing Co. v. McVeity, 33 Ont. L. Rep. 166 (1915).}\footnote{Gateshead Union v. Durham County Council, [1918] 1 Ch. 146.}\footnote{Barlow v. Jones, Warden, 37 Ariz. 396, 294 Pac. 1106 (1930).}
sional titles, to make limited contributions only to a pension fund, to make a certain composition with creditors.

The immunity of the citizen from a particular requirement has been tested quite directly in an attack upon such requirement by request for a declaration of immunity or of no-duty to comply. Possibly the best-known English case on this aspect of the problem is that of Dyson v. Attorney-General, which laid down, or at least strengthened, the foundation for an illustrious line of English cases expanding the utility of the declaratory judgment, particularly in its negative form of expression, beyond previous limits. Dyson asked that certain forms issued by the tax authorities and requiring under penalty the return of detailed information as to his property be declared illegal. The Attorney-General, as protector of the King's rights, claimed that such an issue could be raised only by petition of right; but the Court of Appeals sustained the propriety of the declaration, because it put to the test the validity of administrative acts without purporting to take money out of the Treasury or require the conveyance of property. That distinction has had significant results in enlarging the subject's relief against improper governmental impositions. Lord Justice Farwell in the Dyson case remarked:

"It would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in 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."
In a somewhat similar case in Australia, where a Royal Commission had under penalty required a sugar concern to answer questions deemed improper and to produce documents considered privileged, the High Court affirmed its power to grant a declaration and an injunction against the government where the statute is invalid and where unconferrable powers under an otherwise valid statute or where unconfessed powers are attempted to be exercised. There are numerous instances in which specific demands are thus challenged by a declaration of the plaintiff's privilege and immunity.  

receive of no more convenient mode of doing so than by such an action as this.” See quotation of Fletcher-Moulton by Bankes, L. J., in Guaranty Trust Co. of New York v. Hannay & Co., [1914] 2 K. B. 536, 569; see also Warrington, L. J., in Burghes v. Attorney-General, [1911] 2 Ch. 139, 156.

Other cases following the rule in the Dyson case are: Attorney-General v. Foran, [1916] 2 A. C. 128, aff’d [1915] 1 Ch. 703 (under no duty to make returns on minerals and privileged to make separate return); Smeeton v. Attorney-General, [1920] 1 Ch. 85 (return for excess profits. Denied); Grant v. Knaresborough U. D. C., [1928] Ch. 310 (forms ultra vires and void. Attorney-General not a party. Defendants withdrew defense, but notwithstanding, plaintiff introduced evidence and received declaration of invalidity). If administrative officials can be sued to establish their error without impleading the Attorney-General, the declaration can usually be granted and the question of petition of right does not arise. China Mut. Steam Navigation Co. v. MacLay, [1918] 1 K. B. 33 (invalidity of purported requisition). The difficulty arises as to when the Attorney-General must be made a party, and if so, whether a petition of right becomes the proper proceeding. That it does not become necessary where a money claim or breach of contract is not involved, the Dyson case has established; see also China Navigation Co. v. Attorney-General, [1932] 2 K. B. 197 (requiring plaintiff to pay for protection against pirates). But a contract claim for a declaration cannot be successfully brought against an official (Bombay & Persia Steam Nav. Co. v. MacLay, [1920] 3 K. B. 402), even were the Attorney-General added. That can be done only by petition of right. Cf. Jennings, Declaratory Judgments Against Public Authorities in England (1932) 41 Yale L. J. 407, 423.

The principle of the Dyson case has been applied in other jurisdictions: Hogan v. Special Com’rs of Income Tax, [1932] Ir. R. 53 (returns for supertax); John Chambers & Sons, Ltd. v. Commissioner of Taxes, [1916] N. Z. 617 (returns limited to certain years); Australian Alliance Ass’ce Co. v. Attorney-General of Queensland and John Goodwyn [1916] Queensland St. R. 135 (regulations of workmen’s compensation business). By Chubb, J., at 176: “The plaintiffs are not claiming to recover money or property from the Crown, but simply declarations of their rights (if any) under the statute. They seek from the court a declaration of the true construction of an Act, and regulations made thereunder, which, if the contention for the defendants is correct, they allege, will prevent them from carrying on accident insurance under the Act, and at the same time impose on them the liability of furnishing, without payment, burdensome and expensive returns of their business, for non-compliance with which they are liable to be subjected to severe penalties”). Cf. Egan v. Attorney-General, [1931] A. C. 113 (former officers of the Irish constabulary and dependents receiving pension claimed that, under rules and statutes, allowances for rent, etc., should be included in fixing the basis on which compensation was to be paid under the statutes disbanding the constabulary); Nixon v. Attorney-General, [1930] 1 Ch. 566 (plaintiff retired civil servants claimed declaration that they were entitled to superannuation allowance under 1859 and 1909 statutes and that a 1922 Treasury Minute was null and void in so far as it purported to limit their rights to this allowance. Denied, because not claiming a right).

120 Colonial Sugar Refining Co. v. Attorney-General, 15 C. L. R. (Aust.) 182 (1912).
121 Dowdy v. City of Covington, 237 Ky. 274, 35 S. W. (2d) 304 (1931) (plain-
GOVERNMENT’S CLAIMS AGAINST INDIVIDUALS

In its dealings with individuals, the administration may prefer a declaration of rights to other form of remedy. This may be due to a feeling of doubt whether its claim is quite sound or of assurance that a declaration is equally satisfactory in obtaining the desired relief. It may also be due to a fear that if it acts before a judicial guaranty of the correctness and legality of its proposed step it would expose itself to damages or other sanction, and the executing officer, to criminal penalty or dismissal. We have already observed that under this motivation the administration has sued the private individual affected for a declaration of its privilege to sell land for delinquent taxes, to take land for a purpose alleged to be public, to demolish or remove buildings, to enter upon land, to seize or detain property, to levy execution, to arrest a delinquent, or in relation to public officials, to dismiss, transfer, or retire them.

In this field of relations the administration frequently sues to establish its right to money, for taxes or reimbursement of expenditures or on other account, or its right to property or a lien thereon. With the enforcing machinery at its own disposal, a declaration of the government’s right seems adequate protection to safeguard the public interest. It may also sue for a declaration of the defendant’s duty, or of his no-right to violate the law or make other improper claim, in many cases an adequate sanction for law observance, intiff, moving van proprietor, sought declaration that an ordinance requiring registration of full name and address of persons moving was unconstitutional, on the ground that it had received an administrative construction in favor of non-resident movers. Plaintiff secured a declaration that it did not warrant such interpretation; Flint v. Attorney-General, [1918] 1 Ch. 216, aff’d, [1918] 2 Ch. 50 (plaintiff asked declaration that he was not obliged to comply with a military notice and that it was illegal as to him. He claimed exemption as a clergyman); Western Australian Ins. Co. v. Attorney-General, [1926] Ir. R. 57 (plaintiff claimed a declaration that it was not liable under a demand from the Irish Free State for a deposit, required to do business under a certain statute. Plaintiff had paid this deposit in England previously); Lawson v. Interior Tree, Fruit & Vegetable Committee, [1930] 4 D. L. R. (B. C.) 1027, rev’d, [1931] 2 D. L. R. (Can. S. C.) 193 (plaintiff fruit dealer sought declaration that he was under no duty to secure a license from defendant, to pay its levies, or obey its rules. Case turned on the validity of certain sections of statute; Hamilton v. Cumming, [1919] N. Z. 131 (plaintiff architect sought declaration fixing the validity of a regulation of the New Zealand Institute of Architects, made under statutory authority, requiring signature to a certain declaration. Plaintiff had refused to sign it without amendment); 2 HAMBURGISCHES OBERVERWALTUNGSGERICHT 15, LASSAR, REICHs-VERWALTUNGSGERICHT 34 (plaintiff owner of private school sought declaration that she cannot be forced to cut future classes); WÜRTTEMBERGISCHER VERWALTUNGSGERICHTS-HOF, SOERTEL, RECHTSPRECHUNG (1916) 500 (declaratory action fixing the amount of water fee); TRAUM, op. cit. supra note 5, at 52, 54 (individual’s denial of a duty arising out of police demands with respect to clearing streets, roads, ditches, etc.).

Supra notes 47 and 54.

Supra note 56.
stead of injunction, criminal prosecution, distraint, or abatement. This liability to governmental exaction, whether by way of tax, license, or other restriction, contested by the affected individual, may conveniently be placed in issue and decided before the physical imposition of the charge, with its attendant risks of error.

In the assertion of right to money, the administration has advanced claims for service charges of various kinds, for forfeiture by way of confiscation, for recovery of moneys misapplied or wrongfully obtained, or for taxes due and payable.

24 Barralough v. Brown, [1897] A. C. 615 (plaintiff administrative officer sued for a declaration of his right to recover sums expended in attempting to remove ship, belonging to defendants, from a river channel, where she was an obstruction to commerce); chorley Corp. v. Nightingale, [1905] 2 K. B. 612 (plaintiffs, administrative officers, sought a declaration that they were entitled to reimbursement, under statute, for repairs made on a highway after defendant property owner had refused to do so. Defendant contended that he was not responsible for that part of the highway); Sunderland Corp. v. Gray, [1928] Ch. 756 (plaintiff sought a declaration that defendant was bound to pay the sum assessed for paving in front of his property, and sued in detinue for retention of ship, which defendant had raised. Defendant counterclaimed for a declaration of its right to detain until certain sums were paid); Sydney Harbour Trust Com'rs v. Harriott, 32 C. L. R. (Aust.) 53 (1923) (case stated to determine whether defendant was liable to plaintiff for dock fees under statute permitting plaintiff to charge such fees); Ford Shipping Line, Ltd. v. Superintendent of Mercantile Marine, 29 N. Z. 679 (1910) (plaintiff sued to recover money alleged to have been wrongfully required under statute as deposit for expenses of seaman who left ship on account of injuries received in the course of duty. In deciding the case, the court stated that the point might well have been decided by declaratory judgment procedure); Auckland City Corp v. Dawson, [1929] N. Z. 614 (case stated by President of Compensation Court to determine whether plaintiff was entitled to compensation for betterment of land); Nelson City Corp. v. Busbridge, [1930] N. Z. 269 (plaintiff sought declaration determining right of municipal corporation under statute to surcharge for delay in paying gas and electricity bills. It gave discount for prompt payment).


26 Burnham-on-Sea U. D. C. v. Channing, [1933] Ch. 583 (suit for subsidy money obtained by housebuilder who had violated terms of grant); Rex v. Clement, 6 W. R. 414 (Can. Sup. Ct. 1914) (money paid as travelling allowance to judge, who had stated wrong domicil. Fraud claimed, but Exchequer Court held without jurisdiction of that charge).

27 Attorney-General v. Dodd, [1892] 2 Q. B. 150 (information for a declaration that certain hereditaments passing under a voluntary settlement were subject to account duty under statute, as personal property, though unsold); Attorney-General v. Duke of Richmond, Gordon & Lennox (No. 1), [1907] 2 K. B. 923, aff'd, [1908] 2 K. B. 729 (information for a declaration that certain deductions were not allowed in the assessment of defendant's estate for purposes of estate duty); Attorney-General v. Peck, [1912] 2 K. B. 192, aff'd, [1913] 2 K. B. 487 (Crown claimed declarations that duties became payable upon termination of life estate in advowsons. No tax was paid on the termination of the first life estate by death, or upon the sale by second life tenant); Attorney-General v. Farrell, [1930] 1 K. B. 539, aff'd, [1931] 1 K. B. 81 (plaintiff asked declaration that on death of first remainderman to have possession the estate duty was payable on the principal value of property passing on his death under a certain statute. The original gift had been so varied that when the first remainderman went into possession, he received the smaller portion of the income, and the
The claim to property or rights in property has taken the form of an assertion that disputed property was public and not private, that the administration be declared to have a lien or prior lien on defendant's property for improvements or services rendered or other assessable charges, or that the government has a prior right to the use of property.

A controversy between administration and citizen as to the second, the larger; Attorney-General v. Adamson, [1932] 2 K. B. 159 (Crown sought declarations and orders fixing estate and succession duties due on the death of the settlor, who had died without exercising his power of appointment. Provision had been made that JW was to take two-fifths, remainder equally to settlor's other children.

JW survivor settlor); Gowers v. Walker, [1930] 1 Ch. 262 (plaintiffs, tax officials, by way of special case, claimed a declaration that a certain sum, in respect of tax deducted for 1924 from interest paid by the bankrupt company, was a claim to be preferred by the receiver under statute); Attorney-General for Ontario v. National Trust Co., [1931] 1 D. L. R. (Ont.) 354 aff'd, [1931] 2 D. L. R. (Ont.) 712 (plaintiff sought declaration that the value of the shares for succession duty should be taken as of time of testator's death, not as of date of gift. Prior to his death, testator had given his wife stock, not available on the market, which had quadrupled in value between date of gift and his death); Provincial Secretary-Treasurer v. Robinson, 47 N. B. 55 (1919) (plaintiff sought declaration that succession duty was payable on funds passing to defendants as trustees and at a named rate); 72 RG. 155 (Nov. 5, 1909) (plaintiff sued for repayment of tax; fiscus counterclaimed for declaration that further tax was due on the agreement in question).

City of Paducah v. Mallory, 225 Ky. 692, 9 S. W. (2d) 1015 (1928) (whether dedication effective. City wishes to improve street, alleged to have been dedicated, but defendants in possession deny validity of dedication. Held, valid); Attorney-General for New South Wales v. Hill & Hall, 32 C. L. R. (Aust.) 112 (1923) (Crown's claim to crops resting on earlier lien against claim of defendant resting on earlier registration); Mayor of Wellington v. Stafford, [1927] N. Z. 552 (that certain land was a public road); Attorney-General ex rel. Mayor of Dunedin v. Dunedin Arcade Co., [1929] N. Z. 621 (certain passage was a public way and had been dedicated).

West Hampstead v. Sharp, [1907] 1 K. B. 445 (plaintiff sought a declaration that under statute he was entitled to a charge on defendant's property for balance of apportioned cost of building a private road and that such charge was prior to all others, order for sale, and appointment of receiver); Croydon R. D. C. v. Betts, [1914] 1 Ch. 870 (plaintiffs sought declaration that under sanitary statute they were entitled to charge certain sums on defendant's property for improvements executed by them, sale, and receiver); Kingston-upon-Hull Corp. v. North Eastern Ry. Co., [1915] 1 Ch. 456 (plaintiff sought declaration that a certain expense incurred by it as urban sanitary authority in executing named works, with interest, was a charge on defendant's property until payment—under a named statute); Bristol Corp. v. Sinnott, [1917] 2 Ch. 340, aff'd, [1918] 1 Ch. 62 (plaintiffs sought declaration that under statutory authority they were entitled to a charge on defendant's property for amount apportioned to him); Macclesfield Corp. v. Macclesfield Grammar School, [1921] 2 Ch. 189 (plaintiff claimed a declaration that certain debts were a charge on defendant's property. Acting under statute, plaintiff had improved street on which defendant's property abutted, because defendant refused to do so. Defendant refused to pay); Sunderland Corp. v. Priestman, [1927] 2 Ch. 107 (plaintiff asked an order declaring certain sums, interest, and costs a charge on defendant's property. Plaintiff had been forced to repair road when defendant's predecessor in title had failed to perform his covenant to repair a certain portion of road); Paddington Borough Council v. Finucane, [1928] Ch. 567 (plaintiffs asked declaration that a certain sum be made a charge against defendant's house and that it be made prior to all other charges. Defendant tenant had not acted on plaintiffs' notice; freeholder and other lessees contended that the judgment ran only against defendant tenant).

latter’s duty may, if the government considers that it is adequately protected, be determined by way of a declaration of the defendant’s duty, which may, if desired, be combined with a request for coercive relief. Thus, the government has sued for a declaration that the defendant is under duty to maintain, repair, or widen a highway,\(^{131}\) to supply water,\(^{132}\) to remove an inmate from a poor house,\(^{133}\) to assume a surety’s responsibility on bond for state funds in a defunct bank,\(^{134}\) to pay road and transit fees,\(^{135}\) to take out a license.\(^{136}\)

Observance of the law is often conveniently secured by a declaration that the defendant has no right to do some specific act or maintain a claim alleged to be illegal. The demand may or may not be accompanied by request for an injunction, which often is denied whereas the declaration may be granted. Thus, the administration has sought declarations that the citizen has no right to erect or maintain certain structures, except as permitted by the government,\(^{137}\) to effect a sewer connection with plaintiff’s sewers,\(^{138}\) to open a burial vault except for interment,\(^{139}\) to impose certain conditions in a deed to the community,\(^{140}\) to hold meetings on a beach,\(^{141}\) to display films on unlicensed premises,\(^{142}\) to have a ship


\(^{132}\)City of Bayonne v. East Jersey Water Co., 103 Atl. 121 (N. J. Eq. 1919) (defendant refused to deliver, on ground that assignment of contract to plaintiff city invalid. Assignment upheld. The water company might have taken the initiative and have sued on their claim that they were relieved of further performance, because the assignment was invalid); cf. Société Maritime et Commerciale v. Venus Steam Shpping Co., 9 Com. Cas. 289 (1904).


\(^{134}\)Lawrence v. American Surety Co., 249 N. W. 3 (Mich. 1933) (declaratory action to fix duty of several sureties inter se and to the state, in view of debatable release of one).

\(^{135}\)Bavaria, VERF. GERICHTS GESETZ, art. 8, no. 19, cited in Traum, op. cit. supra note 5, at 59.

\(^{136}\)Mayor of Timaru v. South Canterbury Elec.-Power Board, [1928] N. Z. 174 (license of motor vehicles; issue: "used for commercial purposes"). See also VERF. GER. BREMEN (Nov. 11, 1925), HAMSEAT, RECHTSSTUDIO (1925) 955, cited in LASSAUR, REICHVERWALTUNGSGERICHT (1930) 34 (salesman’s certificate).


\(^{138}\)East Barnet Valley U. C. v. Stallard, 79 L. J. Ch. 103 (1909).

\(^{139}\)Hoskyns-Abrahall v. Paignton U. C., [1929] 1 Ch. 375 (defendant’s counterclaim for declaration granted).


\(^{141}\)Llandudno U. D. C. v. Woods, [1899] 2 Ch. 705 (injunction denied).

\(^{142}\)Attorney-General v. Vitagraph Co., [1915] 1 Ch. 205; cf. The King v. Ottawa Elec. R. Co., (1933) 1 D. L. R. (Ont.) 695 (to run cars on a certain loop. Denied within discretion as unnecessary, for authorizing Order in Council may be revoked at any time).
registered as British, to permit students to practice dentistry and charge fees, to claim a higher salary. These are but illustrations of the types of issues which the administration can put to the test in conflicts with individuals designed to insure observance of the law.

It frequently happens that the administration is not prepared to enforce a demand for taxation or other charge, but desires, nevertheless, as a guide to future action, to have a dispute with an affected citizen adjudicated. This is a convenient way to clear the title, so to speak, of both or all parties to the issue, and is much more efficient than to risk the consequences of mistaken action. Thus, the liability of certain land or persons to taxation may, on dispute, be raised by declaratory action of the administration as plaintiff, a method especially appropriate on a claim to specific exemption or reduction of tax.

143 The St. Tudno, [1918] P. 174 (owned by British corporation with German stockholders).
145 RG. March 9, 1926, HÖCHST. RECHTSPRACHT. (1926) no. 1557 (government's counterclaim).
146 Chesapeake & Ohio R. R. Co. v. City of Morehead, 223 Ky. 698, 4 S. W. (2d) 726 (1928) (plaintiff city sought declaration of rights as to paving assessment, in which defendant railway claimed exemption. Contractor was unwilling to proceed until issue was settled. Issue: construction of dedication deed); Town Board of Greece v. Murray, 130 Misc. 55, 223 N. Y. Supp. 666 (1927) (plaintiff sought declaration fixing its own liability and that of defendant contractor, bondsmen, and certain interested administrative officers on a contract for road construction); State Board of Examiners v. Standard Engineering Co., 157 Tenn. 157, 7 S. W. (2d) 47 (1928) (plaintiff sought declaration fixing the liability to a license tax of an organization using a trade name but not doing the type of professional work so indicated, in view of certain statutes); Islington Corp. v. London School Board, [1902] 2 K. B. 701 (plaintiffs sought a declaration fixing defendants’ liability for deficiencies under an assessment, on the ground that defendants had taken over land under certain statutes); Provincial Treasurer v. Smith, 51 N. S. 490 (1917) (special case to determine situs of bank shares to ascertain liability to succession tax); Mayor, etc., of Napier v. McDougall, 31 N. Z. 1081 (1912) (plaintiff sought to determine whether it could levy a special rate in a district which had been added to the borough. Defendant lived in that district and had refused to pay the levy); Wellington Harbour Board v. Union Steamship Co., [1916] N. Z. 849 (plaintiff sought to determine the validity of a by-law imposing a tax on goods discharged in the port making it payable by the ships—tax to be used for harbor improvement); Eastbourne Borough Council v. Wellington City Corp., [1929] N. Z. 441 (plaintiff sought to determine whether certain lands held by defendant were rateable property under statute. The land was used to raise young trees).
147 Roman Catholic Archbishop of Sydney v. Metropolitan Water, Sewerage & Drainage Board, 40 C. L. R. (Aust.) 472 (1928) (plaintiff administrative authorities sought a declaration that defendant was liable under statute for water rates on property occupied by a certain school); Wellington Harbour Board v. Union Steamship Co. of New Zealand, 32 N. Z. 766 (1913) (plaintiff sought declaration determining defendant’s liability to wharf tax. Issue: whether the exemption attaching while carrying mails lasted for whole voyage, although mails were carried for only a portion. Mails were not on board when the ships entered plaintiff’s harbor); Mayor of Miramar v. Devoy, 34 N. Z. 1072 (1915) (plaintiff sought to determine lia-
Taxation

Many declaratory challenges have been directed by protesting taxpayers to the constitutionality, construction, or interpretation of statutes purporting to subject them to a certain tax. Not infrequently, the administration has itself sought a declaration that the defendant was under a duty to pay a specific tax or was not exempt or was in general subject to the jurisdictional taxing powers of the plaintiff-authorities.

In the present article, attention will be directed to the individual's claims against the administration to immunity from assessments (1) by reason of the nature or situs of, or interest in, or use or contractual exemption of, the property, or on the ground that he is personally exempt or that the amount of the tax is unduly high or the classification improper; or (2) because in the actual administration or assessment of the tax there has been actual or threatened illegality or error, e.g., in failing to comply with the statutory or lawful requirements for a valid assessment, in the matter of valuations, tax rate, mode of assessment, amount claimed, incidence of the tax, discriminations, deductions allowed, time for appeal, and similar matters. In all these cases, the issue is narrowed to the precise question on which tax liability or exemption depends.

Immunity from taxation has thus been claimed for specific property, items, or income by reason of its nature or source or immunity to tax of property used for school during the week and church on Sunday); Napier Borough v. Hawke's Bay Ed. Board, [1924] N. Z. 596 (plaintiff sought to determine defendant's liability on a rate imposed to pay loans. The land was used for school purposes and had been subject to this tax when acquired); Napier Borough Council v. Napier Harbour Board, [1930] N. Z. 239 (plaintiff sought to determine whether land used for quarrying stone for harbor works was subject to tax); Northcote Borough Council v. Buchanan, [1930] N. Z. 798 (plaintiff sought to determine when a statutory provision for reduction of rates on vacant property applied. Plaintiff contended that it applied only when tax on annual or capital value existed).
by reason of the interest of the party assessed.\textsuperscript{151} Tax exemptions have been claimed by reason of the public nature\textsuperscript{152} or statutory privilege\textsuperscript{153} of the owner of property or of its use for religious\textsuperscript{154} or charitable\textsuperscript{155} purposes, or because exempted on other grounds.\textsuperscript{160} The immunity of the person assessed, because he or his property is without the jurisdiction\textsuperscript{157} or because he does not come within the jurisdiction.\textsuperscript{157}


\textsuperscript{152}City of Louisville v. Cromwell, State Treasurer, 233 Ky. 828, 27 S. W. (2d) 377 (1930); Public Trustee v. Hutt River Board, 34 N. Z. 753 (1915) ( held as Crown land through mortgage foreclosure); Public Trustee v. Chairman of County of Waipawa, supra note 151, (held in trust for King); The King v. Mayor of Inglewood, [1931] N. Z. 177 ( Crown exempt on land taken over in default of mortgage debt).

\textsuperscript{153}State ex rel. Smith v. Board of Com'r's of Shawnee County, supra note 150 (property belonging to minor children of deceased soldier in hands of guardian claimed as federal tax-exempt funds).

\textsuperscript{154}Hodge v. City of Moose Jaw, 19 Sask. L. R. 369 (1925) (part used for public worship exemption on whole claimed); Perpetual Trustees, Estate & Agency Co. of New Zealand v. Mayor of City of Dunedin, 34 N. Z. 877 (1915) (part leased).

\textsuperscript{155}Re Assessment Navy League of Canada, 59 N. S. 212 (1927) (having taken over work of tax-exempt Seamen's Society, question, had exemption carried over); Swinburne v. Federal Com'r of Taxation, 27 C. L. R. (Aust.) 377 (1920) (whether certain institution was "charitable," so as to entitled plaintiff to deduction from tax on gift of money to it); President of Shire of Nunawading v. Adult Deaf & Dumb Soc. of Victoria, 29 C. L. R. (Aust.) 98 (1921) (whether land used for growing flowers to sell for maintenance and leased for picnics was "charitable" use); Daly v. State of Victoria, 29 C. L. R. (Aust.) 491 (1921) (charitable bequests in will).

\textsuperscript{156}State ex rel. Peterson, Atty. Gen. v. Maricopa County, 38 Ariz. 347, 300 Pac. 175 (1931) (whether mortgage foreclosure sale merged a prior tax lien); People's Telephone Corp. v. City of Butler, 99 Pa. Super. 256 (1930) (that lot and building used in good faith for plaintiff's business, hence tax-exempt); Canadian Northern Pac. Ry. Co. v. City of Kelowna, 23 B. C. 514 (1917) (that land sold for delinquent taxes was actually tax-exempt. So held); Canadian Northern Pac. Ry. Co. v. City of Vernon, 26 B. C. 222 (1918) (same. Contention that tax appeal should have been taken, dismissed).

\textsuperscript{157}Box Elder County v. Conley, County Assessor, 75 Utah 199, 284 Pac. 105 (1930) (that automobile assembled in California and shipped to Utah was not taxable in Utah for that year); Barwick v. South Eastern & Chatham Ry. Cos., [1921] 1 K. B. 137, aff'd [1920] 2 K. B. 387 (whether reclaimed land within taxing district); Hope v. Edinburgh Corp., 5 Scot. L. T. 195 (1897) (land not within taxing jurisdiction); Re Parker and Succession Duty Act, 36 B. C. 299 (1925).
statutory definition of those liable to tax,\textsuperscript{158} or that the tax is limited to the amount offered or admitted,\textsuperscript{150} or that the classification of the property for taxation was erroneous\textsuperscript{160} is commonly claimed by declaration.

Attacks upon the propriety or payability of a tax have raised questions as to the necessity for a levy;\textsuperscript{161} the illegality of the general tax rate;\textsuperscript{162} the failure to comply with statutory requirements conferring the necessary jurisdiction to tax;\textsuperscript{163} the correctness or
validity of the tax base or valuation for assessment; the correctness of the mode of assessment, discriminating against or improperly burdening the complainant; the amount of tax due; the incidence of the tax; the amount of deductions allowable; and were invalid for want of notice to, and hearing of, landowners involved; Blenheim Corp. v. Australian Mut. Provident Soc., [1922] N. Z. 1229 (plaintiff sought to determine the validity of a rate imposed to pay off loan for gas works construction. Issue: interest, sinking fund, etc., as included in "repayment of moneys borrowed," as the resolution submitted to taxpayers did not specifically mention them in describing the tax).

Edinburgh & Glasgow Ry. Co. v. Meek, 12 D. 153 (Scot. 1849) (plaintiff sought declarator fixing the assessable value of the railroad and the proportion payable in each parish, under statutes taxing railroads for poor benefit [proportion—local mileage: total mileage] and permitting parishes a choice of three ways of assessing); Rex v. Miebach, 22 Alta. L. R. 482 (1927) (special case to determine construction of "net value" under succession duty statute); Finch v. Commissioner of Stamps, 33 N. Z. 144 (1914) (case stated to determine the basis of taxation on property deeded to sons at a price less than its true value); Mayor of Christchurch v. Christchurch Drainage Board, [1925] N. Z. 837 (plaintiff, unit for levy and collection of taxes, sought to determine the proper basis of taxation. Boroughs and cities had used unimproved value. Counties and defendant levying on a special area had used capital value. Plaintiff wished to collect as it did its own taxes); Ellis & Burnand, Ltd. v. Waitomo County, [1926] N. Z. 669 (plaintiff, a timber-cutting concern holding license to remove timber from native land, sought declarator fixing its liability for rates. Plaintiff had done little work in clearing. Natives had two small settlements in the tract, in which they had not been disturbed. Issue: assessment on value of whole block or license; plaintiff as sole occupier under statute); Edginton & Bernstone v. Waihopai River Board, [1929] N. Z. 823 (plaintiff sought declaration fixing basis of taxation and injunction. Land in defendant's area was subject to tax on unimproved value. Under statute, defendant ordered a general rate and failed to notify the borough council. The county council levied on capital value).


In re Aschrott, [1927] 1 Ch. 313 (administrator seeks declaration of estate duty on securities purchased for German by London branch of German bank; two-fifths left by will to British and Polish subjects, three-fifths to German and Austrian subjects); In re Succession Duties Act, 23 Alta. L. R. 521 (1928) (what property in estate, including provincial bonds, taxable and amount due); Donnelly v. Commissioner of Stamps, supra note 159 (plaintiff claims only 5% rate due, as he is a relative within fourth degree, not 10% as claimed).

In the Matter of the Estate of Drew, [1923] 1 Ir. R. 35 (whether freehold or personality of testator should bear estate duty); East London Hosp. v. Cobbett, 30 C. L. R. (Aust.) 278 (1922) (how estate tax to be borne between property in Tasmania and elsewhere); Manning v. Federal Com'r of Taxation, 40 C. L. R. (Aust.) 506 (1928) (whether plaintiff liable as trustee); Death v. Gower, [1916] N. Z. 751 (whether plaintiff vendor or defendant vendee is liable for mortgage tax).
questions involving factors concerning time. In all these cases the declaratory action has made judicial recourse as simple as administrative recourse before a board of tax appeals, an end earnestly to be desired.

ELECTIONS

English precedents have established for numerous British jurisdictions statutory provisions designating a judge of the High Court as the qualified authority to pass upon contested elections and to declare the name of the person elected or whether the election is void. American judges passing upon contested elections often perform the same function, although the term "declaratory judgments" is not used in the authorizing statutes or the decisions themselves. There is no reason, however, why the many questions of law associated with the holding of an election cannot usefully be settled by declaration, and to some extent that has already happened.

Land v. Federal Com'r of Taxation, 35 C. L. R. (Aust.) 209 (1924) (case stated to determine proper construction of a statute and the tax deductions to be allowed); Commissioner of Stamps (Western Australia) v. West Australian Trustee, Executor & Agency Co., 36 C. L. R. (Aust.) 98 (1925) (executor sought to determine whether income taxes made on the basis of the testator's returns and paid should be deducted as debts); Taupo Totara Timber Co. v. Commissioner of Taxes, 31 N. Z. 617 (1912) (plaintiff sought declaration fixing its right to make certain deductions under statute. Plaintiff wished to deduct value of standing timber cut and used in the course of business in fixing gross proceeds).

"Box Elder County v. Conley, County Assessor, supra note 157 (whether property in jurisdiction during the tax year); Granby Consol. Mining, Smelting & Power Co. v. Attorney-General, 31 B. C. 262 (1922) (that taxes had not yet become in arrears, to modify discount); Bank of New Zealand v. Commissioner of Stamps, [1916] N. Z. 1 (where property owned at certain time); Borough of Birkenhead v. Colonial Sugar Refining Co., [1923] N. Z. 445 (time for appeal from valuation); Badische Verwaltungsgerichtshof (March 23, 1909), 2 Soergel, Jahnbruck d. Verwaltungsrechts 499 (time and conditions for suit to clear uncertainties).

The declaratory nature of this procedure is clearly shown in the Commonwealth (of Australia) Electoral Act (1918-1919) § 189, in the definition of the jurisdiction of the High Court:

iv. To declare that any person who was returned as elected was not duly elected;

v. To declare any candidate duly elected who was not returned as elected;

vi. To declare any election absolutely void."

Similar language is to be found in the following statutes: New South Wales Parliamentary Electorate and Elections Act (1912-1929) §§ 155, 161 (v-vii); Queensland Elections Act (1915-1930) §§ 2, 117; Alberta Controverted Elections Act (1922) c. 5, §§ 3, 4, 21; New Brunswick Controverted Elections Act (1923) c. 5, §§ 3 (2), 28; Nova Scotia Controverted Elections Act (1923) c. 5, § 40; Saskatchewan Controverted Elections Act (1930) c. 6, § 4.

Another form of statute uses the word "determine" to describe the result of the trial, as in the case of some declaratory judgment pleadings: Parliamentary Elections Act, 1868 (31 and 32 Vict. c. 125) §§ 2, 11 (1), (13); Dominion [of Canada] Controverted Elections Act (1927) c. 50, § 57; British Columbia Controverted Elections Act (1924) c. 76, §§ 191 et seq.; Manitoba Controverted Elections Act (1924) c. 39, §§ 65 et seq.; Ontario Controverted Elections Act (1927) c. 11, §§ 50 et seq.
Whether an elector is recognized as having an adequate legal interest to challenge the legality of every aspect of an election is a matter on which jurisdictions differ. But issues have been successfully raised by declaration as to the qualifications of electors in a particular election,\textsuperscript{171} as to the eligibility of a candidate or the term for which the candidate has been or may be elected,\textsuperscript{172} and as to the compliance of the administrative authorities holding the election with the prescriptions of the election laws.\textsuperscript{173}

CONCLUSION

These many illustrations of the issues which daily arise between the administration and the individual and between administrative authorities \textit{inter se} will have indicated the convenience and efficacy of the declaratory action as contrasted with other forms of relief. Not only are the inconveniences and pitfalls of the extraordinary legal remedies and of injunction thereby avoided, but the legality of public demands and requirements can be put to the test before rather than after enforcement with sufficient speed to avoid hampering the administration and yet with an advance guaranty of legality. The dangers and risks, the losses and penalties, thereby averted require no further elaboration. The efficiency and security thus afforded the operations of the government to the advantage both of the public and the private interest commend the declaratory judgment as an integral instrument of effective administration.

\textsuperscript{171}\textit{In re Freeholders of Hudson County}, 105 N. J. L. 57, 143 Atl. 536 (1928) (declaration of unconstitutionality sought, on ground that it deprived qualified voters of their right to vote. Court somewhat reluctantly considered it a contested issue and rendered judgment); \textit{Borough of Takapuna v. Takapuna Tramways \\& Ferry Co.}, [1926] N. Z. 796 (who were qualified voters at election to approve purchase of tramway system).

\textsuperscript{172}\textit{McGinnis v. Cossar}, 230 Ky. 213, 18 S. W. (2d) 988 (1929) (defendant had been elected to serve out unexpired term, hence had not been elected to "full term" and was eligible for re-election. Taxpayers' action); \textit{Robinson v. Moser, supra note 97} (term of office of plaintiff, incumbent, placed in doubt by new statute under which defendant claims office); \textit{Emmeler v. Blaise, supra note 97} (when plaintiff's term will end and defendant's begin); \textit{Wingate, Surrogate v. Flynn, Sec. of State, supra note 97} (length of plaintiff's term, six or fourteen years, and if only six years, defendant's duty to list the office as open for election. See remarks of Bills, J.); \textit{Fox, Dist. Atty. v. Ross, supra note 97} (that plaintiff's term ran until the expiration of the term of his predecessor).

\textsuperscript{173}\textit{In re Annexation of a Part of Lancaster Township to City of Lancaster, 6 D. \\& C. 36} (Pa. 1924) (county commissioners, in printing ballots, are not acting legally. Taxpayer plaintiff held to have no special interest); \textit{State ex rel. Binner v. Buer, 174 Wis. 120, 182 N. W. 855} (1921) (declaration to restrain administrative action in connection with election of judges considered injunction); \textit{Simkin v. City of Rock Springs, 33 Wyo. 165, 237 Pac. 245} (1925) (taxpayer elector sues for declaration that election for issuance of bonds was invalid, because not held in accordance with statute); \textit{Hair v. Town of Meaford, 31 Ont. L. Rep. 124} (1914) (invalidity of elections for irregularities and illegality of submission).