THE DECLARATORY JUDGMENT.

I. Its Origin.

In both England and Canada, the granting of declaratory judgments is a practice of recent origin. It is interesting to observe that the Scotch Action of "Declarator," in existence some four hundred years, was finally adopted as the English practice. For this reason, it has been deemed proper to begin this brief historical sketch with the Scotch Action of Declarator.

It is not necessary for our present purpose to examine the correctness of Lord Brougham's view that the action of declarator was among the few valuable gifts, which the Scotch lawyers could provide with some advantage to the practice of English Law.[1] A more polite way of expressing the influence thus exerted by the Scotch practice would be to view the situation as one in which the Scotch sought to express thanks for the form of trial by jury given to them by the English.[2]

It is not possible to assert with any degree of certainty the origin of the Scotch Action of declarator. Unlike in England and Canada, there is no rule of court or statute expressly or inferentially giving rise to its use. Lord Stair wrote that "Declarators of right proceeded of old by the brieve of right which is now out of use."[3] The theory has been advanced[4] that the declarator, as a form of action in Scotland, arose about the year 1532, and the first reported case, instancing the use of the declarator, seems to have been on July 16th, 1541, as may be evidenced from a glance at "Morrison's Dictionary."

Like all other brieves, the brieve of right was at first tried by a jury. This latter institution having been done away with, except in criminal matters, the adoption of the procedure in declarator was effected, it is supposed, because this practice is essentially the same as that under the brieve of right; and, as may be seen in "Quoniam Attachiamenta,"[5] the language used in the summons of declarator is the same as that used in the plaintiff's statement of the case in the brieve of right.[6] Moreover, it would seem from some

[1] Speech delivered in the House of Commons in 1828.
[2] See "The Scotch Action of Declarator," in 41 Law Mag. 178.
[3] Stair's Institutes 4.4.1.
[4] 41 Law Mag. 179.
[5] An old collection of the Laws of Scotland.
[6] *Ibid.* 180.

of the ecclesiastical decisions, that judgments dealing, for example, with legitimacy were pronounced in the form of the declarator, so that in adopting the practice, the successful example of the Episcopal Courts was followed.[7] Since the French law is said to have shaped the Court of Session in Scotland, it is thought that the declarator suit as employed by the Scotch judges also points to French influence in this regard.[8]

In Scotland the declarator seems to have assumed three forms;

(a) the simple declarator, sometimes designated as the pure declarator;

(b) the declarator with petitory, possessory, or other incidental results i.e. consequential relief resulting from the declaration;

(c) the declaratory adjudication, which seems to have been a means of placing the legal title in one beneficially entitled to it.[9]

In an English case,[10] there is some talk of whether a defendant could ask for a declaration. Certainly, in some Canadian cases,[11] the defendant's counterclaim asks for a declaration, but, in Scotland, it is otherwise and it would seem that the decree sought is intended to apply to the plaintiff, the defendant not being called upon to do or pay anything.[12] The purpose of the declarator is to determine rights, and Lord Stair expresses the view that "there is no right that is incapable of declarator." This however does not mean that all rights, regardless of their legal consequences, will be so determined. There must be some substantial interest, and, in form, at least, there must be an issue. The Scotch courts, like the Canadian and English tribunals, will not pronounce a decision that amounts to the giving of mere advice or opinion, and, likewise, we seem to have followed the practice of not granting a declaratory judgment, where some other known remedy exists. It would appear that the declarator is an equitable remedy, although there is a different expression of opinion—to the effect that the declaratory judgment is not chiefly an equitable remedy.[13]

The forms of the declarator may be negative or affirmative, and cover a variety of cases. Thus the Scotch courts have made declara-

[7] These ecclesiastical decisions were published by the Abbotsford Club in 1845.

[8] 41 Law Mag. 180.

[9] See I Bell's Commentaries, 751.

[10] *Guaranty Trust Company* v. *Hannay* (C.A.). [1915] 2 K.B. 536.

[11] 15 Ex. C.R. 252; 52 S.C.R. 317; [1926] 1 A.C. 271.

[12] 4 Stair's Inst. 3, 47 and 4 Erskine. Prin. 1, 25.

[13] Farwell, L.J., in *Chapman* v. *Michaelson* (C.A.), [1909] 1 Ch. 238, 243, denied that it was strictly equitable relief.

tions regarding the validity of marriage,[14] of legitimacy, of bastardy,[15] of putting to silence (negative form of the declarator),[16] of title to and interest affecting property,[17] of the landlord's "right" of re-entry for failure to pay rent or other pecuniary obligations,[18] of the "expiry of the legal" term of redemption,[19] of the forced surrender of rights,[20] of property immovable, right of succession to movables; of trust, validity of trust deeds, power to revoke a trustee, of the ultra vires state of a trust instrument;[21] of partnership,[22] of determining the provisions of lost or destroyed instruments as a means of establishing rights thereunder,[23] and other miscellaneous actions.[24]

As in England and in Canada, the granting of the declarator in Scotland is dependent on the exercise of the Court's discretion. There must also be some indication that utility would result as a consequence of the declarator. Thus, unless the judgment would have the effect of "res judicata" it will not be made,[25] although, as Professor Borchard points out, there is a tendency in Scotland to declare by anticipation rights dependent on some contingency,[26] if the rights alleged are disputed by someone whose opposition to the declaration sought would constitute him a defendant in the action of declarator.[27] In one decision, the Court expressed its unwillingness to pronounce a declaration on a hypothetical and abstract question and the same reluctance was displayed in a refusal to declare the meaning of a statute, unless some legal consequence, attaching to an individual or group, could be shown,[28] and yet,

[14] Fraser, Husband and Wife (2nd ed.) 1238, 1244.

[15] In England a declaration of bastardy will not be granted. *Yool* v. *Ewing* (1904), Irish Ch. 434, 445—no case on this point has been found in Canada.

[16] See Fraser, Husband and Wife (2nd ed.) 1244.

[17] 1 Bell, Commentaries (7th ed. by McLaren) 785.

[18] Technically known as "non-entry duties"—See 1 Bell op. cit., 22.

[19] In this case, the declarator is necessary in order to permit the creditor to acquire an irredeemable title—See *Ormiston* v. *Hill* (1809, Scot.) Far. Coll., 155 and 1 Bell op. cit. 743.

[20] Mackay, Manual of practice in the Court of Session (Edin. 1893) 79 378.

[21] 2 Bell op. cit. 386, note 3.

[22] 2 Bell op. cit. 562.

[23] Erskine "Principles of the Law of Scotland" 542-544; *Lord Lovat* v. *Fraser* (1845), 8 D. 316.

[24] Bell, Dictionary and Digest of the Law of Scotland (7th ed. by Watson) 291.

[25] *Harvey* v. *Harvey's Trustees* (1860), 22 D. 1310, 1326.

[26] Brief on the "Declaratory Judgment" by E. M. Borchard, submitted to United States Senate when considering Bill to authorize Federal Courts to render declaratory judgments.

[27] *Chaplin's Trustees* v. *Hoile* (1890), 28 Sc. L. Rep. 51; *Falconar Stewart* v. *Wilkies* (1892), 29 Sc. L. Rep. 534.

[28] *Todd Higginbotham* v. *Burnet* (1854), 16 D. 794.

if we are to believe Professor Borchard,[29] the Scotch Courts are more willing to make declarations regarding mere facts, some useful results of course being apparent, than are the courts in England, and, as well, it is suggested, in Canada,[30] where declarations will be made only providing legal consequences are attached.[31]

As we have before pointed out to Lord Brougham, a sound lawyer and a distinguished statesman, the practice of granting declaratory judgments in England may be attributed. In the speech delivered in the House of Commons in 1828, which has been described as a "noble and a great one,"[32] he urged the adoption in England of the Scotch practice of granting declaratory judgments.[33] For the purpose of having this practice formally adopted in England, Lord Brougham introduced bills in 1843, 1846, 1854 and finally in 1857. His persistence was partially rewarded in 1858, when there was passed the Legitimacy Declaration Act.[34]

In 1846, in the case of the *Earl of Mansfield* v. *Stewart,*[35] a Scotch case, which was heard on appeal by the House of Lords, and where the judicial settlement sought affected a question of title, Lord Brougham once again expressed himself on the merits of the declaratory judgment. His language is a broad statement, indicating the convenience and utility of the practice, as distinguished from a procedure not characterised by the custom of granting declaratory judgments.

The Act of 1852, enlarged the Chancery Procedure Act considerably. Its provisions provided, in part, for an attainment of what Lord Brougham had been striving for.[36] The practice, however, was limited by subsequent judicial construction. Thus, in the following year, it was held that the right to obtain a declaratory judgment was to be invoked only where it would appear to be necessary for the administration of an estate or as incidental to consequential relief.[37] Chancellor Turner in 1856 conceived that the new Act did not extend "the cases in which declarations of right may be made, but merely enables the court to declare rights without following up the

[29] Op. cit.

[30] *In re Wilkinson's Estate,* [1917] 1 Chan. 620; *In re Price,* [1900] 1 Chan. 442. 447.

[31] (1849), 41 Law Mag. 184.

[32] 18 Hansard (2nd sec. 1828).

[33] *Ibid.* Col. 127, 179.

[34] 21 and 22 Vict. Ch. 93.

[35] 5 Bell's Appeal Cases 139 at 150.

[36] "No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."

[37] *Garlick* v. *Lawson* (1853), 10 Hare, App. XIV.

declaration by the directions which, under the old practice, have been necessarily consequent on them."[38] Further limitation of the practice lay in the reluctance of the courts to pronounce upon rights to be enjoyed in the future or dependent on some contingency.[39] A very important limitation was given in many cases, where it was held that the granting of a declaratory judgment depended on the right of the plaintiff to consequential relief.[40] This, of course, prevented the granting of the so called negative declaratory judgment.[41]

Order XXV. rule 5 of the Supreme Court Rules of 1883[42] effected a desirable change in the practice.[43] The interpretation, likely to be given to the rule, is that a declaration might be made simply and the plaintiff need not have a cause of action, that is, he need not be entitled to consequential relief as a result of the declaration. It will be observed that where a declaration was granted under the Act of 1852, it was necessary that the plaintiff be entitled to relief, although it was not imperative that such relief be asked for. However, it was only in 1915 that this understanding of the rule, in its modified form was fully and authoritatively admitted.[44]

In England, the rule seems to be used more in the Chancery Division than in the King's Bench Division, and it has been held that the rule is not extended to the Probate Division.[45]

The amended rule of 1893 provides for Order LIV. A; which reads:

> In any Division of the High Court, any person claiming to be interested under a deed, will, or other instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.[46]

It may be noted that a considerable proportion of the declaratory judgments arise under this order, which covers the construction of wills, deeds, contracts, and other written instruments.

It will be observed throughout this paper one endeavour, at least, has been to trace the historical development of the practice

[38] *Lady Langdale* v. *Brigg's* (1856), 8 D.G.M. and G. 391, 427.
[39] *Bright* v. *Tyndall* (1876), 4 Ch. D. 189, 196.
[40] *Rooke* v. *Lord Kensington* (1856), 2 K. & J. 753, 760.
[41] See Borchard "The Declaratory Judgment," p. 22; *Jackson* v. *Turnley* (1853), 1 Drew, 617, 627.
[42] 7 Statutory Rules and Orders, 54.
[43] The rule provides that: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."
[44] *Guaranty Trust Co.* v. *Hannay*, C.A., [1915] 2 K.B. 536.
[45] *Countess De Gasquet James* v. *Duke of Mecklenburg-Schwerin* (1914), P. 53 at pp. 53, 71.
[46] Statutory Rules and Orders (1893), 552.

in Canada, as seen in the examined cases. For this reason the remarks here, dealing with the history of the declaratory judgments in Canada are only of a general and cursory nature.

At present Order XXV. rule 5 of the English Rules of the Supreme Court is reproduced word for word in Alberta,[47] British Columbia,[48], Manitoba,[49] New Brunswick,[50] and Ontario.[51] By statutory provision,[52] the Nova Scotia Supreme Court is given jurisdiction to grant declaratory judgments. The act extending this power marks the Court's jurisdiction as equivalent to that of the Imperial Court of Appeal and High Court of Justice, as of October 1st, 1884. Likewise, the Supreme Court of Canada may make binding declarations of right.[53] It would seem however that the practice of granting declaratory judgments is unknown in the province of Quebec.[54] One would expect to find this practice in the only civil law jurisdiction of Canada. The absence of this mode of adjudication there is all the more interesting, when it is borne in mind that the declaratory judgment has for several hundred years been recognized in France, whose civil law was taken over or rather continued by the province of Quebec in 1763, by the Treaty of Paris.

The evolution in the granting of declaratory judgments in England was followed very closely in Canada. Chancery Order 538 was in all respects the same as section 50 of the Chancery Procedure Act of 1850. As the rule then stood, it was necessary, as we have seen was the case in England, that the plaintiff be entitled to consequential relief, although such a relief need not have been asked for, in order to insure the obtaining of the declaration. In 1887, four years later than the English Act, modifying the provision of the Act of 1850, Chancery Order 538 was amended so as to provide for the same changes made in the English Act, and so permit the granting of a declaratory judgment, regardless of the plaintiff's rights to consequential relief. It was but natural that the rule as modified should have been given the limited interpretation, which, as we have seen, was placed on Order XXV. rule 5. Thus as late as 1910, we find a Canadian Court, taking the view that a declaration ought not to be made because of the fact that the plaintiff was not entitled

[47] Alberta Judicature Act, R.S.A. 1922, Ch. 72, 35 (*i*).
[48] British Columbia Rules of Court, Order XXV, Rule 5 (r. 289).
[49] Manitoba King's Bench Act, R.S.M. 1913, Ch. 46 Sec. 25(*e*).
[50] New Brunswick Judicature Act, 1909 (N.B.) Ch. 5.
[51] Ontario Judicature Act, R.S.O. 1927, Ch. 88, Sec. 15(*b*).
[52] R.S.N.S. 1900, Ch. 155, Sec. 15.
[53] Schedule of Rules of Supreme Court, Order XXV, Rule 5 (r. 235).
[54] *La Corporation du Village de la Malbaie* v. *Warren et autre* (1924), Rapports Judiciaires, Que. C.B.R. 70; see the portion dealing with the declaration of rights in general.

to consequential relief;[55] although this was not the unanimous judicial view in Canada, there can be no question that the rule was not given its liberal meaning until the opinion was finally expressed in England, that a declaration might be given regardless of the plaintiff's rights to relief dependent on the declaration.[56]

As in England, the granting of the declaratory decree lies within the Court's discretion, and the instances, which tend to indicate the direction in which the discretion is usually exercised, seem to depend primarily upon the apparent utility and convenience in consequence of the declaration. The practice is also limited by the approved reluctance of the Court to grant a declaratory judgment where the question in issue might more conveniently be decided by some other tribunal, or where embarrassment would likely be felt by a judicial body before whom the question must ultimately come, or where it is provided by legislative enactment that the question and others like it are to be determined by a specially constituted forum. It will be seen from an examination of the cases to be discussed that the practice covers a variety of circumstances. Thus, in Canada, as in England, the declaratory judgments have been used to determine such questions as status, the rights (in the general and broader sense) of parties, interests and title to property, and the construction and interpretation of written instruments. The right to obtain a declaration against the Crown is clearly settled in Canada, as it is in England. However the Crown is not subjected to the obligations of the practice to the same extent as are the Crown's subjects.

II. Purpose, Utility and Convenience of the Declaratory Judgment.

From one point of view, all judgments are declaratory; but it is not in this broad sense that the "declaratory judgment" as a specific judicial act is to be understood. Most judgments deal with rights already violated, or, at the most, with rights, the infringement of which has been anticipated. Where such is the nature of the adjudication, relief by an order for the payment of damages or the granting of an injunction is given in consequence. Perhaps the most distinguishing characteristic of judgments of this class is the effect of the court's judgment on the defendant, whose answer to the plaintiff's claim has not been accepted. Professor Borchard,[57]

[55] *Viola School District Trustees* v. *Canada Saskatchewan Land Co.* (1910), 16 W.L.R. 176.

[56] See note 44.

[57] See citation in n. 26 *supra.*

notes that this class of judgment may be termed "executory." Another type of judgment is that involving a change in status,[58] constitutive or "investitive."[59] Restricting the meaning of the declaratory judgment the Yale Law School Professor observes that this form of judgment should be confined

> to those judgments which merely declare the existence of a jural relation i.e. some right, privilege, power or immunity in the plaintiff or some duty, liability or disability in the defendant.[60]

In Erskine's "Principles of the Law of Scotland,"[61] a declaratory action is defined as "that in which some right, which is actually violated or threatened, is craved to be declared in favour of the pursuer, but nothing sought to be paid or performed by the defender."[62] Lord Stair understood declaratory actions to be those wherein the right of the pursuer is craved to be declared, but nothing is claimed to be done by the defender, but the effect is, that in petitory or possessory actions, the defender is excluded from any defense that might have been proposed in the declaratory action.[63]

It will be seen that the essence of the declaratory judgment is the determination of rights. It is an adjudication, in the full sense of the word, which does not create new rights or duties, but confirms the existence of a jural relation. The effect of a declaratory judgment is then only "to declare what was the pursuer's rights before."[64]

Practical utility would seem to be the justification for using the declaratory action and judgment. Certainly, an analysis of the Canadian and English cases emphasizes this proposition as fundamental. Nor is it conceded that litigation will increase as a result. On the contrary, it is expected that the practice will tend to avoid litigation.[65] The uncertainty of a plaintiff's rights brought into question by the defendant, or disputes as to claims of some sort or other, are instances demonstrative of the purpose of the declaratory judgment. A plaintiff's rights may not even be subjected to threatened violation, and yet the security desired may not be within the plaintiff's grasp, and so, to give the desired security in such a

[58] *Ibid.*
[59] Professor Borchard prefers this term.
[60] *Ibid.*
[61] 21st ed. p. 650.
[62] Examples of which are given as "declarators of marriage, of infancy; of expiry of a legal term, reversions, actions competent to superiors or their donatories for declaring casualties incurred by vassals, etc.," likewise "recissory actions," declarators of property.
[63] "Principles of the Laws of Scotland," p. 457; Mackay in his "Manual of Practice" (1893) 175, uses this definition.
[64] Erskine's "Principles of the Laws of Scotland" 21st ed. p. 651.
[65] *Guaranty Trust Co.* v. *Hannay* (K.B.), 113 L.T. 98, 101.

case, one may invoke the declaratory judgment, providing of course that the right is not unlikely to be attacked.[66] Security of interests may then be given as the purpose of declaratory judgments, but the elements of utility and convenience must be brought to support the claim for a declaration as a means to security.

This can be illustrated by considering typical cases. Once again, let it be noted that a declaratory judgment will not be made unless there is a likelihood of resultant utility. A contrary tendency would clearly be an abuse of this useful practice. The granting of a declaratory judgment lies within the discretion of the court. It will be seen that generally, unless there is strong reason for not doing so, the discretion will be exercised in accordance with the claimant's request, providing always that some use and benefit will result from the declaration.

Thus a declaration of the plaintiff's rights under a contract was sought and refused. The terms of the agreement were plain. No difficulty as to the meaning existed, and, therefore, there was no object in declaring the purport of something that was self-evident.[67] Assuming the fact of plain meaning, it will readily be conceded that no utility would result from the granting of a declaratory judgment in such an instance. The same sort of question arose in *Trottier* v. *National Manufacturing Co.*,[68] where a declaration to the effect that a homestead was not subject to an execution was refused. Since "The Exemptions Act" excluded a homesteader's lands from execution as long as such property remained a homestead within the meaning of the Act, the court very properly asked "what practical benefit, then, does the plaintiff seek to obtain?"[69] It required no ingenuity to appreciate the effect of the statutory provision with reference to the homestead. Since no greater usefulness would result from a judicial pronouncement of an immunity clearly provided for in the enactment, the court acted properly and wisely.

Mr. Justice Riddell[70] was no doubt thinking of the element of utility in declaratory judgments when he remarked that "the Court does not send out a mere 'brutum fulmen.'" Likewise, the question of utility as a condition precedent to the obtaining of a declaratory judgment was recognized by the Appellate Division in Ontario,[71]

[66] *Toronto Railway Co.* v. *City of Toronto* (1906), 13 O.L.R. 532.
[67] *City of Kingston* v. *Kingston, Portsmouth, and Cataraqui Electric Railway Co.* (1898), 28 O.R. 399 at 404.
[68] (1912-13), 3 W.W.R. 383.
[69] *Ibid.* 386.
[70] *Cornish* v. *Boles* (1914), 31 O.L.R. 505 at 523; see *Earl of Dysart* v. *Hammerton & Co.* (1914), 30 T.L.R. 379.
[71] *Cassidy* v. *Stuart* (1928), 62 O.L.R. 374.

where the plaintiff sought a declaration to the effect that he was entitled to a lien for costs upon a sum recovered by him as counsel for his client (the defendant) in the Exchequer Court of Canada. Since the fund in respect of which the lien was claimed was one with which the Appellate Division had nothing to do, it is submitted that the Court's refusal to grant the declaration was wholly justified. Very properly Middleton, J.A., was concerned over the effect a declaration would have regarding the plaintiff's interest in a fund subject to the control of another tribunal.[72] Mr. Justice Masten[73] relied on the statement made by Lord Sterndale, M.R., in *Gray* v. *Spyer*,[74] that: "Claims for declaration should be carefully watched." And continuing Mr. Justice Masten remarked that:

> If the Exchequer Court has jurisdiction, it would certainly be embarrassing, and perhaps might be characterised as impertinent, for this Court to assume to declare how the Exchequer Court ought to exercise its jurisdiction. As pointed out by my brother Orde, in the course of the argument, this Court could not presume to assume jurisdiction to make such a declaration except upon a formal order from the Exchequer Court requesting the assistance of this Court by determining the right claimed and certifying to that Court a declaration of its conclusion.[75]

In the same case, Orde, J.A., disagreed with the view of counsel that the Court should nevertheless make the declaration regardless of the effectiveness of its order, since the power to pronounce declaratory judgments is given "whether any consequential relief is or could be claimed or not." Moreover, the request of the plaintiff was thought to amount to no more than a desire that the court should pronounce upon a hypothetical case.[76] Likewise Lord Sterndale again, in another case, refusing to declare that the plaintiff was a subject of His Majesty the King, observed that the granting of a declaratory judgment was a very useful jurisdiction, particularly in cases of a commercial character. He was clearly guided by the usefulness of the practice when he deplored the extravagant tendency "of later years to ask for declarations on every possible point."[77]

In the Western Provinces of Canada too, the liberality of the courts in granting declaratory judgments is restricted, when no useful purpose can be conceived to be the effect of the binding declaration of right.[78]

[72] *Ibid.* 378.
[73] *Ibid.* 379.
[74] [1922] 2 Ch. 22 at p. 27.
[75] *Cassidy* v. *Stuart* (1928), 62 O.L.R. 374 at 380.
[76] *Ibid.* 383.
[77] *Markwald* v. *Attorney-General*, [1920] 1 Ch. 348 at 357.
[78] *Piper* v. *Spence*, [1925] 1 D.L.R. 334 at 337.

As has already been suggested, the convenience likely to result from the judicial declaration is considered by the courts. The question of utility looks at the result of the declaratory form of judgment. The element of convenience is best observed in the procedure, it being considered that the determination of rights can often be more conveniently ascertained by this method. It was in this sense that Rose, J., remarked: "the proceeding is a convenient mode for determining the question of highway or no highway."[79]

In *Dyson* v. *Attorney-General*,[80] where a declaration against the Attorney-General was sought, it was urged that no declaration should be made on the ground of convenience (*ab convenienti*). The granting of a declaratory judgment in that case would give rise to innumerable actions for declarations as to the meaning of many Acts of Parliament, or of executive ordinances, and add to the work of the law offices of the Crown, it was argued. Assuming that this was true (although it was doubtful) there was much to be said for the convenience which the public would experience as a result of according to the public the rights resulting from this practice. The court very properly was not so much interested in the added labours to law officers, as it was in the convenience that would accrue to the public. Fletcher Moulton, L.J., entertained this view. He said:

> I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty. There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this.[81]

In the *Trottier* case, already considered, the court had no doubt but that the argument from convenience was not to be "lightly entertained." The argument here resolved itself into one of comparative convenience as between the plaintiff and the defendant, the court deciding that the inconvenience which the plaintiff might suffer from the court's refusal to make the declaration was not greater than the inconvenience that the defendant would suffer if judgment

[79] *City of Toronto* v. *Lorsch* (1894), 24 O.R. 227 at 229; see also 1892 Law Quarterly Review, p. 48.
[80] [1911] 1 K.B. 410, at p. 423.
[81] [1912] 1 Ch. 158 at 168.

had gone the other way. It was a question of the balance of convenience. There can be little controversy as to the test adopted here. If one of the benefits inherent in the declaratory judgment is the resultant convenience, then surely it is the duty of the judge to note in which party resides the greater balance of convenience.

It will be observed that in the preceding case, the court, in discussing the element of convenience, had in mind the convenience of the parties and apparently was not concerned, at least to the same degree, with the practice of making judicial declarations from the point of view of convenient procedure, as, for instance, did Lord Sterndale, M.R., when he expressed the view that:

> The plaintiff's claim for a declaration was a convenient method of ascertaining the legal position of the parties without waiting for the time when the notice terminated, and it might well be for the benefit of the parties to have it so determined.[82]

Apparently the Master of the Rolls in this instance looked upon the accruing benefits to the parties as ancillary to the chief justification for the practice, viz., a convenient method.

Finally, the case of *Smith* v. *Attorney-General*[83] is deserving of consideration. The appellant asked for a declaration as to the effect of certain legislation, relative to the prohibition against the importation of intoxicating liquors into Ontario. The only reason possible for his having a cause of action lay in the refusal of several Montreal liquor dealers to supply him in Toronto with liquor shipped from Montreal, the reason for the refusal being that such a shipment would be illegal on account of the legislation in question. The Attorney-General had not taken any steps whatsoever. It need only be added that the Crown would have interfered as soon as there was a violation of the Act. The appellant relied on *Dyson* v. *Attorney-General* (*supra*), in support of his claim for a declaration as to the validity of the disputed enactment. But that case was distinguishable. There a claim had actually been made by the Crown. The present case was a speculative one. Perhaps the most powerful argument adduced by the defendant was that from convenience. It was pointed out by his counsel, that an individual should have some means of raising the question of the legality of official acts, without subjecting himself to a criminal prosecution. The court clearly guided by the argument *ab inconvenienti* thought that to accede to this contention would involve the result of many other citizens maintaining similar actions. To recognize "such a principle would lead to great inconvenience; and analogy is against

[82] *Gray* v. *Spyer*, [1922] 2 Ch. 22 at 27.
[83] (1925) 42 C.C.C. 215 at 220.

it."[84] Great inconvenience in practice would result. It is submitted that the court should have been more concerned over the convenience that the public would enjoy, rather than to stress any inconvenience which the courts and law offices might experience. In *Dyson* v. *Attorney-General* (*supra*), that was the view taken by the court. One perhaps need not complain of the decision in the case at hand, since there were other methods of testing the validity of the Act. The fact that the appellant had made out no concrete case was not in itself sufficient to warrant the court's refusal to make the declaration and extend the rule in *Dyson* v. *The Attorney-General.* If no other method of determining the validity of the Act existed, then it is strongly urged that the court should have granted the declaration, rather than have its validity determined after the appellant had violated it and so possibly have rendered himself liable to a criminal prosecution.

Thus we have seen that the declaratory judgment is in every sense of the word an effective judgment, and in this sense distinguishable from an Advisory Opinion.[85] Jeremy Bentham, in his efforts for law reform, placed, as a criterion of efficient procedure, primarily the element of usefulness. This great law reformer would have gladly accepted the practice of granting declaratory judgments, for in this method of adjudication, its utility is most apparent, and certainly one must not overlook the convenience both from the view-point of procedure and the effect on the parties that the declaratory judgment has. While Bentham's desire for the formulation of law in a code, from which the ordinary citizen might, with little difficulty, ascertain his legal rights and liabilities, seems impossible of attainment, a study of the declaratory judgment impresses one with the fact that this method of determining legal rights is the closest practical fulfilment of what Bentham hoped for.

PAUL MARTIN.

Windsor.

[84] (1925) 42 C.C.C. 215 at 220—Duff, J.

[85] See *Williams* v. *Powell* (1894), W.N. 141, where it was held that a declaratory judgment is a judicial act, and will not be granted merely on admission of counsel, or by consent.