1955 *Present :* Gratiaen, J., and Swan, J.

THE ATTORNEY-GENERAL, Appellant, *and*
S. SABARATNAM, Respondent

S. C. 108—D. C. Colombo, 24,847/M

Quia timet *action—Remedy of declaratory decree—Jurisdiction of Court to grant it—Liability of Crown.*

A party who has a concrete dispute with another may obtain in anticipation a declaration by Court that his opponent does not have a good cause of action against him. The jurisdiction of Court to grant a declaratory decree is, of course, discretionary, and would not be exercised for the purpose of making premature pronouncements as to future contingent rights of litigants.

The Crown enjoys no special immunity from declaratory decrees in cases where they would be appropriate in actions between private litigants.

The plaintiff, when he was a Public Works Department overseer, had been called upon by the Director of Public Works to refund a certain sum of money which was alleged to have been over-paid to him. Plaintiff denied that there had been any over-payment, but the Director persisted in his claim for a refund. Even after he retired from the Public Service, the Government refused to withdraw its claim for a refund and, the plaintiff alleged, was withholding payment of arrears of salary and pension due to him. He instituted the present action asking for a formal declaration in his favour that, *inter alia*, he was not liable to refund any sum of money.

Held, that the action was maintainable.

APPEAL from a judgment of the District Court, Colombo.

V. Tennekoon, Crown Counsel, with *E. R. de Fonseka*, Crown Counsel, for the defendant appellant.

S. J. V. Chelvanayakam, Q.C., with *R. Manikkavasagar*, for the plaintiff respondent.

Cur. adv. vult.

November 28, 1955. GRATIAEN, J.—

This is an appeal by the Attorney-General on behalf of the Crown against a declaratory decree to the effect that " the allegation made by the Government that a sum of Rs. 10,003/57 had been over-paid to the plaintiff on his bill No. 37 for work done in January 1948 was wrongly made, and that the plaintiff is not liable to refund any monies received on account of the said bill No. 37. "

The form of the decree under appeal is certainly unusual, but it was entered in circumstances which rarely occur in the proceedings between the Crown and a subject or even in private litigation. The facts as

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found by the learned trial Judge upon the issues which were framed at the trial are no longer in dispute. Shortly stated they are as follows:

The plaintiff had been a Public Works Department overseer stationed at all material times in Point Pedro. The Department was then engaged in the construction of "the Mahadeva causeway", but found some difficulty in inducing private contractors to enter into sub-contracts undertaking part of the work. Accordingly, the plaintiff and two other P. W. D. overseers were persuaded, in addition to their normal duties, to carry out certain items of works on sub-contract. In due course, the plaintiff submitted for payment through the usual channels his Bill No. 37 setting out particulars of his claim that Rs. 15,892/17 was due to him for work done and materials supplied up to January 1948. This bill was duly settled, but on 25th May 1949 the (then) Director of Public Works wrote to him alleging that there had been an overpayment of Rs. 10,067/77 and calling upon him to refund this sum within three weeks. The letter also alleged that there had been a further over-payment the precise extent of which was still under official investigation, and that a claim for a refund under that head would also be sent to him.

Correspondence then passed in the course of which the plaintiff denied that there had been any over-payment, but the Director persisted in his claim for a refund which was later restricted, however, to Rs. 10,003/37.

In 1950 the plaintiff fell ill, and retired from the Public Service on 30th September on medical grounds. The Government had even at that point of time refused to withdraw its claim for a refund. In due course, the plaintiff instituted this action on 25th June 1951 setting out the facts relating to the dispute, and asking for a declaration in his favour that, *inter alia*, he was not liable to refund any part of the sum paid to him three years previously on Bill No. 37. Part of his complaint against the Crown was that "insisting on the correctness of its demand for a refund the Government was wrongly withholding the plaintiff's (retiring) pension."

The Attorney-General, on behalf of the Crown, filed an answer (and later an amended answer) repeating the allegation that there had been an over-payment as previously suggested, and disputing, in a negative form, the averment that the plaintiff was not liable to refund Rs. 10,003/37 to the Government. In addition the Attorney-General pleaded, as a matter of law, that the plaintiff was not entitled to a bare declaratory decree as to his non-liability to the Crown.

Nineteen issues were framed for adjudication at the trial; of these, 18 related to the principal dispute as to whether the plaintiff had in fact been overpaid on Bill No. 37. The other issue introduced the legal objection that the plaint disclosed no cause of action.

The learned trial Judge, after a careful assessment of the oral and documentary evidence, held that the plaintiff was not liable to refund any part of the money received by him in settlement of Bill No. 37. He also decided that, in the particular circumstances of this case, the plaintiff was entitled, ("for what it was worth") to a formal declaratory decree as to his non-liability.

The Crown has at long last accepted the findings of fact in favour of the plaintiff on the dispute which commenced on 25th May 1949. In the result, the plaintiff must at least receive considerable comfort from the decision of an independent tribunal that, at the time of his retirement after over 26 years of public service, there was no foundation for the accusation that he had "got away" with public funds.

The only ground of appeal raised before us on behalf of the Crown was that the plaintiff could not claim a formal decree absolving him from the imputation of liability to refund monies to the Government. I am glad to say that I find myself unable, as a matter of law, to uphold this objection. The Courts in Ceylon are not completely powerless in situations of this kind, and are vested with a discretion to enter a decree of a declaratory nature although prevented from granting more substantial relief to the successful litigant.

It is perfectly true that the jurisdiction conferred on our Courts by the Civil Procedure Code to grant declaratory decrees is not quite so wide as that enjoyed in England and South Africa. We have no express procedure, for instance, for the settlement of disputes in anticipation by way of "originating summons" as to the interpretation of a statute, a testamentary disposition, or a written contract. Nevertheless, there are many instances in which our Courts have properly assumed jurisdiction to make binding declarations which would serve some tangible purpose concerning the rights and liabilities of litigants in respect of "concrete, genuine disputes" as opposed to "controversies of a purely academic nature". The jurisdiction is, of course, discretionary, and would not be exercised for the purpose of making premature pronouncements as to future contingent rights of litigants (particularly if all the persons likely to be affected are not before the Court). For recent rulings on this subject, see *Hewavitharne's case* [1], *Naganathar's case* [2] and *Selvam's case* [3].

The Crown enjoys no special immunity from declaratory decrees in cases where they would be appropriate in actions between private litigants. "The King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either; it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him." *Pawlett v. The Attorney-General* [4]. It is important to realise that any decree against the Crown for the payment of money to a private individual is itself declaratory in effect though not in form. The Crown is immune from all ordinary modes of enforcing judgments, but in the ultimate result, the obligations arising under the decree are invariably honoured.

In England, the Crown Proceedings Act of 1947 now makes special procedural provision for the remedy of declaratory decrees against the Attorney-General as representing the Crown. But even before that date, the Attorney-General had long since been regarded as amenable in that capacity to such proceedings.

[1] *(1951) 53 N. L. R. 169.*
[2] *(1953) 55 N. L. R. 319.*
[3] *(1954) 55 N. L. R. 426.*
[4] *(1667) Hard 465 at 469; 145 E. R. 550.*

In *Dyson v. A.G.*[1], Cozens-Hardy M. R. explained that the Court has a discretion, having regard to all the circumstances of a particular case, to decide whether or not a declaratory judgment should be granted to enable a party to a concrete dispute, who expects to be made defendant, to obtain in anticipation a declaration that his opponent has no good cause of action against him. In some cases, of course, the Court may well say "wait until you are attacked, and then raise your defence." In others, it may properly decide that justice requires the person aggrieved to be protected from the imputation of liability. See also *Dyson's case* [2] and *Re Clay : Clay v. Booth* [3] where the Court refused a declaratory decree in the particular case, but Eve J. indicated (page 79) that the position would have been different if a "specific right had been asserted" and a claim unambiguously formulated.

In the present action, the plaintiff has asked for and obtained, after adjudication, a decree that the "specific right" persistently asserted against him by the Crown since April 1949 does not exist, and that the claim "formulated" against him has no foundation. In all the circumstances of this case, I am satisfied that the learned Judge has properly exercised his discretion in favour of the plaintiff. It is no small matter for a retired public officer, with a record of long and honourable service under the Crown, to have over his head the constant threat of litigation for the recovery of a substantial sum of money which he does not in fact owe the Government. With the passage of time, there is always a real danger that the best evidence of his non-liability might cease to be available if and when the threatened litigation does materialise. I can think of no case in which the protection of a declaratory decree would be more appropriate. It is based on the *quia timet* remedy.

The institution of the plaintiff's action was virtually an invitation to the Crown either to withdraw the earlier allegation or alternatively to counterclaim the sum of Rs. 10,003/17. The decision to decline both invitations would have been quite inexplicable in the case of a private litigant claiming to be the genuine creditor of his adversary. Mr. Tennekoon, who argued the appeal before us with admirable fairness and moderation, told us that, in the absence of instructions on the point, he was not in a position to explain why the Crown in this case persisted in asserting at the trial that money was due which it did not seek (even after the lapse of so many years) to recover through the usual machinery of the Courts. In these circumstances, the Crown can hardly complain that the plaintiff suspects, and has unequivocally insinuated, that the executive prefers to resort to an indirect (and less commendable) method of recovery by withholding his arrears of salary and his retiring pension until the alleged debt is liquidated. The unchallenged and uncontradicted evidence of the plaintiff on this point was to the following effect :

> "The defendant did not accept my explanation and persisted in asking for the money, and then stopped my salary and my security money and my pension. I appealed to them even to pay me an alimentary allowance, but that was also refused . . . . I had waited

[1] *(1911) 1 K. B. 410 at 417.* [2] *(1912) 1 Ch. D. 158.*
[3] *(1919) 1 Ch. 66.*

for years before I came into Court. My pension has been stopped for two years and one month, and I had to come into Court for a declaration that they were not entitled to a refund in this matter."

This evidence was given over three years ago, and it is not denied that the pension "earned" by this public officer who retired in September 1950 is still being withheld for reasons which have never been divulged. It is therefore very desirable that the plaintiff should receive the formal confirmation of a judicial decree declaring that he is not in fact a debtor of the Crown. This is the only form of assistance that he can receive from a Court of justice which is powerless to compel the payment of salaries to public servants or of pensions to retired public officers.

The plaintiff has complained that his arrears of salary have not been paid. The Courts cannot assist him; "his only claim is on the bounty of the Crown" and "his only remedy lies in an appeal of an official or political kind . . . by petition, by memorial or by remonstrance." see *High Commissioner for India v. Lall* [1], where the Judicial Committee entered a decree declaring that the plaintiff was still a member of the Indian Civil Service, but declined to enter a judgment in his favour for arrears of salary upon that basis. Equally, the Courts cannot compel the Crown to pay the present plaintiff any pension which he may have "earned". The Minutes on Pensions serves as a reminder that "public servants have no absolute right to any pension or allowance under these rules." *Gunawardene v. The Attorney-General* [2]. Accordingly, he is "entitled only to expect" a pension, but "this expectation, though it might be relied on with full certainty, is none the less not a legal right", *Considine v. Mc Inerney* [3]. But Courts of justice have always assumed, so far without disillusionment, that their declaratory decrees against the Crown will be respected. For this additional reason, I would affirm the judgment under appeal in the confident belief that it may thereby assist the plaintiff to obtain through the proper channels extra-legal relief against suspected departmental victimisation. It has now been clearly established that he is not a debtor of the Crown. It is therefore quite unthinkable that the learned Judge's verdict on the facts, which have not been challenged by the Attorney-General, would be insolently ignored for the purposes of any future administrative decision connected with the payment of salary or pension which the plaintiff is "entitled to expect". I would dismiss the appeal with costs.

SWAN, J.—I agree.

Appeal dismissed.

[1] *(1948) A. I. R. P. C. 121.* [2] *(1948) 49 N. L. R. 359.*
[3] *(1916) 2 A. C. 162 at 170.*