THE DECLARATORY JUDGMENT IN AUSTRALIA AND THE UNITED STATES

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Introduction

In the modern world, government has come to impinge on almost all fields of human activity. Questions of the legal validity of governmental action have correspondingly increased in number and importance. In addition, in a federal system, where several sovereign units are involved, issues as to whether an act by one unit of the federation has encroached upon the rights or powers of another increasingly arise.

The traditional procedures such as the writs of *mandamus* and *quo warranto* and the suit for injunction,[1] are subject to restricting technical requirements which make them inadequate for present-day needs. In their search for a more satisfactory public law remedy, litigants have been resorting more and more to the declaratory judgment.

This procedure is like the ordinary civil suit, except that the plaintiff instead of seeking coercive relief against the defendant or his property merely asks the court for a declaration of the relevant rights and duties of the parties to the controversy.[2] For instance, in a suit challenging the authority of a government official to take given action under a statute, the court will be asked simply to declare that the official has no authority to take such action; there will be no demand for coercive relief such as a decree enjoining the defendant official from taking such action.

A declaratory judgment is to be distinguished from an advisory opinion. An advisory opinion is one given by a court on a question referred to it by the legislative or executive branch of the government.[3] The legal issue is thus presented to the court in the abstract

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This issue contains Section I of the thesis; Section II, entitled 'Requirements of the Justiciability and Standing in Declaratory Actions', will be published in the next issue of *M.U.L.R.*

[1] See Borchard, *Declaratory Judgments* (2nd ed., 1941), 360-361 *(mandamus)* 362-363 *(quo warranto)*, 365-367 (injunction).

[2] See Borchard, *Declaratory Judgments* (2nd ed. 1941), 25-26.

[3] See Borchard, *Declaratory Judgments*, 71-73. A statute providing a procedure for advisory opinions was invalidated by the High Court in *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, discussed *infra*.

and unconnected with any litigation. Such a proceeding is very different from the ordinary declaratory suit, where, as in conventional 'coercive' actions, there are adversary parties presenting a specific controversy to the court for determination.

The declaratory remedy has two great advantages in public law litigation. First, it is free of the restrictive technical requirements which encumber the traditional public law remedies. Second, declaratory judgment is available in cases where no coercive relief could be sought.[4]

This paper will discuss the use of the declaratory procedure in public law litigation in the highest courts of two federal governments: Australia and the United States.

Section I

HISTORY OF THE DECLARATORY REMEDY

1. The English Background
2. History of the Remedy in the High Court of Australia
3. History of the Remedy in the Supreme Court of the United States

1. *The English Background*

It is desirable, before considering the history of the declaratory remedy in Australia, to look briefly at the English law and practice. The rule by which declarations are authorized in the Australian High Court derives directly from an English rule of court. With certain notable exceptions, statutes and case law in general in Australia have conformed to English models. The Privy Council in London is still the ultimate tribunal for most classes of Australian cases.[5] Moreover, decisions of the House of Lords and of the lower English courts are generally followed in Australia. Consequently, some description of the English law and practice on declaratory judgments is necessary to an understanding of the remedy in Australia.[6]

[4] *E.g. Dyson v. Attorney-General* [1911] 1 K.B. 410 (C. A.); [1912] 1 Ch. 158 (C. A.). See Friedmann, 'Declaratory Judgment and Injunction as Public Law Remedies', (1949) 22 *Australian Law Journal*, 446, 447.

In suits against the government or against government authorities, coercive relief is ordinarily unnecessary, for the defendant in such suit will generally respect a declaration of the law as much as a coercive judgment or decree. Jennings, 'Declaratory Judgments Against Public Authorities in England' (1932) 41 *Yale Law Journal*, 407, 412.

[5] In cases involving a certain class of constitutional issues, no appeal is permitted from the Australian High Court to the Privy Council unless the High Court has certified that the question should be decided by the Privy Council. Commonwealth of Australia Constitution Act s. 74.

[6] This paper will not consider the details of the rules governing the granting of declarations by the English courts. For material on these rules, see G. L. Williams, *Crown Proceedings* (1948), ch. 4; Jennings, 'Declaratory Judgments Against Public Authorities in England' (1932) 41 *Yale Law Journal*, 406.

The history of the declaratory judgment in English law begins in 1852 with the enactment of section 50 of the Chancery Procedure Act.[7]

> 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.

Early interpretation, however, narrowed the new remedy to the point where it was held merely to authorize the granting of declarations in cases where plaintiff could have sought coercive relief.[8]

The important development came some thirty years later, in the form of Order XXV r. 5 of the Supreme Court Rules of 1883,[9] made by a Rules Committee pursuant to statutory authority given it in the Judiciary Act of 1875.[10] The rule provided:

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

This rule, together with rule LIV, A introduced by the Amended Rules of 1893 (which authorized any person interested under a deed, will or other written instrument to apply to the court for a declaration of rights of the persons interested thereunder) established the declaratory remedy in English jurisprudence.

These declaratory procedures were well recognized by the time the Australian Commonwealth was established in 1901, having been used in numbers of cases before then, both in private law litigation and in challenges to governmental action. During the next fifteen years, doubts which had existed as to the scope of Order XXV r. 5 were dispelled and its wide scope illustrated in two important decisions: *Dyson v. Attorney-General* (1911)[11] and *Guaranty Trust Co. v. Hannay & Co.* (1915).[12]

In *Dyson's* case, plaintiff, a private citizen, brought an action against the Attorney-General for a determination that certain forms issued by the Commissioners of Inland Revenue were *ultra vires* the authority given them by the Finance (1909-10) Act 1910, under which statute they purported to act. Plaintiff sought declarations that he was under no duty to comply with the requirements in the forms (which demanded, *inter alia,* information on the value of property occupied by plaintiff).

Plaintiff had received copies of the forms and had refused to comply with the requirements therein. The Commissioners thereupon

[7] 15 and 16 Vict. c. 86 s. 50. [8] *E.g., Garlick v. Lawson* (1853) 10 Hare, App. xiv.
[9] Statutory Rules and Orders 54. [10] 38 and 39 Vict. c. 77 s. 17.
[11] [1911] 1 K.B. 410 (C. A.); [1912] 1 Ch. 158 (C. A.). [12] [1915] 2 K.B. 536 (C. A.).

threatened to enforce the stated penalty for non-compliance (a fine of up to fifty pounds). Before any action had actually been taken against him, plaintiff brought this suit seeking the declarations.

The Court of Appeal decision held that Order XXV r. 5 gave the court power, in spite of the immunity of the Crown, to grant declarations against the Attorney-General in suits brought against him by aggrieved citizens challening action of Crown servants. Also, the decision impliedly sanctioned granting declaratory relief under Order XXV r. 5 in a situation in which plaintiff could not have secured coercive relief in any form; *e.g.*, neither a suit for an injunction against the Commissioners of Inland Revenue nor an action for damages would have been available to Dyson at the time he brought his declaratory action.

Four years later in the *Guaranty Trust* case the Court of Appeal dealt explicitly with this question, and affirmed its power to make such a declaration.[13]

The factual situation there was more extreme than in the *Dyson* case. Plaintiff, a New York bank, and defendants, Liverpool cotton merchants, were disputing the plaintiff's liability to repay on sixteen bills of exchange. Plaintiff had presented these bills to defendants for acceptance with bills of lading attached. Defendants had accepted the bills of exchange and paid them on maturity, only to discover later that the attached bills of lading were forgeries. It was admitted that English law governed the transaction, and the legal issue between the parties was whether, under English law, by presenting the bills of exchange with the bills of lading attached, plaintiff had made warranty of their genuineness.

Defendants claimed that under English law plaintiff's presentation was such a waranty, and accordingly, to enforce their claim for repayment, they commenced suit against the plaintiff in the Federal District Court in New York to recover the amount of one of the bills of exchange.

While the New York action was pending, the plaintiff brought the present action in the King's Bench Division in England seeking declarations that under English law its presentation had not constituted a warranty of the genuineness of the bills and that in consequence it was not liable to repay defendants on any of the forged bills.

The case had come up to the Court of Appeal on the preliminary objection by defendants that Order XXV r. 5 did not authorize the granting of a declaration in such a case as this, and that, if it did, the rule was *pro tanto* an attempt to extend the jurisdiction of the court

[13] No challenge to governmental action was here involved. The suit was between private parties over a point of private commercial law. The principles enunciated in the case, however, are regarded as applying to either public or private litigation.

and as such *ultra vires* the authority given the Rules Committee by the 1875 Judiciary Act.[14] The Court of Appeal, in a two to one decision, held that it had jurisdiction, under Order XXV r. 5, to make a declaration in the case.

While making it clear that as a matter of discretion it was very doubtful whether the court should exercise its power to grant a declaration here, where, as Bankes L.J. put it, plaintiff was merely asking the court 'to supply them with evidence in a convenient form for use in the American action',[15] the majority was satisfied that the court did have jurisdiction under Order XXV r. 5 to make the declaration, and that the rule as thus interpreted was *intra vires* the authority given the Rules Committee by the Judiciary Act. It was not necessary, the court said, that plaintiff have a 'cause of action' in the traditional sense (*i.e.*, that plaintiff be in a position to seek coercive relief). And as to general scope of the rule, Bankes L.J. said '. . . having regard to the general business convenience and the importance of adapting the machinery of the courts to the needs of suitors, I think the rule should receive as liberal a construction as possible.'[16]

As can be readily imagined from the liberal interpretation given the power conferred by Order XXV r. 5 in the cases just discussed, the declaratory action has come to be widely used in England, both in private litigation and in challenges to governmental action.[17] The liberality of the English law and practice, from which the Australian procedure originated and by which it has been continuously influenced, has helped shape the Australian High Court's attitude towards the declaratory power.

2. *History of the Remedy in the High Court of Australia*

The Commonwealth of Australia, a federation of what had been up to that time six separate English colonies, was established in 1901. The central government was organized under a written constitution, passed by the British Parliament in London in 1900 as the Commonwealth of Australia Constitution Act.[18]

Section 71 of the Constitution provided for the establishment of a federal Supreme Court, to be called the High Court of Australia. The new Commonwealth Parliament provided for such a court in the first Judiciary Act (1903), and under the authority of that Act, the

[14] 38 and 39 Vict. c. 77 s. 17, provides that Rules of Court may be made prescribing the procedure in all matters with respect to which the Court of Appeal and the High Court have for the time being jurisdiction.

[15] [1915] 2 K.B. 536, 575.

[16] [1915] 2 K.B. 536, 572. A similar decision by the House of Lords was given in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 A.C. 438.

[17] See Jennings, 'Declaratory Judgments Against Public Authorities in England' (1932) 41 *Yale Law Journal*, 406, 412.

[18] 63 and 64 Vict. c. 12.

High Court was set up and its rules of procedure made. The court began operation in 1903.

The original jurisdiction of the High Court is delimited by sections 75 and 76 of the Commonwealth Constitution.[19] Section 76 provides that the court shall have original jurisdiction 'in all matters' of certain types, including those '(i) Arising under any treaty: . . . (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party: (iv) Between States, or between residents of different States or between a State and a resident of another State . . .'

Section 76 gives Parliament power to confer original jurisdiction on the High Court 'in any matter' falling under certain heads . . . *e.g.*, (i) Arising under this Constitution, or involving its interpretation: (ii) Arising under any laws made by the Parliament.

The High Court has held that the Parliament cannot confer jurisdiction upon it under these provisions to grant advisory opinions[20] —*In re Judiciary and Navigation Acts* (1921).[21] That case was a challenge to the validity of a Commonwealth statute which purported to confer on the High Court jurisdiction to pass upon the validity of Acts of the Commonwealth Parliament when referred to the court by the executive government. The device only contemplated the referral of actual enactments, not proposed legislation. Determinations by the High Court pursuant to this statute were to be authoritative, final and conclusive.

In holding this device unconstitutional, the court said:

> . . . [T]here can be no matter within the meaning of [section 76] unless there is some immediate right, duty or liability to be established by the determination of the Court . . .[22]
>
> . . . [W]e can find nothing in Chap. III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.[23]

The court, however, seems to have assumed from the start that the granting of declaratory relief, authorized in the High Court from its inception by rule of court, fell within the Commonwealth judicial

[19] The Australian cases with which we will be concerned in this paper have all been brought in the original jurisdiction of the High Court. We will therefore be dealing only incidentally with the court's appellate jurisdiction (provided for in s. 73 of the Constitution).

[20] G. Sawer in an article in *The Commonwealth of Australia* (G. W. Paton ed. 1952) 50 points out that the High Court did not hold that the giving of advisory opinions was a non-judicial function, but only that it did not fall within the ambit of 'matters' in s. 76. He suggests that since s. 73 of the Constitution, which confers appellate jurisdiction on the High Court, makes no reference to 'matters', Parliament could perhaps establish a special federal court to give such opinions, and then the High Court could hear the case by appeal from that court.

[21] 29 C.L.R. 257. [22] *Ibid.*, 265. [23] *Ibid.*, 267.

power. Suits seeking declarations were, from the earliest days of the court, entertained without discussion.

Declaratory judgment cases which come before the High Court are of two types – those reaching the High Court on appeal from the State courts, and those brought in the original jurisdiction of the High Court (in which the court, or a single Justice thereof, hears the case at first instance). The Australian High Court is not only the supreme tribunal in Australia for all federal matters, like the U.S. Supreme Court, but is also, unlike the U.S. Supreme Court, a general court of review for matters of State law.[24] (In the United States matters of State law are committed to the State courts for final determination.)

We shall not consider in this paper declaratory judgment cases coming before the High Court on appeal from the State courts. We will consider only suits brought in the original jurisdiction of the High Court.

In these suits, the High Court's authority to grant declaratory relief derives from a rule of court, made by the High Court judges under statutory authority,[25] and based on the Orders of the Supreme Court of Judicature in England.[26] The rule authorizing declaratory relief in the High Court was included among the first set of High Court rules: Order III r. 1 of the Rules of the High Court 1903 (numbering changed in 1911 to Order IV r. 1). The rule reads as follows:

> An action shall not be open to objection on the ground that a merely declaratory judgment or order is sought thereby; and the Court may make binding declarations of right *in an action properly brought,* whether any consequential relief is or could be claimed *therein* or not.

The rule is a verbatim copy of Order XX r. 5 of the English Supreme Court Rules of 1883,[27] except for the addition, in the Australian rule, of the words 'in an action properly brought' (and of the word 'therein').

As has been mentioned above, no objection has ever been taken to this rule on constitutional grounds (*i.e.,* that granting of declaratory judgments exceeds the constitutional power of the High Court). Nor has any objection been taken on grounds that in making the rule the High Court judges exceeded their statutory power (the argument pressed in *Guaranty Trust Co. v. Hannay & Co.,*[28] *supra*).

Suits seeking declarations under this rule have come before the

[24] This statement is subject to the qualification that in most cases, both those involving federal and those involving State matters, an appeal still lies from a decision of the High Court to the Privy Council in London.

[25] Judiciary Act 1903, s. 86, and High Court Procedure Act 1903, ss. 32-34.

[26] F. C. Hutley, article in *The Commonwealth of Australia* (G. W. Paton ed. 1952), 189-194.

[27] Statutory Rules and Orders 54.

[28] [1915] 2 K.B. 536 (C. A.), *supra* pp. 210-211.

court in large numbers, among them many of Australia's most important cases on public law issues. The limits of the power given by the rule have been discussed in a number of the cases and we shall consider them below. It will suffice here to note that some attention has been paid in the judgments to the words 'in an action properly brought' in Order IV r. 1 and that there has been some discussion as to whether these words differentiate the Australian from the English rule. At least one judge believed that they made the Australian rule a narrower one (Higgins J. dissenting in *Colonial Sugar Refining Co. v. Attorney-General for the Commonwealth*,[29] concurring in *Luna Park v. Commonwealth*[30]). However, another judge has more recently taken an opposite position (Williams J. in *Pharmaceutical Benefits Case* (No. 1) (1945)[31]) and his view would seem to be borne out by the very liberal practice of the High Court in granting declaratory relief, and by the fact that cases brought under the English rule are cited in High Court judgments without any qualification for the difference in the wording of the Australian rule.

One important procedural device used in the High Court should be mentioned in connection with Order IV r. 1. It is Order XXIV rules 1 and 2 of the High Court Rules 1903-1953 authorizing use of the demurrer as a pleading. This rule was not among the English Orders of the Supreme Court. It reads in part 'Any party may demur to any pleading of the opposite party . . . .' The demurrer 'must state some ground in law . . ., but the party demurring shall not on argument of the demurrer be limited to the ground so stated.'

Demurrer has been used extensively in declaratory suits brought in the original jurisdiction of the High Court to challenge governmental action, far more, in fact, than any other type of defensive pleading. Typically, plaintiff will allege the invalidity of a statute, regulation or some other governmental action, the defendant Attorney-General or other official or government body will demur, and then the parties will argue the demurrer before the Hight Court, whose decision on the demurrer will be accepted as the final determination of the matter.

One of the most important developments in the history of the declaratory judgment procedure as a means of challenging governmental action in the High Court was the recognition of standing for such purpose in the Attorney-General of the Commonwealth and in the Attorneys-General of the States.

The first suit in which this was attempted was *Attorney-General for New South Wales v. Brewery Employees Union* (1908).[32] The New South Wales Attorney-General, at the relation of four brewery com-

[29] (1912) 15 C.L.R. 182, 226.
[30] (1923) 32 C.L.R. 596, 601.
[31] [1945] Argus L.R. 435, 453.
[32] (1908) 6 C.L.R. 469 (*The Union Label Case*).

panies, brought suit in the original jurisdiction of the High Court against the Brewery Employees Union and the Commonwealth Registrar of Trade Marks. This suit sought a declaration that a Commonwealth statute purporting to authorize the registration of workers' trade marks was unconstitutional and that consequently a trade mark which the defendant Union had registered with the Commonwealth Registrar under that statute was invalid.

The High Court (three to two) upheld the standing of the Attorney-General to bring the action and granted the declaration prayed. O'Connor J. said:

> It is a principle well established in British law that when a corporation or public authority clothed with statutory powers exceeds them by some act which tends . . . to interfere with public rights . . ., the Attorney-General . . . may institute proceedings . . . to protect the public interests . . .[33]
>
> In a unitary form of government, as there is only one community and public which the Attorney-General represents, the question which has now been raised cannot arise. . . . But it seems to me that in the working out of the federal system established by the Australian Constitution an extension of the principle is essential. The Constitution recognizes that in respect of the exercise of State powers each State is under the Crown an independent and autonomous community. . . . Where, therefore, the complaint is . . . that the people generally of either State or Commonwealth have been injuriously affected by some illegal exercise of State or Commonwealth power. . . . the Commonwealth Court must recognize the State Attorney-General as being entitled to represent the State in any claim for relief. . . . The Attorney-General for New South Wales is entitled to be heard in this Court as representing the public of New South Wales in such a case as this, where the illegal act is of such nature as to affect not only the relator, but the whole trading community of the State. . . .[34]

The principle, established here with respect to a suit by the Attorney-General of a State seeking invalidation of Commonwealth action, has since been applied to permit the Commonwealth Attorney-General to challenge legislation or executive action of a State.[35] Also, the Attorney-General of a State has been held to have standing to challenge action by another State.[36]

Another important early case should be mentioned here. In *Colonial Sugar Refining Co. v. Attorney-General for the Commonwealth* (1912),[37] the High Court entertained a suit brought against (among other defendants) the Attorney-General for the Commonwealth seeking declaratory relief against threatened questioning by a Commonwealth Royal Commission on the grounds that such

[33] *Ibid.*, 550-551.
[34] *Ibid.*, 552-553.
[35] *E.g. Commonwealth v. Queensland* (1920) 29 C.L.R. 1.
[36] *Tasmania v. Victoria* (1935) 52 C.L.R. 157.
[37] (1912) 15 C.L.R. 182 (H.C.); (1913) 17 C.L.R. 644 (P.C.).

questioning exceeded the statutory and/or constitutional powers of the Commission. The case considered and explicitly sanctioned the propriety of suits against the Attorney-General for declarations of the invalidity of governmental action, relying on and adopting the rule in *Dyson v. Attorney-General* (1911),[38] which had recently been decided in England.

3. *History of the Remedy in the Supreme Court of the United States*

In the United States, as in Australia, there are express constitutional limits on the jurisdiction of the federal courts. The first part of Article III, s. 2, of the American Constitution provides in part:

> Section 2. The [Federal] judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . –to all Cases of admiralty and maritime Jurisdiction;– to Controversies to which the United States shall be a Party;– to Controversies between two or more States; . . . –between Citizens of different States; . . .

The Supreme Court has interpreted this language to mean that the jurisdiction of the federal courts is limited to the determination of proceedings which are 'cases' or 'controversies'.[39] The limitation applies to both the original and the appellate jurisdiction of the Supreme Court.[40]

It was early held that the granting of advisory opinions was a function beyond the powers of federal courts. In 1793, the Justices of the Supreme Court received an inquiry from President Washington as to whether he could avail himself of their advice on various difficult legal questions, mainly to do with international law, which were of importance to the conduct of the nation's foreign relations. The questions, as the Secretary of State's letter transmitting the inquiry put it, were ones which 'are often presented under circumstances *which do not give a cognizance of them to the tribunals of the country*'. The Justices conferred, and replied in the negative. Their answer referred to '. . . the lines of separation drawn by the Constitution between the three departments of the government' and continued 'These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to . . .'[41]

[38] [1911] 1 K.B. 410 (C. A.); [1912] 1 Ch. 158 (C. A.).

[39] *E.g. Muskrat v. United States* (1911) 219 U.S. 346.

[40] *E.g. United Public Workers v. Mitchell* (1947) 330 U.S. 75 (appellate jurisdiction); *Massachusetts v. Missouri* (1939) 308 U.S. 1 (original jurisdiction).

[41] *Correspondence of the Justices* (1793); Johnston, *Correspondence and Public Papers of John Jay* (1891) iii, 486-489, as reprinted in Hart and Wechsler, *The Federal Courts and the Federal System* 75-77.

Although the Supreme Court or individual judges on the court in a few instances before and since have given what amounted to informal advisory opinions to the President or to other members of the government,[42] the view expressed in *Correspondence of the Justices* is clearly the law. The court on occasion, when refusing to decide an issue on the grounds that it is 'hypothetical' or 'abstract' or 'moot', will stigmatize the proceeding as one which 'seeks an advisory opinion' and reiterate that advisory opinions are beyond the constitutional powers of the court.[43]

Declaratory judgments were first authorized in the United States in the State courts. Authorization was by statute, the first effective one being a New Jersey Act of 1915.[44] Many States followed suit during the next twenty years, especially after the recommendation of the Uniform Declaratory Judgments Act by the Commissioners on Uniform State Laws in 1922.[45] By 1934, the year in which Congress passed the Federal Declaratory Judgments Act, thirty-one of the forty-eight States had passed statutes authorizing declaratory judgments.[46] By 1949, only four States had no provision for such remedy.[47] Both the Uniform Act and the other State Acts drew from or were based on Order XXV r. 5 or Order LIV, A of the English Supreme Court Rules.[48] By 1934, some 1200 cases seeking declaratory relief had been brought under the State Acts.[49]

With the appearance of cases brought under the State Acts, the question was raised as to whether the Supreme Court could review them. At first the court gave *dicta* to the effect that such review would be beyond its constitutional powers.[50]

Then, in 1933, the question was for the first time squarely presented to the court for decision in *Nashville Chattanooga & St. Louis Ry. v. Wallace* (1933).[51] That case sought review of a judgment given by the Supreme Court of Tennessee under the Tennessee Declaratory Judgments Act. Surprisingly, the Supreme Court took the case and decided it on the merits, considering and unanimously upholding its constitutional power to do so.

The facts in the case were as follows: plaintiff railway had brought an action in Tennessee State Court asking a declaration that a State excise tax on storage of gasoline was, as applied to it, unconstitutional

[42] See instances mentioned in Hart and Wechsler, *op. cit.*, 78-80.
[43] Brandeis J. concurring in *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 345-346; *Coffman v. Breeze Corporations Inc.* (1945) 323 U.S. 316, 324; *United Public Workers v. Mitchell* (1947) 330 U.S. 75, 89. [44] *N.J. Laws of 1915*, c. 116, s. 7.
[45] Borchard, *Declaratory Judgments* (2nd ed., 1941) 132-133.
[46] S. Rep. No. 1005, 73rd Cong., 2nd Sess. (1934) 4.
[47] 'Developments in the Law—Declaratory Judgments 1941-1949', (1949) 62 *Harvard Law Review*, 787, 791. [48] Borchard, *op. cit.*, 133 n. 33; 221.
[49] S. Rep. No. 1005, 73rd Cong., 2nd Sess. (1934) 4.
[50] *E.g. Liberty Warehouse Co. v. Burley Tobacco Growers' Association* (1928) 276 U.S. 71, 89, *per* McReynolds J. [51] 288 U.S. 249.

as violative of the commerce clause and of the XIV Amendment of the federal Constitution. Defendants, State officials, had asserted that the statute was applicable to plaintiff and had demanded payment of the tax in a specified amount. The State trial court heard the case on the merits and decided against the plaintiff and the Supreme Court of Tennessee affirmed.

On appeal to the United States Supreme Court, Stone J., speaking for the court, upheld the court's power to review such a case, provided that 'the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below'.[52]

Since the decision in the *Wallace* case, the Supreme Court has reviewed a number of cases involving declaratory judgments granted by State courts.[53]

As for declaratory judgments in the federal courts, no provision for them existed prior to 1934. In fact, on several occasions during the preceding decade, the Supreme Court had intimated that the granting of such judgments was beyond the constitutional powers of the federal courts.[54]

Legislation authorizing the federal courts to grant declaratory judgments had been introduced in Congress on a number of occasions, beginning in 1919, and four times such bills had been passed in the House of Representatives. Finally, in 1934, after the Supreme Court in its decision in the *Wallace* case had given evidence of more liberal views on the question of constitutionality, the Senate passed the bill.[55]

The report of the subcommittee of the Senate Judiciary Committee which had held hearings on the proposed bill and had reported the bill favourably is of interest. It speaks of the advantages inherent in the declaratory procedure:

> The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or to purport to violate a statute in order to obtain a judicial determination of its meaning or validity.[56]

The strict view which the Supreme Court has taken of the federal

[52] (1933) 288 U.S. 249, 264.

[53] *E.g. Railway Mail Association v. Corsi* (1945) 326 U.S. 88; *Connecticut Mutual Life Insurance Co. v. Moore* (1948) 333 U.S. 541; *Adler v. Board of Education* (1952) 342 U.S. 485.

[54] *Liberty Warehouse Co. v. Grannis* (1927) 273 U.S. 70; *Willing v. Chicago Auditorium Association* (1928) 277 U.S. 274, 289 (*dictum, per* Brandeis J.); *Arizona v. California* (1931) 283 U.S. 423, 464 (*dictum*).

[55] Borchard, *op. cit.*, (*supra* n. 45), 134 and n. 39 there.

[56] S. Rep. No. 1005, 73rd Cong., 2nd Sess. (1934) 2-3, reprinted in Borchard, *op. cit.*, 1044.

declaratory remedy does not give the scope to the statute which the Senate report appeared to contemplate for it, as will appear below.

The report also refers to the history of the declaratory procedure in England and to the extensive use which the English courts had made of the remedy and states that the English Order XXV r. 5 furnished the basis for the proposed law.

In its present form the federal Act reads as follows:

> Section 2201. Creation of remedy
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
> Section 2202. Further relief
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.[57]

Together with the Federal Declaratory Judgments Act, should be read rule 57 of the Federal Rules of Civil Procedure entitled 'Declaratory Judgments':

> The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., section 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

The question of the constitutionality of the Federal Declaratory Judgments Act was not decided until 1937. (In 1936, a declaration had been sought under the Act in *Ashwander v. Tennessee Valley Authority*,[58] but what plaintiffs there asked for was a general declaration of the unconstitutionality of the TVA and the court brushed aside plaintiff's request with the comment that the Act by its terms is restricted to 'cases of actual controversy' and thus did not purport to authorize the broad declaration asked.) In 1937, however, the validity of the Federal Declaratory Judgment Act was squarely challenged in *Aetna Life Insurance Co. v. Haworth* (1937).[59] Like

[57] 28 U.S.C. ss. 2201-2202. The original Act, *48* stat. *955*, was amended in 1935, *49* stat. *1027*, so as to exclude from its scope all actions involving federal taxes. For discussion of judicially created doctrines limiting the use of federal declaratory judgment as a remedy in cases involving State taxes, see 'Developments in the Law – Declaratory Judgments – 1941-1949' (1949) 62 *Harvard Law Review*, 787, 873-874.

[58] (1936) 297 U.S. 288.

[59] 300 U.S. 227.

Dyson v. Attorney-General[60] and *Guaranty Trust Co. v. Hannay & Co.*,[61] the situation was one in which, at the time of bringing suit, plaintiff could not have obtained any kind of coercive relief and thus a declaratory judgment was the only remedy available.

The facts were these: defendant held four insurance policies issued by plaintiff. Plaintiff alleged that defendant had ceased paying premiums, claiming to be permanently and totally disabled within the meaning of the policies and entitled to disability benefits. Plaintiff asserted that defendant was not so disabled and that the policies were void for non-payment of premiums, but that defendant, although he repeatedly made his claim, had not commenced any action in which plaintiff could prove that his claim was false. Plaintiff asserted that it therefore ran the risk of losing evidence due to death or disappearance of witnesses, and that until the issue of the validity of defendant's policies was decided, it had to maintain reserves against the policies.

Plaintiff brought action in federal District Court (federal jurisdiction being grounded on diversity of citizenship between plaintiff and defendant) seeking a declaratory judgment under the federal Act. Defendant challenged the constitutionality of the Act.

The Supreme Court, in a unanimous opinion given by Hughes C.J., upheld the Act's validity. The court said that the Act was manifestly intended to apply only to controversies in the constitutional sense and that its operation was procedural only. 'In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts. . . .'[62]

Although the *Haworth* case put beyond controversy the constitutionality of the Federal Declaratory Judgments Act, the U.S. Supreme Court has not (as will be shown below) given the remedy the scope in public law litigation given it by the English and Australian courts. This is partly explained by the fact that the declaratory remedy is relatively new and unfamiliar in the Supreme Court. (At the time of the creation of the federal remedy in 1934, the modern English procedure, established by Order XXV r. 5 of the Rules of 1883, had been in use for fifty-one years and in Australia the High Court remedy for thirty-one years.)

Another reason for the narrower scope given the remedy by the U.S. Supreme Court is its traditionally strict requirements of justiciability and standing, discussed at length below.[63]

Certain other points of difference between the American federal practice and the Australian practice should be noted here.

In the first place, declaratory actions are seldom brought in the

[60] [1911] 1 K.B. 410 (C. A.), [1912] 1 Ch. 158 (C. A.).
[61] [1915] 2 K.B. 536 (C. A.). [62] (1937) 300 U.S. 227, 240. [63] See Section II 3 (c).

original jurisdiction of the Supreme Court. Most declaratory actions have come before the court in its appellate capacity. This is in contrast to the practice of the High Court, where declaratory suits challenging governmental action are usually brought in the original jurisdiction of that court.

Secondly, the American courts have not developed any real equivalent to the Australian suits by State or Commonwealth Attorneys-General to challenge governmental action. Actions somewhat similar have occasionally been brought in the United States, but they are hedged about with difficulties not present to nearly the same extent in Australia: sovereign immunity barring suits directly against State or federal governments or against officials in their official capacity, strict limitations on the standing of a State to sue as champion of the rights of its citizens, and narrow standards of justiciability in the federal courts.

(To be concluded)