

the Di Lorenzo case, and that it is probably in line with the changed social attitudes toward marriage.¹⁹

A factor of undoubted significance in the development of this liberal attitude of the New York courts toward annulment is the restriction of absolute divorce to only one ground, namely, adultery.²⁰

With this decision, the New York Court of Appeals seems to have definitely accepted the logical result of the Di Lorenzo case; and there seems to be considerable reason and justification for the decision, in view of the statutory situation. But it can well be doubted whether the courts of other jurisdictions will follow, unless they should become convinced that there is less "public policy" in denying relief where the domestic difficulties have already been aired in court than in granting it at the request of the parties, where divorce is difficult or undesirable.

CLIFFORD J. HYNNING

THE CONSTITUTIONALITY OF THE DECLARATORY JUDGMENT

Proponents of the declaratory judgment as a necessary procedural reform¹ may well be heartened by a recent decision² handed down by the United States Supreme Court. After a steady march of approval through numerous state courts,³ the constitutionality of the declaratory judgment as a "case" or "controversy" received a set back at the hands of our highest tribunal in a number

¹⁹ See Ogburn, *The Changing Family*, 23 *Pub. Am. Sociological Soc.*, 124-133 (1928), reprinted in Reuter and Runner, *The Family* (1931), 150-156. Also see *Recent Social Trends* (1933), 661-708. Vanneman, *Annulment of Marriage for Fraud*, 9 *Minn. L. Rev.* 497, says, at page 517,

The mores of the day are not the same as of a hundred years ago. People look upon the marriage relation differently. This point is evident at every point in the marriage relation. It is submitted that a judicious application of the liberal view of the New York courts is in harmony with present day social attitudes, and that the law cannot hope to modify social concepts but will eventually itself be modified thereby as the present trend rather definitely shows.

²⁰ See *Wells v. Talham*, 180 *Wis.* 654, 194 *N.W.* 36, 33 *A.L.R.* 827 (1923), suggesting this explanation.

¹ Borchard, *The Constitutionality of Declaratory Judgments*, 31 *Col. L. Rev.* 561 (1931), *The Declaratory Judgment—A Needed Procedural Reform*, 28 *Yale L. Jour.* 1, 105 (1918), *The Declaratory Judgment in the United States*, 37 *W.Va. L. Rev.* 127 (1931), *Judicial Relief for Peril and Insecurity*, 45 *Harv. L. Rev.* 793 (1932); Cooper, *Locking the Stable Door Before The Horse Is Stolen*, 16 *Ill. L. Rev.* 436 (1921); Dodd, *Progress of Preventive Justice*, 6 *Am. Bar Ass'n. Jour.* 151 (1920); Rice, *The Constitutionality of the Declaratory Judgment*, 28 *W. Va. L. Rev.* 1 (1921); Sunderland, *Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 *Mich. L. Rev.* 69 (1917).

² *Nashville, Chattanooga and St. Louis Railway v. Ray C. Wallace*, Comptroller of the Treasury of Tennessee, etc., 53 *Sup. Ct.* 345 (1933).

³ For a complete tabulation of states and decisions therein, see Borchard, *The Constitutionality of Declaratory Judgments*, 31 *Col. L. Rev.* 561, notes 3 and 4 (1931).

of dicta⁴ several years ago. After a full reconsideration of the problem, a unanimous court has apparently changed its point of view, and the constitutionality of this procedural device is now established.

The case arose under the following circumstances: A Tennessee statute provided for an excise tax on gasoline from each seller, storer or distributor of gasoline for the privilege of doing a gasoline business in Tennessee. The appellant railroad which purchased all of its gasoline outside of the state, brought the gasoline into Tennessee and stored it in private tanks for immediate use. A large percentage of the gasoline taxed was withdrawn and used outside of the state. Practically all of the gasoline was used in one form or another in operation of the railroad's transportation system. The appellant brought an action under the Tennessee Uniform Act on Declaratory Judgments against the taxing authorities to procure a judgment declaring that it was not in the business of storing or distributing gasoline and that the tax was a burden on interstate commerce. The Tennessee courts ruled against the appellants. An appeal was then taken to the United States Supreme Court. In setting the case down for a hearing, the latter court invited the attention of counsel to the question whether a "case" or "controversy" was presented, in view of the proceedings in the state court which were brought for a declaratory judgment. *Held*, that the levy did not burden interstate commerce and the United States Supreme Court had jurisdiction of the appeal.

The importance of the decision lies in the court's pronouncement as to the validity of the declaratory judgment. This is doubly interesting. Not only is the present position of the court contrary to that previously announced,⁵ but a

⁴ *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 47 Sup. Ct. 282 (1927); *Willing v. Chicago Auditorium Co.*, 277 U.S. 274, 48 Sup. Ct. 507 (1927); *Warehouse Co. v. Tobacco Growers*, 276 U.S. 71, 48 Sup. Ct. 291 (1927).

⁵ *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 47 Sup. Ct. 282 (1927). Ky. enacted a state co-operative statute. Certain Ky. warehousemen brought actions under the Ky. Declaratory Judgments Act for a declaration that this act was unconstitutional. The Ky. court rendered a declaratory judgment holding the Warehouse Act constitutional. Nonresident warehousemen thereupon brought an action in the federal district court under the Federal Conformity Act, 17 Stat. 196 (1872), 28 U.S.C. § 724 (1926), for a declaration that the act was unconstitutional. The court held that the proceedings were improper under the Conformity Act, and further that the court had no jurisdiction to decide a case brought under a state declaratory judgment statute as not constituting a "case" or "controversy." See Note, 36 *Yale L. Jour.* 845 (1927).

Willing v. Chicago Auditorium Co., 277 U.S. 274, 48 Sup. Ct. 507 (1927). The association brought a suit in the state court in the nature of a bill to remove a cloud on title. This was removed to the federal district court on grounds of diversity of citizenship. The Circuit Court of Appeals, Seventh Circuit, reversed the dismissal of the suit for want of equity jurisdiction. The Supreme Court reversed the Circuit Court of Appeals, holding that the case was not one within the equity jurisdiction of the court and that what the plaintiff sought was a declaratory judgment. This relief was declared to be beyond the power of the Federal Courts since it did not present a "case" or "controversy." See notes on above cases in 25 *Mich. L. Rev.* 529 (1927); 100 *Cent. L. Jour.* 95 (1927); 13 *Va. L. Rev.* 644 (1927); 36 *Yale L. Jour.* 845 (1927); 23 *Ill. L. Rev.* 595 (1929); 38 *Yale L. Jour.* 104 (1928).

unanimous court went out of its way to give the problem complete consideration. The mere holding that the court had appellate jurisdiction to review the final judgment of a state court involving a federal question would have relieved the court from the necessity of overruling its previous dicta.⁶ It is difficult to imagine what motivated the court's previous hostility.⁷ That the court went out of its way to deal body blows to the constitutionality of the declaratory judgment in earlier cases is clear.⁸ This tardy adoption by the United States Supreme Court of a view long accepted by the state courts is probably the result of a complete and clear analysis of the declaratory judgment.⁹

From the thread that runs through a number of decisions we may gather what

⁶ It was argued by Messrs. Borchard and Clark who filed a brief as "amici curiae" that a decision by the Supreme Court that the judgment of the Supreme Court of Tennessee is not subject to appeal, would have the effect of rendering doubtful if not of nullifying an established procedure of a state court. Such control of state court procedure should not be assumed by the Supreme Court except under an overriding federal law. Or if the appeal is refused, the judgment may be binding on all concerned. "Thus a state court would make a judgment against a federal right which would remain unchallenged." It follows that the issue set at rest by *Martin v. Hunter's Lessees*, 1 Wheat. 304 (1816), that a state court cannot interpose its judgment against that of the United States Supreme Court on a question of federal right (there of title under a treaty with a foreign country), may be revived. P. 17 of brief.

⁷ A note in 45 Harv. L. Rev. 1089 (1932) seeks to justify the court's earlier stand on the grounds that: (1) Issues presented in the federal courts lack the essentials of a "case" or "controversy;" (2) Since the Supreme Court deals with constitutional questions and statutory construction and because under declaratory judgment procedure such questions are apt to be presented without an adequate record of the facts and with insufficient practical experience of the actual operation of the statute; (3) It is inadvisable to require federal courts to determine in advance the legal consequences of certain acts.

See answer in a Note, 41 Yale L. Jour. 1195 (1932), wherein the author contends that the above rationalization has "the disadvantage of proceeding on assumptions as to declaratory judgments which have but little relation to the facts."

⁸ The *Grannis* case, *supra* note 4, could have been decided merely on the fact that the state declaratory judgment statute was not such a procedural matter as to come within the Conformity Act. See 40 Harv. L. Rev. 903 (1927).

In the *Willing* case, *supra* note 4, Mr. Justice Stone said,

I concur in the result. It suffices to say that the suit is plainly not one within the equity jurisdiction conferred by secs. 24 and 28 of the judicial code. But it is unnecessary, and I am therefore not prepared to go further and say anything in support of the view that Congress may not constitutionally confer on the federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this court is without constitutional power to review such judgments of state courts when they involve a federal question.

The commentators support the view taken by Mr. Justice Stone. *Grinnel*, 13 Mass. L. Quar. 50 (1928); *Langmaid*, 23 Ill. L. Rev. 595 (1924); 41 Harv. L. Rev. 232 (1928); 43 Harv. L. Rev. 1290 (1930); 38 Yale L. Jour. 104 (1928).

⁹ That the Supreme Court appears to attribute to the *Liberty Warehouse* cases as well as to the *Willing* Case, a variety of meanings, none of which has any proper relation to the declaratory judgment, would seem to follow from the fact that the court will not render advisory opinions, or decide moot cases, or pass on conclusions of an administrative body. Obviously, it is not a proper exercise of judicial power for a court to render advisory opinions and the action for a declaratory judgment cannot be employed to such an end. *Borchard*, 31 Col. L. Rev. 561, 594 (1931). See cases cited therein.

essentials are necessary to constitute a "case" or "controversy" as required under Article 3 Section 2 of the Federal Constitution.¹⁰ There must be adverse parties;¹¹ the judgment rendered must be conclusive and binding;¹² the issue must be specific¹³—not moot;¹⁴ and substantial legal interests must be involved.¹⁵ In his clever handling¹⁶ of the Grannis and Willing decisions in the main case one feels that Mr. Justice Stone had his tongue in his cheek. These cases, like the instant one, probably contained all the operative requirements the courts had previously announced as prerequisite to a "case" or "controversy." One is led to conclude that after a cursory study of the declaratory judgment procedure in the earlier cases, the court confused such a judgment with a moot case.¹⁷ A careful reading of all these cases will convince one that they contained live is-

¹⁰ Art. 3, § 2 provides that: "The judicial power shall extend to all cases, in Law and Equity, arising under the constitution, the Laws of the United States (and) to controversies between two or more states."

¹¹ *South Spring Gold Mining Co. v. Amador Midion Gold Mining Co.*, 145 U.S. 300, 12 Sup. Ct. 921 (1891); *Muskrat v. United States*, 219 U.S. 346, 31 Sup. Ct. 250 (1910).

¹² *Gordon v. United States*, 117 U.S. 697 (1885); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 47 Sup. Ct. 284 (1926).

¹³ *New Jersey v. Sargent, Atty. Gen., et al.*, 269 U.S. 328, 46 Sup. Ct. 122 (1925).

¹⁴ *Barker Painting Co. v. Local No. 734, Brotherhood of Painters, Decorators, and Paper-hangers of America et al.*, 281 U.S. 462, 50 Sup. Ct. 356 (1929).

¹⁵ *Fairchild v. Hughes*, 258 U.S. 126, 42 Sup. Ct. 274 (1921); *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 42 Sup. Ct. 261 (1922); *Massachusetts v. Mellon*, 262 U.S. 447, 43 Sup. Ct. 597 (1922); *New Jersey v. Sargent*, 269 U.S. 328, 46 Sup. Ct. 122 (1925).

¹⁶ ". . . or a decision advising what the law would be on an uncertain or hypothetical state of facts, *as was thought to be the case* [italics ours] in *Liberty Warehouse Co. et c.*"

¹⁷ "Herein lies the distinction between declaratory judgments and moot cases or advisory opinions. The declaratory judgment is a final one, forever binding on the parties on the issues presented; the decision of a moot case is mere dictum, as no rights are effected thereby; while an advisory opinion is but an expression of law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between interested parties." *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 179 N.W. 350 (1920).

Boarchard and Clark, *op. cit.*, *supra*, note 6, present the following collection of cases to indicate the prerequisites of a declaratory judgment in the state courts:

The declaratory judgment involves and implies an actual controversy. *Hess v. Country Club Park*, 213 Cal. 613, 296 Pac. 300 (1931); *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930); *Karihers Petition (no. 1)*, 284 Pa. 455, 131 Atl. 265 (1925). Cases have been dismissed for lack of justiciable controversy, either because of want of necessary legal interest in the issue upon the part of the plaintiff or defendant, *Garden City News v. Hurst*, 129 Kan. 365, 282 Pac. 720 (1929); *Perry v. City of Elizabethton*, 160 Tenn. 102, 22 S.W. (2d) 359 (1929); or because the parties were not adverse in interest, *Crawford v. Favour*, 34 Ariz. 13, 267 Pac. 412 (1928); *Reese v. Adamson*, 297 Pa. 13, 146 Atl. 262 (1929); or because the facts were not sufficiently ripe for judicial decision, in which event the judgment would merely have been an advisory opinion, *Lisbon Village Dist. v. Town of Lisbon*, 85 N.H. 173, 155 Atl. 252 (1931); *In re Freeholders of Hudson County*, 105 N.J.L. 57, 143 Atl. 536 (1928); or because in the court's discretionary view, there was an absence of certain parties deemed necessary to the suit, *Coke v. Shanks*, 209 Ky. 723, 273 S.W. 552 (1925); *Cummings v. Shipp*, 156 Tenn. 595, 3 S.W. (2d) 1062 (1928); or because the court's judgment would not have finally settled the issue, *Additional Law Judge, 53rd Jud. Dist., 10 D. and C. 577 (Pa. 1927)*; or because the court was not in a position to make its judgment effective, *State ex rel. Baird v. Board of Commissioners of Wyandotte County*, 117 Kan. 151, 230 Pac. 531 (1924).

sues between adverse parties, and involved substantial legal interests properly subject to a binding judgment.

"The distinctive characteristic of the declaratory judgment is that the declaration stands by itself; that is to say, no executory process follows as of course."¹⁸ That execution is not an essential feature of the judicial process is recognized by the Supreme Court in two recent cases.¹⁹ Mr. Justice Stone, in saying in the main case that as long as the controversy is justiciable the form of procedure is immaterial, makes theory conform to actuality. Instances are innumerable wherein the Supreme Court has handed down "binding declarations of right" without further relief. These decisions²⁰ range from the settling of boundary disputes between the states down through the review of judgments of the Court of Claims, bills to remove a cloud on and to quiet title, naturalization proceedings, the construction of wills, the giving of directions to trustees, judgments declaring marriages void, and litigation to determine the location of a county seat. Further, the court has often construed or interpreted statutes and ordinances or administrative action under them.²¹ It is true that usually an injunction against the enforcement of such statutes was asked along with the declaration of unconstitutionality. But an injunction is not really necessary;—once an act is declared unconstitutional, the authorities will not enforce it. In the instant case, the court well realizes that the mere fact that no injunction is prayed for does not render the controversy less justiciable.²²

Thus, we have a definite declaration by the court that the mere fact that an action results in a declaratory judgment will not render it unconstitutional *per se*. Rather, in determining whether a "case" or "controversy" is presented, the court will look at substance instead of form. It is to be hoped that this clean-cut decision will be sufficient to cause favorable action by the United States Senate on the proposed Federal Declaratory Judgment Act.²³

A. A. RIBICOFF

¹⁸ Kariher's Petition (no. 1), 284 Pa. 455, 131 Atl. 265 (1925).

¹⁹ "While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. . . . Nor is it essential that only established and generally recognized forms of remedy should be invoked." *Fidelity Nat. Bank v. Swope*, 274 U.S. 123, 47 Sup. Ct. 511 (1926); *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 49 Sup. Ct. 499 (1928).

²⁰ For a complete collection of cases see Borchard, *ibid.*, 31 Col. L. Rev. 561, 596, note 106.

²¹ *Ibid.*, 586, note 69 (examples).

²² For a discussion of justiciability as applied to these cases, *ibid.*, 610 *et seq.*

²³ A federal declaratory judgment act was passed by the House of Representatives on Jan. 25, 1928. H.R. Rep. 5623, 70th Cong. 1st sess.; see 69 Cong. Rec. 1680, 2025, 2032 (1925). Hearings were held by a subcommittee of the Senate Committee on Judiciary on April 27 and May 18, 1928. The opinion in the Willing Case was handed down on May 21, 1928. The bill, evidently, was "killed" in committee due to this decision. See sub-committee of Senate Committee on Judiciary, 70th Cong. 1st Sess., Hearings on H.R. No. 5623 (1928). A new declara-