VITAMIN, MINERAL, AND OTHER PRODUCTS OF SPECIAL DIETARY SIGNIFICANCE

30585. Special purpose foods. Suits for declaratory judgment and injunction.

COMPLAINTS FILED: On or about August 20, 1962, and November 15, 1962, American Dietaids Co., Inc., Yonkers, New York, a manufacturer of special purpose foods, filed complaint for a declaratory judgment and injunction, in the United States District Court for the Southern District of New York against Anthony J. Celebrezze, Secretary of the Department of Health, Education, and Welfare, and against Edward Warner and Carl E. Lorentzson, inspectors of the Food and Drug Administration. The facts as alleged in the complaints are contained in the court opinions set forth below.

DISPOSITION: The defendants filed a motion for dismissal of the complaint filed on or about August 20, 1962, and on November 5, 1962, the court handed down the following opinion and order relating to the dismissal of the complaint:

McGOHEY, *District Judge:*

Memorandum and Order

"The defendants move under Rule 12(b) of the Federal Rules of Civil Procedure for dismissal of the complaint on the grounds (1) that the Court lacks jurisdiction over the defendant Anthony J. Celebrezze, Secretary of Health, Education, and Welfare, and (2) that in the absence of such jurisdiction over the Secretary, there is a failure to join an indispensable party.

"Service was attempted to be made upon the Secretary by delivery of copies of the summons and complaint to the United States Attorney for the Southern District of New York and, by registered mail, to the United States Attorney General in Washingon, D.C., and by delivery of another copy of the summons and complaint by a United States Marshal to an officer allegedly authorized to accept service for the Secretary in Washington, D.C. This attempted personal service upon the Secretary was made on August 24, 1962, before the recent amendment of 28 U.S.C. section 1391. Pub. L. No. 748, 87th Cong., 2d Sess. § 2 (Oct. 5, 1962). Since at the time there was no authorization for such service of the process of this Court outside the territorial limits of the State of New York, Fed. R. Civ. P. 4(f), the attempted service in Washington, D.C. was without effect.[1] The complaint must therefore be dismissed as against the Secretary.

"The complaint alleges that on or about August 9, 1962, the defendants Warner and Lorentzson, Inspectors of the Food and Drug Administration, gained entry to the plaintiff's business premises under color of authority for the purpose of making a factory inspection pursuant to section 704(a) of the Food, Drug and Cosmetic Act, 21 U.S.C. section 374(a); that they brought into the premises on that occasion a concealed tape recording device without the knowledge or consent of the plaintiff; that the defendants were thus able to 'record statements and conversations of persons in plaintiff's business premises including agents, employees, and representatives of the plaintiff'; that a representative of the plaintiff became aware of the presence and use of the device and demanded that the tape be turned over to the plaintiff, which demand was refused; and that 'upon information and belief' the aforesaid acts were committed 'pursuant to and upon the direction of' Secretary Celebrezze. The complaint asks for a declaration that the acts of the defendants were unauthorized by the statute and illegal under the Fourth Amendment; for an injunction restraining 'the defendants and each of them, their servants, agents, employees and representatives' from further engaging in such acts, and for a further injunction 'directing defendants to turn over to plaintiff the

[1] *Stewart* v. *United States*, 5 Cir., 242 F. 2d 49; *Heiser Ready Mix Co.* v. *Fenton*, 7 Cir., 265 F. 2d 277.

tapes used in the recording device as hereinabove complained of, together with any copies, reproductions, memoranda, notes or other records made from such tapes.'

"It seems clear that a decree granting the relief sought would require some higher official than Warner or Lorentzson 'to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.' *Williams* v. *Fanning*, 332 U.S. 490, 493. Certainly the most important relief sought, an order directing that the tapes be turned over to the plaintiff, could only be obtained by a decree binding an official having present custody or authority over the tapes. Whether the indispensable superior officer is the Secretary himself or some lesser, local official need not be decided now, for it is clear that, in any case, no such official is presently before this Court.

"Accordingly, the complaint will be dismissed, but with leave to file a new complaint naming the official or officials against whom the relief desired, if granted, may be effectively decreed.

"So Ordered."

As a result of the foregoing opinion a new complaint was filed on or about November 15, 1962, as indicated above. The defendants thereafter filed a motion for dismissal and on 3–22–63, the court granted such motion and handed down the following opinion (215 F. Supp. 252):

DAWSON, *District Judge:* "This is a motion by defendants, pursuant to Rule 56 of the Rules of Civil Procedure, for an order dismissing the complaint.

"The action purports to be one for declaratory judgment pursuant to Section 1337, Title 28, U.S.C., declaring that certain acts of the defendants are unauthorized by law and in violation of the provisions of Section 704(a) of the Federal Food, Drug and Cosmetic Act, and for a declaration that they constitute an interference with plaintiff's rights against illegal search and seizure. The complaint also asks for an injunction.

"The acts complained of may be summarized as follows:

"The defendants Warner and Lorentzson are inspectors of the Federal Food and Drug Administration of the Department of Health, Education and Welfare. On or about August 9, 1962, these defendants presented to the plaintiff a notice of inspection to inspect the plant of plaintiff and were granted access to the premises. It is alleged in the complaint that they had a tape recording device with them, and

> 'That said defendants WARNER and LORENTZSON, did thereupon carry said hidden and concealed tape recording device into and through plaintiff's business premises, wherein it was able to and did pick up and record statements and conversations of persons in plaintiff's business premises including agents, employees, and representatives of the plaintiff.'

"There is no indication that any proceeding, criminal or otherwise, is pending or that respondents are seeking to use or intending to use the tape recording referred to in the complaint.

"It may be pointed out that the use of such hidden tape recording device is not a violation of the constitutional prohibition against unreasonable search and seizure. *On Lee* v. *United States*, 343 U.S. 747 (1952); *United States* v. *Kabot*, 295 F. 2d 848 (2d Cir. 1961) *cert. denied* 369 U.S. 803 (1962).

"However, a more important issue is presented at the threshold. The facts alleged in the complaint do not present an issue for which declaratory judgment is an appropriate remedy. Plaintiff seeks a declaration that something done in the past was illegal. It does not contend that any present actual controversy exists. In order to get jurisdiction under the declaratory judgment statute it must be shown that the case involves what the statute calls an 'actual controversy.' Section 2201, Title 28, U.S.C. An actual controversy is one appropriate for legal determination. It must be definite and concrete. It must relate to the relations of parties having adverse interests. It differs from one that is academic or moot. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

"Here there is no adversary proceeding seeking a determination of the legal rights of parties to a presently existing or contemplated controversy.

Plaintiff is saying no more than that a wrong has been done in the past and it wants a declaration that these past acts constitute a wrong. This is not the function of an action for declaratory judgment. If a wrong has been done in the past plaintiff can sue to remedy that wrong. If plaintiff is afraid that the tape recording will be used in the future in a criminal proceeding not yet instituted, it has an adequate remedy at the time of the institution of suit by a motion to suppress.

"If plaintiff is concerned lest similar acts take place in the future, the complaint is still not adequate. Circumstances may well be different in the future. Each such incident must be considered in the light of the facts of the incident. It is not proper to say that because a wrong was done plaintiff is entitled to a declaration that he should not be wronged in the future. Borchard, *Declaratory Judgment* (2d Ed.) p. 84.

"The action is not one which is appropriate for declaratory judgment. The motion for summary judgment dismissing the complaint is granted. So ordered."

The case was appealed by American Dietaids Co., Inc., to the United States Court of Appeals for the Second Circuit and on 5–17–63, such Court affirmed the judgment of the District Court in the following opinion (317 F. 2d 658):

SMITH, *Circuit Judge:* "Appellees Warner and Lorentzson, inspectors of the Food and Drug Administration of the United States Department of Health, Education and Welfare, pursuant to department policy, on August 9, 1962, carried with them a concealed tape recorder while inspecting under authority of § 704(a) of the Federal Drug and Cosmetic Act, 21 U.S.C. § 374(a) [1] the premises of plaintiff, a manufacturer of special purpose foods and allied products.

"Due to a malfunction of the recorder, plaintiff's representatives discovered its use and demanded that the tapes be surrendered, which was refused. Thereupon this action was commenced in the Southern District of New York against the Secretary of Health, Education and Welfare and the two inspectors, seeking a declaration that the acts of the inspectors were violative of the provisions of § 704(a) and of the Fourth Amendment's prohibition of illegal search and seizure, and seeking surrender of the tapes and injunction against 'such acts'. On defendants' motion, the Court, Archie O. Dawson, Judge, granted summary judgment dismissing the complaint. We hold that this action will not lie on the facts here established, and affirm the judgment.

"Even though the government concedes that such use of recorders is in accord with department practice, there is no showing of any intention or threat again so to inspect plaintiff's premises. There is no ground in such a single past incident for declaratory relief against possible future inspections. There is no actual controversy now existing on which to found declaratory relief. Borchard, Declaratory Judgment (2d Ed. 1941), pp. 81–86. *Public Service Commissioner* v. *Wycoff Co.*, 344 U.S. 237 (1952); *Eccles* v. *People's Bank of Lakewood Village, Cal.*, 333 U.S. 426, 431, 'Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.' Here we are not shown what use of the tapes, if any, may be intended. If a civil or criminal action

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[1] § 374. Factory inspection—Right of agents to enter premises; notice; promptness

(a) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

should be brought and if claimed improper use of the tapes is then attempted, motion to discover or suppress the tapes may be appropriate. *On Lee* v. *United States*, 343 U.S. 747, 756 (1952). The courts are reluctant to decide important constitutional questions at a stage of proceedings when the necessity of their resolution has not been established. *Poe* v. *Ullman*, 367 U.S. 497 (1961). Declaratory and injunctive relief were properly denied.

"Nor do we reach the merits of the claim to possession of the tapes, upon whatever theory plaintiff may contend for such a right, for this is plainly an action against the sovereign, to which it has not consented. The tapes were recorded and retained by agents of the Secretary of Health, Education and Welfare in carrying out inspections authorized by the statute and pursuant to department policy. This is not an action to recover damages from defendants personally because of their personal actions. It seeks in this phase recovery of specific government property so that while nominally against the individuals it is in substance against the government over which the court, in the absence of consent, has no jurisdiction. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 688 (1949). *Dugan* v. *Rank*,—U.S.—April 15, 1963, 31 LW 4347.

"The judgment dismissing the complaint is affirmed."

A petition for certiorari was subsequently filed in the Supreme Court and on 10–28–63, such petition was denied (375 U.S. 896).

30586. Childrens' vitamin tablets. (F.D.C. No. 51244. S. No. 43–543 B.)

QUANTITY: 4,827 100-tablet btls., at East Woodstock, Conn.

SHIPPED: 3–13–64, from Philadelphia, Pa.

RESULTS OF INVESTIGATION: Analysis showed that the article contained less than 50 percent of the declared amount of vitamin A, less than 72 percent of the declared amount of vitamin B_1, and less than 40 percent of the declared amount of vitamin B_{12}.

LIBELED: On or about 4–22–65, Dist. Conn.

CHARGE: 402(b)(1)—while held for sale, the valuable constituents, vitamin A, vitamin B_1, and vitamin B_{12}, had been in part omitted or abstracted from the article; and 403(a)—the label statement "Each tablet contains: Vitamin A Acetate 2500 USP Units * * * Vitamin B_1 (Thiamine) 1 mg. Vitamin B_{12} USP 3 mcg. * * *" was false and misleading.

DISPOSITION: 7–6–65. Default—destruction.

30587. Dietary wafers. (F.D.C. No. 51476. S. No. 78–772 B.)

QUANTITY: 29 cases, of 12 36-wafer boxes each, at Knoxville, Tenn., in possession of the White Stores, Inc.

SHIPPED: Between 2–25–65 and 5–27–65, from Atlanta, Ga.

LIBELED: 8–13–65, E. Dist. Tenn.

CHARGE: 402(a)(3)—contained insects; and 402(a)(4)—held under insanitary conditions.

DISPOSITION: 9–24–65. Default—destruction.

30588. Multiple vitamin capsules. (F.D.C. No. 51122. S. Nos. 43–868 B, 43–883 B.)

QUANTITY: 26 ctns., each containing 36 100-tablet btls., at Hartford, Conn., and 256 100-capsule btls., and 43 250-capsule btls., at Berlin, Conn.

SHIPPED: On an unknown date in 1963, from outside the State of Connecticut.

RESULTS OF INVESTIGATION: Analysis showed that the article contained less than 75 percent of the declared amount of vitamin B_{12}.

LIBELED: 3–25–65, Dist. Conn.; libel amended 7–9–65.