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JUDGMENTS-DECLARATORY JUDGMENT AS TO THE APPLICABILITY OF A PENAL STATUTE TO THE PLAINTIFF'S PROPOSED ACTIVITY DENIED

Mary Jane Plumer
University of Michigan Law School

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JUDGMENTS—DECLARATORY JUDGMENT AS TO THE APPLICABILITY OF A PENAL STATUTE TO THE PLAINTIFF'S PROPOSED ACTIVITY DENIED—Plaintiff was informed by the Commissioner of Food and Drugs of the Federal Security Agency that its proposed shipments of artificially colored poppy seeds in

interstate commerce, notwithstanding that they were properly labeled, would be a violation of the section 402 of the Federal Food, Drug, and Cosmetic Act,¹ and would subject it to the penalty prescribed in that act.² It thereupon brought an action against the Federal Security Administration and the Attorney General for a declaratory judgment that such shipments were not prohibited by the act. *Held*, relief denied on the ground that neither of the defendants had threatened to prosecute the plaintiff or to seize and libel its merchandise, and therefore there was no justiciable controversy within the meaning of the Declaratory Judgment Act. *Helco Products Co., Inc. v. McNutt*, (Ct. App. D.C. 1943) 137 F. (2d) 681.

To obtain a declaratory judgment plaintiff must show that a justiciable controversy exists.³ Here he bases his claim that such controversy exists upon two theories; (1) that a specific threat of enforcement is not an absolute condition precedent to the use of the declaratory judgment when the threat of prosecution "is implicit in the statute by reason of the civil and criminal sanctions attached to the statute"; (2) that the declaration by the Commissioner of Food and Drugs constitutes a threat to enforce the statute because it carries with it the duty to report such a violation to the Attorney General who has a mandatory duty to prosecute for violation of the statute. As to the first theory, there is some authority for the view that the penalty in the statute is threat enough when the plaintiff is claiming that the statute is unconstitutional;⁴ but, when the plaintiff's claim, as here, is that his proposed activity does not fall within the statutory prohibition, there must be a threat of enforcement⁵ and perhaps even that is not enough.⁶

¹ 52 Stat. L. 1040 at 1046 (1938).

² 52 Stat. L. 1040 at § 303 (1938): "Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1000, or both."

³ Jud. Code § 274d in 28 U.S.C. (1940) § 400. For a discussion of justiciability in general, see Borchard, "Justiciability," 4 *UNIV. CHI. L. REV.* 1 (1936).

⁴ *Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15 (1923); in *Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163, 287 N.Y.S. 288 (1936) where plaintiff sought a declaration that city sales tax law was partially void, the court said at p. 293, ". . . because of the position of peril in which plaintiffs are placed, in view of the civil and criminal penalties imposed if they fail in their designated duties . . . we consider that a declaratory judgment is the appropriate remedy. . . ." In *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P. (2d) 341 (1937) the court gave a declaratory judgment as to the validity of a statute that had not yet taken effect. *Contra*, *Southern Pacific v. Conway*, (C.C.A. 9th, 1940) 115 F. (2d) 746 at 749; *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1907), discussed in 13 L.R.A. (NS) 932 (1908); *Ex parte La Prade*, 289 U.S. 444, 53 S. Ct. 682 (1932).

⁵ Borchard draws an analogy between this case and the case of one seeking a judgment that a proposed activity will not be an infringement of an existing patent. The courts here require a threat of infringement emanating from patentee to the petitioner or his customers. BORCHARD, *DECLARATORY JUDGMENTS*, 2d ed., 43 (1941) and cases cited.

See also *id.* at 1034 (1941) where he says that a businessman cannot obtain a declaratory judgment to determine the legality of a proposed scheme under the anti-trust laws without a threat from the Attorney General, because the department's limited staff is not available to defend suits selected by private industry.

⁶ Where the activity is mala in se or a border-line case, such as the interpretation

There is a line of English cases which, on their face, might seem to justify a declaratory judgment on this theory.⁷ In *Dyson v. Attorney General*⁸ the court decided that the penalty in an order of an administrative agency prescribed for persons not complying with that order was threat enough upon which to predicate an action for a declaratory judgment against the Attorney General. But those cases may perhaps be distinguished from the instant case in that the punishment in the *Dyson* case was to be enforced against those who did not fill in the prescribed forms, of whom the plaintiff was admittedly one, while in the principal case the punishment was to be enforced against persons doing what the act prohibited, a class to which the plaintiff claimed he did not belong. As to the second theory, the court held that the declaration of the commission fell far short of a threat by either defendant, because neither of them was necessarily obliged to agree with the Commissioner of Food and Drugs, but was free to use his own judgment and discretion. In any event, the plaintiff should first have proceeded to exhaust his administrative remedies as prescribed by the statute⁹ before seeking any judicial relief.¹⁰

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of a gambling statute, the courts are less ready to permit the plaintiff to adjudicate his rights under the declaratory judgment acts. *Reed v. Littleton*, 275 N.Y. 150, 9 N.E. (2d) 814 (1937). *State ex rel. Egan v. Superior Court of Lake County*, 211 Ind. 303, 6 N.E. (2d) 945 (1937).

⁷ *Dyson v. Attorney General*, [1911] 1 K.B. 410, [1912] 1 Ch. 158; *Burghes v. Attorney General*, [1911] 2 Ch. 139, [1912] 1 Ch. 173; *Colonial Sugar Refining Co. v. Attorney General for the Commonwealth*, (Aust. High Ct. 1912) 15 Com. L. R. 182.

⁸ [1911] 1 K.B. 410, [1912] 1 Ch. 158.

⁹ The statute provides in 21 U.S.C.A. (Supp. 1943) § 335: "Before any violation of this chapter is reported by the Administrator to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding."

¹⁰ In *Gully v. Inter-state Nat. Gas. Co.*, (C.C.A. 5th, 1936) 82 F. (2d) 145 at 148 the court said that the plaintiff must pursue the remedies given him under the act questioned before he could resort to a federal equity court. In accord, *City of South Bend v. Marckle*, 215 Ind. 74, 18 N.E. (2d) 764 at 769 (1939); *Meredith v. Carter*, (D.C. Ind. 1943) 49 F. Supp. 899, abstracted in 42 MICH. L. REV. 190-191 (1943); *Utah Fuel Co. v. Nat. Bituminous Coal Co.*, (App. Ct. D.C. 1938) 101 F. (2d) 426. But *Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163, 287 N.Y.S. 288 (1936) seems contra.