

THE COURT: What is the theory of your action? (23)
Is it to more or less chastise, if you will, the county, and to say,
"Now, look, You have used it, and you better cut it out," or what?

MR. YANNACONE: At the present time - - -

THE COURT: They violated an order or what happened?

MR. YANNACONE: At the present time the county has indicated that they wish to continue the use of DDT.

THE COURT: In other words, the anticipated use is what you want to stop?

MR. YANNACONE: Right.

THE COURT: All right. Go ahead.

* * *

THE COURT: In other words, breaking that down (25)
(the Court referring to the defendant's third affirmative defense)
into basic language, the county has been using DDT principally for the
death of mosquitoes?

MR. YANNACONE: Right. (26)

THE COURT: And any other use that they might have made of the DDT was minimal?

MR. YANNACONE: That is not the way I interpret it.

MR. CORWIN: Not the use - - the results.

THE COURT: Well, read what you just said over again to me.

MR. YANNACONE: I am now quoting from paragraph 10 of their answer, Your Honor:

"The injury to other natural resources than mosquitoes by the Commission's use of chlorinated hydrocarbon pesticides is insignificant and has, if any, a de minimus effect on the balance of nature."

THE COURT: All right. Go Ahead. I have it now.

* * *

THE COURT: Is there any reply to that defense? (27)

MR. YANNACONE: There are no replies to the affirmative defenses as such, Your Honor, other than general denials. There will be evidence adduced in opposition. (27)

THE COURT: In other words, you deny their allegations?

MR. YANNACONE: Yes, categorically.

THE COURT: All right. Go ahead.

* * *

THE COURT: Is there anything said concerning the method of the application of the DDT. (28)

MR. YANNACONE: By that, Your Honor, do you mean in the Plaintiffs' case?

THE COURT: Do they use airplanes or do they run up to an area and let it out of a tank?

MR. YANNACONE: There are no statements on the record at the present time indicating the method used by the Suffolk County Mosquito Control Commission, Your Honor, other than their plans of work, which have been the same for the past. Well, from 1957 to 1965, the same identical statement has appeared in the county record.

THE COURT: And what was the method set forth?

MR. YANNACONE: May I quote:

(Mr. Yannacone then read the 1965 Plan of Work)

Now, with the exception of the year, everyone of the years from 1957 to today is word for word identical.

* * *

THE COURT: Doesn't this indicate a localization of the use? (31)

MR. YANNACONE: Yes, Your Honor, except that at the county board meeting the commissioner, Mr. Williamson, stood up and told the county board that he sprayed 40,000 catch basins with DDT on a regular systematic basis throughout the entire, spring, summer and fall season.

* * *

THE COURT: What I want to know in my own mind is this. As you know, I have never seen this case before. Now, assuming that your testimony shows that the application was more or less localized, and then you put a witness on the stand who is going to testify as to the use by tanks, airplanes, and you name it, Now, would that testimony be admissible? (32)

MR. YANNACONE. Well, this is one of the questions (32)
that we are going to reach today. * * *

I understand your point, Your Honor, and (33)
for that reason I will now outline pretty much the scope of
the plaintiffs' case.

THE COURT: In other words, if they use it, and I
am merely giving you a supposition, for example, they run it out
of a tank into a pool of water, a stagnant pool. Now, if that is
done, then you bring testimony as to the damage it will do by
using an airplane, a DC-3, or whatever you want to use. Do you
see what I am getting at? * * *

Let me go back. Now it won't relate back to
the actual factor of the case.

MR. YANNACONE: Conceded.

THE COURT: All right. Go ahead.

* * *

MR. YANNACONE: The plaintiffs' first witness will (34)
be Christian T. Williamson, the executive director of the Suffolk
County Mosquito Control Commission, and it is our intention to
elicit from him the actual day-by-day method utilized by the
Mosquito Commission.

THE COURT: That is what I would want.

* * *

MR. YANNACONE: . . . We will produce a great (37)
many technical witnesses who will testify as to the biological
effects of DDT in various locations around the world.

There will be causal relationship between the
ecosystems described as damaged by these experts and the eco-
systems presently under the jurisdiction and subject to spraying
by the Suffolk County Mosquito Commission. There will be
connection.

MR. CORWIN: May I interrupt? This is one of
those things that I am perfectly willing to concede and which I am
sure can save a lot of time, a lot of the Court's time.

THE COURT: Apropos of that, it reminds me that
one of the last cases I had was a sailboat case where somebody
was killed going through Hellgate. They had an expert on proving
how the water rises and falls in Halifax. I begged him to get me back
to Hellgate, where I could go on with the case.

MR. YANNACONE: Your Honor, every piece of biological effect evidence that will be adduced on the plaintiffs' direct case will be directed to Suffolk County. (38)

MR. CORWIN: It is not going to be directed. It is what the Mosquito Commission did - - -

THE COURT: Gentlemen, what I am trying to bring home is this: If the conditions that you are going to disclose are not analagous to the conditions that we have here - - -

MR. YANNACONE: They will be. We are not talking about air spraying, and we are not talking about crop dusting. We will adduce only testimony that is relevant.

Now, Your Honor, there is this little technical appendix which was submitted on the motion.

THE COURT: That's the appendix?

MR. YANNACONE: That is the appendix.

THE COURT: Just for the record, how many pages are there in that appendix?

MR. YANNACONE: About 174 or so.

MR. CORWIN: May I interrupt, Your Honor, so we talk about the relevant portion. There is an article in there about the peregrine falcon over in Scotland, and what happened over there with respect to that.

THE COURT: Mr. Corwin, you have no soul. However, let us go on.

MR. YANNACONE: There are nine more of these, Your Honor, that are this thick and that encompass the body of current literature.

THE COURT: Nine more?

MR. YANNACONE: Yes, Your Honor, nine more appendices like this. Nine of them, plus this make up the general body of currently accepted scientific literature on the biological effects of DDT. However, nine of them are irrelevant to the ecological conditions and applications in the County of Suffolk, and this lawsuit. This one is the compendium of those cases which are.

THE COURT: All right. Go ahead.

MR. YANNACONE: We are well aware of counsel's objection to bringing in extraneous matters but there are areas around the world which do have similar problems as Suffolk County.

MR. YANNACONE: One of the constitutional issues (41) that has been raised on the prior motion, and which was not specifically discussed by the Court - and it is in the memorandum - is whether or not this action is maintainable at all. This action seeks a rather unique form of relief. It is a form of anticipatory relief. It is demanding a judgment based on the fact of similar ecological systems in similar areas throughout the world, based on similar conditions that are existing now in the County of Suffolk, and after a period of time the latent damaging effects of DDT manifest themselves disastrously.

THE COURT: That is like proving a shortage before you even give delivery.

MR. YANNACONE: No, Your Honor, it is not quite. There is a great realm of law that is building on this anticipatory latent defect condition, especially with radiation injuries.

THE COURT: Here is what I am trying to bring home to you. The main objective as I see it, of your burden, is to show that the use of DDT in and about Suffolk County, as used, was in fact deleterious to the welfare of the people of this County.

MR. YANNACONE: More than that.

THE COURT: Excuse me, what they do in Russia or Scotland or China, doesn't interest me.

MR. YANNACONE: Your Honor, there will be a basic question raised which, unfortunately, you will have to decide squarely in this case on the nature of accepting scientific testimony.

THE COURT: I will take scientific testimony as long as it is relevant.

MR. YANNACONE: All right. In this particular case (43) the affidavits indicate that in areas where these scientists believe the ecological systems are similar or identical to that of Suffolk County, continued operations similar to that of the Suffolk County Mosquito Commission, in fact, better than the Suffolk County Mosquito Commission, after such and such a period of time produced a disaster.

THE COURT: All right.

MR. YANNACONE: That basically is the gist of the plaintiffs' case. In summary, there will be ecological testimony by a local ecologist, tying in the individual studies that are relied on by the other experts in this in the specific conditions of Suffolk County.

Finally there will be testimony here as to the last constitutional point that becomes a matter of issue here - whether or not damage to natural resources has any bearing on the individuals who live in the area where the resources may be damaged. This is a question that has never been squarely decided by any court. This is a question that the whole concept of the probe of environmental contamination rests on - whether or not there is a right for an individual to have an environment - - -

THE COURT: How do you prove damages?

MR. YANNACONE: In this particular case, Your Honor, we will adduce testimony to show that there are values. In fact, money values to maintaining an environment that contains wild life, trees - - -

THE COURT: Damages to whom?

MR. YANNACONE: Damages to any individual in the area that has any kind of property rights existing in the area.

THE COURT: I am not a party to this thing.

MR. YANNACONE: This is essentially a derivative or (45) representative action. Actually it is a representative action.

THE COURT: All right. Are you looking to get a verdict for \$1,000,000?

MR. YANNACONE: No, Your Honor. There are no money damages sought. This is an action to restrain a practice injurious to the natural resources.

THE COURT: In other words, there is no money demand?

MR. YANNACONE: No money demand.

THE COURT: Strictly a restraining action?

MR. YANNACONE: Strictly restraining, Your Honor.

THE COURT: All right. Go ahead.

MR. YANNACONE: That is all that is involved. The issue of whether or not the birds and animals have a value is at the core of this, and at the present time there has been a great deal of - - -

THE COURT: You don't have to prove that birds have value, do you?

MR. YANNACONE: I hope not, your Honor.

THE COURT: Take a woodpecker. We know he takes worms out of trees.

MR. YANNACONE: We could also show a couple of other birds. There are a few birds, who it appears eat more mosquitoes than the Suffolk County Mosquito Commission is able to kill normally.

Your Honor, the Federal Government has wrestled with this problem entirely on the basis of injury to humans by the accumulation of DDT. There is no claim in this case at any point, none will there be any by any expert produced by the plaintiff that there is any involvement between DDT and its damaging effects on wild life, and direct poisoning of humans. This is not in issue.

* * *

MR. YANNACONE: The effect on humans is solely the effect caused by diminishing their natural resource environment. That is the only effect that is being sought after. It will be admitted, I think, by the very first witness that there is a current body burden in every human being over the age of twenty of 12.8 parts per million or so DDT, whole body. (47)

THE COURT: So what?

MR. YANNACONE: So there are no known effects resulting from this.

* * *

THE COURT: We are only concentrating on DDT? (48)

MR. YANNACONE: DDT only, Your Honor. The issue has been whether or not this is an action to eliminate all pesticides necessary to Suffolk County agriculture or whether we are in favor of the killing of mosquitoes.

THE COURT: I don't get that. Give it to me again.

MR. YANNACONE: It has been stated in public and in passing in the papers that this is an action to effectively bar the continued application of agricultural pesticides necessary for the maintenance of this county's economy or in the alternative to protect Suffolk County's mosquitoes.

THE COURT: I am just curious about one thing. What does the farmer do? * * *

Do you have any thoughts that he can do that without pesticides?

MR. YANNACONE: No sir, and this is what I want to make clear. This is not an action to eliminate the agricultural pesticide industry, nor is it an action to preserve for any crazy reason whatsoever Suffolk County's mosquitoes. The plaintiffs and all the experts that the plaintiff will produce are as much interested in eliminating the mosquitoes as the Mosquito Commission. However, the plain tiffs will show that there are better ways to do it than by the use of DDT.

It is not the Suffolk County Mosquito Commission that is really on trial, Your Honor, but it is the single substance DDT, which is such a bad actor, and of which there is such a vast body of information that the plaintiffs contend that there is no legal reason for anybody in their right mind to continue using that substance.

* * *

MR. YANNACONE: . . . The only pesticide that has been (51) used indiscriminately and with almost ignoring the fact that it accumulates in vast quantities into the environment and just doesn't want to break down is DDT. This action is specifically directed at DDT.

* * *

MR. CORWIN: . . . I want to point out particularly (52) that before the type of testimony that he indicates he is going to give is relevant in this case, that they are going to have to prove that the results they are talking about were caused by this particular defendant.

The proof will be that although there may be building up in the food chains of the worms, the birds, the fishes, the crustacea, and the other families a lot of DDT which under certain circumstances will kill them, that only about 5% of that is being applied by this particular defendant; and that without the other 95%, the conditions about which they are talking and the results about which they are complaining do not exist.

Your Honor, this is similar to the detergent situation about which Your Honor is familiar.

THE COURT: In other words, it is your contention, counselor, among other things, one of your contentions is that if there was such damage as complained about, it was not caused solely by the county but by others?

MR. CORWIN: Very emphatically so. (54)

* * *

MR. CORWIN: Once again, Your Honor, and coming back to that subject on the question of perspective, we feel that even if you take all of the results together, that they are going to have to be weighed in the light of the purpose of the defendant commission - the absence of mosquitoes in an economy such as ours, given as it is particularly in the summer months to the recreational aspects of our life and our economy; and that the damage that has been done and that is presently being done is not of any great significance.

Now, the best way to kill a mosquito, Your Honor, is to hit him with your hand. Now, he has been talking about the birds.

MR. YANNACONE: We could also show a couple of other birds. There are a few birds, who it appears eat more mosquitoes than the Suffolk County Mosquito Commission is able to kill normally.

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Now, the best way to kill a mosquito, Your Honor, is to hit him with your hand. Now, he has been talking about the birds.

Perhaps when we kill mosquitoes, we kill natural resources in (55)
that respect too, Your Honor, by depriving some of the birds of
their food. You can get into a lot of different streams on this case
if you consider all aspects of it, and I don't propose to do that.

The fact of the matter is that probably nicotine that
is smoked, alcohol that is being drunk, the arsenates that we talked
about, and the aspirins that kids get and shouldn't get from the medi-
cine cabinets of their parents together with a lot of other things are
doing a great deal more damage to the people and to the economy of
Suffolk County than all the DDT that is being spread by the Commission
and everybody else.

Now, Your Honor, to lay that groundwork, we are going
to be contesting this case as we would any other. We are going to try
to minimize the testimony of the experts that they are going to bring in
here and pin them down to the exact situation that we are confronted
with here and not with a lot of testing and what happens all over the
world.

I am aware of the fact that they found DDT in the pen-
guins at the Arctic. We think that when all the testimony is in the
Court will have drawn no conclusion as to the effects of this. We
say that what is being asked for here is an outright prohibition.

Now, the Suffolk County Mosquito Commission, the
State of New York, the Department of Agriculture and Markets,
and the Department of Health are all aware, as are these plaintiffs,
that there is some inherent danger to the continued application of
DDT in that it does build up in the food chain and is affecting some
of the higher forms of animal life, including mortal. Since we are
aware of that, we now have a pesticide control board which is a
rather recent development. We have a voluntary phasing-out of the
use of DDT by this particular defendant.

We want to study this a little more and find out (57)
whether or not there should be administrative controls, perhaps
legislative controls rather than an outright judicial prohibition at
this stage. We think it very likely, and we candidly admit, that it
is perhaps indicated there should be such control.

However, your Honor, we don't think it is our prob-
lem, particularly in Suffolk County, to be the one to take the first
forward step in that direction. In fact, we believe that it is being
made by the state and by the Federal Government in the groundwork
that is now being formed.

We think that there is reason why the Court should
not have the right to prohibit that for the reasons, primarily, that
it has been found - and I think the plaintiffs witnesses will admit it-
that DDT is the most effective way to kill mosquitoes; that they are
the carriers of certain kinds of disease; that we are in an area where
that is a danger. Certainly, Your Honor, if there were to be an en-
cephalitis epidemic, we would want to be in a position to use the most
effective way to kill them, and that is DDT.

THE COURT: Apropos of that, gentlemen, I want to make it known to both of you that I worked closely with the State of New York in its encephalitis program; that I did maintain pheasants that were bled regularly by the State of New York for this very thing; that they might be carriers by reason of mosquito bites. The mosquito bites the pheasant, and the pheasant has it, thus being able to transmit it. I want that known to both of you. Do you understand? * * *

 I worked with the state for two years (59) on that program. All I did, of course, was to keep the pheasants, and I fed them. They would come to the pens and read the numbers off the bands, and bleed them. That was it. That was the sum and total of my work, but I want it known to both of you.

* * *

MR. CORWIN: At this time, Your Honor, I am not going into any detail about the county's defense. There are some aspects of it that I would rather not disclose.

THE COURT: May I ask you this? I just want to move to you, Mr. Yannacone, for a minute. You say this is directed merely against DDT, and it is directed solely against the County (60) or all people in the county, is that right?

MR. YANNACONE: No, it is directed against the County Mosquito Commission. * * *

 Now counsel makes this statement on behalf of the commission, and he has made it a dozen times through the affidavits here that DDT is the most effective method of mosquito control in the County of Suffolk. We shall prove by a vast preponderance of the scientific evidence - and I mean vast - that DDT is not only not the best, but it is one of the worst methods of mosquito control available to the Suffolk County Mosquito Commission. (61)

 With respect to malaria and encephalitis, if the County should, and I doubt that they are going to be able to do so on their affirmative defense, produce any testimony relative to malaria and encephalitis - - -

THE COURT: Excuse me, counsel, * * *
 Assuming you win your case
against the county. How about third persons who might be using DDT?

MR. YANNACONE: If we win this action against the county, unless there is a voluntary ban, such as by virtue of the county ordinance or something equivalent, either banning or controlling under certain very selective conditions the use of DDT in the county, there will be further litigation. This will basically be the precedent for it. (62)

THE COURT: You mean to stop the individuals.

MR. YANNACONE: To stop groups of individuals.

THE COURT: Assuming you don't have a group. Do you have individuals as such?

MR. YANNACONE: To the best of my legal knowledge, Your Honor, there is really no way to stop individuals without thousands of lawsuits. There is no such thing.

THE COURT: There is one way, and that is by legislation.

MR. YANNACONE: Yes, Your Honor. However, let me put it in the record * * *

In 1963, President Kennedy appointed the Weisner Committee which recommended the elimination of DDT. In 1966, the president's Science Advisory Council also recommended the elimination of DDT. The Velsicol Chemical Corporation's dumping of endrin into plant sewers was directly responsible for the killing of millions of fish in the Mississippi. All this is stuff on the record. The legislatures have not yet been able to pass the law.

THE COURT: Come back to me for a minute. Assuming that I find the county is using it and the county is wrong. I make an order stopping them. * * *

Now let us assume that they only use ten percent or fifteen percent or twenty percent or fifty percent of DDT. Where do you go from there?

MR. YANNACONE: To the County Board which has been holding this matter in abeyance pending this lawsuit. (64)

THE COURT: For legislation?

MR. YANNACONE: For legislation.

THE COURT: Now, can't this be done without a decision from me?

MR. YANNACONE: No, Your Honor. There is no way to solve the DDT problem without judicial action. There are four other states in which actions similar to this have been drawn and are waiting for service pending the determination of this case.

THE COURT: Do you mean to tell me that somebody can't get special legislation politically, if you will?

MR. YANNACONE: Your Honor, there is no way to ban the use of DDT. We are not talking about anything else, but just DDT, which has ten of these books full of harmful effects already documented.

THE COURT: Don't they every day pass laws that say you can't put this in bread, and you can't put this in your tea or you can't put this someplace else? (65)

MR. YANNACONE: Your Honor, the reason is that DDT has not killed any human as yet. As Dr. Smolker, an embryologist, said in his affidavit:

"...an informed guess would be that DDT interferes with normal development resulting in death of the bird embryo at an early stage and death followed by resorption or abortion of the mammal fetus. The probabilities would favor an effect earlier in development than occurs in the parallel case, thalidomide."

You know Judge, and I know, and a lot of other people know the background of the thalidomide story, and they would still be dispensing thalidomide if the direct causal relation had not been shown as dramatically as it was.

THE COURT: I don't understand your thinking on this. You want them to rely on an individual judge to make a decision. Wouldn't the legislature be more impressed if you took these experts up to them?

MR. YANNACONE: Your Honor, these experts, many of them have testified from United States panels on down to state legislatures. A couple of states have reacted and passed DDT elimination statutes. (66)

THE COURT: You mean a judge has to start the ball rolling?

MR. YANNACONE: It is not the judge, Your Honor, but what you represent. You represent the testing of these experts in a cauldron where their testimony is measured not in their own language but in the language of the law.

THE COURT: Mr. Yannacone, you sat right back there when you heard these doctors testify, and they imposed the burden upon the judiciary to determine whether a person should be kept in an institution or let out. I am sure that few, if any, judges have any extensive learning in psychiatry, including myself.

MR. YANNACONE: Judge, I have cross-examined in compensation cases maybe twenty or thirty psychiatrists a year for the past six years. When it comes to a determination of my sanity and my ability to face the world, I will take the lowest magistrate God ever made to the greatest psychiatrist in the world.

THE COURT: But then, you see, you are doing the same thing here.

(67)

MR. YANNACONE: No, Your Honor. We are letting a man who is trained to ferret out the facts and who is able to become, by virtue of the institution - - -

THE COURT: All right, counsel. I was just wondering if you wouldn't get a quicker and more appropriate answer elsewhere, because even if I held in your favor, I don't think the Legislature would go on the decision of a judge. They would say, "Look, prove it to me."

MR. YANNACONE: The Pesticide Control Board, which had a meeting at Brookhaven National Laboratory, and we have one of the members of the advisory board to it, as one of our experts in this case, who submitted the initial affidavit. They had their meeting down in Brookhaven, and they spent the second day discussing this particular litigation and whether or not they should take a stand for or against. Although, Counsel says the Department of Agriculture and Markets is going to get involved and there should be further study and everything, it appears that they have been studying this problem for three years. They have had the benefit of reams of scientific testimony. They are allegedly trained scientists.

Now, first of all, the statute gives them absolutely no power whatsoever to do anything but recommend. Secondly, they could not agree among themselves on whether or not the recommendation should be made as a scientific matter.

THE COURT: All right. Let me go a step further. Assuming again - and I am only assuming - that we have people who are just little gardeners out in the back, and they want to grow corn. They apply certain poisons to the corn seed for the destruction of certain insects. Now, the birds, pull the seed out of the ground and in the process of eating the seed, this kills the bird. How are you going to distinguish between the birds that are killed this way and the birds that are killed by DDT? * * *

You know further, counsel, I have been told that in some orchards you get birds who get in there and put a hole in say a nice big ripe peach or pear just when you are getting ready to take it off the tree, and before you can whistle Dixie you have yellow jackets in there. Then this thing is sprayed, and while they are sprayed to kill the bees, it kills the birds and kills everything that goes with it. Did you know that? (70)

MR. YANNACONE: Yes, Your Honor. Now, I would like to complete what the issue is, Your Honor. The killing of the birds in the orchards, the bird who picks up the corn seed, this does not threaten the survival of that species of bird. For instance, the elimination of every single mosquito in the County of Suffolk would not in any way, shape or manner diminish the population of the normal mosquito eating birds, because they turn to another insect and eat it and probably do a better job.

This is not an action to save the mosquito so that we may have more food for the birds. This is ridiculous. This is what has stayed the whole subject of this action for twelve years. (71)

The issue here, Your Honor, is whether or not an act, which the technical testimony will show, threatens the very survival ability of the species should be permitted, and the use of DDT. - - -

THE COURT: I don't follow that. You mean, in other words, one species of bird that dies?

MR. YANNACONE: No, Your Honor. In some cases many. The environmental contamination with sub-lethal doses of DDT that ecologically magnify in the food chain and threaten whole broad levels of the overall food chain. This is the action that is sought to be stopped. The individual farmer on a dry field in the normal method of Suffolk County agriculture cannot do as much damage as the Suffolk County Mosquito Commission dumping five percent DDT into the Great South Bay.

THE COURT: I understand. * * * (72)

MR. CORWIN: Well, at this time I should like to state for the record, before we get involved, that I move to dismiss the complaint as to the defendant H. Lee Dennison on the ground that it does not demand any relief. It does not state any cause of action as to him. In that connection I should like to point out, so that there isn't any dispute or misunderstanding about it later on, that the Suffolk County Mosquito Commission does not have jurisdiction over all of Suffolk County.

THE COURT: All right, I will reserve decision.

MR. YANNACONE: * * * The first witness we want is Chris Williamson, and I respectfully ask the County attorney to produce him without a subpoena.

THE COURT: They will produce him. (74)