CONSTITUTIONAL LAW

CANON OF RESTRICTIVE INTERPRETATION REPUDIATED

Sullivan, a retail druggist, was convicted of violating §301(k) of the Federal Food, Drug, and Cosmetic Act[1] which prohibits misbranding of food, drugs, or cosmetics while "held for sale after shipment in interstate commerce." Sullivan bought sulfathiazole tablets from an interstate importer in bottles properly labeled to meet the requirements of the Act, which included a caution: "to be used only by or on the prescription of a physician." In selling the tablets to his intrastate customers,[2] Sullivan put them in pasteboard containers labeled only "sulfathiazole." The Circuit Court of Appeals for the Fifth Circuit reversed the conviction on grounds that the Act intended to regulate only the *first* sale after the interstate shipment,[3] and in part justified its narrow interpretation on grounds that if more broadly construed the statute would be of doubtful constitutionality. On certiorari, the Supreme Court reversed: A retail sale of drugs, which have been shipped in interstate commerce without reproducing the label of the interstate container upon the retail container, is a misbranding in violation of §301(k). By way of dictum, the Court stated that a statute should not be narrowly construed because the literal meaning of its words would raise a constitutional question.[4] *United States v. Sullivan*, 68 S.Ct. 331 (1948). (Justice Rutledge concurred; Justices Frankfurter, Reed, and Jackson dissented).

1. 52 Stat. 1040 (1938), 21 U.S.C. §331(k) (1940).
2. The sales were made to two federal inspectors. Apparently no defense of entrapment was pleaded.
3. U.S. v. Sullivan, 161 F.2d 629 (C.C.A. 5th 1947). Section 301(k) was given a liberal interpretation by the Seventh Circuit in U.S. v. Lee, 131 F.2d 464 (C.C.A. 7th 1942), which held that the bringing together of printed matter containing false and misleading claims, in the presence of and associated with an article after shipment in interstate commerce, resulted in a violation of §301(k). The courts have repeatedly recognized that the Act was designed primarily to protect the consuming public and should be construed liberally. See U.S. v. Kordel, 66 F.Supp. 538 (N.D. Ill. 1946).
4. The Circuit Court cited N.L.R.B. v. Jones Laughlin Steel Corp., 301 U.S. 1 (1937) and quoted the Supreme Court's statement that: "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid serious doubt the rule is the same." See Circuit Court's opinion at 631.

A question presented by the dictum in the principal case is whether the Supreme Court has thereby abandoned a frequently used canon of statutory construction. Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*[5] listed several canons of construction by which the Supreme Court has avoided passing upon a large part of all constitutional questions pressed on it for decision. The seventh rule listed was that "when the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[6] This rule is in effect the same one relied on in part by the Circuit Court in the principal case. The Circuit Court doubted whether under its commerce power Congress can prohibit misbranding by a retail merchant who is neither shipper nor receiver of an interstate shipment. The contention of the government was that the statute, by its literal meaning, intended to prohibit misbranding by all sellers after the interstate shipment.[7]

In rejecting the Circuit Court's use of the canon of construction under discussion, Mr. Justice Black for the majority said: "A restrictive interpretation should not be given a statute merely because giving effect to the express language employed by Congress might require a court to face a constitutional question."[8] If this dictum is followed, the Supreme Court in the future will put aside constitutional doubts until the meaning of the statute is ascertained; and then will pass on constitutionality. In this event, the Court will not dodge

5. 297 U.S. 288 (1936).

6. Id. at 348.

7. As expressed in the House Committee Report, H.Rep. 2139, 75th Cong., 3rd Sess. 3 (1938), §301(k) was intended to extend the protection of the consumers "to the full extent constitutionally possible."

U.S. v. Phelps Dodge Mercantile Co., 157 F.2d 453 (C.C.A. 9th 1946) held that under §304 (a) (the seizure section of the Federal Food and Drug Act) the Federal Security Administrator could not seize a food which had been adulterated after its shipment in interstate commerce and while remaining in the original unbroken package at a terminal warehouse. Following that case, the Administrator addressed a letter to the Senate and House, pointing out that in order to restere the necessary protection to the consumer, Congress should promptly amend §304(a) by inserting the words "or while held for sale after shipment in interstate commerce." See Note, 2 Food, Drug, Cosmetic L. Q. 461 (1947).

8. Instant case at 334.

constitutional questions by choosing of two possible constructions the one which is more clearly constitutional.

An extreme use of this canon was in *United States v. Delaware and Hudson Co.*,[9] where the Court interpreted the Commodities Clause of the Hepburn Act.[10] That Act prohibited railroad companies from transporting in interstate commerce "any article . . . manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect. . . . " The acknowledged purpose of the Act was to force railroads out of the coal production business to prevent discrimination.[11] The Circuit Court held the clause to be in violation of due process,[12] and the decision was widely criticized.[13] By a totally unpredicted interpretation, the Supreme Court upheld the Act on the ground that the object of the clause was to prevent carriers engaged in interstate commerce from being associated in interest *at the time of transportation* with the commodities transported. Consequently, the carriers could continue to mine coal and transport that same coal as long as it had been sold previous to shipment. The Court invoked the rule of construction here discussed stating: "And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[14]

The canon has been used as an aid to interpretation in numerous cases, with the probable result that the meaning of statutes has been twisted to avoid constitutional questions. The following cases are examples to illustrate the extreme use of the canon.

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9. 213 U.S. 366 (1909).
10. 34 Stat. 584 (1906). 49 U.S.C. §1 (1940).
11. U.S. v. Delaware and Hudson Co., 213 U.S. 366, 380 (1909).
12. 164 Fed. 215 (C.C.A. 3d 1908).
13. For example, see Learned Hand, "The Commodities Clause and the Fifth Amendment," 22 Harv. L. Rev. 250 (1908).
14. U.S. v. Delaware and Hudson Co., 213 U.S. 366, 407 (1909). For a criticism of the decision, see Note, 9 Col. L. Rev. 523 (1909).

A Missouri statute prohibited the defense of suicide by an insurer when the policy in question was issued. A later statute under which the insurer was subsequently incorporated provided that any insurance company "doing business" thereunder would not be subject to any other provisions of the general insurance laws of the state. In an action by the beneficiary, the insurer pleaded the suicide of the insured by way of defense. The Supreme Court interpreted the words "doing business" as meaning the issuing of policies, and not the paying of them, saying: "A man does business when he contracts obligations—he ceases to do business when he discharges them."[15] By this unnatural interpretation, the defense was not allowed, thus avoiding the question of whether the application of the latter statute would be an impairment of contract.

The Interstate Commerce Act granted authority to the Interstate Commerce Commission to subpoena witnesses and to inquire into the management of carriers for information "to enable the Commission to perform duties and carry out the objects for which it was created."[16] Two statutory purposes of the Commission were to keep informed as to the manner and methods of business by which carriers are conducted, and to recommend additional legislation. The Act stated that the Commission could require the attendance of witnesses "from any place in the United States, at any designated place of hearing." The Supreme Court held that these provisions applied only to a witness called to testify concerning a specific violation.[17] A literal interpretation would have necessitated a holding upon the constitutional questions of the extent of Congress' inquisitorial powers, and their delegability. A later case interpreted another section of the Interstate Commerce Act by which railroads "subject to the Act" were prohibited from abandoning operation without first obtaining permission from the Commission.[18] A certain railroad was located wholly within Texas, but three-fourths of its traffic was interstate commerce. Despite the fact that the railroad was "subject" to the Act for other pur-

15. Knights Templar Indemnity Co. v. Jarman, 187 U.S. 197 (1902).
16. 24 Stat. 383 (1887). 49 U.S.C. §12 (1940).
17. Harriman v. Interstate Commerce Commission, 211 U.S. 407 (1908), cited as authority for the canon of construction used in U.S. v. Delaware and Hudson Co., 213 U.S. 366 (1909).
18. 41 Stat. 477 (1920), 49 U.S.C. §1 (1940).

poses, the Supreme Court interpreted the statute not to grant the Commission authority over railroads located wholly within the state and not connected with any other line.[19] The Court, saying that by its restricted construction the "validity will be undoubted,"[20] thus avoided deciding whether, under its commerce power, Congress can grant permission to discontinue intrastate operations when the railroad is located wholly within a state.

Section 8 of the Harrison Drug Act[21] provided that possession of specified narcotics by "any person" not licensed under the Act was unlawful. Although in form a revenue measure, the Act was passed to control trade in narcotics.[22] Mr. Justice Holmes, for the majority, said: "If opium is produced in any of the States, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime."[23] Consequently, "any person" was construed to mean only those persons enumerated in another section of the Act as being required to have licenses, and not *any person* in the United States. By this narrow construction the control obviously intended by the statute, *i.e.*, to control opium addicts, was materially lessened.

On the one hand, there is merit to a presumption that by enacting a statute any legislative body intends to change the existing law and, conversely, not to exceed its constitutional powers, thereby doing a futile thing. When the language of a statute is ambiguous and where one rational construction thereof might raise questions concerning the act's constitutionality, it is in line with this presumption for courts to accept instead a rational construction which appears to the court less likely to render the act unconstitutional. On the other hand, the presumption of constitutionality is carried beyond its logical core when, as is illustrated by the cases above, the Supreme Court has accepted unreasonably restrictive intepretations of statutes in order to avoid more reasonable interpretations which raise constitutional ques-

19. Texas v. Eastern Texas R. Co., 258 U.S. 204 (1922).
20. Id. at 217.
21. 38 Stat. 789 (1914), not in present code.
22. U.S. v. Jin Fuey Moy, 241 U.S. 394, 395 (1916). The bill originated from the State Department after the United States' participation in the International Opium Convention.
23. Id. at 401. Mr. Justice Holmes probably doubted the power of Congress to control local opium production.

tions. If the Supreme Court in the principal case has abandoned its use of the canon of construction under discussion, the result should be an aid toward determination of true legislative purpose.

DECEDENTS' ESTATES

RIGHT OF ADMINISTRATOR TO APPEAL

The administrator of an estate applied to the court for leave to sell realty to pay debts. A bid of $3500 was received for a tract of 40 acres which the court subsequently approved. Before the sale had been completed, a second bid of $3500 was received for 20 of the 40 acres, *i.e.*, an equal amount was offered for one-half the land. The administrator therefore filed a petition in court asking that the uncompleted sale to the first bidder be set aside. The court refused to set aside the sale and ordered that the deed be delivered to the first bidder. On appeal by the administrator, the Appellate Court affirmed the judgment on the ground that the administrator had no appealable interest. The Supreme Court reversed the judgment, holding that the administrator had a duty to sell real estate for the best obtainable price, and to that extent at least he was "trustees for the heirs" and as such was authorized to appeal from the order directing him to sell at the low price. *Ohlfest v. Rosenberg*, 75 N.E. 2d 147 (Ind. 1947).

The problem before the court in the instant case was to determine whether the judgment ordering the completion of the sale to the lower bidder affected the interest of the estate which the administrator represented in such a way that he should be allowed to appeal from it. Since there was no controlling authority on this point,[1] the problem had to be resolved in the light of the more general rights of an administrator to appeal in his representative capacity.

The rights of a representative to appeal in his represent-

1. In Simpson v. Pearson, 31 Ind. 1 (1869) and Staley v. Dorset, 11 Ind 367 (1858), appeals by administrators were dismissed on other grounds, implying that orders for the sale of real estate could be appealed by administrators. However in Hetzell v. Morrision, 115 Ind. App. 512, 60 N.E.2d 150 (1945), it was held that the administratrix could not appeal the denial of such an order, but there were other facts to justify the dismissal of this appeal. Thus there was no explicit authority on the proposition.