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Criminal Law--Pure Food and Drug Act--Misleading Literature Accompanying Drug in Interstate Commerce (Kordel v. United States, 335 U.S. 345 (1948))

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man to breach the peace;¹³ a law making it a crime to advocate the overthrow of government by unlawful force;¹⁴ and a statute penalizing a person who edited printed matter tending to encourage and advocate disrespect for law.¹⁵

In the case under discussion, two factors were present along with the rights of the individual to a fair criminal standard: (1) the local need to stamp out crimes arising from such publications and (2) the ability to strictly define the scope of the subject matter in question. Although it does not deny that a state may punish circulation of objectionable printed matter, the court maintains that the clause "so massed as to incite crime" can become meaningful only by concrete instances, since it has no technical nor common law definition.¹⁶ The dissent expresses doubt as to whether more clarity can be reached. Should the New York legislature enumerate the objectionable publications, or are they to specify in detail the ingredients that incite these violent and depraved crimes?¹⁷ Why does the lewd and obscene which have always been condemned by the courts enjoy a constitutional prerogative over criminal tales that lead to bloodshed?¹⁸ If it be granted that the material considered objectionable can be no more clearly defined by our legislatures, there remains the problem whether the expediency of the state must bow to the individual's right to have notice of an ascertainable standard of guilt. The court here felt that the need did not justify the sanctioning of a statute deemed repugnant to due process of law.

V. O'N.

CRIMINAL LAW — PURE FOOD AND DRUG ACT — MISLEADING LITERATURE ACCOMPANYING DRUG IN INTERSTATE COMMERCE.— Defendant was tried and convicted for violations of Section 301 of the Federal Food, Drug, and Cosmetic Act of June 25, 1938.¹ Each violation arose out of the shipping of a drug in interstate commerce, and the subsequent shipment of explanatory literature to the same consignee, which literature contained certain false and misleading statements, thereby rendering the drug misbranded² within the mean-

¹³ *Chaplinsky v. New Hampshire*, 315 U. S. 568, 86 L. ed. 1031 (1942).

¹⁴ *Gitlow v. New York*, 268 U. S. 652, 69 L. ed. 1138 (1925).

¹⁵ *Fox v. Washington*, 236 U. S. 273, 59 L. ed. 575 (1915).

¹⁶ *Winters v. New York*, 333 U. S. 597, 92 L. ed. 654, 662 (1948).

¹⁷ *Ibid.*

¹⁸ See note 16 *supra*.

¹ 52 STAT. 1040 (1938), 21 U. S. C. § 301 (1946).

"The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded. . . ."

² 52 STAT. 1050 (1938), 21 U. S. C. § 352 (1946).

"A drug or device shall be deemed to be misbranded . . .

(a) If its labeling is false or misleading in any particular. . . ."

ing of the statute.³ Defendant's principal contention was that there could be no crime since the allegedly misleading literature did not physically accompany the drug while in interstate commerce. *Held*, judgment upholding the conviction affirmed. The Act itself does not require, in order to constitute a violation thereof, that the descriptive literature be transmitted contemporaneously with the drug, and the court will not attribute such a meaning to the words of the statute. The statute is not to be narrowly construed where the result of such narrow and technical construction is a frustration of the purpose of the Act which is to protect the innocent consumers. *Kordel v. United States*, 335 U. S. 345, 93 L. ed. 73 (1948).

This question and its various ramifications have had an interesting history in the courts. The Supreme Court decided to hear this case in order to settle a controversy brought on by a contradictory decision of the same question in another circuit.⁴ Originally the Act encompassed only such products as "shall bear" the false and misleading printed matter.⁵ This provision could be circumvented easily by the simple expediency of enclosing the printed matter in the package but not affixed to the bottle or container. Subsequently the Congress attempted to prevent such evasions of the spirit of the law by including explanatory printed materials contained in the package in the text of the law.⁶ But even this was not sufficient. Enterprising drug merchants began sending the descriptive literature under separate cover. In a further attempt to obviate continued exploitation of loopholes in the law, Congress in 1938 again amended the statute to its present form.⁷

Since the latest amendment has been in effect there have been both criminal and civil actions involving its interpretation in most of the federal circuits.⁸ The majority of the circuit courts have held in conformity with the opinion in the instant case, but a few had clung to the theory that the "accompanying" must be physical, and where the descriptive literature was not enclosed in the same package with the drug, the minority of the courts found no violation.

By this present decision the Supreme Court has settled this phase of the controversy. It is now established that descriptive or instructive literature, not otherwise free of the onus of the statute, will come under its prohibitive provisions when there is a "functional"

³ 52 STAT. 1040 (1938), 21 U. S. C. § 321(m) (1946).

"The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

⁴ *Urbuteit v. United States*, 164 F. 2d 245 (C. C. A. 5th 1947).

⁵ 34 STAT. 768 (1906).

⁶ 37 STAT. 416 (1912).

⁷ See note 3 *supra*.

⁸ *United States v. Dotterweich*, 320 U. S. 277, 88 L. ed. 48 (1943), *reversing* 131 F. 2d 500 (C. C. A. 2d 1942); *United States v. Sullivan*, 332 U. S. 689, — L. ed. — (1948), *reversing* 161 F. 2d 629 (C. C. A. 5th 1947).

relationship between the printed material and the drug. It matters not that there is a time interval of weeks, months, or even years⁹ between the shipment of the drug and the mailing of the literature. There is a violation if the court finds the necessary "textual relationship," and this relationship, when found, constitutes "accompanying" within the meaning of the disputed section. As Mr. Justice Douglas said: "One article or thing is accompanied by another when it supplements or explains it, in the manner that a committee report of the Congress accompanies a bill."¹⁰

However, as suggested in the dissenting opinion (in which three justices concurred), there is a need for congressional revision of the phraseology of other sections of the Act, if the courts are to be spared the necessity of further judicial interpretations of ambiguous statutes. Guided by the intent of the law-makers the courts will continue to seek the protection of the unsuspecting consumers, but that worthy purpose can be rendered easier of accomplishment by a timely clarification of the statutes involved.

W. G.

FEDERAL CROP INSURANCE—FEDERAL REGISTER AS EFFECTIVE NOTICE.—Plaintiff, an Idaho farmer, procured crop insurance from the Federal Crop Insurance Corporation¹ after receiving the assurance of local agents of the corporation that the crop was insurable. Thereafter, plaintiff's crops failed and he sought recovery under the terms of the policy. The corporation opposed any recovery under the policy on the ground that the plaintiff's crop was uninsurable. Neither the plaintiff nor the agents knew that under the Wheat Crop Insurance Regulations, which had been duly published in the Federal Register, the crop was actually uninsurable.² The Idaho state court in which the plaintiff brought his action, invoking the doctrine of equitable estoppel, allowed evidence to the effect that plaintiff was not apprised of the regulations and had been misled by the representations of the corporation's agents into believing that the crop was insurable. On appeal to the Idaho Supreme Court judgment for plaintiff was affirmed.³ *Held*, reversed 5 to 4. Estoppel is not applicable here, for the appearance of rules and regulations in the Federal Register is ". . . sufficient to give notice of such [rules and

⁹ One count in the informations against Kordel alleged that the printed matter was posted 561 days after the shipment of the drugs.

¹⁰ *Kordel v. United States*, 335 U. S. 345, 350, 93 L. ed. 73 (1948).

¹ The Corporation, a government agency, was created in 1938 by the Federal Crop Insurance Act, 52 STAT. 72 (1938), 7 U. S. C. § 150 *et seq.* (1946), for the purpose of insuring farmers' crops against loss due to drought and other causes.

² 7 Code Fed. Regs. § 414 (Supp. 1945), 10 Fed. Reg. 1585 (1945).

³ 67 Idaho 196, 174 P. 2d 834 (1946).