Volume 1
Issue 1 *NEW YORK LAW FORUM, vol 1, 1955*

Article 30

January 1955

NOTES

NOTES

ADMIRALTY LAW—CONTRACT OF MARINE INSURANCE WITHIN STATE INSURANCE LAW RATHER THAN FEDERAL ADMIRALTY LAW.—Jurisdiction of admiralty causes is vested in the federal judiciary by the United States Constitution.[1] This jurisdiction is implemented by federal legislation pursuant to the "necessary and proper" clause of the Constitution.[2] The purpose of the special Constitutional provision regarding admiralty jurisdiction was the establishment of a uniform body of federal maritime law, in contradistinction to the provision regarding commerce,[3] wherein an area of regulation was left to the States.[4] Congress has enacted a "saving to suitors" provision[5] under which common law remedies may be pursued in State Court actions of a maritime nature, although the substantive general admiralty law must be applied.[6] The admiralty jurisdiction has been held to extend to all navigable waters of the United States and it has been established that a contract of marine insurance is a maritime contract and is thus cognizable under the admiralty jurisdiction.[7]

In spite of the well-recognized principle that there must be a uniform admiralty law, the Supreme Court of the United States in the case of *Wilburn Boat Co.* v. *Firemen's Fund Insurance Co.*[8] held that there is no judicially established federal admiralty law governing the marine insurance policy terms which were in question, declined to establish such a law, and held on authority of *Hooper* v. *California*[9] and *Nutting* v. *Massachusetts*[10] (both non-admiralty cases) and the McCarran Act[11] that the States have the power to regulate marine insurance in addition to other insurance.[12] The theory that terms of a marine insurance contract must be strictly performed was rejected as not having been established as part of the body of federal admiralty law, despite the minority opinion that a rule of strict performance has been

[1] U. S. CONST. art. III, § 2: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

[2] U. S. CONST. art. I, § 8: "The Congress shall have the Power . . . to make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."

[3] U. S. CONST. art. I, § 8: "The Congress shall have the Power . . . to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes; . . ."

[4] Cooley v. Board of Wardens, 12 How. (53 U. S.) 299 (1851); Knickerbocker Inc. Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834 (1920).

[5] 28 U. S. C. § 1333: "The district courts shall have original jurisdiction, exclusive of the courts of the States of (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

[6] Garrett v. Moore-McCormack Co., Inc., et al., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942).

[7] Insurance Co. v. Dunham, 11 Wall. (78 U. S.) 1 (1870).

[8] 348 U. S. 310, 75 S. Ct. 368, 99 L. Ed. 281 (1955).

[9] 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (1894).

[10] 183 U. S. 552, 22 S. Ct. 238, 46 L. Ed. 324 (1901).

[11] 15 U. S. C. § 1011: "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

[12] Paul v. Virginia, 8 Wall. (75 U. S.) 168 (1868).

established in the admiralty law of this country and the citation of a number of cases therein supporting this view.[13]

In the *Wilburn* case three brothers, merchants in Denison, Texas, bought a small houseboat in Mississippi for the purpose of carrying passengers on Lake Texoma, an artificial lake situated between Texas and Oklahoma. After the vessel was insured against fire and other hazards by defendant insurance company and brought from Mississippi, title was transferred to plaintiff, a corporation owned by the Wilburn brothers, original purchasers of the houseboat. Subsequently, the vessel was destroyed by fire while moored on Lake Texoma.

Defendant denied liability on the ground of breach of the policy terms prohibiting subsequent mortgaging or sale of the vessel or use of the vessel for other than private pleasure purposes, contending that these were valid terms of marine insurance under the general admiralty law. Admitting breach of the policy terms, plaintiff sought recovery on the insurance contract upon the theory that the policy provisions breached were unenforceable under the insurance statutes of Texas.[14]

The major issue presented by the *Wilburn* case is whether the regulation of the terms of a marine insurance policy may constitutionally be controlled by the States, regardless of whether a rule requiring literal fulfillment of every policy term has been established.

The importance of a general maritime law cannot be minimized. The framers of the Constitution, in order to secure this uniformity, did not leave maritime affairs to the commerce clause, but included a special provision, completely pre-empting the entire field of admiralty jurisdiction.[15] In the words of Mr. Justice Story: "The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction."[16] The following quotation from *The Lottawanna* further expresses the same principle: "The constitution must have

[13] Wilburn Boat Co. v. Firemen's Fund Ins. Co., *supra,* note 8 at 326.

[14] Vernon's Rev. Civ. Stat., art. 4890 (1936): "Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void and shall be of no force and effect. Any such provision within or placed on any such policy shall be null and void."

Vernon's Rev. Civ. Stat., art. 4930 (1936): "No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

Vernon's Rev. Civ. Stat., art. 5054 (1936): "Any Contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same."

[15] See note 1 *supra.*

[16] DeLovio v. Boit, 2 Gall. 399, 443, F. C. No. 3,776 (1815).

referred to a system of law co-extensive with, and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."[17]

The reason given by the Court in the *Wilburn* case for its refusal to consider a federal admiralty rule regarding policy terms of marine insurance, was that the field of insurance regulation has been left to the States with the consent of Congress,[18] although it is considered that Congress has the power to regulate insurance under the commerce clause of the Constitution.[19] This is plainly a confusion of the mutually exclusive provisions of the Constitution governing commerce on the one hand and admiralty on the other. The McCarran Act was passed for the purpose of declaring the Congressional intent that regulation of insurance should remain in the States. However, it would seem that the McCarran Act does not authorize the States to supersede the general maritime law as to the force and validity of the terms of marine insurance contracts, but was passed for a different purpose. The interpretation given to the McCarran Act by the Supreme Court in the *Wilburn* case gives permission to the States to revive the diversity of State control in the substantive admiralty and maritime jurisdiction. Thus interpreted, it defeats the purpose of Article III, Sec. 2, and exceeds the powers of Congress.

The minority opinion statement in the *Wilburn* case, that "When State power intrudes upon the uniformity imposed by federal law, its exercise is invalid when applied to maritime litigation. . . ."[20] seems to be the only tenable position in light of the origin and development of the admiralty jurisdiction in the United States.

ANTITRUST LAW—MULTISTATE THEATRE BUSINESS HELD TO CONSTITUTE "TRADE OR COMMERCE" UNDER SHERMAN ACT.—Defendants, multistate operators of legitimate theatres, were charged with violation of the Sherman Act. The Federal District Court dismissed the government's action on motion, on the ground that defendants were not engaged in interstate commerce. The United States Supreme Court, in reversing the dismissal below, held that the business of producing, booking and presenting legitimate theatre attractions on a multistate basis constitutes trade or commerce within the meaning of the Sherman Act, and remanded the case for trial on the issues.[1]

The defendants in this action were three individuals and three corporations controlled by them, engaged in all phases of the legitimate theatre business, including the production of plays in New York and in cities all over the country. They own theatres in many of these cities, and were alleged to have discriminated in favor of their own productions when booking plays into their houses. In a criminal complaint, the government charged them with conspiracy to prevent competition, in violation of

[17] 21 Wall. (88 U. S.) 558, 575 (1874).

[18] See note 11 *supra*.

[19] United States v. Southeastern Underwriters Ass'n, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

[20] Wilburn Boat Co. v. Firemen's Fund Ins. Co., *supra* note 8, at 335.

[1] United States v. Shubert, 348 U. S. 222, 75 S. Ct 277, 99 L. Ed. 213 (1955).

sections one and two of the Sherman Act,[2] which sections in essence prohibit combinations in restraint of trade or commerce among the several states, and monopolization or attempted monopolization of said trade or commerce.

On motion to dismiss, defendants argued that their business did not constitute "trade or commerce" within the meaning of the Sherman Act. The district court granted the motion, citing *Toolson* v. *New York Yankees*,[3] a case in which the Supreme Court recently followed *per curiam* an earlier holding[4] that baseball games performed for profit were not subject to federal anti-trust laws. In the earlier case[5] Mr. Justice Holmes states that in the case of baseball, the transportation across state lines was merely incidental in nature and did not go to the essence of the transaction. Essentially the transactions or games are performed in one or more individual places within individual states and each game is separate and distinct. The unique type of organization existing in professional baseball was cited as one of the controlling reasons for the special treatment of this industry. There was a strong dissent in both of the above cited baseball cases which looked beyond the superficial organization of the game. However, in the *Toolson* case[6] the court pointed out that there had been a considerable period of time in which Congress could have legislated against immunity for the game, and that failure so to act was an indication to the court that *stare decisis* should control. Therefore, the district court held that, by analogy, the defendants' business did not amount to "commerce."

On appeal, the Supreme Court reversed, stating that there was no valid reason to extend this immunity to interstate theatres and pointed out that Mr. Justice Holmes himself, did not extend immunity to fields other than baseball. In the case of *Hart* v. *B. F. Keith Vaudeville Exchange*,[7] where the theatre was involved, he declared for the court that the issue of the incidental nature of transportation across state lines was one of fact for a court to determine.

Many enterprises not usually thought of as being trade or commerce have been judicially declared to be such. Production, distribution and exhibition of motion pictures,[8] medical services to members of a health co-operative,[9] insurance underwriting,[10] and real estate brokerage[11] have all been held to come within the term "trade and commerce" by the United States Supreme Court. In the case of *United States* v. *American Medical Association*,[12] Chief Judge Groner of the Court of Appeals for the District of Columbia concluded that the term *trade* embraced "all occupations in which men are engaged for a livelihood." (However, Mr. Justice Douglas in the *Real Estate*

[2] 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2.

[3] 346 U. S. 356, 74 S. Ct. 78, 98 L. Ed. 64 (1953).

[4] Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922).

[5] *Ibid.*

[6] See note 3 *supra*.

[7] 262 U. S. 271, 43 S. Ct. 540, 67 L. Ed. 977 (1923).

[8] United States v. Paramount Pictures, 334 U. S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948).

[9] American Medical Association v. United States, 317 U. S. 519, 63 S. Ct. 326, 87 L. Ed. 434 (1943).

[10] United States v. South Eastern Underwriters Ass'n, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

[11] United States v. National Association of Real Estate Boards, 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950).

[12] United States v. American Medical Ass'n, 72 App. D. C. 12, 16-20, 110 F. 2d 703 (1940).

Board case[13] intimated that such a wide definition would not be applicable to the professions).

There have been several instances in which the New York courts have specifically held the theatre business not to be trade or commerce. It has been held in a criminal case that owning, controlling and leasing theatres, producing plays and booking contracts were acts not constituting commerce.[14] In another New York criminal prosecution charging defendant with conspiracy to commit acts injurious to trade or commerce[15] it was held in *People* v. *Klaw*[16] that the producing of plays and entertainments and the booking of contracts for the production of said plays is not trade or commerce. The court in the *Klaw* case cited as authorities decisions by Mr. Justice Strong[17] and Chief Justice John Marshall.[18] However, both of these latter cases predate the Sherman Act and cannot fairly be held to apply squarely to its interpretation.

At present it appears that the immunity of baseball from anti-trust legislation is unique. This immunity is due almost solely to the influence of Mr. Justice Holmes. His attitude toward anti-trust legislation, in at least one stage of his career, was summed up in a letter written to Sir Frederick Pollock in 1910, in which he said, "(o)f course I enforce whatever constitutional laws Congress or anybody else sees fit to pass, and so in good faith to the best of my ability—but I do not disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence."[19] With this attitude as a background, it is easy to see how the unique factual situation of the baseball case[20] would provide an escape from the strict interpretation of the law to the mind of this most able jurist. However, this attitude of Justice Holmes is not in favor today. If there is to be any trend in this phase of the law it most probably will be in the direction of the broader interpretation of Judge Groner.[21]

[13] See note 10 *supra.*

[14] People v. Newman, 109 Misc. 622, 180 N. Y. Supp. 892 (Ct. Gen. Sess., N. Y. Co., 1919).

[15] L. 1881, c. 676, now N. Y. PENAL L. §§ 580-6.

[16] 55 Misc. 72, 106 N. Y. Supp. 341 (Ct. Gen. Sess., N. Y. Co., 1907).

[17] Hannibal & St. Joseph R. R. v. Husen, 95 U. S. 465, 128 L. Ed. 527 (1887).

[18] Gibbons v. Ogden, 22 U. S. 1, 6 L. Ed. 23 (1824).

[19] BIDDLE, *The Humanism of Justice Holmes,* New Republic 14 (April 11, 1955).

[20] See note 4 *supra.*

[21] See note 12 *supra.*