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Trade Regulation—Consumer Protection Act—Operation under Federal Consent Decree

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libelous per se to permit recovery without proof of special damages.[13] Since the publication was held to be libelous per se, it was unnecessary to prove special damages. However, after reciting the traditional Washington rule, the court approved the English rule,[14] and Restatement of Torts § 569,[15] in which special damages need not be proved in any action for libel. Thus, the court strongly indicated that the libel per se-libel per quod distinction will be rejected in subsequent decisions. Rejection of this purposeless and confusing distinction would indeed be welcome.

TRADE REGULATION

Consumer Protection Act—Operation Under Federal Consent Decree. In 1961 Washington joined those states which have enacted comprehensive trade regulation statutes.[1] The Washington Supreme Court recently sustained the constitutionality of this statute in an opinion which suggests that the law will have an active future. The state Attorney General brought an action to enjoin alleged monopolization by certain motion picture distributors and theatre owners of second run feature films in the Seattle area. The trial court sustained defendants' motion to dismiss for lack of jurisdiction over the subject matter on grounds that Congress had preempted trade regulation of interstate commerce, that the Washington act would interfere with and burden interstate commerce, and that defendants were excluded from coverage by the act's own terms. On appeal, the Washington Supreme Court reversed. *Held:* Federal antitrust statutes do not preempt the field of trade regulation so as to prohibit state regulation of business activities having sufficient local impact to justify exercise of state police power, even though these activities are an incidental part of interstate commerce. Section 17 of the Consumer Protection Act does not exempt combined interstate and intrastate activities which are subject to regulation—but not in fact regulated by—a federal officer, and does not include operation under federal consent decrees within the meaning of

[13] Velikange v. Millichamp, 67 Wash. 138, 120 Pac. 876 (1912).

[14] Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331, 69 A.L.R. 720 (1930).

[15] "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom."

[1] Consumer Protection Act., WASH. REV. CODE ch. 19.86 (1961). The substantive features and enforcement procedures of the act are detailed in Dewell & Gittenger, *The Washington Antitrust Laws*, 36 WASH. L. REV. 239 (1961).

"regulation." *State v. Sterling Theatres Co.*, 64 Wn.2d 761, 394 P.2d 226 (1964).

The court found little difficulty in disposing of defendants' preemption argument.[2] No federal antitrust statute evinces Congressional intent to occupy the field of trade regulation to the exclusion of state law. Although the United States Supreme Court has never ruled upon the permissible limits of state trade regulation laws which affect business in interstate commerce, it has declined to review one of several state decisions upholding state antitrust statutes against arguments similar to the defendants' contentions in the principal case.[3] The court in the principal case found that there is no pervasive scheme of federal trade regulation, that trade regulation is not an area in which the federal interest is dominant, and that enforcement of the Consumer Protection Act would not hamper administration of federal antitrust laws.[4] The defendants' case having failed to meet these criteria, the court's refusal to uphold the trial court's finding of federal preemption was clearly correct.

Although recognizing the interstate character of defendants' activities, the court found that exhibition of motion pictures was an operation of sufficient local impact to justify use of the state's police power.[5] Thus enforcement of the state act does not burden or interfere with interstate commerce.

Pointing to the provisions of section 17 of the Consumer Protection Act, defendants claimed that they were exempt from coverage:

> Nothing in this act shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington public service commission, the

[2] The Consumer Protection Act makes illegal "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade" and forbids "any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce." WASH. REV. CODE §§ 19.86.030-.040 (1961). This language is nearly identical to that of §§ 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1958).

[3] State v. Southeast Tex. Chap. of Nat'l Elec. Contractors Ass'n, 358 S.W.2d 711 (Tex. Civ. App. 1962), *cert. denied*, 372 U.S. 969 (1963). See State v. Allied Chem. & Dye Corp., 9 Wis.2d 290, 101 N.W.2d 133 (1960); Peoples Sav. Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777 (1960); Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950); Leader Theatre Corp. v. Randforce Amusement Corp., 186 Misc. 280, 58 N.Y.S.2d 304 (Sup. Ct. 1945), all cited by the court in the principal case.

[4] These are the criteria for determining whether Congress intended to preempt a certain field, as set forth in Pennsylvania v. Nelson, 350 U.S. 497, 502-05 (1956).

[5] Citing Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910). The broad scope given to state laws regulating aspects of interstate commerce that are also under federal regulation is exemplified by Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963); Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 372 U.S. 714 (1963); Parker v. Brown, 317 U.S. 341 (1943).

federal power commission or any other regulatory body or officer acting under statutory authority of this state or the United States.[6]

Defendants first argued that their combined intrastate and interstate activities in Washington could be regulated by the Attorney General of the United States in enforcing the Sherman Act. The court rejected this argument's premise that the state act was intended to apply only to cases outside the scope of the Sherman Act, finding that "such an interpretation would be overly restrictive, unreasonable, and would frustrate the clear intent of the legislature."[7] The court therefore held that the Attorney General of the United States was not a "regulatory... officer" within the meaning of section 17. Defendants also contended that they were exempt from the state act because they were presently being "regulated" by consent decrees obtained by federal authorities in an earlier suit against the motion picture industry.[8] The court rejected this contention, finding that "certain surveillance and enforcement activities undertaken . . . pursuant to consent decrees"[9] is not "regulation" within the meaning of the Consumer Protection Act.[10]

WORKMEN'S COMPENSATION

Back Injuries—Absence of Unusual Strain or Exertion. The Washington Supreme Court recently refused to apply the "unusual strain" test used in heart attack cases to back injury litigation. Claimant, a clerk-typist, suffered a herniated intervertebral disc when she twisted around to answer a telephone which rang as she was bending over in the opposite direction. Claimant's employer contended that her injury did not constitute a "sudden and tangible happening of a traumatic nature" within the statutory definition of "injury" in the Industrial Insurance Act. A compensation award by the Board of Industrial Insurance Appeals was upheld by the trial court. On appeal, *held:* Impairment of claimant's skeletal mechanism, sustained in a normal course of employment act without any unusual strain or exertion, is an

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[6] WASH. REV. CODE § 19.86.170 (1961).

[7] 64 Wn.2d at 766, 394 P.2d at 229.

[8] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). Action to prevent a discriminatory price fixing policy by national film distributors acting in concert with movie producers and national theatre chains culminated in that decision.

[9] 64 Wn.2d at 764, 394 P.2d at 229.

[10] WASH. REV. CODE § 19.86.170, *supra* note 6. *Accord,* State v. Texaco, Inc., 14 Wis.2d 625, 111 N.W.2d 918 (1961); State v. Allied Chem. & Dye Corp., 9 Wis.2d 290, 101 N.W.2d 133 (1960).