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Monopolies—Interstate Commerce—Organized Baseball

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Appeals pointed out the irreconcilable conflict of the decisions in this regard, *Reilley v. Steinbart* 217 N. Y. 549, 112 N. E. 468 (1916) and subsequently refused to answer the question directly. *Franklin Sugar Refining Co. v. Lipowicz* 247 N. Y. 465, 160 N. E. 916 (1928). Only recently it has been held that in the absence of an express intention to the contrary the N. Y. Statute of Frauds (N. Y. Pers. Prop. Law Sec. 31(1) is to be characterized as substantive. *Silverman v. Indevco Inc.* 106 N. Y. S. 2d 699 (1951). It was Story's original position that the requirement of writing under the Statute of Frauds is substantive, Story, Conflict of Laws §262 (1st ed., 1834), and his views were urged upon the English court in *Leroux v. Brown*, *supra*.

Professor Morgan has expressed the view that the law of the locus should be applied even to matters of procedure if they are likely to have a material influence on the outcome of the case as long as its application would not violate the public policy of the forum. Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 195 (1944).

It is submitted that the court in the principal case follow the better rule in characterizing the N. Y. Statute of Frauds as substantive. Effect is thus given to the contract valid in the state where made, which has the closest connection with the contract, and the outcome of the case will not depend on the state in which it is tried but will be the same in the forum as well as in the place of the making of the contract.

Phyllis J. Hubbard

MONOPOLIES—INTERSTATE COMMERCE—ORGANIZED BASEBALL

Plaintiff, a professional baseball player, sued the defendant baseball clubs and leagues under the Sherman Act (26 Stat. 209, 15 U. S. C. A. §§1, 2) and Clayton Act (38 Stat. 731, 15 U. S. C. A. §15), alleging that he was deprived of his livelihood by the defendants. The complaint was dismissed for want of jurisdiction over the subject matter; the court holding that baseball was not interstate commerce and defendant's activity was not within the purview of the antitrust legislation. *Toolson v. New York Yankees, Inc. et al.*, 101 F. Supp. 93 (S. D. Cal. 1951).

The Sherman Act was enacted in 1890 in order to suppress devices and practices which tend toward monopolies in restraint of interstate commerce. *U. S. v. Colgate*, 250 U. S. 300 (1919); *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165 (1915); *Northern Securities Co. v. U. S.*, 193 U. S. 197 (1904). Early applications of the statute were limited to activities which were obviously interstate commerce. *U. S. v. Joint Traffic Association*, 171 U. S. 505

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(1898); *Northern Securities Co. v. U. S. supra*, (interstate carriers). Local activities which only affected interstate commerce were not held to be within the scope of the act. *U. S. v. E. C. Knight*, 156 U. S. 1 (1895) (monopoly in sugar industry).

Since these early decisions, the court's interpretation of interstate commerce has been extended to include many local activities which only incidentally affect interstate commerce. These include: manufacturing, *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); agriculture, *Wickard v. Filburn*, 317 U. S. 111 (1942); intrastate railroads, *Houston, East & West Texas Ry. Co. v. U. S.*, 234 U. S. 342 (1914); practice of medicine, *American Medical Association v. U. S.*, 110 F2d 703 (1940), *cert. denied* 310 U. S. 644 (1940); insurance, *U. S. v. South-Eastern Underwriters Association*, 332 U. S. 533 (1944); trade in news among the states, *Associated Press v. U. S.*, 326 U. S. 1 (1945); theatrical productions, *Ring v. Spina*, 148 F2d 647 (1945); motion pictures, *U. S. v. Paramount Pictures*, 334 U. S. 131 (1948); and fixing local prices, *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219 (1948).

Baseball, however, was held not to be interstate commerce in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs et al.*, 259 U. S. 200 (1922). The court based its decision on two grounds: (1) labor expended other than in the production of goods is not commerce; and (2) the transportation of players and equipment across state lines is merely incident to the chief purpose of baseball clubs.

Hooper v. California, 155 U. S. 648 (1895) was cited to support the first test. But the *Hooper* case has been completely undermined by *U. S. v. South-Eastern Underwriters Ass'n.*, *supra*, which held insurance to be interstate commerce within the scope of the antitrust statutes. Similarly, other fields involving the use of labor other than in the production of goods have been found to be commerce under the Sherman and Clayton Acts. *Ring v. Spina, supra*; *Asso. Press v. U. S., supra*; *American Medical Asso. v. U. S., supra*.

The incidental test has been used by the court in several cases to determine whether defendant's activities constituted interstate commerce. *Northern Securities Co. v. U. S., supra*; *Standard Oil Co. v. U. S.*, 193 U. S. 197 (1904); *Apex Hosiery v. Leader*, 310 U. S. 469 (1940). However, this approach was seriously impaired when the court in *Wickard v. Filburn, supra*, ruled that a farmer's production of only 239 bushels of wheat in excess of his quota, set under the Agricultural Adjustment Act of 1938 (52 Stat. 31, as amended 7 U. S. C. §1281 et seq.), had a substantial effect on interstate commerce. This result was reached even though defendant's activities were purely local and the excess wheat was intended for his personal consumption. Cf: *Mandeville Island Farms Inc. v. American*

Crystal Sugar Co., supra; Martino v. Michigan Window Cleaning Co., 327 U. S., 173 (1946); *Mabee v. White Plains Pub. Co.*, 327 U. S. 178 (1946); *Roland Electric Co. v. Walling*, 326 U. S. 657 (1946). *Contra: North American Co. v. Securities Exchange Commission*, 327 U. S. 686 (1946).

The *Federal Baseball case, supra*, was not followed in *Gardella v. Chandler*, 172 F. 2d 402 (2d Cir. 1949). The court distinguished present day baseball from that of 1922 and held it to be now within the scope of the antitrust statutes. Radio and television broadcasting of games were the principal grounds of distinction. The court compared the televising of games to a theatrical production in which the viewers, although in a different state from the source of the broadcast, are the spectators and the players the actors, together forming an indivisible unit.

Organized Baseball has grown considerably since the time of the *Federal Baseball Case*. Today players are more frequently shuttled back and forth across state lines to play games and to carry out their assignments in the extensive farm systems. In 1951 the 16 major league teams owned a total of 175 farm clubs scattered throughout the United States and Canada. World's Series receipts for the 4 games played in 1950 amounted to \$1,928,669.03 of which \$975,000.00 was derived from national radio and television broadcasting of the games. See *Baseball Guide and Record Book 1951*, pp. 130, 158.

It is submitted that Organized Baseball's present interstate features combined with its monopolistic practices are sufficient to bring it within the antitrust acts. Future exemptions from these statutes, if necessary to baseball's continued existence and the public interest, should be made by Congressional enactment and not by the courts.

Robert S. Gottesman

LABOR LAW—UNION LIABILITY FOR CONCERTED ACTION

WHERE THERE IS AN ALTERNATIVE JUDICIAL REMEDY

The plaintiff employed a member of one of the defendant unions who had been fired and suspended for a violation of a union rule. When the plaintiff refused the local Building Trades Council's request that the employee be compelled to pay the fine or be discharged, the Council called the workers off the job and together with the other unions, picketed and boycotted to compel compliance with their demands. An added condition to the resumption of work was the payment of a sum of money to a charity as a penalty on the employer. The employer thereupon sued the Building Trades Council, the participating locals and their agents on two counts for damages arising out of the work stoppage. The Nevada court found for the plaintiff on both counts holding that (1) to compel payment