

Price-Fixing and the Fair Trade Acts

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of harmony among the states, should the issue ever be tried before the High Tribunal.

Economic considerations should be our premise in determining whether or not a minimum wages and hours bill would qualify under the harmony clause. We must show first that such a bill would operate to the welfare of the whole people and not to the benefit of any class as opposed to the interests of another class. Secondly, that a national ruling is necessary to avoid a disharmony that will result from leaving the matter to local legislation.

Social research should account for the first requirement, as well as for the second. To tie the legal technics in with economic and social needs so as to justify a national solution to this problem is the applied science of law, as creative in its usage as the inventor who puts into practical effect the finding of theorists.⁴⁸

SYDNEY SAXON.

PRICE-FIXING AND THE FAIR TRADE ACTS.

Constitutionality of the Fair Trade Acts.

The passage by 42 state legislatures of almost identical Fair Trade Acts represents the culmination of almost thirty years of persistent striving by proponents of resale price maintenance to overcome predatory price-cutting. It seemed, however, that all this work would be of no avail in New York when the first resale price maintenance contract was declared invalid by the Court of Appeals in *Doubleday, Doran & Co. v. Macy & Co.*¹ In this case, the plaintiff publishing company brought an action to restrain the defendant retailer (the plaintiff publisher's vendee) from selling or offering for sale certain books published by Doubleday, Doran & Company at a price less than that stipulated as the retail price of such books in a contract made between such publisher and another retailer of books. Macy's defense was that it had never had anything to do with this agreement made by the plaintiff and the other retailer; that the stipulations as to the resale price of the books of the contracting retailer could not possibly bind Macy & Co., a stranger to this contract; and that the Fair Trade

⁴⁸ The writer wishes to thank Arthur L. Shapiro, St. John's Law School, '38, for much of the editorial comment contained herein.

¹ 269 N. Y. 272, 199 N. E. 409 (1936). See Comment (1936) 34 MICH. L. REV. 691; (1935) 10 ST. JOHN'S L. REV. 319.

statute² violated the due process clauses of the federal³ and state⁴ constitutions.

An analysis of this statute discloses that, in effect, it compels a non-contracting retailer who has actual or constructive notice of the resale price-maintenance agreement to adhere to the stipulated resale price, which other parties have agreed upon, at the risk of a suit for damages or a restraining injunction. Thus let us suppose that *A*, a wholesaler of a trade-marked or specifically labeled product, contracts with his immediate vendee *B*, a retailer, that the latter should not resell *A*'s peculiarly identified product below a fixed price. As a result *C*, another retailer who has notice of the resale price agreement made between *A* and *B*, is bound to sell *A*'s labeled goods at the price *A* stipulated to *B* notwithstanding *C* himself was not in privity of contract with either *A* or *B*. The New York Court of Appeals upheld the defendant Macy's contentions and ruled that the Fair Trade Act⁵ is unconstitutional on the ground that the United States Supreme

² Laws of 1935, c. 976, p. 1902. The New York Law provides as follows: "Section 1. Subdivision 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(b) That the vendee or producer require on delivery to one whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

"2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

"(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(c) By any officer acting under the orders of any court.

"Section 2. *Wilfully and knowingly* advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section one of this act, whether the person so advertising, offering for sale or selling *is or is not a party to such contract* is unfair competition and is actionable at the suit of *any* person damaged thereby. (Italics ours.)

"Section 3. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale price.

"Section 4. The following terms as used in this act, are hereby defined as follows: 'Producer' means grower, baker, maker, manufacturer or publisher. 'Commodity' means any subject of commerce.

"Section 5. If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"Section 6. This act shall take effect immediately."

³ U. S. Const. Amtds. V, XIV.

⁴ N. Y. Const. art. I, § 6.

⁵ Laws of 1935, c. 976, p. 1902.

Court in numerous decisions ⁶ had decided that the state legislatures, in the absence of an emergency, cannot fix the selling price of any and all ⁷ commodities unless the business is "affected with a public interest" and that these books are not so "affected." The plaintiff's answer, that the Fair Trade Act was not price-fixing by the legislature; that it was merely legislative consent or permission for parties to contract as to resale price maintenance of trade-marked or branded articles; and that it therefore bore no relation to the Supreme Court's refusal to allow the state legislatures to fix the selling prices of diverse businesses, was disregarded by New York's highest court with the statement: ⁸

"* * * to arbitrarily fix the price of books by *legislation* and not by *agreement* comes within the condemnation of the decisions which have heretofore dealt with like legislation. What the Legislature cannot do *directly*, it cannot do *indirectly*. Nor does it cease to be a price fixed by the Legislature because that body had clothed the publisher with the power or authority to establish it. For a publisher to agree with its subsidiary or agent to the price of a book which shall thereafter bind all other parties who purchased like books from the publisher is in reality a method whereby the Legislature fixes the price; it is a species of delegated authority." (Italics ours.)

But this very argument of the plaintiff's was later adopted in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*⁹ by the United States Supreme Court who refused to employ the New York Court of Appeals^{7 10} viewpoint.

It is thus seen that the two high courts had two different interpretations of the Fair Trade Act: the New York Court of Appeals finding that the Fair Trade Act is indirect legislative price-fixing and the United States Supreme Court's holding that the statute is not a method of legislative price-fixing but merely legislative *consent* for parties to contract as to resale prices. The United States Supreme Court's position, of course, must be regarded as the ruling law and the New York Court of Appeals in *Bourjois Sales Corp. v. Dorfman*¹¹ expressly overruled its opinion in the *Macy*¹² case by saying that it felt obliged to follow the decision of the nation's highest court although distinctions in the facts could be drawn between the

⁶ *Munn v. Illinois*, 94 U. S. 113 (1877); *Brass v. Stoeser*, 153 U. S. 391, 14 Sup. Ct. 857 (1894); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612 (1914); *Tyson v. Banton*, 273 U. S. 440, 47 Sup. Ct. 426 (1927); *Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 548 (1928); *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 Sup. Ct. 115 (1929).

⁷ *Doubleday, Doran & Co. v. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936).

⁸ *Id.* at 281-282, 199 N. E. at 410.

⁹ 299 U. S. 183, 57 Sup. Ct. 139 (1936).

¹⁰ *Doubleday, Doran & Co. v. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936).

¹¹ 273 N. Y. 167, 7 N. E. (2d) 30 (1937).

¹² See note 10, *supra*.

Macy and the *Seagram*¹³ cases. In the former case, it will be recalled, the defendant retailer never signed a resale price maintenance agreement, while in the latter, Seagram distillers signed a price agreement but violated it. The New York Court of Appeals agreed, however, that under the Fair Trade Act these distinctions were a matter of emphasis and not of principle.

To reason as New York's highest court did, that starting with the premise (which the Supreme Court subsequently overruled¹⁴) that the Fair Trade Act was a price-fixing statute by indirection, it would seem that the Court of Appeals decided as a matter of law¹⁵ that these books, stamped with the publisher's name, are not "affected with a public interest" and consequently their selling price can not be fixed by the Legislature for the Supreme Court of the United States had set up a standard¹⁶ as to which businesses' prices could be regulated. A close examination of the Supreme Court's criterion, so assiduously followed by the Court of Appeals¹⁷ of New York, reveals that this old standard itself lacked standardization and was virtually repudiated in 1934, two years before the *Macy* case was decided, in *Nebbia v. New York*¹⁸ by the Supreme Court. The Court

¹³ *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139 (1936).

¹⁴ *Ibid.*

¹⁵ (1935) 10 ST. JOHN'S L. REV. 319.

¹⁶ See note 6, *supra*.

¹⁷ *Doubleday, Doran & Co. v. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936).

¹⁸ *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934) (That there is nothing omnipotent and absolute about property rights and that business must and can be regulated for the best interests of the public is settled. The state's limitation in infringing on the due process clause is that the exercise of the legislature's actions be neither arbitrary, unreasonable, discriminatory, nor irrelevant to the desired ends. But the price-fixing action of the state legislatures was overturned by the Supreme Court as unconstitutional from 1894 to 1934 for the illusory reason that the "businesses were not affected with a public interest" and not because the legislatures' action was arbitrary, unreasonable, discriminatory, or irrelevant to the desired economic purposes. Not only did Justices Holmes, Brandeis, and Stone in dissenting opinions decry this incomprehensible and arbitrary test of price-fixing, but the majority of the bench and of the bar did likewise. See Hamilton, *Affection with a Public Interest* (1930) 39 YALE L. J. 1089 (1930); Finklestein, *From Munn v. Illinois to Tyson v. Banton* (1927) 27 COL. L. REV. 769; Note (1929) 39 YALE L. J. 256; Hale, *The Constitution and the Price System* (1934) 34 COL. L. REV. 401; Merrill, *New Judicial Approach to Price Fixing* (1929) 18 KY. L. J. 1; see dissenting opinions: of Mr. Justice Holmes in *Tyson v. Banton*, 273 U. S. 440, 47 Sup. Ct. 426 (1927); of Mr. Justice Stone in *Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 548 (1928); of Mr. Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 Sup. Ct. 371 (1932). Finally in 1934 the Supreme Court with a changed personnel, in the *Nebbia* case overthrew the Supreme Court's interpretation of "businesses affected with a public interest" as a guiding principle for price fixing and this time the majority opinion written by Mr. Justice Roberts, using all the arguments of the justices that were formerly in the minority, said: "The phrase, affected with a public interest, can in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." And in another place the majority opinion

decided that a business' prices are subject to legislative control if it is found (by the Court) that the general public is in danger of being subjected to abusive prices. However, to reiterate, after the *Seagram*¹⁹ case, the New York Court of Appeals reversed its earlier decision, followed the Supreme Court in *Bourjois Sales Corp. v. Dorfman*,²⁰ and ruled that the Fair Trade Act was constitutional.

Background of the Fair Trade Statutes.

The first Fair Trade statute was enacted in California in 1931²¹ and at this time new conditions, which had their origin in post-war prosperity, were prevalent in business.²² Manufacturers and producers of certain articles such as different kinds of soaps, powders, various toilet articles, liquors, patent medicines, perfumes, and canned, boxed and bottled foodstuffs spent large sums of money to make their products well known by advertising through billboards, newspapers, magazines and the radio, and created a great demand for these articles and their peculiar identifying marks, labels and names. The resulting popularity and fame of these products was utilized as so-called "loss-leader," "bait" and cut-rate schemes by certain large retailers, department and cut-rate stores as a means of enticing the general public to do business with them and obtain unheard of "bargains." Many stores sold some of these well-known goods not only at a lower price than competitors, but at a price below cost in efforts to induce customers, who know the well-advertised articles' prices, to believe that in these business places all articles were sold at cheaper prices than in other stores. Soon the prestige and good-will of the label, trademark, brand or name of the manufacturer was damaged and he began to try to induce his retailer-vendees to sell his branded article at a standard price but, in general, his efforts at price-fixing were unsatisfactory.

A conference with his legal advisers probably informed him, if he did not already know it, that the public policy of the courts since

read: "The due process clause makes no mention of sales or of prices any more than it speaks of business * * *. The thought nevertheless seems to have persisted that there is something peculiarly sacrosanct about the price one may charge * * * and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of *directly* controlling the price itself. This view was negated many years ago".

¹⁹ See note 13, *supra*.

²⁰ 273 N. Y. 167, 7 N. E. (2d) 30 (1937).

²¹ CAL. GEN. LAWS (Deering 1931) § 8782, p. 4910, amended CAL. GEN. LAWS (Deering 1933 Supp.) § 8782, p. 2396.

²² SAYRE and KELLEY, MAINTENANCE OF RESALE PRICES (1927); SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932); Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting* (1936) 24 CALIF. L. REV. 640; BURNS, DECLINE OF COMPETITION (1936); U. S. FED. TRADE COM., REPORT ON RESALE PRICE MAINTENANCE (Part I, 1929) (Part II, 1931); CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933).

the passage of the Sherman Anti-Trust Act²³ in 1890 was free, open and unrestricted competition for it was believed by the leading economists, the bench and the public in these "rugged individualistic" days that such competition benefited the public in obtaining cheaper prices.²⁴ And as a result early attempts by manufacturers to maintain and standardize prices of goods made under secret process, trademarked, branded or labeled articles were struck down by the federal²⁵ and most of the state courts²⁶ as a violation of the Sherman²⁷ and the later-passed Clayton Anti-Trust²⁸ and Federal Trade Commission²⁹ Acts. Legislative price-fixing was forbidden by the Supreme Court from 1892 until 1934 unless the majority of the Justices thought the "business was affected with a public interest."³⁰ In the interim, the manufacturer's attempts at price-fixing by means of contracts, both express and implied,³¹ between manufacturers and retailers to standardize prices, various methods by which the manufacturers attempted to sell their articles subject to a price restriction or condition,³² and the employment of blacklists³³ (the listing of names of retailers who

²³ 28 STAT. 209 (1890), 15 U. S. C. § 1 (1934).

²⁴ For a review of the state court decisions, see SELIGMAN AND LOVE, *op. cit. supra* note 22, at Appendix III, pp. 460-470; 7 A. L. R. 449 (1920); Dunn, *Resale Price Maintenance* (1923) 32 YALE L. J. 676; *United States v. A. Schrader's Sons, Inc.*, 252 U. S. 85, 40 Sup. Ct. 251 (1920); *United States v. Trenton Potteries Co.*, 273 U. S. 392, 47 Sup. Ct. 377 (1927); *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139 (1936).

²⁵ *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616 (1913) (This case was held to be governed by the rule that a patentee who has parted with a patented article by passing title to the purchaser has placed the article beyond the limits of the monopoly secured by patent legislation. In *Free American Graphophone*, 246 U. S. 8, 26, 38 Sup. Ct. 257 (1918), the Supreme Court struck down a stipulation that patented articles should not be resold at prices other than those fixed presently from time to time by the patent owner and suggested that if this view resulted in damage to the patent holder's rights or if the law afforded insufficient protection to the inventor, *the remedy lay within the scope of the legislature*). (Italics ours.) *Sewing Machine Co. v. Bry-Block Mercantile Co.*, 204 Fed. 632 (W. D. Tenn. 1913); *Ford Motor Co. v. Union Motor Sales Co.*, 244 Fed. 156 (C. C. A. 6th, 1917); see Note (1936-37) 12 WIS. L. REV. 226, 228, n.15.

²⁶ SELIGMAN AND LOVE, *loc. cit. supra* note 24.

²⁷ 28 STAT. 209 (1890), 15 U. S. C. § 1 (1934).

²⁸ 38 STAT. 730 (1914), 15 U. S. C. § 13 (1934).

²⁹ 38 STAT. 717 (1914), 15 U. S. C. § 41 (1934).

³⁰ See note 6, *supra*.

³¹ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376 (1911); *Boston Store of Chicago v. Am. Graphophone Co.*, 246 U. S. 8, 38 Sup. Ct. 257 (1918); *United States v. A. Schrader's Sons, Inc.*, 252 U. S. 85, 40 Sup. Ct. 251 (1920).

³² *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616 (1913); *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412 (1917).

³³ *Federal Trade Commission v. Beech-Nut Co.*, 257 U. S. 441, 42 Sup. Ct. 150 (1922).

refused to follow the producer's price suggestions) were all condemned by the Supreme Court as:³⁴

"illegal restraints of trade * * *. It creates, in effect, a combination for prohibited purposes. The producer having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

The Court also indicated that the manufacturer who sold his product at a price satisfactory to himself parted with his whole title, and therefore was in no position to dictate to his vendee, the sole and absolute owner of the article, as to resale price.³⁵ But it should be noted, as Mr. Justice Sutherland emphasized in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*,³⁶ that while the Supreme Court once held that:³⁷

"a system of contracts between manufacturers, wholesalers, and retail merchants which sought to control the prices of sales by all such dealers by fixing the amount which the consumer should pay, amounted to an unlawful restraint of trade, invalid at common law, and so far as interstate commerce was affected, invalid under the Sherman Anti-Trust Act * * *," there was a strong implication that there was no *constitutional* objection to these contracts for in the same opinion the Supreme Court said:³⁸ "Nor can the manufacturer by rule of notice, *in the absence of contract or statutory right* (Court's italics) even though its restriction be known to purchasers, fix prices for future sales." And the *Seagram*³⁹ opinion points out that this old view of the Supreme Court in condemning price maintenance schemes was based on the fact that they constituted an unlawful restraint of trade and that⁴⁰ "a careful reading of the decisions discloses *no other ground.*" (Italics ours.)

Thus we notice that at the same time the Supreme Court was forbidding direct legislative price-fixing as unconstitutional,⁴¹ it was

³⁴ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 407-409, 31 Sup. Ct. 376 (1911).

³⁵ *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616 (1913); *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139 (1936) (Generally, the right of an owner of property to fix the price at which he will sell the property is an inherent attribute of this property and is protected by the due process clauses of the United States Constitution. The Supreme Court in this case held that the Fair Trade Act makes no exception of the subject matter (trade-marked or labeled goods) of resale price maintenance legislation for the manufacturer or producer of the "identified" product is entitled to have his "good-will", the well-known trade-mark or label, protected).

³⁶ 299 U. S. 183, 57 Sup. Ct. 139 (1936).

³⁷ *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 408 Sup. Ct. 376, 386 (1911).

³⁸ *Id.* at 405, 31 Sup. Ct. at 383.

³⁹ *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139 (1936).

⁴⁰ *Id.* at 184, 57 Sup. Ct. at 384.

⁴¹ See note 6, *supra*.

implying⁴² that legislative permission or consent would permit certain price-maintenance agreements to be made and that these contracts had no constitutional objections. The *Seagram* opinion mentions that from time to time efforts, which bore no fruit until August, 1937, were made to have Congress authorize standardization of price agreements in respect to identified (by means of trade-marks, labels or names) goods and that while the proposed legislation was assailed vigorously in other respects by the bar, public and economic experts, there were no constitutional infirmities suggested.⁴³ But in spite of the inferences that certain contracts as to resale prices were constitutional, the manufacturer's hands were still tied and it seemed as though he were powerless to prevent the predatory price-cutting, for price-maintenance agreements had formerly been denounced by the Supreme Court as illegal restraints of trade.⁴⁴ It took a long time, but finally the manufacturer and his legal aides realized that the Supreme Court's subtle suggestion was that only the legislature could aid resale price maintenance in each individual state for the Federal Anti-Trust legislation of 1890⁴⁵ and 1914⁴⁶ represented the attitude of Congress. Once again fortune smiled on the manufacturer who formerly had successfully resisted legislative price-fixing by pleading the due process clauses, for public and economic opinion had changed and the general majority beliefs in 1931 were that predatory price-cutting was destroying the good-will of the producer's trade-mark, name or label; that the principle that free and open competition was beneficial and desirous did not apply to the cut-rate situation; that the public was being misled and ultimately injured by the "loss leader," "bait," and "bargain" schemes of the cut-rate retailers; and that innumerable small retailers, who could not compete with these unholy tricks, were being driven out of business with a consequent loss of markets for the

⁴² *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139 (1936).

⁴³ *Old Dearborn Distributing Co. v. Seagram Distillers*, 299 U. S. 183, 57 Sup. Ct. 139, 143 (1936) ("It is not without significance that while the proposed legislation was vigorously assailed in other respects, we do not find that any constitutional objection was urged. And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary * * *. While these observations of the court cannot, of course, be regarded as decisive of the question, they plainly imply that the court at the time foresaw no valid constitutional objection to such legislation, for it cannot be supposed that the court would suggest a legislative remedy the validity of which might seem open to doubt"). For Congressional hearing see: *Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 13305*, 63d Cong., 2d and 3d Sess. (1914); H. R. 13568, 64th Cong., 1st and 2d Sess. (1916-17); REP. FED. TRADE COMM. ON RESALE PRICE MAINTENANCE, 70th Cong., 2d Sess., H. Doc. No. 546 (1929).

⁴⁴ See note 31, *supra*.

⁴⁵ 28 STAT. 209 (1890), 15 U. S. C. § 1 (1934).

⁴⁶ 38 STAT. 730 (1914), 15 U. S. C. § 13 (1934); 38 STAT. 717 (1914), 15 U. S. C. § 41 (1934).

manufacturer.⁴⁷ Ironically, the manufacturer who had bitterly fought state legislative attempts to regulate his business' prices now reversed his attitude and appealed to his former adversary to help him fix prices in other people's businesses. And the ever-merciful legislature did so by conceiving the Fair Trade Act.

In 1931 the California State Legislature enacted the first Fair Trade statute⁴⁸ and by August, 1937, forty-two states had passed fundamentally the same Act.⁴⁹ Prior to this, Congress had refused to abandon its old economic concept that resale price-maintenance agreements were economically unsound with the result that such contracts were illegal under the Federal Anti-Trust Statutes⁵⁰ and it was therefore necessary for each individual state to legalize resale price maintenance within its own territory and jurisdiction. Nevertheless, if the manufacturer or producer of identified goods engaged in interstate commerce, he was still violating the federal laws and therefore efforts were continued to have Congress exempt from the Federal Anti-Trust Laws agreements for resale price maintenance which are lawful under state Fair Trade Acts. Congress finally yielded to public opinion and passed the Tydings-Miller Act—an amendment⁵¹ to the Sherman Act

⁴⁷ SAYRE AND KELLEY, *MAINTENANCE OF RESALE PRICES* (1927); SELIGMAN AND LOVE, *PRICE CUTTING AND PRICE MAINTENANCE* (1932); Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting* (1936) 24 CALIF. L. REV. 640; BURNS, *DECLINE OF COMPETITION* (1936); U. S. FED. TRADE COM., *REPORT ON RESALE PRICE MAINTENANCE* (Part I, 1929) (Part II, 1931); CHAMBERLAIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1933); Miller, *The Maintenance of Uniform Resale Prices* (1914) 63 U. OF PA. L. REV. 22; Rogers, *Predatory Price Cutting as Unfair Trade* (1913) 27 HARV. L. REV. 139; Note (1936) 13 N. Y. U. L. Q. REV. 267; Miller, *The Fair Trade Act* (1936) 5 FORD. L. REV. 50; Comment (1936) 31 ILL. L. REV. 793.

⁴⁸ CAL. GEN. LAWS (Deering 1931) § 8782, p. 4910, amended, CAL. GEN. LAWS (Deering 1933 Supp.) § 8782, p. 2396. The amendment reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of § 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

As amended it was adopted by the forty-one other states. The Wisconsin Fair Trade Act, Wis. Laws of 1935, c. 52, p. 80, has a provision for an administrative tribunal to review prices at the protest of anyone who believes them to be unfair or unreasonable.

⁴⁹ It should be noticed that in 1913 New Jersey enacted a statute which made it unlawful for any merchant to cut prices on a trade-marked product where the goods carried a notice prohibiting such practice (N. J. Laws of 1916, c. 106). This was the only form of legislation that sanctioned resale price maintenance until 1931. New Jersey, twenty-two years later, passed a similar statute to the California and New York Fair Trade Acts (N. J. Laws of 1935, c. 58, §§ 1-6).

⁵⁰ 28 STAT. 209 (1890), 15 U. S. C. § 1 (1934); 38 STAT. 730 (1914), 15 U. S. C. § 13 (1934); 38 STAT. 717 (1914), 15 U. S. C. § 41 (1934).

⁵¹ The text of (H. R. 7472) passed the Senate, was signed by President Roosevelt, and became law in August, 1937) the federal price maintenance measure which amends Section 1 of the Sherman Act, 28 STAT. 209 (1890), 15 U. S. C. § 1 (1894), reads as follows:

exempting the state Fair Trade Acts from Federal Anti-Trust Laws—and today those persons desiring to enter into resale price agreements in the states which have Fair Trade Acts can now do so without fear of prosecution under federal law.

In December, 1936, the constitutionality of the Illinois⁵² Fair Trade statute, with similar provisions to the California and New York price-maintenance statutes, was sustained by the United States Supreme Court in *Old Dearborn Distributing Company v. Seagram Distillers Corp.*⁵³ Mr. Justice Sutherland rejected the argument that the Fair Trade Acts were indirect legislative price-fixing and that therefore price-fixing in the distilling business was prohibited as violative of the due process clauses because this business was not "affected with a public interest" and ruled: that prices in respect of identified (by trade-mark, name or label) goods may be fixed under legislative leave or permission by contract between the parties; that the resale price-maintenance statutes' essential aim is to protect the *good-will* of the manufacturer's identified product, a valuable property right entitled to protection; and that retailers can sell the product at any price by stripping off the manufacturer's peculiar identifying mark; that the retailer against whom the statute is aimed is not an innocent purchaser of the identified product, but one who acquired the goods with a pre-existing knowledge of the price-maintenance contract made by the manufacturer with another retailer; that if the retailer elects to buy the identified product with the pre-conditioned price restriction, he should not complain of the price standardization for he was not compelled to buy the goods; and that the Supreme Court accepts the economic opinion of the legislature.

Several months after the *Seagram* decision, the New York Court of Appeals in *Bourjois Sales Corp. v. Dorfman*⁵⁴ expressly overruled its earlier attitude as stated in the *Macy*⁵⁵ case, followed the United States Supreme Court, and ruled that the Fair Trade Act was constitutional in New York State. It would seem, albeit the Supreme Court says that the Fair Trade statutes are not legislative price-fixing but merely legislative permission for certain parties to contract as to resale price maintenance, that the forces that have been endeavoring to

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared illegal: Provided, that nothing herein shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to *intrastate* transactions * * *." (Italics ours.)

⁵² Ill. Smith-Hurd Rev. Stat. of 1935, c. 121½, § 188 *et seq.*

⁵³ 299 U. S. 183, 57 Sup. Ct. 139 (1936).

⁵⁴ 273 N. Y. 167, 7 N. E. (2d) 30 (1937).

⁵⁵ *Doubleday, Doran & Co. v. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936).

obtain judicial consent to fix prices have at last achieved their objective. It has been indicated that all that a manufacturer or producer has to do to compel retailers to sell his goods at a certain price is to label or trade-mark his products. This is undoubtedly one form of price regulation, but if one follows the Supreme Court and refuses to call the Fair Trade scheme legislative price-fixing by indirection as the New York Court of Appeals did in the *Macy* case, it can be called price-fixing by means of a specific legislative sanctioned contract. However, it would seem that even if the United States Supreme Court had agreed with the New York Court of Appeals and ruled that the resale price-maintenance statutes were legislative price-fixing, the nation's highest court would have sustained the constitutionality of the Fair Trade Acts on the basis of its former decision in the *Nebbia*⁵⁶ case (*i.e.*, the danger of abusive prices to the public). It is to be noted that a fundamental difference underlies the two different interpretations. If a court rules that a statute is constitutional legislative *price-fixing*, it (the court) constitutes itself the sole determiner whether the enacted law will benefit the general public. If, however, a statute is ruled to be a constitutional legislative *sanction* for *contractual* price-fixing, the court accepts the economic opinion of the legislature. In the former case, the court assumes an omnipotent and omniscient role, while in the latter instance, it altruistically allows the legislature to enact its economic concepts.

A close analysis of the Fair Trade Acts provokes much astonishment and conjecture as to how the Supreme Court arrived at its conclusion that this is price-fixing by contract.⁵⁷ Under the statutes, the manufacturer has merely to find one person, possibly an agent, to contract with and all the other retailers who have been notified of the stipulated price by some mysterious source, or by the manufacturer openly, will be bound notwithstanding they themselves never made any agreement with the producer. And an empty right is given to these non-contracting parties who wish to sell at their prices in the form of a suicidal election not to buy the very popular and much demanded identified product. However, whether the Fair Trade Acts

⁵⁶ *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934); see note 18, *supra*.

⁵⁷ See note 55, *supra*. See also *Seagram Distillers Corp. v. Seyopp Corp.*, N. Y. L. J., Jan. 15, 1938, p. 233, col. 1 (The statute is not unconstitutional notwithstanding the defendant retailer never signed a price maintenance contract for an injunction or damages may only be obtained by a plaintiff if the defendant violator had knowledge of the existence of a resale price agreement. In this case, the proof shows that a letter was received advising it of the existence of fair trade contracts and enclosing a form of such contracts).

It should also be noted that Section 3 of the New York Fair Trade Act (and all the other states have the identical provision) reads that "this act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale price." These, commonly denominated "horizontal agreements" (*i.e.* between wholesaler and wholesaler or between retailer and retailer) in distinction to "vertical" agreement (*i.e.* between wholesalers and retailers), are illegal under the Anti-Trust statutes.

be denominated legislative price-fixing or legislative sanction for price-fixing, it is this writer's opinion that the Supreme Court's decision was a sound and desirable one in view of the aforementioned abusive results of predatory price-cutting. But in a true democracy dissenting voices will always be heard and immediately after the United States Supreme Court upheld the constitutionality of the Fair Trade Acts by accepting the economic opinion of the Legislature that resale price maintenance is essential for the public welfare, opponents of this form of price control began to predict that the Fair Trade statutes would eventually produce greater social evils than those caused by predatory price-cutting, the immediate reason for the procreation of the Fair Trade legislation.

Several months before the *Seagram* case, Judge Rosenman, in *Coty, Inc. v. Hearn Dept. Store*,⁵⁸ denounced the Fair Trade Act as arbitrary, unconstitutional price-fixing and outlined many weaknesses of this form of legislation. His and other⁵⁹ criticisms were: that the prices are fixed, not by a state body, but by private individuals at any level they desire; that no outsider, who may be ultimately bound by the determination, is permitted an opportunity to be heard as to the reasonableness of the prices; that the consumer, who must bear the burden of the increased prices, has no opportunity to state his views; that no machinery is provided for judicial or administrative review of any of the acts of the price-fixers; that there is no standard set up for the contract to be entered into between producer and retailer, by virtue of which contract the conduct of all retailers is to be governed; that discrimination may be made in favor of certain retailers; that no standard is set up which is adjustable to particular conditions in given localities; that no standard is set up to guide non-contracting retailers as to which contract they are bound by for the statute says *any* contract; that the consequent higher prices would encourage boot-legging; and that the cost of living would be raised.

Recent Treatment of the New York Fair Trade Act.

It should be noticed, however, that this disparaging viewpoint of the price-fixing situation under the seemingly unadministratable Fair Trade Acts was an *a priori* one since it was based on purely theoretical arguments and was made before the results of the statute's application to business could be clearly seen. But as the end of 1937 approached, it began to appear that the complaint that discrimination could easily be practiced by the producer of branded or trade-marked articles in favor of some retailers was justified.⁶⁰ It is undoubtedly

⁵⁸ 158 Misc. 267, 284 N. Y. Supp. 533 (1936).

⁵⁹ N. Y. Times, Aug. 20, 1937, p. 1, col. 1.

⁶⁰ Nat. Distillers Products Corp. v. Columbus Circle Liquor Stores, N. Y. L. J., Jan. 18, 1938, p. 272, col. 1; Schimpf v. Macy & Co., N. Y. L. J., Jan. 20, 1938, p. 312, col. 1.

within the power and discretion of the producer of identified products to sue one violator of a resale price contract and yet ignore another's breach. And the Fair Trade statutes provide for no penalty for price-cutting aside from a suit for damages or a restraining injunction. But just as the excitement among retailers began to spread alarmingly and agitation for an amendment to the New York Fair Trade Act grew, the Appellate Division of the Second Department in *Port Chester Wine & Liquor Shop v. Miller Bros.*⁶¹ ruled that one retailer may sue for damages or restrain another retailer from price-cutting though the parties are not in privity of contract on the ground that Section 2 of the New York resale price-maintenance statute reads that "any" person damaged may sue. And the court pointed out that this is proper justice for the retailer who observes contract obligations, bears the brunt of price-cutting by his retail competitor and has a limited property right in the producer's good-will.

In view of the treatment and interpretation that the Fair Trade statute has received in the *Port Chester* case and in other lower court decisions,⁶² it is submitted that a hopeless and disparaging attitude towards the resale price-maintenance situation in New York is unwarranted.

In *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*,⁶³ an injunction was obtained restraining the defendant retailer from selling plaintiff's branded products at prices below those fixed by existing price-maintenance contracts though defendant had never signed such an agreement. Mr. Justice Shientag in a carefully worded opinion sums up recent decisions and points out that: the legislature, instead of formulating certain general rules and leaving them to some administrative agency to apply under varying conditions, has laid down broad general principles and put the burden of interpretation directly on the courts at the instance of private litigants; that the obvious legis-

⁶¹ 253 App. Div. 188, 1 N. Y. Supp. (2d) 802 (2d Dept. 1938).

⁶² *Seagram Distillers Corp. v. Seyopp Corp.*, N. Y. L. J., Jan. 15, 1938, p. 233, col. 1; *Schimpf (Crocker-Evans Service) v. Macy & Co.*, N. Y. L. J., Jan. 20, 1938, p. 312, col. 1; *Nat. Distillers Products Corp. v. Opera Wine & Liquor Corp.*, N. Y. L. J., Jan. 29, 1938, p. 488, col. 5 (Injunction not granted in this case for plaintiff did not show that the equities were in his favor). It will be seen from a study of lower court decisions during the last couple of months that the courts feel that the New York legislature purposely did not provide for any administrative body or agency to review prices at the protest of anyone who finds them unreasonable as did the lawmakers of Wisconsin (Wis. Laws of 1935, c. 52, p. 80) but intended to let the courts decide resale price maintenance disputes according to the equities of each specific case. If for example, the defendant's breach was not deliberate and it (a corporation) specifically pleads in its brief an intention to abide by the terms of the agreement, the plaintiff's motion for an injunction (*Nat. Distillers Products Corp. v. Brandie-Wine Stores*, N. Y. L. J., Feb. 4, 1938, p. 601, col. 1) will not be granted. In the *Seyopp* case, cited in the instant footnote, an injunction *pendent lite* was not granted because the complaint did not allege that the goods which were sold in violation of the statute were acquired by the defendant subsequent to its acquiring knowledge of the resale price agreements.

⁶³ N. Y. L. J., Jan. 20, 1938, p. 312, col. 7.

lative intent is that the Fair Trade statute should receive a broad judicial construction in order to effectuate its primary purpose and to eliminate and minimize any hardship or inequity which may result from its application; that not only should the brand owner be protected but the retailer and consuming public as well; and that equitable principles and safeguards should be applied to prevent the producer from treating the retailer arbitrarily. The learned Justice then goes on to formulate certain rules which the courts should apply in settling disputes between Fair Trade litigants. Among his praiseworthy and outstanding suggestions he indicates that the statute implicitly requires that the prices fixed for resale by retailers be uniform in any one competitive area; that, between the parties, discounts and trade-in allowances are not precluded if made fairly; that manufacturer or producer should diligently seek to prevent price-cutting by means of legal process or by refusing to sell to violators of the statute; and he concludes that experience may show the need of creation of an administrative agency charged with the enforcement of the resale price-maintenance statute. It is to be noted that the Wisconsin Fair Trade Act ⁶⁴ provides for such an administrative agency, but during the three years of the existence of this price review tribunal no appeal has been made by anyone affected by any price-maintenance contract and all the other Fair Trade states have had no opportunity to observe the results and achievements of such a body.

Conclusions.

Thus, to reiterate, it is submitted that the legislators were not entirely unmindful of the general public's ultimate veto power in the form of a boycott on exorbitant-priced branded products and because of this highly potent economic weapon, the power of retailers to check on each other by means of a suit for damages or a restraining injunction, and because of the application of equitable principles as a condition precedent to granting relief to Fair Trade litigants by the courts, many of the fears regarding the workableness of the resale price-maintenance acts may soon prove to be unjustified and groundless.

M. RICHARD WYNNE.

THE MERGER OF LAW AND EQUITY.

Introductory.

The common law courts chained the hands of liberal judges with iron bonds of intricate rules of procedure.¹ Adjective law became the

⁶⁴ Wis. Laws of 1935, c. 52.

¹ The system of common law pleading developed after the Norman Conquest, and was first methodically formed into a science during the reign of