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Constitutional Law--Unfair Competition--Section 2 of the New York Fair Trade Practice Act--Validation of Resale Price Maintenance Agreements (Doubleday, Doran & Co., Inc., et al. v. R. H. Macy & Co., Inc., 269 N.Y. 272 (1936))

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RECENT DECISIONS

CONSTITUTIONAL LAW—UNFAIR COMPETITION—SECTION 2 OF THE NEW YORK FAIR TRADE PRACTICE ACT—VALIDATION OF RESALE PRICE MAINTENANCE AGREEMENTS.—The publisher and manufacturer of books sold to its subsidiary corporation, a dealer of books at retail, certain books under a contract which provided that the vendee would not resell those books except at prices stipulated by the vendor. The publisher and its subsidiary, as plaintiffs, seek to restrain defendant, another retailer, from selling the same books, which had been purchased under no resale agreement, at a price lower than that stipulated between the co-plaintiffs, invoking Section 2 of the Feld-Crawford Fair Trade Practice Act.¹ *Held*, Section 2, as applied to the facts set forth in the complaint, is unconstitutional. Complaint dismissed. *Doubleday, Doran & Co., Inc.*, et al. v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409 (1936).

The legislature may not fix the prices nor regulate the rates of an industry not intimately affected with the public interest.² Railroads,³ the milk industry,⁴ grain elevators,⁵ and insurance companies⁶

¹ N. Y. Laws 1935, c. 975: "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 not 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 in delivery to 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. [subd.] 2. * * *

"Section 2. Willfully 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 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. [Italics, the writer's.]

"Section 3 * * * Section 6 * * *." See Legis. (1936) 36 COL. L. REV. 293 for a detailed consideration of this statute.

² *Munn v. Illinois*, 94 U. S. 113 (1876); *Wolff-Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 Sup. Ct. 630 (1923); *Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 545 (1928). See 3 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2d 1929) 1749 *et seq.*

³ *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169 (1912).

⁴ *Nebbia v. New York*, 292 U. S. 502, 54 Sup. Ct. 505 (1934).

⁵ *Munn v. Illinois*, 94 U. S. 113 (1876).

⁶ *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612 (1914).

are subject to rate control. Theatre-ticket service⁷ and employment agencies,⁸ the gasoline,⁹ ice,¹⁰ food and clothing,¹¹ cream¹² and food-packing¹³ industries are not subject to rate control. A declaration by the legislature that a business is affected with the public interest is not conclusive; in each case it is a question of law for the court.¹⁴ In the instant case the Court of Appeals said that "books, at least these books, are not affected with a public interest"; that no emergency has yet arisen in literary publications, and the business is not such as comes within the class which must submit to rate fixing. Consequently, the legislature had no right to fix arbitrarily the price of books by legislation rather than by agreement, nor did 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 by contract with one other than the defendant.

By way of *dictum* the court reiterates the well-settled rule that the producer is not obliged to sell to those who cut prices,¹⁵ and indicates that the producer may contract with a retailer to sell at a fixed price¹⁶ and thus create an equitable servitude on the chattels.¹⁷ If the words "any contract" in Section 2 of the Act¹⁸ are not construed as binding upon third parties, as they were in the instant case, but rather as binding on the contracting parties, and hence as creating an equitable servitude on the chattels, the Act will fall within this latter *dictum*.

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⁷ *Tyson & Brother v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

⁸ *Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 545 (1928).

⁹ *Williams v. Standard Oil Co. of La.*, 278 U. S. 235, 49 Sup. Ct. 115 (1928).

¹⁰ *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

¹¹ *People v. Gilson*, 109 N. Y. 389, 17 N. E. 343 (1888).

¹² *Wolff-Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 Sup. Ct. 630 (1923).

¹³ *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1, 47 Sup. Ct. 506 (1927).

¹⁴ *Wolff-Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 Sup. Ct. 630 (1923).

¹⁵ *Doubleday, Doran & Co., Inc., et al. v. R. H. Macy & Co., Inc.*, 269 N. Y. 272, 282, 199 N. E. 409, 411 (1936). The leading case for this rule is *United States v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465 (1919). But where a monopoly exists such refusal may not be made. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 42 Sup. Ct. 150 (1922).

¹⁶ *Doubleday, Doran & Co., Inc., et al. v. R. H. Macy & Co., Inc.*, 269 N. Y. 272, 282, 199 N. E. 409, 411 (1936). Such agreements when they affect goods shipped in interstate commerce are held to be invalid under the SHERMAN ANTI-TRUST ACT, 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1926), *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376 (1911). But it is difficult to see why such an agreement would not be valid under the Act in question which would only apply to intrastate goods.

¹⁷ *Chafee, Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 945. However, the court further indicates in the instant case that the price restriction might not extend further to one who subsequently purchased without a restrictive stipulation.

¹⁸ N. Y. Laws 1935, c. 975, *supra* note 1.