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CONSTITUTIONAL LAW-RESALE PRICE MAINTENANCE -FAIR TRADE ACTS

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CONSTITUTIONAL LAW — RESALE PRICE MAINTENANCE — FAIR TRADE ACTS — Four cases upholding the validity of the California and Illinois Fair Trade Acts [1] were recently sustained by the United States Supreme Court. All four cases involved a similar set of facts. Plaintiffs, the owners or authorized distributors of certain well known trade-marked articles, entered into a series of contracts with wholesalers and retailers fixing the resale prices of their branded products. When defendants, certain retailers who had refused to enter

[1] Cal. Gen. Laws (Deering, 1931), Act 8782, § 1-5, amended by Cal. Gen. Laws (Deering, 1933 Supp.), Act 8782, § 1½; Ill. Rev. Stat. (1935), c. 140, § 8-11.

into such agreements,[2] persisted in reselling the articles below the prices stipulated in the contracts with other retailers, plaintiffs sued to enjoin them under the provisions of the state Fair Trade Acts.[3] The injunctions were allowed by the California and Illinois Supreme Courts over the objection of defendants that the statutes were invalid under the due process and equal protection clauses.[4] On appeal to the United States Supreme Court it was *held* that the statutes were legitimate measures designed to protect the good will of a producer as symbolized in his trade-marked goods. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., McNeil v. Joseph Triner Corp., Pep Boys v. Pyroil Sales Co., Kunsman v. Max Factor & Co.*, (U. S. 1936) 57 S. Ct. 139, 147.

Although the courts have usually refused[5] to permit resale price maintenance[6] in the past, the cases contain no suggestion of any constitutional barrier which might bar its legislative validation.[7] In fact, decisions[8] upholding statutes which authorize price agreements or forbid unfair price fixing prac-

[2] The defendant in the Old Dearborn case actually entered into a resale agreement, but since its validity was disputed the Court treated it as invalid for purposes of the decision. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., (U. S. 1936) 57 S. Ct. 139.

[3] "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract . . . 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." Cal. Gen. Laws (Deering, 1933 Supp.), Act 8782, § 1½; Ill. Rev. Stat. (1935), c. 140, § 9.

Literally construed, this section would apply to one who had no knowledge of the price restriction at the time of acquiring the goods. The Court avoids this broad interpretation of the statute on the ground that all of the defendants in the instant cases purchased with notice of the resale price agreements. (U. S. 1936) 57 S. Ct. 139 at 144. See also 34 MICH. L. REV. 1241 (1936).

[4] Max Factor & Co. v. Kunsman, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936); Pyroil Sales Co. v. The Pep Boys, 5 Cal. (2d) 784, 55 P. (2d) 194 (1936); Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929 (1936); Seagram-Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N. E. (2d) 940 (1936).

[5] For a collection of cases, see 7 A. L. R. 449 (1920), 19 A. L. R. 926 (1922), and 32 A. L. R. 1087 (1924).

[6] The term has been defined as "a system whereby the manufacturer endeavors to keep at a level prescribed by him the price of his product charged by retailers and other distributors." SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE 1 (1932).

[7] The Supreme Court itself has intimated that this might be accomplished by legislation: "it must be apparent that if the forebodings [of the cases forbidding resale price maintenance] are real the remedy for them is to be found, not in an attempt judicially to correct doctrines which by reiterated decisions have become conclusively fixed, *but in invoking the curative power of legislation.*" (Italics added.) Boston Store of Chicago v. American Graphophone Co., 246 U. S. 8 at 26, 38 S. Ct. 257 (1918). See also, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373 at 405, 31 S. Ct. 376 (1911).

[8] Ingersoll & Brother v. Hahne, 88 N. J. Eq. 222, 101 A. 1030 (1917), affd., 89 N. J. Eq. 332, 108 A. 128 (1918) (sanctioning resale price agreements); Liberty Warehouse Co. v. Burley Tobacco Growers Assn., 276 U. S. 71, 48 S. Ct. 291

tices, entirely apart from the question of legislative price fixing,[9] are not at all uncommon. It is also generally recognized that the legislature may safeguard the interest of an owner in his trade-mark or brand against infringement or unauthorized display.[10] In view of these considerations, the action of the Court in sustaining the fair trade statutes as similar legislative efforts designed to prevent the unauthorized appropriation of the good will or trade expectancy represented and created by trade-marked products,[11] seems quite sound. Its previous decisions [12] holding resale price agreements invalid under the Sherman Act [13] are not overruled, but are distinguished on the ground that Congress has not acted to legalize such agreements with respect to interstate commerce transactions. In this respect the instant decisions are significant, since they create a direct conflict between federal policy [14] under the Sherman Act and state policy under the Fair Trade Acts. The line of demarcation separating the constitutional spheres of application of each is incapable of exact definition,[15] and remains to be established by the slow process of judicial inclusion and exclusion. The instant cases mark the beginning of this process by recognizing that resale price agreements made in connection with intrastate sales and shipments are governed by state law regardless of the original source of the goods.[16]

(1928) (legalizing horizontal price fixing agreements); Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 S. Ct. 66 (1912) (forbidding price discrimination between different localities); Rast v. Van Deman & Lewis Co., 240 U. S. 342, 36 S. Ct. 370 (1916) (prohibitive tax to eliminate trade inducements); Van Camp & Sons v. American Can Co., 278 U. S. 245, 49 S. Ct. 112 (1928) (prohibiting price discrimination between different persons). But cf. Fairmount Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506 (1927).

[9] The New York Fair Trade law was recently held invalid on the ground that it constituted legislative price fixing. Doubleday Doran & Co. v. R. N. Macy & Co., 269 N. Y. 272, 199 N. E. 409 (1936). See 36 COL. L. REV. 293 (1936); 49 HARV. L. REV. 811 (1936); 34 MICH. L. REV. 691 (1936).

The Court rejected this contention in the instant decisions on the ground that the statutes were entirely permissive, and merely legalized the acts of individuals to contract as they saw fit. (U. S. 1936) 57 S. Ct. 139 at 144.

[10] Complete texts of these statutes are collected in HOPKINS, TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION, 4th ed., 620 et seq. (1924); 2 SHOEMAKER, TRADE MARKS 1028 et seq. (1931).

[11] For a discussion of the injurious effects of retail price cutting and "loss leader" selling, see SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE 162 (1932); 49 HARV. L. REV. 811 (1936); 45 YALE L. J. 672 (1936).

[12] For a review of these decisions, see Dunn, "Resale Price Maintenance," 32 YALE L. J. 676 (1923).

[13] 26 Stat. L. 209, 15 U. S. C., § 1 (1890).

[14] The Sherman Act has been expressly construed to prohibit any resale price agreement directly affecting interstate commerce. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1911); Federal Trade Comm. v. Beech Nut Packing Co., 257 U. S. 441, 42 S. Ct. 150 (1922).

[15] See Powell, "Current Conflicts between the Commerce Clause and State Police Power, 1922-1927," 12 MINN. L. REV. 607 (1928).

[16] While it is possible that resale price agreement with respect to such transactions may operate to reduce the supply of goods moving in interstate commerce, it has been held repeatedly that an effect of this nature is too remote and indirect to

Conversely, it would seem that such agreements looking to the sale or shipment of commodities between parties in different states come within federal supervision.[17] The importance of determining what law shall govern a given transaction is enhanced by the increasing tide of state fair trade legislation,[18] and the repeated rejection of similar measures by Congress.[19]

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come within federal supervision. United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 S. Ct. 623 (1924); Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935).

[17] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1911). See also Klaus, "Sale, Agency and Price Maintenance," 28 COL. L. REV. 312 (1928); 4 U. S. LAW WEEK, index p. 440 (1936).

[18] For a collection of these enactments, see 34 MICH. L. REV. 691 at 693, note 19 (1936). Since the publication of this last citation, four additional states have adopted Fair Trade laws. *Louisiana*: La. Laws (1936), Act 13, § 1-6, p. 62; *Ohio*: Ohio Code Ann. (Page Supp. 1936), § 6402-2 et seq.; *Rhode Island*: R. I. Laws (1936), c. 2427, § 1-6 p. 567; *Virginia*: Va. Laws (1936), c. 321, § 1-9, p. 521.

[19] During the period from 1914 to 1932 thirty bills designed to legalize resale price maintenance were introduced in Congress, but all met with failure. SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE 479 et seq. (1932). Two similar attempts were made during the last session of Congress. S. 3518, 74th Cong., 2d sess. (1936); S. 3822, 74th Cong., 2d sess. (1936).