The decision in the instant case is in line with the weight of authority[11] and is just both from the standpoint of reason and practicability.

M. B.

CONSTITUTIONAL LAW—DUE PROCESS—RESALE PRICE MAINTENANCE[1]—FAIR TRADE ACTS—[United States]—In two recent decisions, hailed as a Magna Charta for producers of trade-marked merchandise,[2] the Supreme Court of the United States has sustained the validity of the Fair Trade Acts of Illinois[3] and California.[4] In each of these cases suit was brought under state Fair Trade Acts which authorize the producer of trade-marked commodities which are in fair and open competition with commodities of the same general class produced by others, to provide in the sales contract that the buyer will not resell such commodity except at the price stipulated by the producer, and that the buyer will require a similar contract from his vendee. The acts further provide that the wilful and knowing selling of any such commodity at less than the price stipulated in such contract, on the part of any party covered by it, is unfair competition and is actionable by any person damaged, regardless of whether or not the person who cut prices is a party to the contract.[5] The acts apply only to vertical agreements, that is, as between persons in successive marketing stages.[6]

The appellants were retail dealers who had cut prices in violation of resale agreements between appellees, the wholesale dealers in certain trade-marked commodities, and certain distributors from whom they had bought.

Diamond Service Station v. Broadway Motor Co., 158 Tenn, 258, 12 S. W. (2d) 705 (1929); Twin City Motor Co. v. Rouzer Motor Co., 197 N. C. 371, 148 S. E. 461 (1929); Spritzer v. Rutgers Chevrolet Co., 12 N. J. Misc. 782, 174 Atl. 881 (1934).

10. Bozeman Mortuary Asso. v. Fairchild, 253 Ky. 74, 68 S. W. (2d) 756, 92 A. L. R. 419 (1934); Contra, Atlas Insurance Co. v. Gibbs, 121 Conn. 188, 183 A. 690 (1936).

11. 2 Berry, *Law of Automobiles* (6th ed. 1929) sec. 1806.

1. For a definition of the term, "resale price maintenance" see Note, 49 Harv. L. Rev. 811 f.n. 1 (1936).

2. Pub. W. 130: 2281, 2283, 2296 (Dec. 12, 1936). Business Week, page 13-14 (Dec. 12, 1936).

3. Old Dearborn Distributing Company v. Seagram-Distillers Coroporation, 57 S. Ct. 139 (Dec. 7, 1936).

4. Pep Boys, Manny, Moe and Jack of California v. Pyroil Sales Company, Inc., 57 S. Ct. 147 (Dec. 7, 1936).

5. Smith-Hurd Rev. Stat., 1935, c. 121½, sec. 188 et seq.; Illinois State Bar Stat., 1935, c. 140, sec. 8 et seq. The California statute is substantially the same: Cal. Stat. 1931, p. 583; Deering's Gen. Laws of California, 1931, vol. 3, Act 8782.

6. "This Act shall not apply to any contract or agreement between producers or between wholesalers or betwen retailers as to sale or resale prices." Supra, note 5, sec. 3. This section forbids the applictaion of the act to "horizontal" price-fixing agreements. See also Fowle v. Park, 131 U. S. 88, 9 S. Ct. 658, 33 L. ed. 67 (1889); Park & Sons Co. v. National Wholesale Druggists' Ass'n., 175 N. Y. 1, 67 N. E. 136 (1903).

The retailers challenged the validity of the Fair Trade Acts on the ground that the right to sell for any desired price is inherent in the ownership of a commodity, and hence the acts, by authorizing a regulation of prices as against those not in privity of contract, were in violation of the due process of law clause of the Fourteenth Amendment.[7]. In answering this objection the court drew a distinction between ownership of the goodwill which makes a commodity saleable and the property right in the commodity itself. The court pointed out that under the acts, if the owner of the commodity removes the name and hence separates the goodwill of the producer from the commodity itself, he may sell the commodity at any price he pleases.[8]

Nearly twenty years ago a New Jersey court in the case of *Ingersoll and Bro. v. Hahne and Company*[9] sustained 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. In *Dr. Miles Medical Company v. Park and Sons Company*[10] the Supreme Court of the United States held that price maintenance contracts similar to those involved in the instant cases were invalid in so far as they affected goods in interstate commerce because they were in violation of the Sherman Anti-trust Act.[10a] Although the court in that case clearly indicated that such agreements might be legalized by an act of the legislature[11] the question of the liability of a non-contracting party for price cutting was involved. The holding in that case has been followed with slight modifications,[12] not only by later federal decisions but also by states which have anti-trust legislation.[13] In the absence of prohibitory legislation the state courts have generally held that resale price agreements are valid, but these holdings have not been extended so as to affect non-contracting parties.[14]

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7. Appellants relied on Tyson & Brother v. Banton, 273 U. S. 418, 71 L. ed. 718 (1926); Wolff Co. v. Industrial Court, 262 U. S. 522, 67 L. ed. 1103 (1922); Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913 (1927); Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287 (1928); New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747 (1931). The court, however, distinguished these cases from the instant cases, holding that they "deal only with legislative price fixing;" and "constitute no authority for holding that prices in respect to 'identified' goods may not be fixed under legislative leave by contract between the patries." Supra, note 3.

8. Supra, note 3.

9. Ingersoll and Bro. v. Hahne and Company, 89 N. J. Eq. 332, 108 Atl. 128 (1918).

10. 220 U. S. 373, 31 S. Ct. 376, 55 L. ed. 502 (1911).

10a. 26 Stat. 209, 15 U. S. C. A. sec. 1 (1890).

11. Supra, note 10, l. c. 405: "Nor can the manufacturer by rule and notice, in the *absence of contract or statutory right*, even though the restriction be known to purchasers, fix prices for future sales."

12. United States v. Colgate & Co., 250 U. S. 300, 39 S. Ct. 465, 63 L. ed. 993, 7 A. L. R. 443 (1919). United States v. General Elec. Co., 272 U. S. 476, 47 S. Ct. 192, 71 L. ed. 362 (1926).

13. Note, 30 Ill. Law Rev. 640 (1936); Note, 49 Harv. L. Rev. l. c. 813, footnotes 7 to 15. For a case holding a resale contract unlawful in Missouri see: Katz Drug Co. v. Sheaffer Pen Co., 6 F. Supp. 212 (D. C. W. D. Mo., 1933) aff'd. 72 F. (2d) 548 (C. C. A. 8, 1934).

14. Note, 30 Ill. Law Rev. 640 (1936).

Since the decision in the *Miles* case several fair trade bills have been unsuccessfully introduced in Congress,[15] but the Tydings Fair Trade Act, which aims at overcoming the decision of the *Miles* case as to goods in interstate commerce, recently passed the Senate, and in view of the decision in the instant cases will probably receive favorable action by the House in the present session.[16] A number of states have enacted Fair Trade Acts which extend to parties not in privity of contract.[17] Although similar bills were introduced in Missouri and Oklahoma, they were unsuccessful.[18]

It has been suggested that the validity of the acts should be upheld as merely applying the doctrine of equitable servitudes to chattels,[19] but this view has been criticized as insufficient on the ground that it begs the question, since there is basically no difference between price fixing by the parties with legislative authorization, as in the principal cases, and price fixing which lacks express permission.[20] Again, it has been proposed that properly to sustain the fair trade acts resort must be had to the broadened concept of due process announced in *Nebbia v. New York*,[21] which extended the established "public interest" test for price fixing by stating that there is no closed category of business affected with a public interest.[22] In that case, the Supreme Court of the United States sustained a statute which provided for the establishment of minimum retail milk prices. However, the New York Court of Appeals in *Doubleday, Doran & Co. v. Macy & Co.*[23] recently declared the New York Trade Act invalid, stating that books are not affected with a public interest so as to come within the class of commodities which may be subjected to price-fixing. The court in that case regarded the act as providing for direct legislative price-fixing. Thus it appears that the implications from the *Nebbia* case taken alone are not sufficient to sustain the acts.

As to the desirability of price maintenance from an economic standpoint there is considerable disagreement. On the one hand it is contended that

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15. 171 Printer's Ink (June 27, 1935) page 7.

16. Business Week (Dec. 12, 1936) page 13.

17. Besides the California and Illinois Statutes, supra, note 5, the following states have passed Fair Trade Bills: *Iowa*, Acts 1935, c. 106; *Maryland*, Laws 1935, c. 212; *New Jersey*, Acts 1935, c. 58; *New York*, Laws 1935, c. 976; *Oregon*, Laws 1935, c. 295; *Pennsylvania*, Acts 1935, No. 115; *Washington*, Sess. Laws 1935, c. 177; *Wisconsin*, Session Laws 1935, Ass. Bill 343. *Arizona, Ohio, Louisiana*, and *Rhode Island* have also recently passed similar acts. Business Week (Dec. 12, 1936) page 13.

18. 171 Printer's Ink (June 27, 1935) l. c. 87.

19. Note, 13 N. Y. U. L. Q. Rev. 267 (1936). The leading case on the doctrine of equitable servitudes is Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (1848). See also Chaffee, Equitable Servitudes on Chattels (1928) 41 Harv. L. Rev. 945.

20. Note, 49 Harv. L. Rev. l. c. 817 (1936).

21. 291 U. S. 502, 54 S. Ct. 505 (1934); see Note, 19 ST. LOUIS LAW REVIEW 202 (1934). See also Notes and Comments, 34 Col. L. Rev. 401 (1934); 47 Harv. L. Rev. 130 (1934); 32 Mich. L. Rev. 382 (1934).

22. This suggestion is made in a Comment, 5 Brooklyn Law Rev. 211 (1936). It is again suggested in a Note, 49 Harv. L. Rev. l. c. 817 (1936).

23. 269 N. Y. 272 (1936).

such agreements tend toward monopoly and higher prices.[24] On the other hand it is argued that the protection given to the owner of the trade-mark extends to the retailer and ultimate consumer because of the elimination of uneconomic practices, such as the sale of "loss leaders" results in lower prices in general.[25]

O. R. A.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—TRADE REGULATION—COMMODITIES EXCHANGE ACT—[Federal].—In 1922 Congress passed the Grain Futures Act[1] providing for the regulation of trading in grain futures (sales for future delivery) in interstate commerce. In 1936 it passed the Commodities Exchange Act[2] amending the Grain Futures Act by extending it to transactions in various commodities other than grain.

In two recent cases, plaintiffs brought suit to enjoin the enforcement of the latter act on the ground that it was a regulation of intrastate commerce and hence not within the power of Congress. In one case the injunction was refused, in the other the bill was dismissed for want of equity.[3]

The judicial interpretation of that clause of the Federal Constitution granting to Congress the power to regulate commerce among the several states has had a kaleidoscopic history. Definition of the concept of interstate commerce has always been a perplexing problem to the courts. As to what is commerce, the earliest cases gave a broad definition, calling it not only "traffic," but the whole of commercial intercourse.[4] In subsequent cases this concept shrank to one of transportation, covering generally whatever was transported, by whatever means.[5]

Public opinion, aroused at attempted monopolies, and changes in its membership[6] caused the Supreme Court to expand the definition again, this time

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24. Note, 30 Ill. Law Rev. l. c. 645 (1936); see also, Goldsmith and Winks, Price Fixing: Nebbia to Guffey (1936) 31 Ill. L. Rev. 179.

25. The Illinois act reads: "An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name." Supra, note 5. Note, 30 Ill. L. Rev. l. c. 646; Pub. W. 130: 2281, 2283, 2296, (Dec. 12, 1936); Business Week, page 13-14 (Dec. 12, 1936); 171 Printer's Ink (June 27, 1935) 7.

1. 42 Stat. 998, 7 U. S. C. A. sec. 3 (1922).

2. 49 Stat.—, U. S. C. A. Aug. 1936 Supp. 92 (1936).

3. Board of Trade of Kansas City v. Milligan, 4 U. S. Law Week 65 (D. C. W. D. Mo., 1936); Moore v. Chicago Merc. Exchange, 4 U. S. Law Week 35 (D. C. N. D. Ill., 1936).

4. Gibbons v. Ogden, 22 U. S. (9 Wh., 6 Curt.) 1, 189, 6 L. ed. 1 (1824).

5. Phila. & Reading R. R. Co. v. Penna., 82 U. S. (15 Wall.) 232, 21 L. ed. 146 (1873); U. S. v. E. C. Knight Co., 156 1, 15 S. Ct. 249, 39 L. ed. 325 (1895).

6. Four new appointments were made between 1895 and 1905, while Mr. Justice Harlan, who had dissented in the Knight case, remained on the bench.