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Power of State to Regulate Price of Resale of Theater Tickets by Brokers

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In the latter case no actual prejudice is likely to result, because the record is ordinarily accessible, and the pleading has notified the defendant of its importance.

If no conviction has taken place he will naturally deny it on cross-examination. If there has been some sort of conviction in fact, but legally defective, as for want of jurisdiction, or insufficiency of the charge to state the necessary offense, or from a failure to enter the judgment as not infrequently happens on a plea of guilty in an inferior court, the defendant is in a position to produce the record itself and thus disclose the legal objection. In case of documents of which the defendant has no notice or warning, and which he may not be able to obtain in the midst of a trial, a cross-examination may be manifestly unfair and prejudicial. He may be forced to make general admissions as to the contents and effect of documents when he is in no position to correct erroneous impressions or raise legal objections by producing the instrument itself.

If the rule is strictly confined to situations like that in the principal case, there is no great practical objection. On the other hand there is no positive reason for breaking in on the general rule, because the prosecution ought to be prepared to produce the record alleged in the information. And our law of evidence is complicated enough without making unnecessary exceptions. If the exception is not strictly confined it leads to all the objections which the best evidence rule was designed to prevent.

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CONSTITUTIONAL LAW—DUE PROCESS—POWER OF STATE TO REGULATE PRICE OF RESALE OF THEATRE TICKETS BY BROKERS.—[United States] In *Tyson & Bros.-United Theatre Ticket Offices, Inc.* v. *Banton*[1] the federal Supreme Court has just decided a question of much interest to theatre-goers of our larger cities. A New York statute[2] required a license from those engaged in the business of reselling theatre tickets, and criminally forbade a charge of more than fifty cents a ticket by licensees for this service. It was admitted that this price afforded a reasonable return for the service. Plaintiff, a corporation engaged in the business of reselling in New York City yearly about 300,000 theatre tickets out of a total of about 2,000,000 thus resold, sought an injunction in the local federal district court against the enforcement of this law by the local state district attorney. From a decree denying this, plaintiff appealed and secured a reversal in his favor by a five to four decision of the Supreme Court.

The opinion of the majority by Mr. Justice Sutherland proceeds chiefly upon the ground that the price at which theatres sell tickets cannot be regulated for lack either of an historical sanction (such as exists for inns, carriers, and grist mills) or of a sufficient public necessity for it—if the price of food and of rents can be limited

1. (1927) 47 Sup. Ct. 426.
2. New York Laws 1922 ch. 590 secs. 167, 168, 172.

only in emergencies, a fortiori is this true of amusements; and that the power to regulate the resale price of tickets depends upon the same considerations. Dissenting opinions by Justices Stone and Sanford, concurred in by Justices Holmes and Brandeis, emphasize the fact that the question is not of the power to regulate the price at which theatre owners may originally sell tickets, but to regulate the price brokers may charge for their services intermediate between the producer and the customer, well compared by Mr. Justice Sanford to the elevator services between producers and consumers of grain, permitted to be regulated as to price in *Munn* v. *Illinois*[3] quite apart from any suggestion that this was dependent upon the power to regulate the sale price of the grain itself. To the writer this seems the preferable analysis of the matter. The facts showed that the ticket brokers of New York subscribed regularly in advance of each production for all of the best seats in the first-class theatres of New York for a period of eight weeks, these advance sales operating in favor of the producers as an insurance against the losses on unsuccessful plays, and giving to the brokers a virtual monopoly of the seats thus purchased which enabled them to make excessive profits from resales to the public. About 25% of unsold tickets could be returned to the theatres. The "brokers" were thus partly true brokers and partly outright purchasers of the tickets, but their position was essentially that of middlemen, occupying a position of marked economic advantage with regard to the ticket-buying public on account of this arrangement with the theatre owners. Considering this difference in function between brokers and producers, it does not seem unreasonable to regulate the charge of the broker for his services, even though admitting that perhaps the producer's price could not be limited.

The principles suggested by Mr. Justice Stone as governing statutory price regulation are also more satisfactory generalizations than those usually attempted. He says:

"The phrase 'business affected with a public interest' seems to me to be too vague and illusory to carry us very far on the way to a solution. . . . It is difficult to use the phrase free of its connotations of legal consequences, and hence, when used as a basis of judicial decision, to avoid begging the question to be decided. . . .

"The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interests and private right are both adequately protected when there is 'free' competition between buyers and sellers, and that, in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified, and hence is a taking of property without due process of law.

"Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this court in which price regulation has been upheld will disclose that the element common to all is the existence of a

3. (1876) 94 U. S. 113.

situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies, or from the circumstance that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy, or consume, as in *Munn* v. *Illinois* supra; or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in *German Alliance Ins. Co.* v. *Kansas* 233 U. S. 389; or from a housing shortage growing out of a public emergency, as in *Block* v. *Hirsh* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman* 256 U. S. 170; *Levy Leasing Co.* v. *Siegel* 258 U. S. 242 (cf. *Chastleton Corp.* v. *Sinclair* 264 U. S. 543)—the result is the same. Self-interest is not permitted to invoke constitutional protection at the expense of the public interest, and reasonable regulation of price is upheld.

"That should result here. . . . Nor is the exercise of the power less reasonable because the interests protected are in some degree less essential to life than some others. Laws against monopoly, which aim at the same evil and accomplish their end by interference with private rights quite as much as the present law, are not regarded as arbitrary or unreasonable or unconstitutional because they are not limited in their application to dealings in the bare necessities of life."[4]

This seems a fair and workable rationalization of the leading cases upon the subject, and one which leaves the doctrine properly flexible for the future.

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CONSTITUTIONAL LAW—SEPARATION OF POWERS—POWER OF SENATE TO ATTACH WITNESS FOR REFUSAL TO TESTIFY BEFORE COMMITTEE.—[United States] The long-awaited decision in *McGrain* v. *Daugherty*[1] was handed down on January 17, 1927, upholding the power of the Senate committee, appointed to investigate certain official conduct of Attorney-General Harry M. Daugherty, to compel the attendance and testimony of his brother, Mally S. Daugherty, a banker doing business at Washington Court House, Ohio. Two subpoenas had been served on M. S. Daugherty by the Senate committee, one requiring him to produce certain books and papers of the bank, the other merely requiring his appearance to give testimony relating to the subject under consideration. Both had been disregarded, but the Senate by resolution had ordered the attachment of his person only to bring him before the Senate to answer questions pertinent to the matter under inquiry, with a recital that his presence was necessary in order that the committee "may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." The witness, having been taken into custody in Cincinnati by a deputy sergeant-at-arms of the Senate, was released on habeas

4. 47 Sup. Ct., at 435-36.

1. (1927) 47 Sup. Ct. 319.