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# **STATE ANTITRUST LAWS**

**PREPARED BY**

**THE  
MARKETING LAWS SURVEY**

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# STATE ANTITRUST LAWS

# FOREWORD

## SCOPE OF THE MARKETING LAWS SURVEY

**T**HE PRIMARY purpose of the MARKETING LAWS SURVEY is the compilation, review, and analysis of the text of all the State laws directly affecting the marketing of goods from the point of production to the point of consumption. Interrelations with Federal marketing laws are suggested.

The scope of the Survey includes the following subjects which will be fully presented in the projected series of publications: Entry into business or market; sales promotion devices; transportation, storage, and warehousing; financing and security; marketing organization and commodity exchanges; cooperatives; regulation of price policies and practices; regulation of monopolies and practices in restraint of trade; barriers to trade between the States, governmental purchasing and distribution; taxes directly affecting the marketing of goods.

Reported decisions of Federal and State courts interpreting State marketing laws will be cited or restated. The legal principles and doctrines evolved in significant cases will be coordinated with and analyzed under each of the topics covered.

Statutes and cases relating to the composition, substantive powers, and procedures of State administrative agencies in the field of marketing will be included.

The compilations will be published in a series of volumes in such form as will be useful as referencé books to Federal and State public agencies, the lawyer, the reséarch worker, and the business executive who is faced with the problem of formulating marketing policies in conformity with the myriad regulatory laws of the various States.

### ACKNOWLEDGMENTS

This publication, *State Antitrust Laws*, is volume one in the series. It is, however, actually the third work to be issued by the Survey. The first *Comparative Charts Illustrating Barriers to Trade Between the States*, was a preliminary and not necessarily exhaustive study of those State laws which on their face or in operation tend to obstruct the marketing of goods in interstate trade. Typical examples were

extracted from state statutes to cover the 10 categories selected by the Council of State Governments; as a summary of a subject that holds national attention, this book has had wide circulation and acceptance. The second publication was a trade barrier digest covering 9 States.

The present work is a factual presentation of the antitrust laws of the 48 States set forth in actual text of the statutory provisions or in summary where, in instances, that was more practical. Decisions of the Federal and State courts interpreting the antitrust provisions of each State from the earliest years of such enactments is an important feature of the present analysis.

The selection and compilation of these statutes and the digests of the applicable court decisions represent the work of the **MARKETING LAWS SURVEY** staff of attorneys and their research assistants employed in Washington, D. C., and in the regional offices at Los Angeles, Chicago, and New York City. Research followed a carefully developed outline of compilation that had been prepared by the Survey in consultation with Federal agencies and groups of recognized authorities in the special field of trade regulatory law. The staff extracted the present compilation from a study of some 400,000 statutory provisions affecting marketing and more than 97,000 court decisions interpreting these acts over a period of 100 years.

The organization, preparation, final review, and analysis of this important body of legislation and its interpretation by the courts was under the general, legal, and technical direction of **IRWIN W. SILVERMAN**, Chief Attorney; **L. THOMPSON BENNETT, Jr.**, Chief Administrative Attorney; and **HERMAN GRANT**, Assistant Chief Administrative Attorney.

Special acknowledgment is made by the **MARKETING LAWS SURVEY** to the many law libraries in each region, including those of Federal and State courts, the law schools of many universities and colleges, legal publishing houses and other private libraries—all of which generously placed their invaluable special facilities at the service of the Survey. This splendid cooperation saved months of labor in selecting and compiling the statutes and court decisions.

A final acknowledgment must be made to the entire staff of this legal Survey, for each had a share in gathering and organizing this volume for publication. Its worth awaits appraisal by the lawyer handling problems of marketing law and by the business executive.

**A. H. MARTIN, Jr.,** *Director.*

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# ANALYSIS OF STATE ANTITRUST LAWS (Scope Note)

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## I. TRUSTS, COMBINATIONS, AND MONOPOLIES

**S**TRIKING but not surprising is the degree of connection between State and Federal antitrust legislation. The events and influences that shaped the course of public opinion, some conspicuous and some obscure, operated through the legislative bodies of State and Nation at the same time. Usually the seeds of legislation in this field produce first fruits in a few States and the enactment of Federal law has had a stimulating effect elsewhere.

The Sherman Antitrust Act of 1890<sup>1</sup> was neither the first nor the last of a series of enactments of the same general character. A dozen States had already established constitutional declarations or statutes to the same end. Two-thirds of the States had fallen in line by 1898. This wave of legislation differed from such later movements as those sponsored by organized groups of special interests. Later legislation favoring farmers' cooperatives or resale price maintenance follows a limited number of definite patterns. Not only long phrases but complete statutes are frequently identical in numerous jurisdictions. The nineteenth century antitrust legislation, however, presents as many variant forms as might be expected from a popular reaction against both the power and the abuses of power of organized business. On the whole the drafting of the State statutes does not reach the moderate standard represented by the Sherman Act. Although enforcement of the national legislation has not been conspicuously successful, a comparatively small number of words have there served to form a basis of governmental restraint upon business abuses at least as effective as that achieved under more verbose State enactments. This is of course partly due to the fact that the Federal administration is

<sup>1</sup> 26 Stat. 209 (1890) (15 U. S. C. A. (1927) Secs. 1-4).

more often able to command the strength and independence to deal with powerful enterprises conducted on a regional or on a national scale.

General antitrust laws, while doubtless promoted in part by popular distrust of big business, make no reference to the absolute or relative size of permissible combinations in the form of corporations or otherwise. The sort of detail encompassed in such State legislation is illustrated by the elaborate Texas Antitrust Law of 1889,<sup>2</sup> which formed the basis of the "Reagan Amendment" to the Sherman bill. The definitions there embodied references to combinations of capital skill or acts,<sup>3</sup> restrictions in trade, commerce or the free pursuit of any lawful business, preventing or lessening competition, fixing or maintaining any standard whereby prices would be in any manner affected or controlled, agreements to withhold any article or commodity from the market or to preclude free and unrestricted competition in its sale or transportation or to pool, combine or unite any interest whereby prices might be in any manner affected, regulating or limiting production, boycotts, and combinations to abstain from business or from the market.

In this and other State statutes of the same type a great variety of expressions connected with production, transportation, sale, purchase, and insurance chiefly hold close to the basic ideas of agreement or combination lessening competition with particular reference to production and price control. The evil almost universally appearing as the central objective of the draftsman seems to be limitation of price competition with a view to raising prices, but arrangements to limit production or combinations of buyers with a view to lowering the prices of commodities or produce fall within the language of all of the statutes in this group.

No uniformity obtains in the remedies for violations, although general similarity to the Sherman Act prevails in several respects. The acts commonly make violations crimes punishable by fines up to a few thousand dollars and by imprisonment for maximum periods

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<sup>2</sup>This statute, Gen. L. 1889, p. 141, rendered inoperative by a technical decision that, while it defined and purported to punish trusts, monopolies and conspiracies in restraint of trade, it did not prohibit or declare them illegal (*Queen Insurance Co. v. State*, 3 Tex. Civ. App. 545, 22 S. W. 1048 (1893)), was substantially reenacted in 1903 (Gen. L. 1903, c. 94, p. 119), with the necessary brief formal declaration to make it operative. Texas has since been one of the few States active in antitrust prosecution.

<sup>3</sup>This phrase used in the definition of trust in the Texas Act was made the basis of a definition of monopoly in the South Carolina Act of 1897, XXII, 434, S. C. Code (1932) Sec. 6625, and expanded into "any union, or combination or consolidation, or affiliation of capital, credit, property, assets, trade, custom, skill or acts, or any other valuable thing or possession." No fruits of such assiduity are manifest.

ranging from 6 months to 10 years.<sup>4</sup> Individuals participating in or causing the violations of corporations are frequently covered by a separate penal section.<sup>5</sup> An unusual section in Tennessee makes all persons and corporations that become members of an interdicted combination jointly and severally liable to pay the debts of each member as fully as if all were partners in the creation of such debts.<sup>6</sup> The attorney general is commonly charged with the duty of instituting proceedings in equity to restrain violations of the act, and jurisdiction of courts to issue the necessary decrees is expressed or unequivocally implied. In lieu of the forfeiture of property provided by section 6 of the Sherman Act,<sup>7</sup> State antitrust legislation, particularly of early vintage, prominently features provisions for the forfeiture of the charters of domestic corporations and for the ouster of foreign corporations from the privilege of doing business in the State. Private parties injured by violations are commonly authorized to sue for double or triple damages. Injunction suits by private individuals to restrain violations of the statutes, not authorized until 1914 by Federal law,<sup>8</sup> were earlier allowed by statute or court decision in several States and are now commonly available. The area covered by the substantive provisions of the Sherman Act was thus thoroughly cultivated by State legislation before the turn of the century, although some States did not enter this field until later and a few still have no antitrust legislation properly so called.

Statutes of 13 States<sup>9</sup> declared that a conspiracy to injure the "public trade" or "trade or commerce" is a misdemeanor, punishable by fine and imprisonment. Horizontal price-fixing arrangements and combinations to prevent competition have been held to be conspiracies within the meaning of such a provision.<sup>10</sup>

<sup>4</sup> E.g., Tex. Stat. (Vernon, 1936) Pen. Code, art. 1637 (Acts of 1907, p. 457). This extreme penalty is exceptional, but occurs in a few other States.

<sup>5</sup> Cf. Clayton Act, 38 Stat. 736 (1914) sec. 14 (15 U. S. C. A. (1927) secs. 22-25).

<sup>6</sup> This, like many other drastic penal provisions, such as forfeiture of property of a combination under sec. 6 of the Sherman Act, does not seem to have been applied to any appreciable extent. The section was once cited in a case affirming the constitutionality of the statute as a whole, but the reports and digests do not seem to afford indication of its application.

<sup>7</sup> 26 Stat. 210 (1890) (15 U. S. C. A. (1927) sec. 6).

<sup>8</sup> Clayton Act, 38 Stat. 737 (1914) sec. 16 (15 U. S. C. A. (1927) sec. 26).

<sup>9</sup> Alabama Code Ann. (Michie, Supp. 1936), sec. 3571; Illinois Rev. Stat. (Smith-Hurd), c. 38, sec. 139; Iowa Code (1939), sec. 13-162; Maine Rev. Stat. (1930), c. 138, sec. 25; Minnesota Stat. (Mason, 1927), sec. 10055; Mississippi Code Ann. (1930), sec. 830; Nevada Comp. Laws (Hillyer, 1929), sec. 10061; New York Cons. Laws (McKinney), vol. 39, art. 54, sec. 580; North Dakota Comp. Laws Ann. (1913), sec. 9441; South Dakota Comp. Laws (1939), sec. 13.0301; Tennessee Code Ann. (Michie, 1938), sec. 11064; Utah Rev. Stat. Ann. (1933), sec. 103-11-1; Washington Rev. Stat. Ann. (Remington, 1932), sec. 2382.

<sup>10</sup> *People v. Dwyer*, 145 N. Y. Supp. 748, 160 App. Div. 542 (1914); *People v. North River Sugar Refining Co.*, 7 N. Y. Supp. 406 (1869) aff'd, 121 N. Y. 532, 24 N. E. 834; *Unckles v. Colgate, et al.*, 25 N. Y. Supp. 672 (1893) aff'd, 148 N. Y.



Three States<sup>8b</sup> punish conspiracies "to defraud the State."

Under such a provision in Oklahoma, it was held that the prevention of competition in the letting of public contracts was an offense within the meaning of the statute.<sup>8c</sup>

State as well as Federal authorities had experience emphasizing the platitude that the enactment of legislative prohibitions and penalties is easier than their effective enforcement. The delays of litigation are particularly acute where complicated states of fact must emerge, from myriad papers and many witnesses, first in the minds of prosecuting attorneys and then in the minds of the members of tribunals usually unacquainted with the business in question. The situation is aggravated where, as frequently, the defendant considers it good policy to refuse all cooperation in the exposition of the facts.<sup>9</sup> The exceptional need for the discovery of evidence was even more acute than the need for expedition. These considerations led to Federal legislation of 1903 known as the Immunity Act<sup>10</sup> and the Expediting Act.<sup>11</sup> The former, and, to a lesser extent, the latter, have their counterpart in State legislation. The correspondence upon a chronological basis, however, is less noteworthy. Missouri originally granted immunity from criminal prosecution for matters disclosed in what are commonly called "antitrust affidavits"<sup>12</sup> and in 1891 Tennessee included immunity provisions in its general antitrust act. State legislation of this kind, however, is otherwise virtually confined to the 12-year period centered on 1903, the year of the first Federal Immunity Act.

Development of workable procedure smacks of sterile legalism to the layman and also to the lawyer-legislator more preoccupied with popular politics than with legal science. Consequently adjective legislation does not pass over the country on waves of popular interest, but grows in a more leisurely fashion. Nevertheless, before 1910 several States had enacted elaborate provisions for discovery, backed at least on paper by potent sanctions as exemplified by an Arkansas stat-

529, 43 N. E. 59; *People v. Sheldon*, 39 N. Y. 251, 34 N. E. 785 (1893); *W & V. Coal Co. v. People*, 214, Ill. 421, 73 N. E. 770 (1905); *Drake et al., v. Siebold*, 30 N. Y. Supp. 697 (1894); *Sultan v. Star Co.*, 174 N. Y. Supp. 52, 106 Misc. 43 (1919).

<sup>8b</sup> Georgia Code Ann. (Park, et al., 1936), secs. 26-4201 to 26-4204; Nebraska Comp. Stat. (1929), sec. 28-301; Oklahoma Stat. Ann. (1936), tit. 21, sec. 424.

<sup>8c</sup> *State v. Young*, 20 Oklahoma Cr. 383, 203 Pac. 484.

<sup>9</sup> Many pages were consumed at the outset of the monumental record in *U. S. v. Standard Oil Company of New Jersey* (see 221 U. S. 1, 9 Cases and Points, p. 13 (1911)) in the examination of the secretary of the defendant corporation, who seemed to know next to nothing about the business of the company or about its records, or who would know about it or them, or where the records were kept or could be found.

<sup>10</sup> 32 Stat. 854 (1903) (22 U. S. C. A. (1927), sec. 86).

<sup>11</sup> 32 Stat. 823 (1903) (15 U. S. C. A. (1927), secs. 28-29).

<sup>12</sup> Mo. Stat. Ann. (1882), c. 47, art. 3, sec. 8728, (L. 1891, p. 186, sec. 7, superseded by L. 1895, p. 237).

ute,<sup>13</sup> and provisions directed at the expedition of proceedings occasionally appear. Lengthy sections specifying procedure for hearings before a master enacted in Massachusetts in 1911,<sup>14</sup> represent perhaps the most matured product of this state of preoccupation with adjective law, but in practice Massachusetts has shared New England's coolness toward antitrust proceedings.

### EXEMPTIONS

Exemptions from antitrust provisions were the first products to be turned out in volume in the post-war period. Early State antitrust legislation attempting to favor farmers had been declared unconstitutional. An Illinois act failed because the exemption of farmers was held to be improper favoritism and the statute could not be upheld with the elimination of the exemption without restricting the freedom of the class the legislature indicated a clear intention to leave unmolested.<sup>15</sup> Kentucky antitrust laws became involved with meaningless phrases about the real value of commodities and were declared unconstitutional by the United States Supreme Court when an examination of their construction by the Kentucky courts disclosed that they were construed so that farmers could do no wrong and industrial corporations were furnished no guide to the manner in which they might escape violation of the act.<sup>16</sup> A Colorado antitrust statute was found unconstitutional because it exempted associations to conduct operations at a reasonable profit or to market at a reasonable profit products not otherwise marketable.<sup>17</sup> The cooperative movement after the World War developed a successful technique of lawful statutory discrimination in favor of farmers. State legislatures hastened to adopt statutes containing lengthy recitals of public policy based upon further recitals of the farmers' inability to meet the buyers on equal terms without cooperation. Cooperatives were authorized to tie their members to exclusive dealing contracts covering long terms of years and extraordinary remedies were provided. Not only were such contracts made specifically enforceable, but legal pressure was frequently brought to bear on third parties as by penalizing a warehouseman who afforded facilities to contract breakers. By way of express exemptions from the antitrust laws, the statutes commonly contain apparently innocuous declarations that cooperatives are not illegal combinations or conspiracies and that they shall be free to control the output of their

<sup>13</sup> Ark. Dig. Stat. (Pope, 1937), secs. 9407-9432. Acts of 1905, No. 1, secs. 1-4.

<sup>14</sup> Mass. Ann. Laws (1933), c. 93, sec. 2 (L. 1911, c. 503, secs. 1-4).

<sup>15</sup> *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679 (1902).

<sup>16</sup> *Int'l. Harvester Co. v. Comm. of Kentucky*, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284 (1914).

<sup>17</sup> *Cline v. Frink Dairy Co.*, 274 U. S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146 (1927).

members. The significant part of this movement is that under the shield of these statutes, which do not on their face necessarily authorize monopolization on a crop basis, such monopolization has sometimes proceeded with limitation of production and destruction of surpluses limited only by the economic power of the agricultural combinations, and cases of successful legal attack are wanting. Labor unions have been the second beneficiaries of widespread exemptions, but declarations that unions do not violate the act have not generally been held to mean that they cannot violate the act by unduly oppressive conduct. The policy of the State with reference to abuses of power by labor unions is thus not encompassed by innocuous exemptions from the antitrust laws.

### ANTITRUST LAWS APPLICABLE TO PARTICULAR KINDS OF BUSINESS

While legislatures have sought to exempt certain favored groups, other groups have been made the subject of special restrictive legislation. The most numerous special acts of this sort relate to railroads. The railroads were early of preponderant economic importance and in many States special favors granted them by way of inducement to extend their lines offered additional reason for subjecting them to special regulation. The exceptional number of nineteenth century statutes relating to the consolidation of railroads, frequently several in the same State, seems largely due to special pressures producing statutes framed in general form but designed to permit a single consolidation only. It is quite apparent that many legislatures were inclined to yield to "just one more" consolidation at a time.<sup>18</sup> The more general statutes of this nature announce but one principle and that with almost innumerable minor variations—extended and feeder lines may consolidate, but parallel and competing lines may not.

Next frequent among the statutes touching railroads which come within the scope of this volume are those directed against pooling freights. A prohibition of this nature was enacted as early as 1873 in Iowa.<sup>19</sup> These laws include enactments closely paralleling the Interstate Commerce Act of 1887<sup>20</sup> in that respect. Indeed, the Missouri

<sup>18</sup> Illinois provides a good example of a multiplicity of consolidation statutes for railroads. None of the following statutes have been regarded as repealing the statutes preceding them in the list. Ill. Rev. Stat. (Smith-Hurd), c. 114, sec. 46 (L. 1875, p. 96 as amended by L. 1895, p. 293); Ill. Rev. Stat. (Smith-Hurd), c. 114, sec. 39 (L. 1883, p. 124); Ill. Rev. Stat. (Smith-Hurd), c. 114, sec. 165 (L. 1885, p. 229 as amended by L. 1925, p. 510); Ill. Rev. Stat. (Smith-Hurd), c. 114, sec. 42 (L. 1893, p. 166); Ill. Rev. Stat. (Smith-Hurd), c. 114, sec. 167 (L. 1897, p. 281); Ill. Rev. Stat. (Smith-Hurd), c. 114, sec. 170 (L. 1907, p. 473); Ill. Rev. Stat. (Smith-Hurd), c. 114, sec. 49c (L. 1929, p. 591).

<sup>19</sup> Iowa Code (1935) sec. 8050 (Code of 1873, sec. 1297).

<sup>20</sup> 24 Stat. 379 (1887) (49 U. S. C. A. (1929) secs. 1-27).

Legislature in extra session in 1887 forthwith enacted the substantial provisions of that statute, so far as applicable to State jurisdiction, including the section against pooling.<sup>21</sup> The Washington Constitution of 1889<sup>22</sup> evidences the same concern. This found legislative expression in different States every few years until the Federal control of railroads was expanded in 1906.<sup>23</sup>

A policy against having railroads interested in other business has had several manifestations. The commodity clause of the Hepburn amendment of 1906 to the Interstate Commerce Act<sup>24</sup> was directed at the interest of common carriers in commodities transported by them. Like legislation occurred in Pennsylvania in 1907<sup>25</sup> and in Kansas in 1911,<sup>26</sup> although the first might be regarded as merely implementing a constitutional prohibition, going back to 1874.<sup>27</sup> As early as 1867, Ohio had limited the stock interest that railroads might hold in grain elevators,<sup>28</sup> and in the last quarter of the century Tennessee specifically forbade any carrier to become a party to any combination to control cotton compressing,<sup>29</sup> and West Virginia forbade railroads to trade in coal.<sup>30</sup> In 1890 South Dakota evidenced concern of the legislature with agreements between railroad companies and a warehouseman to consign property to a warehouse without the consent of the owner,<sup>31</sup> and the same practice was forbidden elsewhere, Wisconsin following suit as late as 1905.<sup>32</sup> In the same year, while the discussion of railroad rebates in general, leading to Federal legislation of 1906 was rife, Nebraska passed a law against rebates in aid of local price-discrimination practices on the part of shippers.<sup>33</sup> Missouri legislation addressed

<sup>21</sup> Mo. Stat. Ann. (1932) c. 32, art. 2, sec. 4798, p. 2185 (L. 1887, ex. sess., p. 15, sec. 5).

<sup>22</sup> Wash. Const. art. XII, sec. 14.

<sup>23</sup> By the Hepburn Amendment to the Interstate Commerce Act, 34 Stat. 584 (1906) (49 U. S. C. A. (1929) secs. 1 (1)-(9), 6, 11, 14, 15, 18, 16 (a), 18, 20, 41).

<sup>24</sup> Same as 23, *supra*.

<sup>25</sup> Directed at the officers and agents and not at the company, Pa. Stat. Ann. (Purdon, 1931), tit. 67, secs. 234, 235 (L. 1907, No. 359).

<sup>26</sup> Kan. Gen. Stat. Ann. (Corrick, 1935) c. 66, art. 1, sec. 66-122 (L. 1911, c. 238, sec. 23).

<sup>27</sup> Const. art. 17, sec. 5.

<sup>28</sup> Ohio Code Ann. (Baldwin's Throckmorton, 1936) sec. 10173 (L. 1867, p. 86, sec. 4).

<sup>29</sup> Tenn. Code Ann. (Michie, 1938) secs. 5524-5526 (L. 1879, c. 160).

<sup>30</sup> W. Va. Code Ann. (Michie and Sublett, 1937) sec. 3101 (Acts 1895, c. 16).

<sup>31</sup> S. D. Comp. Laws (1929) sec. 9763 (L. 1890, c. 99, sec. 23).

<sup>32</sup> Wis. Rev. Stat. (1937) sec. 126.37 (L. 1905, c. 19, sec. 37).

<sup>33</sup> Neb. Comp. Stat. (1929) c. 59, art. 8, sec. 59-815 (L. 1905, c. 162, sec. 15). This section declares it unlawful to transport the property of corporations or combinations soliciting or receiving rebates. A reference to the illegality of transporting the property of any such corporation or combination indulging in local price discrimination is here assumed to cover only corporations and combinations guilty of the acts condemned in the last sentence. The section seems highly penal and should be strictly construed even though the second sentence then subtracts from the first rather than adds to it. No cases have been found on the point.

itself to the subject of interlocking officers of railroads as early as 1887.<sup>84</sup>

The Federal legislation affecting railroads in 1906 approximately marks the end of the period of State activity in that respect. The Interstate Commerce Commission assumed an increasing degree of control, and long before the Transportation Act of 1920<sup>85</sup> marked a reversal of Federal legislative policy which now favored a combination of railroads under administrative control, State legislatures had turned their attention almost exclusively to other fields. Statutes such as that of West Virginia in 1927 remitting the subject of the consolidation of parallel lines to administrative control<sup>86</sup> are merely of passing interest as evidencing the spirit of the times. The subject matter was no longer generally regarded as a matter of systematic State concern.

Several other statutes involving railroads which have not so far been described are included in the body of this compilation, but all the types commonly occurring have been here mentioned and there included, except those centering around the activities of railroad or public utility commissions and those setting forth the regulations to be enforced by such commissions. These statutes are outside the scope of this volume. Analytically, they seem to fall within the distinct field of public utility regulation. While antitrust laws necessarily touch public utilities and intersect the legal arrangements for administrative control, in themselves, they represent a simpler phase of real or attempted Government control over business. Enforced by criminal proceeding, injunction, or damage suit, they do not involve direct control of capital issues or price-fixing, which constitute two of the distinctive features of public utility regulation.

The compilation does include, however, a number of statutes of an antitrust nature affecting public utilities, but largely antedating extensive commission control. As early as Civil War days, Missouri forbade telegraph companies to obtain exclusive rights-of-way for their lines from landowners,<sup>87</sup> and a prohibition in Ohio against the consolidation of parallel telegraph lines also came early.<sup>88</sup> Ohio cities were denied authority to grant exclusive rights in streets to gas companies in 1868<sup>89</sup> and the express mention of telephone companies in that State

<sup>84</sup> Mo. Stat. Ann. (1932) c. 32, art. 2, sec. 4692, p. 2101 (L. 1887, reg. sess., p. 108). This law was repealed in 1939 (L. 1939, p. 280, sec. 1).

<sup>85</sup> 41 Stat. 474 (1920) (49 U. S. C. A. (1929) sec. 1).

<sup>86</sup> W. Va. Code Ann. (Michie and Sublett, 1937) sec. 3107 (Offic. Code (1931) sec. 31-2-11).

<sup>87</sup> Mo. Stat. Ann. (1932) c. 32, art. 6, sec. 4923, p. 2239 (G. S. 1865, p. 349, sec. 7, purporting to amend R. S. 1856, p. 152, sec. 7).

<sup>88</sup> Ohio Code Ann. (Baldwin's Throckmorton, 1936) sec. 9190 (50 v. 274, 238, sec. 48).

<sup>89</sup> Ohio Code Ann. (Baldwin's Throckmorton, 1936) sec. 3969 (66 v. 219, sec. 422).

goes back almost to the earliest days of the telephone.<sup>40</sup> As in the case of railroads, legislation against specific practices, such as the South Dakota statute of 1911 against pooling messages,<sup>41</sup> follows statutes against combinations.

Nebraska paid express attention to the consolidation of street railways as early as 1889,<sup>42</sup> although the statute then enacted was in permissive form, and, as late as 1915,<sup>43</sup> Texas took occasion to forbid the consolidation of competing interurban railways. The decline of electric railway transportation is reflected by such statutes as the Georgia Act of 1924 authorizing electric railways to acquire the securities of bus companies.<sup>44</sup> As previously suggested, however, the bulk of the later statutes falls within the excluded field of public utility laws, only occasional instances being embodied in this collection by reason of more than usual affiliation with the antitrust laws.

Several provisions affecting other public utilities have been included for one reason or another without any attempt to survey that field. They relate, not only to mergers, but to combinations through stockholders. Some prohibit transfer of franchises. Some relate to specific services, such as the hydroelectric industry or motor carriers, but as might be expected from a miscellaneous collection merely adhering, so to speak, to the general antitrust laws, they disclose no particular trend or other significant generalization. Such significance must be sought elsewhere.

Antitrust statutes appear in another field which has also been remitted in most part to administrative control—that of insurance. As early as 1887, Michigan required foreign insurance companies to enter into a bond conditioned that they refrain from combinations in restraint of competition.<sup>45</sup> Missouri legislation of the nineties made special reference to fire, storm, and property damage insurance in connection with the general antitrust laws.<sup>46</sup> Although regulations of a statutory nature relating to combinations, pooling, or other interferences with the competitive process have been strung out over a period of 50 years, the most activity in this field occurred during the 8 years following the insurance scandals of 1906-7. Virtually all kinds of insurance companies are covered by statutes of an antitrust nature in one State or another. Most of the statutes do not refer to all kinds of insurance. Concern with fire insurance and other in-

<sup>40</sup> Ohio Code Ann. (Baldwin's Throckmorton, 1936) sec. 9191 (R. S. 1880, sec. 3471).

<sup>41</sup> S. D. Comp. Laws (1929) sec. 9511 (L. 1911, c. 207, sec. 9).

<sup>42</sup> Neb. Comp. Stat. (1929) c. 74, art. 11, sec. 74-1106 (L. 1889, c. 38).

<sup>43</sup> Tex. Stat. (Vernon, 1936) Civ. Code, art. 6543 (L. 1915, 1st called sess., c. 14, sec. 2).

<sup>44</sup> L. 1924, p. 99 [Ga. Code Ann. (*Park et al.*, 1937) title 94, sec. 94-1010].

<sup>45</sup> Mich. Stat. Ann. (1937) secs. 24.99-24.101 (Mich. Pub. Acts 1887, No. 285).

<sup>46</sup> Mo. Stat. Ann. (1932) c. 47, art. 3, sec. 8728, p. 6503 (L. 1895, p. 237, sec. 1).

demnity for the loss of property seems to be more general than concern with life insurance.

An examination of the statutes collected with emphasis upon chronology gives prominence to the interesting fact that legislation of a particular type seems to run its course in the period of about a decade. A few statutes are likely to be found before the critical period and a scattering few afterward, but nearly every type of statute has a fashionable era, and the length of that era is seldom more than 2 years away from 10 years on either side. This observation can be confirmed to a considerable degree by a comparison of the specific fields here outlined.

Irregular as is the pattern of antitrust legislation among the States, some fairly definite geographical tendencies appear. An examination of the cases would seem to indicate that Texas has been the most aggressive in the enforcement of antitrust policies, with Missouri and Illinois probably following in the order named. Legislators have been particularly active in about one-third of the States, and, roughly speaking, this activity centers in the States intersected by any of the meridians from the ninetieth to the one hundredth.<sup>47</sup> This is related to the fact that among antitrust laws directed expressly at specific activity, livestock, grain, and more or less related farm products form probably the most prominent group of subjects. Although most of these laws are not recent, they partake in large part of one aspect of a modern trend—solicitude for the producer as against the organized distributor and to some extent the unorganized distributor against the more organized. During the period from 1913 to 1921, however, solicitude for the consumer due to the high cost of living was manifest. Statutes were accordingly passed, first chiefly against the destruction of food and then against the storing of food with a view to affecting prices. Several States accordingly provided for limiting the period which food might be stored and for administrative remedies in case of excessively long storage.

After the Ohio statute of 1867 forbidding railroads to hold interest in grain elevators which has already been mentioned,<sup>48</sup> the States in the region from Illinois to Montana and from Kansas to Minnesota all enacted legislation with antitrust aspects, specifically relating in whole or in part to grain. In mass the unsystematic and fragmentary character of this legislation is its most prominent feature.

Illinois came out against future dealings and corners in 1874 by a law which was not amended so as to put transactions on the continually operating and growing board of trade clearly on a legal basis

<sup>47</sup> Wis., Ill., Tenn., Miss., Minn., Iowa, Mo., Ark., La., N. Dak., S. Dak., Nebr., Kans., Okla., Tex.

<sup>48</sup> Ante, p. LIII.

until 1913.<sup>49</sup> Nebraska directed its attention to pooling by dealers in 1887,<sup>50</sup> and several other States have since specifically legislated against that practice. As has been previously mentioned, in 1890 South Dakota directed its fire against combination between railroads and warehousemen to consign grain to a public warehouse without the consent of the owner, and similar legislation was passed in Oklahoma and Wisconsin at intervals during the next 15 years.<sup>51</sup> The latest concern, on the whole, has been with reference to discrimination in the operation or administration of exchanges, the legislative design being to keep the public markets open to all. While no State has anything like comprehensive legislation covering the majority of the points suggested by a perusal of the materials collected in this volume with the requisite attention to local dealers, elevators, transportation companies, and central markets, Nebraska seems to have made the most persistent efforts to deal with the more troublesome aspects. The anti-pooling legislation of 1887 was followed after 10 years by a law directed at combination between dealers and elevators boycotting nonmembers,<sup>52</sup> and the subject of keeping exchanges open was attacked in 1919.<sup>53</sup>

This last date is of course close to the Federal Packers and Stockyards Act of 1921,<sup>54</sup> thus supporting another illustration of the fairly consistent way in which Federal legislation finds earlier prototypes in the States. The closely related subject of livestock exchanges was dealt with in several other States about the same time. Oregon directed its attention to the preservation of competitive bidding in 1919.<sup>55</sup> The Kansas Stock Yards Act was passed in 1920, and the following year Minnesota and South Dakota adopted legislation directed at keeping the exchanges open to all qualified persons without discrimination. For some reason not apparent from the bare record, Indiana got around to legislating against division of territory by buyers of livestock in 1935.<sup>56</sup> A few early statutes specifically refer to livestock, but in the nineteenth century reliance was chiefly upon the general antitrust laws. Prominence was given to the meat packers in the debate leading to the enactment of the Sherman Act and the general antitrust laws so commonly enacted within a few years before or after that time, particularly in the cattle-raising sections of the

<sup>49</sup> Ill. Rev. Stat. (Smith-Hurd), c. 38, sec. 328 (L. 1913, p. 256, amending L. 1874, sec. 130).

<sup>50</sup> Neb. Comp. Stat. (1929), c. 28, art. 11 (d) (L. 1887, c. 114).

<sup>51</sup> Ante, p. LIII.

<sup>52</sup> Neb. Comp. Stat. (1929), c. 59, art. 2 (L. 1897, c. 80).

<sup>53</sup> Neb. Comp. Stat. (1929), c. 59, art. 9 (L. 1919, c. 233).

<sup>54</sup> 42 Stat. 159 (1921) (7 U. S. C. A. (1939), secs. 181-183).

<sup>55</sup> Ore. Code Ann. (1930), sec. 14-869 (L. 1919, c. 33).

<sup>56</sup> Ind. Stat. Ann. (Burns, Supp. 1938), sec. 42-921 (Acts 1935, c. 203, sec. 12).



country, were doubtless relied upon to meet the problem of the packing trust.

The modern dairy business, particularly in milk and cream as distinguished from butter and cheese, is primarily a development of the World War. The great demand for condensed milk built up volume of business, and improvement in refrigeration and transportation extended the so-called milk sheds. It is well known that during and since the bottom of the great depression, extensive regulation of milk production and distribution has been organized in several States. Much economic regimentation is carried on under the guise of health regulation, but also statutes frankly directed at economic regulation have been upheld and applied. From 1917 to 1925, however, the period of greatest activity in the field of antitrust laws affecting the dairy industry specifically, the greatest attention was paid to local price discrimination.

Local price discrimination tending toward monopoly is the subject matter of section 2 of the Federal Clayton Act of 1914. This had precursors in the States as early as 1902,<sup>57</sup> but the Iowa law of 1909<sup>58</sup> was the only pre-war legislation specifically directed at dairy products. After 1925 the emphasis shifts from antimonopoly to legislation against "unfair" discrimination condemned in the Mississippi statute of 1928<sup>59</sup> or unfair competition in buying milk and cream in the Nebraska law of 1931.<sup>60</sup>

Legislation relating to farm products in general is, of course, not clearly to be differentiated from legislation affecting the more specific activities discussed. Statutes in several States relates to farm products in general. Idaho in 1917<sup>61</sup> and Louisiana in 1936<sup>62</sup> legislated against combinations in this field. These States are not, however, exceptions to the practically universal agreement that farmers' cooperatives are not combinations in violation of general or special antitrust laws and that exclusive dealing contracts by them shall not be regarded as violating the antitrust laws or other policies of the States. A larger number of States have been concerned with various aspects of price discrimination affecting farm products. The measures adopted vary

<sup>57</sup> S. C. Code (1932), sec. 6624 (S. C. Acts 1902, No. 574, sec. 3), relates to sales below cost, but seems closely related. The corresponding price discrimination statute is S. C. Code (1932), secs. 6626-6633 (S. C. Stat. (1909) XVI, No. 7).

<sup>58</sup> L. 1909, c. 222 (Iowa Code (1935), c. 432, secs. 9885-9886). Grain was equally within the scope of this act.

<sup>59</sup> Miss. Code Ann. (1930), secs. 4291-4293 (L. 1923, c. 296, sec. 16). This statute still refers, however, for tests of unfairness to the purpose of destroying the business of a competitor or creating a monopoly.

<sup>60</sup> Neb. Comp. Stat. (Supp. 1937), c. 59, art. 10, sec. 59-1001 (L. 1931, c. 7). The test here relates to the tendency to injure those buying or manufacturing or to create a monopoly.

<sup>61</sup> Idaho Code Ann. (1932) secs. 22-1201, 22-1206 (L. 1917, c. 23).

<sup>62</sup> La. Gen. Stat. Ann. (1939) sec. 4957.1 (Acts 1936, No. 136).

from that of the Idaho Act of 1917<sup>63</sup> which prohibits local discrimination without the qualifying references to tendency or effect to be found in section 2 of the Clayton Act, to that of the Utah Act of 1939 which specifically undertook to guard agricultural producers against discrimination by buyers.<sup>64</sup> In the meantime, Nebraska<sup>65</sup> and Missouri<sup>66</sup> had passed statutes against discrimination in the membership or operation of exchanges for farm products in general analogous to the legislation previously mentioned concerning livestock or grain exchanges. In 1925 Tennessee provided, at least on paper, for administrative control against price enhancement.<sup>67</sup>

Overlapping the legislation relating to various types of farm products are the laws particularly directed at the necessities of life. The West Virginia act of 1917 against storing with a view to cornering the market was expressed in terms of necessities rather than in terms of foodstuffs.<sup>68</sup> Some of the provisions of the Federal war-time Lever Act<sup>69</sup> with a like orientation were, in substance, re-enacted in Maine in 1919.<sup>70</sup> In the absence of a general antitrust law, Connecticut in 1911 passed a statute against combinations to increase the price or limit the production of coal, ice, or the necessities of life.<sup>71</sup>

Other specific references to the coal business seem to have been in the nineties. In 1893 Nebraska came out against pooling and price-fixing by coal and lumber dealers.<sup>72</sup> In 1897 Tennessee expressed a particular policy against agreements to raise the price or limit the production of coal.<sup>73</sup> A West Virginia statute of 1895 against railroads trading in coal seems<sup>74</sup> more closely related to the commodity clause of the next decade.

Legislation in several States directed against commission merchants seems to have been confined to a decade commencing in 1913. They were legislatively attacked for price fixing combinations rather than for discrimination.

While the petroleum business has frequently been specifically noticed, reliance has been apparently placed chiefly upon the general antitrust laws for such degree of restraint of concerted activities as

<sup>63</sup> Idaho Code Ann. (1932), secs. 22-1201, 22-1206 (L. 1917, c. 23).

<sup>64</sup> L. 1939, c. 10, sec. 6.

<sup>65</sup> Neb. Comp. Stat. (1929) c. 59, art. 9 (L. 1919, c. 233).

<sup>66</sup> Mo. Stat. Ann. (1932) c. 87, art. 26, secs. 12727-12728, pp. 525-526 (L. 1921, p. 580, secs. 3 and 4).

<sup>67</sup> Tenn. Code Ann. (Michie, 1933), sec. 5891 (Pub. Acts 1925, c. 49).

<sup>68</sup> W. Va. Code Ann. (Michie and Sublett, 1937), sec. 6112 (Acts 2d Ex. Sess. 1917, c. 14).

<sup>69</sup> Litigation centered around the drastic provisions of sec. 4. 40 Stat. 276, 277 (1917) (in force only during the World War).

<sup>70</sup> Me. Rev. Stat. (1930), c. 133, sec. 31 (L. 1919, c. 256 (spec. sess.)).

<sup>71</sup> Conn. Gen. Stat. (1930), sec. 6352 (Pub. Acts 1911, c. 185).

<sup>72</sup> Neb. Comp. Stat. (1929), c. 59, art. 4 (L. 1893, c. 49).

<sup>73</sup> Tenn. Code Ann. (Michie, 1933), sec. 5888 (L. 1897, c. 93).

<sup>74</sup> W. Va. Code Ann. (Michie and Sublett, 1937), sec. 3101 (L. 1895, c. 16).

has existed. A New Mexico statute in 1899 directed against the oil trust by an attempt to control dealers through licensing<sup>75</sup> was declared unconstitutional because a license fee was held to be an undue burden on interstate commerce.<sup>76</sup> The law was amended in 1905 to eliminate this objection.<sup>77</sup> Three statutes against local price discrimination in petroleum products illustrate a trend in the development of formulas in that particular. The Iowa Act of 1906<sup>78</sup> prohibits price discrimination for the purposes of destroying the business of a competitor in any locality and creating a monopoly, the conjunctive form making the effect of the discrimination upon the market as a whole an indispensable element of the offense created by the act. The South Dakota Act of 1923 refers to the purpose of monopoly or of destroying the business of a competitor in the disjunctive,<sup>79</sup> thus offering protection against individual injury where the market is unimpaired. This small variation in form might seem accidental, rather than significant, were it not reinforced by the general trend of price discrimination legislation shortly to be noticed. An Oregon statute of 1933 refers to "unfair" discrimination in the purchase or sale of gasoline, in accordance with the fashion of the time.<sup>80</sup>

The relations of pipe lines were also specifically touched in different aspects. An Oklahoma act of 1909 contains a qualified commodities clause prohibiting pipe lines to own the oil they transport unless they purchase all oil they reach without discrimination,<sup>81</sup> and a California act of 1913 is directed against combinations between railroads and pipe lines.<sup>82</sup> Some statutes in the current decade are limited to declarations that conservation laws with reference to petroleum are not to be taken in derogation of the antitrust laws. The Interstate Compact of 1935 enacted by several of the largest oil-producing states contains a recital that it is not for the purposes of price control.<sup>83</sup> This seems on its face to be a disingenuous recital, a characteristic particularly prevalent in modern legislation. The most recent statutes that might be classified in the field of antitrust legislation are those providing for administrative control of production.

The subject of Government purchasing is to be covered in a projected volume of the Marketing Laws Survey. A few statutes intersecting that field are here included because of their direct relation to

<sup>75</sup> N. M. Stat. Ann. (Courtright, 1929), sec. 24-102 (L. 1899, c. 50).

<sup>76</sup> In re *B. G. Wilson*, 10 N. Mex. 32, 80 Pac. 73 (1900).

<sup>77</sup> N. M. Stat. Ann. (Courtright, 1929), sec. 24-109 (L. 1905, c. 125).

<sup>78</sup> Iowa Code (1935), c. 432 (31 G. A., c. 169).

<sup>79</sup> S. D. Comp. Laws (1929), secs. 7883A-7883D (L. 1923, c. 203).

<sup>80</sup> Ore. Code Ann. (Supp. 1935), secs. 55-1700-55-1713 (L. 1933, c. 317). But reference is still made to intent to suppress competition or create a monopoly.

<sup>81</sup> Okla. Stat. Ann. (1937) tit. 52, sec. 57 (L. 1909, c. 26, sec. 5).

<sup>82</sup> Cal. Gen. Laws (Deering, 1937) art. 5634, sec. 1 (Stat. 1913, c. 285).

<sup>83</sup> Okla. Stat. Ann. (1937) tit. 52, sec. 204, art. V (L. 1935, c. 59).

the preservation of competition. Nebraska adopted a specific measure against pooling and price fixing by bridge contractors in 1907.<sup>84</sup>

In Pennsylvania,<sup>85</sup> Wisconsin,<sup>86</sup> and New York<sup>87</sup> legislation enacted within a space of 6 years before and 6 years after this date appeared to limit the use of patented materials on public work. The peak of the legislation designed to preserve competition in highway and bridge construction, however, occurred during the commodity inflation of the last war and early post-war period. In 1919 Texas resorted to the device of the antitrust affidavit for protection against collusive bids on contracts for State supplies.<sup>88</sup> Such affidavits were a common reliance in the legislation of the nineties, but successful prosecutions for perjury have been indeed rare. The device seemed obsolescent at the beginning of the present century.

At least seven jurisdictions have legislated against combinations in school books. In 1891 Nebraska simply provided for avoiding contracts with members of a combination to raise prices.<sup>89</sup> The bulk of the statutes were passed in the decade from 1905-15, but California legislation followed as late as 1929.<sup>90</sup> The device of the antitrust affidavit so much employed in Texas was there prescribed to stimulate competition among bidders for the opportunity of selling stationery to counties.<sup>91</sup>

Where a statute on a particular subject matter has been found only in one or two States, the reasons are sometimes obviously connected with particular activities in the State where the statute appears, although in most instances such activities are carried on in adjacent States which have ignored the problems or remitted them to attack under the general antitrust laws. Thus it is not surprising to find a Mississippi act specially relating to cotton ginning with a view to separating the control of that operation from operations in cottonseed oil and its byproducts<sup>92</sup> and a statute establishing special commission control over processors of sea food is comparably appropriate there.<sup>93</sup> In view of the large grapefruit output of southern Texas, Texas seems a suitable site for a statute concerning citrus marketing

<sup>84</sup> Neb. Comp. Stat. (1929) c. 59, art. 6 (L. 1907, c. 156, secs. 1-4).

<sup>85</sup> Pa. Stat. Ann. (Purdon, 1931) tit. 53, sec. 9539 (L. 1901, No. 14, art. XV, sec. 2).

<sup>86</sup> Wis. Rev. Stat. (1937) secs. 62.15 (7) and 62.15 (8) (L. 1909, c. 417).

<sup>87</sup> Highway Law (McKinney) sec. 39 (L. 1913, c. 80, sec. 25).

<sup>88</sup> Tex. Stat. (Vernon, 1936) Civ. Code, art. 635 (G. L. 1919, c. 167, sec. 5).

<sup>89</sup> Neb. Comp. Stat. (1929) c. 79, art. 18, secs. 79-1805, 79-1806, (L. 1891, c. 46, secs. 5-8).

<sup>90</sup> Cal. School Code (Deering, 1937) art. IV, sec. 6.405 (Cal. School Code (1929) c. 696, art. IV, sec. 6.405).

<sup>91</sup> Tex. Stat. (Vernon, 1936) Civ. Code, arts. 2358-2367 (G. L. 1907, Reg. Sess., c. 136).

<sup>92</sup> Miss. Code Ann. (1930) secs. 4809-4811 (L. 1914, c. 162).

<sup>93</sup> Miss. Code Ann. (Supp. 1938) secs. 2591-2600 (L. 1938, c. 185).

agreements,<sup>94</sup> and a special direction to the commissioner of agriculture in North Carolina to report on trusts in the production of commercial fertilizers<sup>95</sup> is entirely consonant with the activities of that State. An early West Virginia statute against intimidation of miners calls<sup>96</sup> for no particular explanation, and, although Arkansas may be regarded by some as primarily an agricultural or pastoral State, the output of the Ozarks affords a plausible reason for the inclusion of a particular reference to mining in the general trust laws of that State.<sup>97</sup> Knowledge of particular local history would appear to be required, however, to know why Utah was the source of detailed legislation against press associations in 1905<sup>98</sup> and why Oklahoma was particularly concerned with advertising space and service 30 years later.<sup>99</sup> Similar observations apply to a Nebraska statute of 1893 against pooling and price fixing by coal and lumber dealers,<sup>100</sup> a Florida antitrust statute of 1897 relating to the sale of meat<sup>101</sup> and the particular reference to ice in the Connecticut law of 1911.<sup>102</sup> A Texas statute prescribing no connection between local mutual aid associations<sup>103</sup> is an example of miscellaneous legislation having an anticombination nature and hence properly included in this compilation. But this does not promote understanding of movements in the antitrust field throughout the country.

The repeal of prohibition produced much legislation in the field of liquor regulation. Liquor law has always been *sui generis* and local public opinion and local political forces have varied greatly from State to State. Among the bewildering variety of regulations, two related groups dominate the selection found in this compilation—those directed at the separation of ownership of manufacturing and distribution facilities and those against tying the saloon or the package retailer to the manufacturer. Both can be justified on the theory that manufacturers controlling their outlets to the consumer often promoted excessive consumption in pre-prohibition days. A presumption usually but probably not always fictitious is indulged that liquor distribution licenses are granted on a basis of moral character which could not be possessed by corporate manufacturers impelled by the profit motive.

<sup>94</sup> Tex. Stat. (Vernon, Supp. 1938) Civ. Code, art. 5764a, sec. 19 (G. L. 1937, c. 362, sec. 19).

<sup>95</sup> N. C. Code Ann. (Michie, 1939) sec. 4658 (L. 1901, c. 479 sec. 4).

<sup>96</sup> W. Va. Code Ann. (Michie and Sublett, 1937) sec. 2459 (L. 1887, c. 50, sec. 14).

<sup>97</sup> Ark. Dig. Stat. (Pope, 1937) secs. 9407-9432 (L. 1905, No. 1, sec. 1).

<sup>98</sup> Utah Rev. Stat. Ann. (1933) secs. 73-2-1 to 73-2-7 (L. 1905, c. 106).

<sup>99</sup> Okla. Stat. Ann. (1937) tit. 79 (L. 1935, c. 691, secs. 2-3).

<sup>100</sup> Neb. Comp. Stat. (1929) c. 59, art. 4 (L. 1893, c. 49).

<sup>101</sup> Fla. Comp. Gen. Laws Ann. (Skillman, 1927) sec. 7075 (L. 1897, c. 4534, sec. 1).

<sup>102</sup> Conn. Gen. Stat. (1930) sec. 6352 (Pub. Acts 1911, c. 185).

<sup>103</sup> Tex. Stat. (Vernon, 1936) art. 4875a-4 (L. 1929, c. 274, sec. 4).

It will be surprising if the economic struggles going on in the motion-picture industry do not soon produce extensive legislation in aid of the independent exhibitor. This volume includes three diverse examples of legislation in this field during the current decade. In 1931 South Carolina, for reasons obscure to the uninitiate, empowered cities having population between 5,000 and 6,500 to grant, for periods not exceeding 20 years, exclusive franchises to operators of motion pictures and to other like public amusements.<sup>104</sup> Apparently more germinal are the sweeping New Mexico act of 1933 against overbuying by exhibitors<sup>105</sup> and the North Dakota act of 1937 separating theater ownership from the production or distribution of films.<sup>106</sup>

Although this Scope Note endeavors to outline the more important types of materials contained in this compilation and to interpret them in the light of business and political forces which at once penetrate and transcend the limits of the statute books, adequate interpretation would require a treatise. The chronological tables below were fabricated merely as a sort of scaffolding to assist in construction and to enable the reader to visualize the scope of the materials in the compilation. The general antitrust laws and the exemptions from them yield readily to description without tabular organization. No inference adverse to their importance in the field should be drawn from the fact that the field of antitrust laws affecting particular industries or directed at particular acts or practices form the basis of the following table:

## TIME TABLE OF SPECIAL ANTITRUST LAWS

### Advertising Space or Service:

Oklahoma, 1935.

### Agricultural Products. See Farm Products.

### Banking. See Clayton Act, sec. 7, Mississippi, Oklahoma, Texas, West Virginia.

Oklahoma, 1907 (Constitution).

California, 1921.

Iowa, 1931.

Mississippi, 1936.

<sup>104</sup> S. C. Code (1932) sec. 6326 (Acts 1931, No. 271).

<sup>105</sup> N. M. Stat. Ann. (Courtright, Supp. 1938) secs. 35-2905 to 35-2927 (L. 1933, c. 177).

<sup>106</sup> N. D. L. 1937, c. 165 (repealed L. 1939, c. 202).

**Bridge Contracts:**

- Nebraska, 1907.
- Oklahoma, 1919.
- Washington, 1937.

**Citrus Fruit:**

- Texas, 1937.

**Clayton Act.** See *Exclusive Dealing and Tying Contracts*, Inter-corporate Stock Holding, Price Discrimination.

**Coal:**

- Nebraska, 1893.
- West Virginia, 1895.
- Tennessee, 1897.
- Connecticut, 1911.
- New Hampshire, 1917.

**Commission Merchants:**

- Michigan, 1913.
- Louisiana, 1916.
- Washington, 1923.
- Missouri, 1925.

**Conspiracy to Defraud, Trust Combination as:**

- Utah, 1896.
- South Carolina, 1902.
- Mississippi, 1908.

**Cotton Ginning:**

- Mississippi, 1914.

**Dairy Products.** See also Farm Products.

**Price discrimination:**

- Iowa, 1909.
- Indiana, 1913.
- Oregon, 1915.
- Vermont, 1917.
- Washington, 1919.
- Missouri, 1921.
- Ohio, 1923.
- Tennessee, 1925.
- Mississippi, 1928.
- Nebraska, 1931.

**Antimonopoly:**

- Rhode Island, 1918.
- Idaho, 1923.

**Administrative control:**

- New Jersey, 1935.

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New Hampshire, 1937.

New York, 1937.

### Dams:

Iowa, 1924.

**Electric Railway.** See Street Railway.

### Exclusive Dealing and Tying:

Kansas, 1907.

Massachusetts, 1907.

North Carolina, 1913.

Virginia, 1919.

### Express Companies:

Indiana, 1901.

**Farm Products.** See also Dairy Products.

#### Price discrimination:

Idaho, 1917.

#### Anticomination—price fixing or enhancement:

Tennessee, 1925.

Idaho, 1927.

Louisiana, 1936.

#### Exchange membership:

Nebraska, 1919.

Missouri, 1921.

South Dakota, 1921.

### Fertilizers (Commercial):

North Carolina, 1899.

**Food.** See also Dairy Products, Farm Products, Grain.

#### Anticomination:

Minnesota, 1888 (Constitution).

Ohio, 1913.

New Hampshire, 1917.

West Virginia, 1917.

#### Destruction:

California, 1913.

Colorado, 1917.

Nebraska, 1921.

#### Excess storage or corners:

Illinois, 1917.

Indiana, 1917.

Montana, 1919.

Minnesota, 1921.

Nebraska, 1921.



Warehouseman not to deal:

Virginia, 1919.

**Freight Pools.** See Railroads.

**Gas:**

Ohio, 1868.

**Grain:**

Anticombination:

Nebraska, 1887 (pooling).

South Dakota, 1890.

Nebraska, 1897 (boycotting).

Kansas, 1899.

Iowa, 1905.

Montana, 1915.

Minnesota, 1923.

Exchanges—Discrimination:

Nebraska, 1919.

South Dakota, 1921.

**Highway Construction.** See Bridge Construction, Patented Materials.

Texas, 1919.

West Virginia, 1921, 1933.

**Ice:**

Connecticut, 1911.

**Immunity Acts:**

Missouri, 1891, 1899.

Tennessee, 1891.

Wisconsin, 1897.

Mississippi, 1902.

South Carolina, 1902.

South Dakota, 1903 (fire insurance only).

Ohio, 1906.

Oklahoma, 1908.

Montana, 1909.

**Insurance:**

Michigan, 1887.

Iowa, 1896.

Missouri, 1895.

Nebraska, 1897.

Mississippi, 1900.

South Dakota, 1903.

Arkansas, 1907.

North Dakota, 1907.

Montana, 1911.  
Louisiana, 1912.  
Arizona, 1912.  
Nebraska, 1913.  
Washington, 1915.  
Texas, 1919.  
Washington, 1937.

**Interurban Railways.** See Street Railways.

**Intercorporate Stockholding:**

In general.

Oklahoma, 1907 (Constitution).  
Massachusetts, 1913.  
Louisiana, 1915.  
Tennessee, 1923.

**Banks:**

Oklahoma, 1907 (Constitution).  
Texas, 1909.  
West Virginia, 1929.  
Mississippi, 1934.

**Railroads:**

Michigan, 1873.

**Labor:**

West Virginia, 1887. Intimidation of miners.  
Texas, 1899. Combination to limit production.

**Liquor:**

Wisconsin, 1937. Pro-union act.  
Alabama, 1936.  
Arizona, 1939.  
Arkansas, 1933.  
California, 1935.  
Colorado, 1935.  
Connecticut, 1933.  
Delaware, 1933.  
Florida, 1935.  
Georgia.  
Idaho, 1935.  
Illinois, 1933.  
Indiana, 1935.  
Iowa, 1933.  
Kansas, 1937.  
Kentucky, 1938.  
Louisiana.  
Maine, 1937.

- Maryland, 1933.  
 Massachusetts, 1933.  
 Michigan, 1933.  
 Minnesota, 1934.  
 Mississippi, 1934.  
 Missouri, 1933.  
 Montana, 1933.  
 Nebraska, 1933.  
 Nevada.  
 New Hampshire, 1933.  
 New Jersey, 1933.  
 New Mexico, 1939.  
 New York, 1933.  
 North Carolina.  
 North Dakota, 1933.  
 Ohio, 1933.  
 Oklahoma.  
 Oregon, 1933.  
 Pennsylvania, 1933.  
 Rhode Island, 1933.  
 South Carolina.  
 South Dakota, 1933.  
 Tennessee, 1933.  
 Texas, 1935.  
 Utah.  
 Vermont, 1934.  
 Virginia, 1933.  
 Washington, 1933.  
 West Virginia, 1937.  
 Wisconsin, 1933.  
 Wyoming, 1935.
- Livestock.** See Packers and Stockyards.  
 California, 1893. Antitrust.  
 Oregon, 1919. Competitive bidding.  
 Minnesota, 1921. Board of Trade open.  
 South Dakota, 1921. Exchanges open.  
 Indiana, 1935. Against division of territory.
- Stockyards:**  
     Nebraska, 1887.  
     Kansas, 1920.
- Lumber:**  
     Nebraska, 1893.

**Meat:**

Florida, 1897.

**Milk, etc.** See Dairy Products.

**Mining.** See Labor, West Virginia.

Arkansas, 1905.

**Motion Pictures.** See also Theaters.

South Carolina, 1931.

New Mexico, 1933.

North Dakota, 1937, repealed 1939.

**Musical Compositions:**

Florida, 1937.

Montana, 1937, repealed 1939.

Nebraska, 1937.

Tennessee, 1937.

Washington, 1937.

**Mutual Aid Associations:**

Texas, 1929.

**Necessaries.** See Coal, Farm Products, Food, Ice.

Connecticut, 1911.

West Virginia, 1917.

Maine, 1919.

**News Gathering:**

Utah, 1905.

**Nonprofit Corporations:**

Washington, 1907.

**Packers and Stockyards.** See Livestock.

California, 1937.

**Patented Materials:**

Pennsylvania, 1901.

Louisiana, 1912 (New Orleans Charter).

New York, 1913.

Louisiana, 1916 (Lake Charles Charter).

**Petroleum:**

Price discrimination:

Iowa, 1906.

South Dakota, 1923.

Oregon, 1933.

New Mexico, 1899. License control over retailer.

Oklahoma, 1909. Like Hepburn Amendment.

California, 1913. Combinations of pipe lines and railroads.

Texas, 1932. Conservation subject to antitrust laws.

Washington, 1937. Administrative control over produce agents.

**Price Discrimination—General.** See also Dairy Products, Farm Products, Patented Materials, Petroleum. For State Robinson-Patman acts and Unfair Practices Acts see *State Price Control Legislation*, **MARKETING LAWS SURVEY SERIES**.

South Carolina, 1902.

Nebraska, 1905.

Missouri, 1907.

Tennessee, 1907.

Louisiana, 1908.

Oklahoma, 1908.

Wyoming, 1911, amended 1923.

Massachusetts, 1912.

Idaho, 1913.

Wisconsin, 1913.

**Printing:**

Wisconsin, 1911.

**Public Contracts.** See also Bridge Construction, Highway Construction, Patented Materials, Printing, School Books.

Wisconsin, 1889.

Wyoming, 1933.

**Public Utilities, Miscellaneous.** See also Railroads, Street Railroads, Telegraph Companies, Telephone Companies, Water Carriers.

Tennessee, 1889.

Montana, 1909.

New Hampshire, 1911, 1913.

Massachusetts, 1913.

Missouri, 1913, 1917.

South Carolina, 1925.

Texas, 1935.

Nebraska, 1937 (motor carrier).

**Railroads:**

Combinations with warehousemen:

South Dakota, 1890.

Oklahoma, 1899.

Wisconsin, 1905.

With canal companies:

Pennsylvania, 1870.

Interest in grain elevators limited:

Ohio, 1867.

Combinations controlling cotton compressing:

Tennessee, 1879.

No consolidation with foreign corporation:

Texas, 1876.

Commodities clause:

Pennsylvania, 1874 (Const.) 1907.

Kansas, 1911.

Administrative control of consolidation of parallel lines:

West Virginia, 1927.

Consent of legislature required:

Vermont, 1898.

Stockholding in and by limits:

Missouri, 1913, 1917.

Interlocking officers:

Missouri, 1887.

Must serve express companies:

Missouri, 1889.

Not to carry merchandise of price discriminator:

Nebraska, 1905.

Pooling:

Iowa, 1873.

Nevada, 1879.

Missouri, 1887.

Washington, 1889 (Constitution).

South Dakota, 1897.

North Dakota, 1897.

Kansas, 1901.

Minnesota, 1905.

**Remedies, Peculiar:**

Tennessee, 1891. Joint liability of trust agents as partners.

Missouri, 1897. Boycotting corporation whose charter forfeited.

Nebraska, 1905. Agents liability for company's debts.

Missouri, 1913. Association book prima facie evidence of insurance pool.

Ohio, 1913. Greater penalties for violating general antitrust laws re sale of most kinds of food.

Louisiana, 1915. Plants closed 1 year—presumption of restraint of trade.

New Hampshire, 1917. Like Ohio, *supra*.

**School Books:**

Nebraska, 1891.

Texas, 1905.

Minnesota, 1911.

Arizona, 1912.

Wisconsin, 1915.

Georgia, 1919.

California, 1929.

**Stationery:**

Texas, 1919.

**Sea Food Processors.**

Mississippi, 1938.

**Street and Interurban Railways:**

Nebraska, 1889.

Georgia, 1890, 1924.

Michigan, 1905.

New Hampshire, 1911.

Texas, 1915.

**Stock Yards. See also Livestock, Packers and Stockyards.**

Nebraska, 1887.

Kansas, 1920.

Missouri, 1921.

**Text Books. See School Books.**

**Telegraph Companies:**

Ohio, 1851.

Missouri, 1856.

Pennsylvania, 1874 (Constitution).

Texas, 1874.

Colorado, 1876 (Constitution).

South Dakota, 1895 (administrative control); 1911 (against pooling messages).

Delaware (consolidation).

**Telephone Companies:**

Ohio, 1880.

South Dakota, 1895, 1911.

**Theaters. See Motion Pictures.**

Texas, 1907.

**Tobacco:**

Kentucky, 1893.

North Carolina, 1933.

**Warehousemen. See Railroads.**

Virginia, 1919.

**Water Carriers. See Public Utilities Other Than Railways, etc.**

New York (discrimination in European transportation).

Washington, 1889 (Constitution).

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## SPECIFIC MONOPOLISTIC OR PREDATORY PRACTICES

The presidential campaign of 1912 has been generally credited with focussing public attention on antitrust problems more than any other development of the pre-war period of the current century. The entire period from the Standard Oil decision in the spring of 1911<sup>107</sup> to the enactment of Federal legislation in the autumn of 1914, however, was featured by widespread discussion of such topics. Procedural provisions suggestive of the Clayton Act are to be found in a few States such as those giving private victims of trusts the benefits of presumptions arising from successful governmental prosecutions, and tolling statutes of limitation for the better realization of such benefits. The subject matter of the substantive antitrust provisions of the Clayton Act is identifiable on a large scale in State legislation. These sections relate to (1) interlocking directorates, (2) intercorporate stockholding, (3) exclusive dealing arrangements or tying clauses, and (4) price discrimination.

The first mentioned<sup>108</sup> is the least enforced, and the least followed in State legislation, but its text is interesting for purposes of comparison. In addition to rather narrow restrictions upon the directors, officers or employees of Federal Reserve banks it forbids interlocking directorships in two or more corporations where the elimination of competition between such corporations by agreement would constitute a violation of any of the antitrust laws. This on its face discloses the idea that not all agreements eliminating competition violate the antitrust laws, and carries the inference that a substantial effect upon the market is required so to do.

Several States have provisions to some extent resembling the section limiting intercorporate stock holding.<sup>109</sup> The latter literally applies where the effect of a stock acquisition is to lessen competition substantially between the corporations involved. This would seem to direct attention to the two corporations as a closed system, and if one corporation acquired voting control of the other, the law would be necessarily violated without reference to the importance of either corporation as a factor in the market as a whole. The law, however, has not been so construed.<sup>110</sup>

<sup>107</sup> *Standard Oil Co. of N. J. v. U. S.*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619 (1910).

<sup>108</sup> 38 Stat. 732, sec. 8 (1914) (15 U. S. C. A. (1927) sec. 19).

<sup>109</sup> 38 Stat. 731, sec. 7 (1914) (15 U. S. C. A. (1927) sec. 18).

<sup>110</sup> *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291, 50 Sup. Ct. 89, 74 L. Ed. 431 (1930).



Limitation of exclusive dealing arrangements or tying clauses traceable to Massachusetts Legislation of 1907 directed at the lease system of the United Shoe Machinery Co.<sup>111</sup> as well as to the corresponding provisions of the Clayton Act<sup>112</sup> appear in several States. The prohibitions of this section of the Clayton Act and of that concerning price discrimination<sup>113</sup> were both expressly limited to cases in which the effect of the act or practice was to lessen competition substantially or to tend to create a monopoly in any line of commerce. These sections stood unmodified until 1936 when the price discrimination law was amended by the Robinson-Patman Act,<sup>114</sup> a verbose and complicated enactment which it would be inappropriate to describe fully here. The most relevant point is that the prohibition of price discrimination was extended so as to cover also transactions "where the effect of such discrimination may be to injure, destroy, or prevent competition with any person who either grants or knowingly receives a benefit of such discrimination or with customers of either of them." This expresses a concern about the competition with any person engaging in such a discriminatory transaction altogether apart from the importance of such competition in its relation to the market. A valuation of this change can only be effected by a realization of the clearly established fact that this legislation was a part of antichain store agitation. It represented in part an antitrust policy that economic power of chains should not be abused, but it was also a part of a movement whereby an old-fashioned method of distribution was sought to be bolstered by political action.

The practice of certain special groups in sponsoring legislation to prevent prices from being lowered to the consumer is still in full force. Legislation akin to the Robinson-Patman Act is also related to tax legislation drastically penalizing the chain form of distribution and to liquor regulation with a positive orientation in the same direction. These movements in turn have complicated interrelations with the National Industrial Recovery Act<sup>115</sup> and its aftermath—arrangements whereby not only those in the same stage of production and distribution, but those in subsequent stages and both employers' associations and labor unions attempt to promote what they conceive to be common interests by keeping up prices. Much of the material upon which these observations are based is contained in the separate volume of the Marketing Laws Survey on the subject of State price-control legislation. The entire climate of modern leg-

<sup>111</sup> Mass. Ann. Laws (1933) c. 93, sec. 14 (L. 1907, c. 469).

<sup>112</sup> 38 Stat. 730, sec. 2 (1914). 15 U. S. C. A. (1927) sec. 13.

<sup>113</sup> 15 U. S. C. A. (1927) sec. 13 (38 Stat. 730, sec. 2 (1914)).

<sup>114</sup> 49 Stat. 1526 (1936) (15 U. S. C. A. (Supp. 1936) sec. 13).

<sup>115</sup> 48 Stat. 195 (1933) (15 U. S. C. A. (1939) secs. 701-702).

islation in this field cannot be reproduced here as a background for the understanding of State legislation on the subject of price discrimination, but the actual effect of such legislation cannot be estimated without reference to such climate. The general outlines of what appears to one contemplating the texts of these statutes in the light of the outstanding features of business and political history during the last half century have already been noticed in connection with antidiscrimination legislation with specific references to the dairy<sup>116</sup> and petroleum industries.<sup>117</sup>

At first glance, the State enactments present a bewildering variety of minor variations in form, but a closer examination reveals at least three types or stages. First, the legislation is expressed in terms of the avoidance of monopoly and the preservation of competition in the market as a whole. This emphasis is only relative, for regard for the small business man as well as for the consumer has always been an important element in antitrust psychology. The second stage directs particular attention to injury to an individual competitor—"the competition of a regularly established dealer" or in one instance "any person attempting to become a dealer," without reference to the importance of the actual or potential competition involved. The third stage prohibits "unfair" discrimination, an adjective which is suspect because of NRA and Fair Trade Act associations. In the so-called Fair Trade Acts, trade associations obtain legislative support for price maintenance schemes by purporting to protect the interest of the proprietor of brands who is frequently in fact indifferent. A failure to keep up prices is regarded as an unfair trade practice. If trade associations can supplement legislation by procuring administrative control in accordance with their views, any attempt to give a consumer a bargain will be legally unfair. State legislation on price discrimination has reached no such extreme stage. Its movement for the time being tends appreciably in that direction.

Since the beginning of 1937, a number of States have adopted legislation against marketing combinations by the owners of copyrighted musical compositions or against contracts which tie compositions to programs.<sup>118</sup> The sudden outburst of this legislation, as well as

<sup>116</sup> Ante, p. LVIII.

<sup>117</sup> Ante, p. LIX-LX.

<sup>118</sup> (a) Fla. Comp. Gen. Laws Ann. (Skillman, Supp. 1938) sec. 7954 (1)-(20) (L. 1937, c. 17807).

(b) Mont. L. 1937, c. 90, sec. 6, repealed L. 1939, c. 123, sec. 11.

(c) Neb. L. 1937, c. 138.

(d) Tenn. Code Ann. (Michie, 1938) secs. 7912 (1)-(11) (Pub. Acts, 1937, c. 212).

(e) Wash. Rev. Stat. (Remington, Supp. 1938) secs. 3802-2, 3802-12 (L. 1937, c. 218, secs. 8-13).

rather far-fetched legislative recitals about its educational character, suggest steam-roller tactics by well-organized interests. It is probably unconstitutional in whole or in major part as an invasion of the power of Congress over copyrights.

The mere fact that legislation is directed toward a particular business or toward a particular practice is no indication that it is inconsistent with the general welfare. Special industries present different problems and it has long been recognized by students of the field that general antitrust laws have limitations not necessarily encountered in like degree in more specific legislation. Nevertheless both legal criticism of the recent waves of legislation and judicial construction of particular statutes cast up by them are promoted by a recognition of the sponsorship and the legislative history behind them. The modern tendency to pass legislation which can be administered to restrict rather than to promote the freedom of the market seems to have been greatly accelerated in recent years.

### COMMISSIONS AND BOARDS

Parallelism between State and Federal legislation breaks down with regard to the Federal Trade Commission Act.<sup>119</sup> State administrative control has been extended in specific cases such as that of the milk industry, but there is no State trade commission established as an administrative agency to aid in the enforcement of general antitrust laws. Recently two State commissions have been established. The Utah act suggests N. R. A. technique for fostering concerted action by producers under the plea of protecting employment.<sup>120</sup> In 1919 Montana designated the Board of Railroad Commissioners to be ex officio the "Montana Trade Commission" with the duty of supervising the business of milling grains.<sup>121</sup> It has since been given the mission of administering the so-called Unfair Practice Act, which includes prohibitions of sales below cost<sup>122</sup> and expressly provides for admitting trade association cost surveys as evidence of the costs of individual concerns.<sup>123</sup> It would thus seem to be a vehicle for promoting trade association price-maintenance combinations in direct opposition to traditional antitrust policy.

<sup>119</sup> 38 Stat. 717 (1914) (15 U. S. C. A. (1927) sec. 41).

<sup>120</sup> Utah L. 1939, c. 10 naming the State Board of Agriculture to administer the Agricultural Fair Trade Act.

<sup>121</sup> Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) sec. 3914 (L. 1919, c. 223, sec. 1).

<sup>122</sup> Mont. L. 1937, c. 80, sec. 3.

<sup>123</sup> Mont. L. 1939, c. 50, sec. 12A (L. 1937, c. 80, sec. 5).

## II. CONTRACTS NOT TO COMPETE

The statutes collected under the heading of "contracts not to compete" belong to two main classifications widely distinguishable in historical origin and in economic orientation. The phrase "contract not to compete" is very much like the phrase "contract in restraint of trade" and partakes of the same dualism. That is, the oldest contracts in restraint of trade were a particular sort of contract not to compete, covenants not to engage in a trade or calling. The covenantee apparently wished to limit competition with himself, but the public policy drawn in question was preponderantly and almost solely a policy against permitting society to be deprived of the economic activities of a useful member. In the days of an inflexible feudal society such agreements were looked upon as unqualifiedly bad. In a flexible modern society, a covenant against pursuing a particular business does not necessarily deprive the commonwealth of all useful activity on the part of one who has eliminated himself altogether from a given field. In the process of evolution the law early developed the formula that only contracts in unreasonable restraint of trade were invalid, and it later developed increasingly in transactions between manufacturers or traders that restraints most extensive, both in time and in space, might be justified by the needs of a large business operating in a large market.<sup>1</sup>

A differentiation of secondary importance developed between transactions where both parties were manufacturers or traders, on the one hand, and, on the other hand, transactions where the covenanting party was an employee undertaking not to compete with his master after the termination of his employment. This fact is related to the policy of the Middle Ages only in a very general way. The controlling portion of the social and economic background is not a rigid society which precludes change of employment, but rather a conviction that equality before the law involves a solicitude on the part of the State that the employer not take undue advantage of his bargaining power, which is, in most cases, much greater than that of the individual employees who enter into the covenants of the sort here in question.

The second major kind of contract in restraint of trade or contract not to compete, which first became a matter of substantial public concern in the last half of the last century, is directed at control of the

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<sup>1</sup>*Nordenfelt v. Nordenfelt Co.*, House of Lords (1894) App. Cas. 535. The elementary history here outlined has been many times developed in greater detail. The cases are, for instance, collected in Oliphant, *Cases on Trade Regulation* (1925). For text development of the material see McLaughlin, *Cases on the Federal Antitrust Laws* (1933), Historical Introduction.

market and the public policy-violated is the policy in favor of the free functioning of the price mechanism as a guiding factor in economic activity.<sup>3</sup> Repercussions which affect the continuation of the economic activities of individuals may be involved in any case. Nevertheless, the contract not to compete of the antitrust laws arises in an atmosphere quite distinct from the atmosphere of the contract limiting the activities of the apprentice, the retiring partner, or the professional man selling his practice.

The fact that combinations dominating the market on a wide basis, sometimes national or international, grew in part by purchases of the good will of businesses reenforced by contracts by the sellers not to compete,<sup>4</sup> is only one of the connecting links that have caused both of the phrases here discussed to cover two such clearly distinguishable fields. Particularization may develop this point more clearly than further generalities. New Mexico has a statute expressly prohibiting contracts not to compete between railroads.<sup>5</sup> This is clearly a contract of the modern or second type. Consideration for the continuation of the economic activity of the individual seems a far call here. There is no policy against having artificial persons drop out of economic society unless there is some adverse effect upon the efficiency of production, distribution or transportation. The policy here (now largely abandoned in favor of commission regulation) is a policy in favor of relying upon the preservation of competition as a regulator of railroad rates. An Indiana statute particularly prohibiting division of territory by buyers of livestock belongs to the same general class.<sup>6</sup> The same is true of a definition in the general antitrust laws of Texas, that a combination to abstain from business is a trust.<sup>6</sup> Indeed, a large portion of the general antitrust laws could conceivably be classified under the head of "contracts not to compete" because they include prohibitions of contracts in restraint of trade of all sorts, and a particular reference to a contract not to compete is a matter of details of form rather than a matter of substance.

Several States, however, have specific provisions relating to contracts not to compete of the classical sort. Justice Taft (later Chief Justice of the United States Supreme Court) propounded a useful summary of the common law bearing on this field in a late nineteenth century proceeding.<sup>7</sup> He pointed out that covenants not to

<sup>3</sup> See Watkins, *Industrial Combinations and Public Policy* (1927).

<sup>4</sup> As in *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 13 N. E. 419 (1887).

<sup>5</sup> N. M. Stat. Ann. (Courtright, 1929) sec. 116-704 (L. 1882, c. 59, sec. 1).

<sup>6</sup> Ind. Stat. Ann. (Burns, Supp. 1939) sec. 42-921 (Acts 1935, c. 203, sec. 12).

<sup>7</sup> Tex. Stat. (Vernon, 1936) Civ. Code, art. 7426 (7), (Acts 1903, p. 119).

<sup>8</sup> *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6th (1898)).

compete were always ancillary to a sale, to a partnership, or to an employment. The five classes he listed included covenants by a partner "pending" the partnership not to compete with the firm, and by a buyer not to use property bought in competition with a seller. The legislation here compiled, however, mentions only the three more common types of covenants, by sellers, by retiring partners, and by employees.

A North Dakota statute marks a transitional stage in providing that the seller may promise not to compete in a limited territory,<sup>8</sup> for, while the subject matter suggests a restriction of the old-fashioned sort, the purpose seems merely to declare that the policy of preserving competition is not infringed. Legislation particularly mentioning sellers, partners, or employees, however, operates, with such minor exceptions, in the direction of placing narrow limits upon such covenants more arbitrary than any which would obtain at common law. Thus, Louisiana forbids employers to exact covenants restricting employees from entering into competing businesses after termination of employment.<sup>9</sup> This would seem to exclude all such restrictive covenants by employees, since a claim that an employee bargained for the restriction could scarcely be taken seriously. Other States arrive at similar results by declaring all contracts restraining the pursuit of a profession, trade, or<sup>10</sup> business to be void, with certain exceptions only, and including no exception of covenants by employees.<sup>10</sup> In a few States restrictive covenants accompanying the sale of a business or the dissolution of a partnership are arbitrarily limited in space without regard to the reasonable needs of the particular business.<sup>11</sup> In South Dakota restrictive covenants by employees are lawful only in professions, the practitioners of which are required to be licensed by the law of the State.<sup>12</sup>

Thus, in several jurisdictions, a laundryman, endeavoring to prevent his drivers from taking his customers with them when they change jobs, would seem clearly to be handicapped. In any event, the policy of such legislation would definitely seem to be a pro-labor policy rather than an antitrust policy.

<sup>8</sup> N. D. Comp. Laws Ann. (1913) sec. 5929 (Civ. Code (1877) sec. 960).

<sup>9</sup> La. Gen. Stat. Ann. (Dart, 1939) secs. 4963.1-4963.3 (Acts 1934, No. 183, secs. 1-3).

<sup>10</sup> Cal. Civ. Code (Deering, 1937) secs. 1673-1675 (Cal. Civ. Code (1872) secs. 1673-1675); Mont. Rev. Code Ann. (Anderson & McFarland, (1935) secs. 7559-7561 (Civ. Code (1895) secs. 2446-2448); Okla. Stat. Ann. (1937) tit. 15, secs. 217-219 (L. 1890, secs. 886-888).

<sup>11</sup> S. D. Comp. Laws (1929) secs. 899, 900 (C. L. Civ. Code (1913) secs. 1278-1279); Cal. loc. Cit., n. 10, *supra*.

<sup>12</sup> S. D. Comp. Laws (1929) sec. 900 (C. L. Civ. Code (1913) sec. 1279).

**III. TYING CONTRACTS AND EXCLUSIVE DEALING  
ARRANGEMENTS**

Statutes relating to tying clauses and exclusive dealing arrangements are numerous and distinctive enough to warrant their segregation under a special section in the compilation that follows. Their scope and significance, however, can best be discussed in relation to the broader topic of legislation against specific monopolistic or predatory practices. They have accordingly been discussed under that heading at page **LXXIV**.

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